



## 38 NORTH

*Informed analysis of events in and around the DPRK.*

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### North Korea and the Prolif- eration Secu- rity Initiative

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## 38 NORTH SPECIAL REPORT: NORTH KOREA AND THE PROLIFERATION SECURITY INITIATIVE (PSI)

The Proliferation Security Initiative (PSI) celebrated its seventh anniversary on May 31, 2010. This milestone seems an appropriate time to take stock of the initiative's effectiveness and to suggest ways to improve it. In 2003, the initiative was announced by then President George W. Bush as an activity designed to prevent weapons of mass destruction (WMD), their delivery systems and related materials from entering or leaving states of proliferation concern.<sup>1</sup> The focus was to be on interdiction as a means to fill the gaps in the existing international regime to stop the spread of WMD. It was assumed that PSI, at the very least, would deter suppli-

ers and customers by making proliferation more costly and difficult.

The U.S. leads what has become a multi-national effort to undertake interdictions at will, albeit supposedly only for "good cause" and "consistent with existing international law."<sup>2</sup> The original concept called for an *ad hoc* 'coalition of the willing' to interdict vessels carrying WMD and related materials<sup>3</sup> moving to and from North Korea; Iran and Syria were added later to an American list of "rogue" nations. PSI was to be an activity outside the UN system that would not be institutionalized and therefore unconstrained by cum-

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bersome decision-making processes and second guessing. Independence and rapid action were paramount.

To be sure, PSI and other U.S.-driven support efforts have improved the awareness of the danger and urgency of this problem. The focus on interdiction has no doubt constrained some WMD-related trade, or at the very least, forced rogue smugglers to change their tactics. PSI exercises have also increased national capacities for coordinated detection and interdiction of suspect shipments. Since the United States has successfully negotiated ship-boarding agreements with countries whose flags fly on the bulk of the world's ships, flag state consent for boarding to search for WMD related technology has become an expectation for and of many states<sup>4</sup>—but not a legal obligation.



Members of seven nations participate in an international exercise that is part of a US-led initiative to prevent the trafficking of weapons of mass destruction in front of Croatian northern harbour of Rijeka on May 13, 2008. Dubbed Adriatic Shield 08, the exercise is being held under the Proliferation Security Initiative (PSI) that was launched by the United States in 2003. Photo: STRINGER/AFP/Getty Images

Most importantly, PSI has evolved from a focus on interdiction of ships at sea, to inspection in ports, to carriage of WMD by aircraft, and—for the United States—to disruption of financial networks supporting trafficking. Moreover, the initiative has become conflated in concept and practice with the interdiction of vessels and aircraft suspected of violating various UN sanctions against North Korea.

However, much water has passed under the stern since PSI's early days of full steam ahead. The two senior Bush administration officials, John Bolton and Robert Joseph, who were the architects and principal champions of PSI, are long gone from the U.S. government. Moreover, as the initiative's activities have become better known, it has been criticized for lack of transparency and public accountability, stretching (if not violating) the principles of international law, impeding legal trade, weakening the UN system, opening political divisions, diluting other non-proliferation efforts, and—for all these reasons—having limited effectiveness.

## North Korea as a Target of UN Sanctions

In response to North Korea's second nuclear test in May 2009, the UN Security Council (UNSC) passed a resolution (1874) to expand and tighten sanctions imposed in response to North Korea's first nuclear test in 2006. Some argued that earlier sanctions had almost no financial impact, in part, due to lax enforcement.<sup>5</sup> But 1874 went a step further. In an attempt to choke off its main source of foreign currency,<sup>6</sup> the resolution imposes almost a complete embargo on the import and export of weapons to and from North Korea. It also establishes detailed expectations and obligations for all states regarding the inspection of suspected, prohibited cargo bound to or from North Korea found on their territory or in their airports or ports.

Specifically, UNSC Resolution 1874:

- Calls upon states to consent to inspection of their flag vessels on the high seas if there are 'reasonable grounds' to believe they are carrying prohibited cargo.
- Stipulates that should the flag state not consent to inspection, then "the flag state shall direct the vessel to proceed to an appropriate and convenient port for the required inspection."
- Prohibits the provision of fuel and bunkering services to DPRK vessels believed to be carrying contraband.
- Expands financial sanctions related to WMD and missile production, designated additional banned goods, entities and individuals, and enhanced monitoring of the implementation of these sanctions.

While the resolution appears to be robust, it has failed to close all the gaps and has left key terms undefined. In particular, the UNSC issued the resolution under Chapter III, Article 41 of the UN Charter, which specifically does *not* authorize the use of force. China and Russia threatened to veto a binding use of force resolution because they did not want to encourage U.S. military operations in their waters. Both countries also feared that forceful interdiction would generate a violent response from North Korea and that the interpretation of "reasonable grounds" to interdict would be made unilaterally (by the United States).

Consequently, if a North Korean (or other) flagged vessel refuses to consent to inspection or to proceed to an "appropriate port" as directed for the required inspection, the interdicting vessel cannot threaten or use force to make it do so. If it does, the interdicting vessel would be violating the resolution's call for

all inspections to be consistent with international law and for all states to refrain from any action that might aggravate tensions. This would be particularly true if the interdicted vessel were a state-owned or -operated vessel used only for non-commercial purposes, which, under the 1982 UN Convention on the Law of the Sea, has sovereign immunity. Thus, all the interdicting vessel could legally do is report the suspect vessel to the UNSC sanctions committee. Recognizing this loophole, North Korea has already claimed that it is the victim of violations of international law that are detrimental to freedom of navigation.<sup>7</sup> Although the resolution appears to allow the United States to unilaterally declare “reasonable grounds” to interdict North Korean vessels on the high seas and even in others’ territorial waters, the United States has said it will “not forcibly board them.”<sup>8</sup>

Since the passage of the latest UN resolution, the record of PSI interceptions related to North Korea has been mixed. There have been successes. On December 12, 2009, after a U.S. intelligence tip-off, Thai authorities in Bangkok seized 35 tons of North Korean arms on a Ukrainian plane allegedly bound for Iran.<sup>9</sup> In February 2010, South African authorities seized a shipment of North Korean tank parts hidden among sacks of rice in two shipping containers;<sup>10</sup> They were destined for the Republic of Congo.

The results of other intercepts have been unclear. For example, in July 2009, the U.S. Navy destroyer *John S. McCain* shadowed a North Korean freighter—the *Kang Nam 1*—bound for Myanmar and suspected of carrying cargo banned by the relevant UNSC resolutions. However, the freighter abruptly turned around and returned to North Korea after at least three ports denied it entry.<sup>11</sup> U.S. Chief of Naval Operations Admiral Gary Roughead claimed that the *Kang Nam 1* turned around because of the UNSC resolution, but others suspected that the U.S. persuaded the Malaysian government to block payments for the shipment from a local bank, prompting Myanmar to ask the ship to head back home.<sup>12</sup> Another possibility is that the *Kang Nam 1* may have been false bait in a trap set by the North to embarrass the United States and undermine support for PSI and UNSC Resolutions.<sup>13</sup> This would not be the first time such a mistake was made. For example, in the 1993 Yinhe debacle, the Clinton administration alleged that the Chinese cargo ship was carrying precursors for chemical warfare to Iran. The ship was searched in Saudi Arabia over



The *Kang Nam 1*. Photo: manfredeye.com

China's protests and no trace of precursors was found—much to the embarrassment of the U.S. government.<sup>14</sup>

False alarms have transpired under PSI as well. In August 2009, India detained and inspected the North Korean ship *Mu San*.<sup>15</sup> The Indian government said that the vessel entered its waters illegally and was carrying equipment and material to Myanmar to help it build a nuclear reactor. However, nothing illegal was found.<sup>16</sup> In September 2009, four North Korean containers allegedly holding items related to chemical weapons were seized in a Busan port from a Panamanian-registered freighter bound for Syria.<sup>17</sup> But reports indicate that “nothing particular was discovered.”

Successful interdictions are probably only the tip of the iceberg in terms of North Korean arms trade. A UN panel has accused the DPRK of continuing to export nuclear and missile technology in defiance of UN sanctions. The panel said that North Korea used “front companies and intermediaries to sell weapons and provide illegal assistance to Iran, Syria and Burma.”<sup>18</sup>

South Korea's newfound willingness to join PSI—announced in April 2009—may help improve the initiative's future performance in regards to North Korea.<sup>19</sup> And Seoul has implemented an internet-based monitoring system to track the real-time flow of inter-Korean shipments in order to prevent transfer of restricted items.<sup>20</sup> This was a marked turnabout from former President Roh Moo Hyun's administration which refused to join PSI for fear of provoking a clash with North Korea. Indeed, Pyongyang has repeatedly warned South Korea that its participation in PSI would result in war. After the South announced its decision to fully participate, the North said it could no longer guarantee the safe passage of U.S. and South Korean naval or civilian ships in neighboring waters.<sup>21</sup>

While there was understandably some hesitation by South Korea in implementing interdiction in its waters, such was before an international investigation concluded that a North Korean submarine was responsible for the sinking of the South Korean corvette *Cheonan*. Now South Korea has declared it will fully participate in PSI and take part in exercises in coming weeks to intercept cargo vessels suspected of carrying WMD components or prohibited arms.<sup>22</sup> Moreover, it has rescinded permission for North Korean vessels to transit its territorial waters and has threatened that, if necessary, it will use force to deny them access. As of June 11, 2010, South Korea had on 20 occasions ordered North Korean vessels to leave its waters with “no major trouble” reported.<sup>23</sup>

However, even with Seoul's agreement to join PSI, transforming the initiative into an effective tool

against North Korea and the broader international community of technology smugglers will require fundamental changes that go well beyond this positive step forward.

## Evaluating PSI

President Obama has strongly endorsed PSI and proposed expanding it to eradicate nuclear black market networks. In an April 2009 speech in Prague, the President stated: “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 and the Global Initiative to Combat Nuclear Terrorism into durable international institutions.” But the Obama administration has its work cut out for it.

In the case of North Korea, the Obama’s administration’s policy seems predicated, in part, on the assumption that exports of banned material and imports of weapons-related material, by land, air and sea can be blocked.<sup>24</sup> However, the optimistic rhetoric of PSI proponents may not be based on a realistic assessment of its performance to date. Indeed it is critical that PSI’s ineffectiveness be recognized and rectified if it is indeed to be a tool in the administration’s North Korea policy.

As a general proposition, evaluating the initiative’s effectiveness is difficult because of the secrecy surrounding interdictions and confusion regarding what constitutes a PSI action. Some interdictions cited as PSI successes were, in fact, carried out in pursuance of U.S. law and existing legal authorities. Similarly, some interdictions were carried out under various UN resolutions barring the transfer of missiles and certain materials to or from North Korea and Iran. It also appears that PSI proponents are trying to expand its achievements to include customs officials’ denial of export licenses as well as countries’ denial of over-flight rights.<sup>25</sup> One official defined a success for the initiative as when, “you stop anything from going to a proliferation destination.” Rather than focus on interceptions, others have claimed that the real measure of success for the initiative is the growing individual and collective capabilities of participants to curb proliferation.

In addition, there are a number of factors that undermine PSI’s effectiveness and the willingness of states to support this American initiative.

- First, there are legal lacunae that allow state and non-state actors who want to avoid PSI interdictions to legally transport WMD components on their own flag vessels or aircraft or on those

of non-PSI-participating states. If the components are aboard military vessels or aircraft used for non-commercial purposes, according to the 1982 UN Convention on the Law of the Sea, such vessels and aircraft have sovereign immunity and cannot be stopped, seized, or searched. If the components are on non-PSI flag participants, the flag state has no obligation to submit to search and seizure. Even if the vessel or aircraft is suspected of violating UN sanctions, force cannot be used if it does not consent to a search.

- Second, until the U.S. accedes to the Convention on the Law of the Sea—which is seen as providing the legal framework for implementing PSI—many suspect PSI is meant to operate outside the international legal framework and are somewhat wary of getting involved.<sup>26</sup>
- Third, the very secrecy that helps make PSI interdictions possible creates suspicion that the United States is employing politically-motivated double standards and extra legal methods to take such actions. This also undermines the willingness of other states to fully participate.
- Fourth, for some governments, open participation in PSI interceptions at the behest of the U.S. could be politically dangerous. For example, Malaysia might hesitate to help intercept Iranian vessels given the strong domestic political influence of Islamicists.
- Fifth, given past U.S. intelligence failures in Iraq and elsewhere, some countries may be reluctant to act solely on Washington’s say-so.
- Finally, in practical terms, PSI is further constrained by the lack of an independent budget or coordinating mechanism.

Another key challenge undermining efforts to stop North Korean exports is that, based on a study of insurance databases, Pyongyang’s ships are not likely to be involved in smuggling because they are too closely watched.<sup>27</sup> Rather, the North is more likely to transport missiles, other weapons or related technologies via airplanes or ships of other flags. Movement by air—while falling under PSI—may be more difficult to detect and prevent. Moreover, WMD components could take a round-about land route from North Korea via China and Russia, which is harder to trace, or use cargo planes at night.<sup>28</sup> North Korea could also build



In this undated photo released by the North's officials Korean Central News Agency on Dec. 9, 2009, North Korean leader Kim Jong-il inspects the Kanggye General Tractor Plant No. 26 in Jagang Province. Photo: *Chosun Ilbo*

assembly factories in importing countries to circumvent an entry ban on its ships in ports. Or it could charter ships under the names of foreigners, falsify the country of origin, or do business through a third country. That is likely how it has been able to continue to export arms to Iran, Syria, Myanmar and Laos.<sup>29</sup> Finally, there is always the possibility of using the “diplomatic pouch” to smuggle critical WMD elements, just as it has been used to smuggle drugs and counterfeit currency.

Perhaps the greatest obstacle to PSI effectiveness is the fact that most of the ingredients for WMD are dual-use in nature, having both civilian and military applications. While few, if any, countries export ‘turn-key’ WMD, the harsh reality is that countries and non-state actors can use dual-use technologies and machines to build their weapons. Moreover, the indigenous capability to produce WMD components based on dual-use technology is spreading rapidly. According to some doubters like William Perry, former U.S. Secretary of Defense, it is a “hopeless task” to try and control such technology.<sup>30</sup> Consequently, it is very difficult to make decisions regarding ‘good cause’ for interdiction and such decisions will inevitably be politically influenced based on who is sending or receiving the shipment. Furthermore, a proliferation of interdictions of dual-use materials may hamper legitimate commerce and thus engender opposition, even from allies.

In addition to these problems, many key countries remain unenthusiastic participants or outside PSI altogether. Although Russia and Japan have implemented UNSC-approved sanctions,<sup>31</sup> neither were efficient or enthusiastic PSI participants to begin with.<sup>32</sup> Key countries like China, India, Indonesia, Malaysia and Pakistan remain outside PSI.<sup>33</sup> China, in particular, presents a significant problem. Beijing refuses to join PSI because it doubts the initiative’s legitimacy and does not want to approve U.S. or other foreign naval operations in its waters. Moreover, the CIA claims that Chinese companies continue to sell dual-use technologies and components in the Middle East and South Asia that could support WMD and missile programs.<sup>34</sup>

Even U.S. allies are having trouble stopping such trade. The few examples of successful intercepts that have surfaced may only indicate a deeper and broader clandestine trade. In mid-July 2009, an Australian-owned ship registered in the Bahamas, bound from North Korea to Iran, was found by United Arab Emirates authorities to be carrying ten container loads of weapons.<sup>35</sup> This interdiction supposedly delayed an Iranian missile test because electronic navigation parts from North Korea were detained in the UAE.<sup>36</sup> On February 27, 2009, the Kanagawa Prefectural police raided a Tokyo trading house under suspicion of attempting to export a machine part to North Korea that could be used to make WMD. How-

ever, in the past, Japanese companies have played a key role in supplying equipment for Pakistan's nuclear arms program, including an electron microscope and ring magnets, a key device used to manufacture centrifuges to enrich uranium.<sup>37</sup>

## Whither PSI

Despite strong public support from Presidents Bush and Obama, the U.S. government seems to be dragging its feet regarding PSI. Indeed, the initiative is presently a bureaucratic 'orphan.' Originally, it was managed within the National Security Council (NSC). While it still receives overall direction from the NSC, the State Department and the Defense Department now manage parts of the initiative. It has not been institutionalized in the federal bureaucracy—but should be. Until PSI has a 'home,' there will be confusion regarding who is in charge, how much can be spent on the initiative and for what purposes, and what PSI's priority is relative to other needy programs.

The sense of Congress—indicated by the 9/11 Commission Act of 2007 and the Nuclear Weapons Threat Reduction Act passed that same year—is that PSI should be strengthened and expanded by establishing a clear authority and budget for its coordination, as well as by increasing cooperation with NATO and other countries. However, in November 2008, a General Accounting Office report found that the Bush administration had neither issued a key directive to U.S. agencies to guide the strengthening of PSI efforts nor provided the required budget documents. Moreover, key agencies had not established performance indicators to assess PSI effectiveness, nor had they outlined policies, procedures or funding requirements as requested by Congress. Indeed, the State Department outright rejected the need for a joint PSI budget arguing that it is “a set of activities interwoven into the U.S. government's established diplomatic, military and law enforcement relations with other countries.” While change is essential, there is no sign that the Obama administration has taken any concrete steps to improve PSI's effectiveness.

For PSI to be fully successful, the initiative will also require near universal support.<sup>38</sup> Otherwise legal lacunae and trade through the “weakest links” will continue to undermine its effectiveness. Even if global support is forthcoming, inadequate resources, intelligence, and capacity may ensure that a significant portion of WMD-component shipments will avoid detection and air or sea interdiction.

To secure the adherence of two key countries currently not fully participating—China and Russia—

Washington will have to ‘walk the talk’ of President Obama’s promise to listen, compromise and cooperate in multilateral endeavors. In other words, the United States may have to give up control of decisions to interdict, the definition of ‘reasonable grounds’ to do so, and the actual interdiction itself.

The best way to do this would be to have interdictions/inspections on the high seas carried out by UN-flagged vessels. That would require making PSI part of the UN system by, for example, seeking a Security Council resolution authorizing the use of force for interdiction—on or over the high seas and in territorial waters—of WMD and related materials, either in specific cases, or in general. In that context, establishing a neutral organization to assess intelligence, coordinate and fund activities, and make recommendations or decisions regarding interdictions would eliminate double standards and increase transparency. Such an organization could answer key questions regarding what combinations of actors and materials represent threats and what is ‘good cause.’ It would also help avoid erroneous judgments and disagreements that might impede legitimate commerce or delay action. Furthermore, the organization would give PSI a concrete structure with a consistent strategy and *modus operandi*, as well as a budget to fill gaps in interdiction and intelligence collection efforts. Moreover, it could ensure that activities stay within existing international law or serve as a vehicle for changing it. The new organization would also complement other non-proliferation efforts rather than undermine them.

While it is imperative that PSI effectiveness be improved, both to stem the worldwide trade in WMD-related technologies and to enforce specific restrictions on countries like North Korea, there are clearly a number of significant hurdles to overcome before that will be possible. If the United States is prepared to meet the conditions outlined above, then, in a post-*Cheonan* environment, a UN agreement may be possible on the use of force in interdiction for “reasonable cause” (and after exhaustion of all other means to get the ship to stop for inspection). Otherwise, closing the gaps in PSI and, thus, significantly increasing its efficiency is unlikely.

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