

# Maritime Interdiction of North Korean Ships under UN Sanctions

*James Kraska\**

## INTRODUCTION

To be effective in shaping state conduct, the liberalism and idealism that informs public international law must contend with geopolitical realities and the role of power in the international system. David D. Caron was unafraid to address this dichotomy.<sup>1</sup> His work bridged epistemic communities and offered concrete approaches to some of the most vexing international problems. Caron's work on radioactive waste and nuclear weapons at sea, for example, manifests a profound understanding of the threats posed by the proliferation of nuclear weapons and illicit nuclear materials in the oceans, and how international law reduces these ghastly perils. By providing boundaries for state behavior and fashioning a stability of expectations, international law deepens military and environmental security, and thereby reduces geopolitical risks. Inspired by the contributions of Caron and Harry Scheiber in exploring international law as a tool for addressing the threat of nuclear weapons and material at sea,<sup>2</sup> this Article demonstrates how the legal process is the best tool available, albeit an imperfect one, to counter North Korea's maritime proliferation of nuclear weapons and technology.

The nuclear weapons program of the People's Democratic Republic of Korea (DPRK) emerged within a complex regional political reality. Protected by U.S. extended deterrence, the Republic of Korea (ROK) has prospered for nearly seventy years despite lying directly under the guns of North Korea, which is

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\* James Kraska is Chairman and Charles H. Stockton Professor of International Maritime Law in the Stockton Center for International Law, U.S. Naval War College and Visiting Professor of Law and John Harvey Gregory Lecturer on World Organization at Harvard Law School. The author gratefully acknowledges research assistance from Jennifer Wu, Harvard Law School.

1. This Article is in fond memory of and deep respect for the life and work of David D. Caron, a towering figure in international law and a public intellectual for the rule of law with global standing as one of the world's most influential champions of the law at sea.

2. See generally THE OCEANS IN THE NUCLEAR AGE: LEGACIES AND RISKS (David D. Caron & Harry N. Scheiber eds., 2nd ed. 2014) (considering how the nuclear age has affected the oceans and the legal regime of the oceans).

enabled by China and Russia to serve as a cudgel to oppose American presence in the region. The DPRK detonated its first nuclear device in 1993, challenging the U.S. nuclear security umbrella and opening the specter of nuclear proliferation. If the United States and ROK actively punish North Korea with military force, North Korea likely would lash out in all directions. If they relent and accept the DPRK into the nuclear club, the consequences could prove equally deadly. International law lies within this dilemma as the only credible option for containing the rogue state's nuclear ambitions. The Charter of the United Nations (UN) and the United Nations Convention on the Law of the Sea (UNCLOS) operate in tandem for this purpose. The Charter may be considered a constitution for the world; UNCLOS has been called the constitution for the oceans.<sup>3</sup> These seminal treaties work together in a powerful way to restrain North Korea's nuclear program. Specifically, the UN Security Council has invoked its authority in Chapter VII of the Charter to address threats to the peace by harnessing the legal competence of flag state, port state, and coastal state authority reflected in UNCLOS to strangle North Korea's access to oceanic trade, crippling its economy and undermining its ability to spread nuclear material and weapons.

The struggle to develop and enforce international rules to stop North Korea's nuclear program is a story still unfolding. But decades of progress in international law and state practice have combined with tighter sanctions by the Security Council to dramatically cripple North Korea's ability to develop and share nuclear weapons and supporting material and technology. The consequences of failure are genuinely terrifying, as even a single nuclear detonation anywhere in the world would prove catastrophic to global economic and political stability.<sup>4</sup>

#### I. CONTROLLING NUCLEAR PROLIFERATION AND THE LAW OF THE SEA

The UN negotiations for the law of the sea began after World War II. Law of the sea conferences in 1958 and 1960 arose within the dynamic context of the bipolar Cold War strategic nuclear confrontation. Some states held out the prospect that a new treaty on the law of the sea could curb the greatest dangers posed by the most dangerous weapons. Newly independent states feared the U.S.-Soviet naval rivalry generated externalities of increased military risk, and even nuclear war, in the global commons, and they hoped that a new law of the sea could unwind some of the tension. In 1958 for example, the Second Committee of the UN Geneva Conference on the Law of the Sea considered

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3. Tommy T.B. Koh, President of the Third United Nations Conference on the Sea, Remarks, A Constitution for the Oceans, *reprinted in* THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 11–16 (Myron H. Nordquist ed., 1985).

4. Matthew Bunn & Nickolas Roth, *The Effects of a Single Terrorist Nuclear Bomb*, BULLETIN OF THE ATOMIC SCIENTISTS (Sept. 28, 2017), <https://thebulletin.org/2017/09/the-effects-of-a-single-terrorist-nuclear-bomb/>.

prohibiting the testing of nuclear weapons on the high seas.<sup>5</sup> In 1963 the two superpowers banned nuclear tests in the atmosphere, outer space, and under water, including the territorial seas and high seas.<sup>6</sup> Ambassador Arvid Pardo advanced a proposal for preserving the oceans for peaceful purposes during his historic speech on seabed mining in the UN General Assembly in November, 1967.<sup>7</sup> The following month, the UN General Assembly established an Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction.<sup>8</sup> After three sessions, the committee presented its conclusion to the UN General Assembly in 1968.<sup>9</sup> This study convinced the General Assembly of the need for broader review, which was initiated through establishment of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction.<sup>10</sup> Comprised of forty-two member states, the committee explored the norms and rules for global oceans governance. On December 15, 1969, the committee report requested that the Secretary-General gauge support for convening a multilateral conference of states to codify oceans governance.<sup>11</sup> Nearly a year later, the UN General Assembly adopted a resolution reserving the high seas and seabed and ocean floor for peaceful purposes.<sup>12</sup> The resolution also decided to convene a general comprehensive conference in 1973 on the law of the sea.<sup>13</sup> The conference would be named the Third UN Conference on the Law of the Sea.

The conference set in motion by Ambassador Pardo did not regulate nuclear weapons at sea, but it did adopt a comprehensive multilateral regime for oceans governance—United Nations Convention on the Law of the Sea (UNCLOS).<sup>14</sup> In keeping with the mandate of the General Assembly, however, UNCLOS aspires to promote the “peaceful uses” of the seas and oceans. The term “peaceful purposes” or “peaceful uses” is referred to eight times in UNCLOS, including the preamble.<sup>15</sup> Article 301 of the treaty, “[p]eaceful uses of the seas,” declares that states parties shall refrain from the “threat or use of force against the

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5. U.N. Conference on the Law of the Sea, *Official Records*, at 43–48, U.N. Doc. A/CONF.13/40 (Vol. IV) (Apr. 27, 1958).

6. The Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, Oct. 15, 1963, 480 U.N.T.S. 43.

7. U.N. GAOR, 22nd Sess., 1515th mtg. at 1–15, U.N. Doc. A/C.1/952 (Nov. 1, 1967).

8. G.A. Res. 2340 (XXII), ¶ 1 (Dec. 18, 1967).

9. Rep. of the Ad Hoc Comm. to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, UN Doc. A/7230, (Dec. 31, 1968).

10. G.A. Res. 2467 (XXIII), at 15 (Dec. 21, 1968).

11. G.A. Res. 2574 (XXIV), at 10 (Dec. 15, 1969).

12. G.A. Res. 2750 (XXV), at 25–27 (Dec. 17, 1970).

13. *Id.*

14. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

15. See *id.* at pmb., art. 301 (reserving the seas for peaceful purposes); art. 141, 143, 147 (reserving the international seabed Area for peaceful purposes); art. 88 (reserving the high seas for peaceful purposes); art. 240, 242, 246 (noting that marine scientific research may be conducted only for peaceful purposes).

territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.”<sup>16</sup> This text is replicated from article 2(4) of the Charter of the United Nations and reflects a bedrock norm of international law.<sup>17</sup> These two treaties now work in tandem to contain the North Korean nuclear threat, and the principles they embody are echoed in numerous subsequent treaties concerning nonaggression in international affairs and reducing the threat of weapons of mass destruction.

Arising from the zeitgeist of the time, the Non-Proliferation Treaty (NPT) was adopted in 1968<sup>18</sup> and the Seabed Nuclear Arms Treaty was adopted in 1971.<sup>19</sup> Meanwhile, regional efforts focused on establishment of nuclear-free oceans and zones of peace in the South Pacific,<sup>20</sup> the Indian Ocean,<sup>21</sup> and the Caribbean and Latin America in 1967.<sup>22</sup> These were supplemented by the Outer Space Treaty<sup>23</sup> and the Antarctic Treaty,<sup>24</sup> both of which restricted nuclear weapons in areas of the global commons. The nuclear armament negotiations of détente produced the Strategic Arms Limitations Treaty, which placed a cap on submarine-launched ballistic missiles.<sup>25</sup>

In the intervening years, four additional treaties built international will and capability to counter the threat of nuclear proliferation. The Convention on the Physical Protection of Nuclear Material (CPPNM) requires states to take measures to prevent, detect, and punish offenses relating to nuclear material.<sup>26</sup> Second, the Nuclear Terrorism Convention covers a range of inchoate and

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16. *Id.* at art. 301.

17. U.N. Charter art. 2, ¶ 4.

18. Treaty on the Non-Proliferation of Nuclear Weapons, Mar. 5, 1970, 729 U.N.T.S. 161.

19. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil thereof, May 18, 1972, 955 U.N.T.S. 115.

20. South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga) art. 3, Aug. 6, 1985, 1445 U.N.T.S. 177.

21. *See* Comm. on Disarmament, Report on the Work of its Thirty-Fifth Session, U.N. Doc. A/35/27 at 22 (1971); G.A. Res. 2832 (XXVI), at 36 (Dec. 16, 1971).

22. Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco) art. 1, Apr. 22, 1968, 634 U.N.T.S. 281.

23. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies art. 3, Oct. 10, 1967, 610 U.N.T.S. 205. *See also* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies art. 3, Dec. 5, 1979, 1363 U.N.T.S. 21.

24. The Antarctic Treaty art. 1, Dec. 1, 1959, 402 U.N.T.S. 71.

25. Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Arms (with Protocol), U.S.-U.S.S.R., May 23, 1972, 944 U.N.T.S. 13445. A follow-on agreement, Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms (with Protocol), June 18, 1979, was largely observed but never entered into force.

26. Convention on the Physical Protection of Nuclear Material (with annexes), Mar. 3, 1980, 1456 U.N.T.S. 101.

completed crimes related to nuclear terrorist attacks.<sup>27</sup> The Terrorist Bombing Convention focuses on the unlawful use of explosives with the intention to kill, to injure, or to cause extensive destruction to compel a government to act (or not act).<sup>28</sup>

Finally, the most recent instrument was negotiated after the attacks of 9/11 and applies specifically to the oceans. The 2005 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) completely transformed an earlier version of the treaty that had focused on extradition and prosecution of crimes aboard ships.<sup>29</sup> The 1988 version of SUA largely has fallen into desuetude. The new agreement holds greater promise, although it entered into force in 2010 and is underutilized. The 2005 SUA contains a comprehensive set of protocols for disrupting the movement of weapons of mass destruction (WMD)<sup>30</sup> at sea and includes a regime for boarding foreign-flagged vessels.<sup>31</sup> The new treaty is also the first multilateral treaty to criminalize dual use material<sup>32</sup> that could be misused in WMD to threaten a ship or pose a danger at sea or as a means of intimidating a population, a government, or an international organization.<sup>33</sup>

The new SUA Convention is the first comprehensive legal regime for maritime security. While it holds great promise for expanding and strengthening security in the maritime domain, it has weaknesses that prevent it from being an optimal instrument to restrain DPRK nuclear proliferation. First, with just forty-five contracting states, the Convention is not universally adopted.<sup>34</sup> Second, enforcement jurisdiction under the treaty is based entirely on flag state consent. At sea that means any action against a suspicious vessel is subject to the

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27. G.A. Res. 59/290 (Apr. 13, 2005).

28. International Convention for the Suppression of Terrorist Bombings art. 2, Dec. 15, 1997, 37 I.L.M. 249, 2149 U.N.T.S. 284. See Samuel M. Witten, Note, *The International Convention for the Suppression of Terrorist Bombings*, 92 AM. J. INT'L L. 774, 774 (1998).

29. Int'l Conference on the Revision of the SUA Treaties, *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, IMO Doc. LEG/CONF. 15/21, Nov. 1, 2005.

30. *Id.* at art. 1(d) (defining biological, chemical, and nuclear weapons); art. 3bis(1)(b) (forbidding transport on a ship of explosive or radioactive material, knowing it is intended to be used to cause death or injury, and special fissionable material or related equipment, knowing it is intended to be used in violation of the safeguards under the International Atomic Energy Agency (IAEA)).

31. *Id.* at art. 8bis.

32. 2005 SUA, *supra* note 29, at art. 3bis(1)(b)(iv) (stipulating that a seafarer transporting a dual use item that is used in WMD must have the general intent that the device can be used as a WMD and the specific intent that in fact it will be used in such manner). The earlier treaty is the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221.

33. 2005 SUA, *supra* note 29, at arts. 3(2), 3bis(a).

34. International Maritime Organization, Comprehensive Information on the Status of Multilateral Conventions and Instruments in Respect of which the International Maritime Organization or its Secretary-General Performs Depositary or other Functions, Sept. 21, 2018, 442–43, available at <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202019.pdf>. Benin is the most recent State Party—it joined on July 26, 2018. *Id.*

exclusive jurisdiction of the flag state.<sup>35</sup> Seeking flag state consent for any particular enforcement action is often time consuming, and even fruitless, as ship registries and governments grapple with whether to permit foreign armed forces to conduct an opposed boarding of a ship that flies its flag. Ensuring that the government has appointed a designated authority to make such decisions is crucial for the effective implementation of the SUA Convention. Yet only five states parties have designated a flag state law enforcement authority to respond to requests for assistance, such as to confirm nationality or flag registry, or to authorize boarding of a ship. These states are: France, Latvia, San Marino, Sweden, and the United States.<sup>36</sup> The lack of a designated authority in most member states means that it takes more time to discover and utilize channels of communication to coordinate among flag, port, and coastal states during any enforcement action.

Such communications seams are exploited by traffickers. For decades North Korea relied on the prerogative of exclusive flag state jurisdiction to shield its ships from international scrutiny, since flag state administrations are so slow or reluctant to act. Article 92 of UNCLOS captures the longstanding rule that flag states maintain exclusive jurisdiction over vessels that fly their flag. While this rule has facilitated international trade and contributes to a liberal international order, it has also protected shadowy networks and made collective security more challenging.<sup>37</sup>

Effective flag state enforcement is essential because coastal state enforcement jurisdiction is so weak. While it may be possible under some circumstances for a coastal state to assert prescriptive jurisdiction over a foreign-flagged ship in the territorial sea for violation of national laws that implement these agreements, the extension of criminal enforcement jurisdiction in such cases is rather tenuous. Coastal states may assert jurisdiction over violations of their laws committed on board ships in the territorial sea if the crimes inure to the good order or security of the coastal state.<sup>38</sup> Coastal states also may act against ships in the contiguous zone—out to twenty-four nautical miles from the shoreline—in cases involving suspected immigration or customs violations

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35. See UNCLOS, *supra* note 14, at art. 92.

36. IMO Comprehensive Information, *supra* note 34, at 444–46.

37. For example, in 2002, U.S. and Spanish naval forces intercepted a shipment of fifteen Scud ballistic missiles on the high seas on board the *So San* but were unable to seize the cargo because it was on board a North Korean ship and protected by North Korean flag state jurisdiction. See Thom Shanker, *Threats and Responses: Arms Smuggling; Scud Missiles Found on Ship of North Korea*, N.Y. TIMES (Dec. 11, 2002), <https://www.nytimes.com/2002/12/11/world/threats-and-responses-arms-smuggling-scurd-missiles-found-on-ship-of-north-korea.html>; Thomas E. Ricks & Peter Slevin, *Spain and U.S. Seize N. Korean Missiles*, WASH. POST (Dec. 11, 2002), <https://www.washingtonpost.com/archive/politics/2002/12/11/spain-and-us-seize-n-korean-missiles/f9741e30-0cf3-4eb6-bec6-862dc46ccb5c/>.

38. UNCLOS, *supra* note 14, at art. 27.

occurring in the territorial sea.<sup>39</sup> Port states may have some limited jurisdiction over foreign-flagged vessels that arrive in port, but assertion of port state control measures generally is effective only if all ports available to a ship act in unison to enforce the same laws. Otherwise, the criminal vessel simply seeks out substandard ports that will give it a pass. In some ports, for example, proper records are not maintained, or port officials may be bribed to overlook infractions. In sum, coastal state and port state law enforcement authorities must have the capability or proficiency to act and the capacity or bandwidth to act, and their leaders must have the political will to do so.

These challenges lead to the third major weakness of the 2005 SUA Convention. While its proscriptive rules are advanced and procedural mechanisms are durable on paper, it is not as yet tightly connected to the enforcement architecture led by the states with the greatest naval capability, maritime presence and capacity, and political will to act, including through the UN Security Council. The attacks of 9/11, however, galvanized states to graft the new SUA counterproliferation regime onto the framework of UNCLOS to offer even greater prospects for success than the original SUA treaty. While the United States pursued negotiation of the SUA Convention through the International Maritime Organization (IMO) in 2002 (and they were completed in 2005), it launched the Proliferation Security Initiative (PSI) as a more flexible, legally nonbinding tool in 2003. PSI provided impetus for a stronger, global multilateral regime to combat the proliferation of WMD.<sup>40</sup>

## II. THE GREAT POWER COUNTER-PROLIFERATION REGIME

The attacks on September 11, 2001 motivated the international community to take more serious steps to guard against asymmetric WMD.<sup>41</sup> Just months after the attacks, in December 2002, President George W. Bush unveiled a new strategy to combat WMD proliferation that went beyond the traditional methods of diplomacy, arms control, threat reduction assistance, and export controls by placing greater emphasis on actual interdiction of WMD. The resulting *National Strategy to Combat Weapons of Mass Destruction* specifically focused on implementing effective interdiction as a key element of a comprehensive U.S. approach.<sup>42</sup>

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39. *Id.* at art. 33. Coastal states also may enforce fiscal and sanitary (quarantine) laws in the contiguous zone.

40. Michael Byers, Note, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT'L L. 526, 528 (2004).

41. See N.R. Kleinfeld, *U.S. Attacked; Hijacked Jets Destroy Twin Towers and Hit Pentagon in Day of Terror*, N.Y. TIMES (Sept. 12, 2001), <https://www.nytimes.com/2001/09/12/us/us-attacked-hijacked-jets-destroy-twin-towers-and-hit-pentagon-in-day-of-terror.html>.

42. DEP'T OF HOMELAND SEC., *National Strategy to Combat Weapons of Mass Destruction* (Dec. 2002), available at <https://www.hsdl.org/?abstract&did=860>; Statement on the National Strategy to Combat Weapons of Mass Destruction, 38 WEEKLY COMP. PRES. DOC. 2150 (Dec. 11, 2002).

In early 2003 the United States and ten cooperating nations established PSI.<sup>43</sup> The PSI network set forth a *Statement of Interdiction Principles* that relies on voluntary actions by states that are consistent with their national legal authorities and relevant international law to prevent the proliferation of WMD and related materials.<sup>44</sup> The program is based entirely on multilateral coordination. Support has expanded from the original eleven sponsors to more than one hundred states, all of which have pledged to implement the *Interdiction Principles*.<sup>45</sup> These states are examining and updating existing national laws and utilizing international legal authorities and frameworks during periodic exercises.<sup>46</sup>

States participate in PSI by adhering to the *Interdiction Principles*, which pledge to disrupt the illegal transfer of WMD and their delivery systems.<sup>47</sup> By agreeing to the *Interdiction Principles*, states commit to implement effective measures, either alone or in concert with other states, to disrupt the transfer or transport of WMD, their delivery systems, and related materials.<sup>48</sup> States are also obligated to adopt streamlined procedures for the rapid exchange of information about suspected proliferation activity.<sup>49</sup> Through collaboration and operational expert meetings, states agree to review and strengthen their national protocols and legal authorities, as well as promote the progressive development of international law to support these commitments.<sup>50</sup>

States also express a willingness to take specific action consistent with their national laws to interdict WMD and related systems and materials.<sup>51</sup> These actions are dependent on the existing legal architecture embedded in UNCLOS that recognizes the competence of flag states, coastal states, and port states to exercise jurisdiction over ships at sea. States agree not to transport or assist in

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43. Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, and the United Kingdom. See *Principles for the Proliferation Security Initiative*, U.S. DEP'T OF STATE (Sept. 4, 2003), <https://2001-2009.state.gov/t/isn/rls/prsr/23809.htm>.

44. Proliferation Security Initiative: Statement of Interdiction Principles, U.S. DEP'T OF STATE (Sept. 4, 2003), <https://2001-2009.state.gov/t/isn/rls/fs/23764.htm>. See also Mary Beth Nikitin, Proliferation Security Initiative (PSI) CRS Report for Congress (Congressional Research Service, Aug. 9, 2018).

45. Nikitin, Proliferation Report, *supra* note 44, at 12. On November 1, 2018, the Republic of Palau become the 106th state to PSI and the Statement of Interdiction Principles. See Office of the Minister of State, Republic of Palau, Diplomatic Note 107/MSUS/2018, 1 Nov. 2018.

46. Steven R. Weisman, *U.S. to Send Signal to North Koreans in Naval Exercise*, N.Y. TIMES (Aug. 18, 2003), <https://www.nytimes.com/2003/08/18/world/us-to-send-signal-to-north-koreans-in-naval-exercise.html>.

47. Statement of Interdiction Principles, *supra* note 44. Excerpts may be found at JAMES KRASKA & RAUL PEDROZO, INTERNATIONAL MARITIME SECURITY LAW 786–87 (2013). See also AARON DUNNE, THE PROLIFERATION SECURITY INITIATIVE: LEGAL CONSIDERATIONS AND OPERATIONAL REALITIES, STOCKHOLM INT'L PEACE RES. INST. POLICY PAPER 36, 13–17 (2013).

48. DUNNE, *supra* note 47, at 13.

49. *Id.*

50. *Id.*

51. *Id.* at 13–14.



the transport of WMD-related cargoes, and board and search their ships on the high seas suspected of transporting such illicit cargoes. States are also required to interdict foreign ships in their internal waters or territorial sea that are illegally trafficking in WMD and associated materials and technology. There is a presumption that states that have signed the *Interdiction Principles* will provide consent for their ships to be boarded and searched by foreign warships.<sup>52</sup> Port states should not permit suspicious foreign-flagged vessels to get underway from their ports without a thorough inspection. Furthermore, ships in the territorial sea of a coastal state that are in violation of international nonproliferation regimes may be considered prejudicial to the good order or security of the coastal state and therefore forfeit their right of innocent passage and may be boarded by the law enforcement forces of the coastal state.<sup>53</sup>

States especially agree to take effective measures to keep WMD and related materials out of the hands of rogue states and nonstate actors.<sup>54</sup> States should adopt streamlined procedures to facilitate the rapid exchange of time-sensitive intelligence to facilitate interdiction operations. States party to SUA, for example, have a legal responsibility to identify designated contacts to share information and authorize actions affecting their ships, coasts, and ports. PSI states also agree to take action, which may be interdiction at sea, boarding and inspection of ships in port, or simply passing along time-sensitive information for use by a partner state to disrupt the delivery of WMD and related cargo.<sup>55</sup>

Participating states may implement bilateral or multilateral boarding agreements that authorize foreign law enforcement or armed forces to interdict their ships that are suspected of trafficking in WMD. For example, the United States has signed bilateral ship boarding agreements with the largest flag state registries in the world, which include (in order of total deadweight tonnage): (1) Panama; (2) Liberia;<sup>56</sup> (3) Marshall Islands; (6) Malta; and (7) The Bahamas.<sup>57</sup> The United States also has PSI agreements with Belize, Croatia, Cyprus, Mongolia, and Saint Vincent and the Grenadines.<sup>58</sup> Combined, the United States

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52. *Id.*

53. See R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 83 (3d ed. 1999); DOUGLAS GUILFOYLE, *SHIPPING INTERDICTION AND THE LAW OF THE SEA* 11–12 (James Crawford & John S. Bell eds., 2009).

54. DUNNE, *supra* note 47, at 13–14.

55. *Id.*

56. See Sean D. Murphy, Commentary, “*Proliferation Security Initiative*” for Searching Potential WMD Vessels, 98 AM. J. INT’L L. 355, 355 (2004) (noting the Feb. 11, 2004 agreement with Liberia).

57. *Top 10 Flag States 2017*, LLOYD’S LIST (Dec. 8, 2017), <https://lloydlist.maritimeintelligence.informa.com/LL1120177/Top-10-flag-states-2017>. The United States does not have agreements with (4) Hong Kong; (5) Singapore; (8) China; (9) Greece; and (10) Japan.

58. See John R. Crook, Commentary, *United States Concludes Additional Proliferation Security Initiative Ship Boarding Agreements*, 99 AM. J. INT’L L. 919, 919 (2005) (recounting agreements signed with Belize and Cyprus); *The United States and Mongolia Proliferation Security Initiative Shipboarding Agreement*, U.S. DEP’T OF STATE (Oct. 23, 2007), <https://2001->

has signed agreements with flag states that account for some 54 percent of global shipping.<sup>59</sup> The agreements provide that ships may be boarded under different circumstances.<sup>60</sup> In the agreements with The Bahamas and Croatia, for example, flag state consent is required in all situations. Other agreements, however, permit flag state consent to be presumed if the flag state does not respond to a request to board a ship within a certain time frame, such as four hours.

The year after PSI began, the United States, the United Kingdom, and France successfully led the UN Security Council to adopt Resolution 1540, which decided that all states shall “refrain from providing any form of support to non-state actors that attempt to develop, acquire, manufacture, possess, transport,

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2009.state.gov/t/pa/prs/ps/2007/oct/93957.htm; *St. Vincent Holds Bilateral Proliferation Security Initiative Workshop and Tabletop Exercise with the United States*, U.S. EMBASSY IN BARBADOS, THE EASTERN CARIBBEAN, AND THE OECS (Aug. 19, 2015), <https://bb.usembassy.gov/st-vincent-hosts-bilateral-proliferation-security-initiative-workshop-tabletop-exercise-united-states/>.

59. Percentages of world shipping tonnage for states with PSI shipboarding agreements with the United States are: Panama, 18.44%; Liberia, 11.78%; Marshall Islands, 11.63%; Malta, 5.33%; The Bahamas, 4.29%. The United States also has PSI agreements with Belize, Croatia, Cyprus (1.81%), Mongolia, and Saint Vincent and the Grenadines. *See* U.N. Conference on Trade and Development, *Review of Maritime Transport*, p. 32, UN Doc. UNCTAD/RMT/2017 (2017).

60. In alphabetical order, the agreements are: Agreement Between the Government of the Commonwealth of the Bahamas and the Government of the United States of America Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea, Aug. 11, 2008, <https://2009-2017.state.gov/t/isn/trty/108223.htm>; Agreement Between the Government of the United States of America and the Government of Belize Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea, Aug. 4, 2005, <https://2001-2009.state.gov/t/isn/trty/50809.htm>; Agreement between the Government of the United States of America and the Government of the Republic of Croatia Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials, June 1, 2005, <https://2009-2017.state.gov/t/isn/trty/47086.htm>; Agreement Between the Government of the United States of America and the Government of the Republic of Cyprus Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea, July 25, 2005, <https://2009-2017.state.gov/t/isn/trty/50274.htm>; Agreement Between the Government of the United States of America and the Government of the Republic of Liberia Concerning Cooperation To Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea, Feb. 11, 2004; <https://2009-2017.state.gov/t/isn/trty/32403.htm>; Agreement Between The Government Of The United States Of America And The Government Of Malta Concerning Cooperation To Suppress The Proliferation Of Weapons Of Mass Destruction, Their Delivery Systems, And Related Materials By Sea, Mar. 15, 2007, <https://2009-2017.state.gov/t/isn/trty/81883.htm>; Agreement Between the Government of the United States of America and the Government of the Republic of the Marshall Islands Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, Aug. 13, 2004, <https://2009-2017.state.gov/t/isn/trty/35237.htm>; Agreement Between the Government of the United States of America and the Government of Mongolia Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, Oct. 23, 2007, <https://2009-2017.state.gov/t/isn/trty/106218.htm>; and Amendment to the Supplementary Arrangement Between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement Between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, May 12, 2004, <https://2009-2017.state.gov/t/isn/trty/32858.htm>.

transfer or use nuclear, chemical or biological weapons and their means of delivery.”<sup>61</sup> The resolution was adopted under Chapter VII of the Charter, which authorizes the Security Council to take measures, when it determines there exists a threat to the peace, a breach of the peace, or an act of aggression, to restore international peace and stability.<sup>62</sup> The resolution declares that the spread of weapons of mass destruction, including nuclear, chemical, and biological weapons, as well as their means of delivery, constitute a threat to international peace and security, thereby meeting the first of the three criteria that may trigger Security Council action.<sup>63</sup>

The Security Council adopted Resolution 1540 under article 41, which authorizes states to use nonforceful measures to compel compliance, such as cutting diplomatic ties and ceasing international trade and communication. The use of force, which is authorized by article 42 and is typically signaled in resolutions through text authorizing “all necessary means,” was not invoked. Still, the Security Council’s authority looms large and states are directed to adopt and enforce effective national measures to stop illegal efforts to acquire or use WMD, especially for the purpose of terrorist attacks.<sup>64</sup> Duties to implement Resolution 1540 extend to the prevention of financing WMD and an affirmative obligation to establish accountability and controls over materials related to WMD. States are also required to maintain stringent border controls and to employ law enforcement forces to detect, deter, prevent, and counter illicit trafficking and brokering in WMD and associated materials.<sup>65</sup> The Resolution complements obligations under the NPT, the Chemical Weapons Convention,<sup>66</sup> the Biological Weapons Convention,<sup>67</sup> and state responsibilities under the International Atomic Energy Agency (IAEA). In 2016 the Security Council unanimously reaffirmed the obligations in Resolution 1540 and called on states to strengthen and intensify their efforts to fully implement it.<sup>68</sup>

Resolution 1540 is a useful authority to restrain the proliferation of nuclear, chemical, and biological weapons. But the threats from such WMD are diffuse and enforcing the provisions against violators presents a problem in collective

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61. S.C. Res. 1540, ¶ 1 (Apr. 28, 2004). The Resolution has been progressively extended. The current mandate expires on April 28, 2021. *See* S.C. Res. 1673 (Apr. 27, 2006); S.C. Res. 1810 (Apr. 25, 2008); S.C. Res. 1977 (Apr. 20, 2011).

62. U.N. Charter art. 39.

63. Res. 1540, *supra* note 61, at ¶ 9.

64. *Id.* at ¶ 2.

65. *Id.* at ¶ 3(c).

66. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45.

67. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Oct. 4, 1972, 1015 U.N.T.S. 163.

68. S.C. Res. 2325, ¶ 1 (Dec. 15, 2016).

action.<sup>69</sup> Effective enforcement of nonproliferation regimes requires states to act in concert, but lack of consensus on the threat posed, diverging interests, and free riders weaken the effectiveness of collective action in this case.<sup>70</sup> While the DPRK presents the most acute threat of nuclear proliferation, China holds the cards in stopping stronger enforcement mechanisms.<sup>71</sup> Resolution 1540 is a generic resolution and a necessary part of the progressive development of nonproliferation authority, but what is needed in the case of DPRK is Security Council action tailor-made to isolate the country and cut it off from the global economy. Such a resolution, however, is unlikely because it would be blocked by China and Russia.

Additionally, the U.S. Department of Treasury has an arsenal of financial levers to enforce sanctions against foreign companies and individuals that supplement UN Security Council authority. The American President can unilaterally impose U.S. sanctions on businesses and individuals involved in propping up the North Korean economy.<sup>72</sup> Because the U.S. economy is so important to the global economy and Washington controls access to much of the global banking system, even unilateral U.S. sanctions can deter legitimate foreign firms from engaging in illegal activity.<sup>73</sup> For example, even though European states have not gone along with a reimposition of sanctions on Iran, U.S. sanctions are still a powerful tool against the regime in Tehran. A chief executive at A.P. Møller-Maersk A/S, the world's largest shipping company, stated in May 2018, "I don't think any shipping line that operates globally will be able to do business in Iran if the [U.S.] sanctions arrive in full force[.]"<sup>74</sup> As the Trump administration threatened to impose sanctions on Iran during the fall of 2018, the container and tanker shipping industry began to wind down their business with the Iranian regime.<sup>75</sup>

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69. MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 8 (2nd ed. 1971) ("Just as those who belong to an organization or group can be presumed to have a common interest, so they obviously also have purely individual interests. . . .").

70. Jeffrey W. Knopf, *After Diffusion: Challenges to Enforcing Nonproliferation and Disarmament Norms*, 39 *CONTEMP. SEC. POLICY* 367, 375–76 (2018).

71. Jane Perlez, *On U.S.-North Korea Talks, China May Hold the Cards*, *N.Y. TIMES* (May 11, 2018), <https://www.nytimes.com/2018/05/11/world/asia/north-korea-china-nuclear-trump-sanctions.html>.

72. See, e.g., North Korea Sanctions and Policy Enhancement Act of 2016, Pub. L. No. 114-122, §§ 201–210, 130 Stat. 93 (2016); Memorandum on Delegation of Certain Functions and Authorities under the North Korea Sanctions and Policy Enhancement Act of 2016, 2016 *DAILY COMP. PRES. DOC.* (May 18, 2016); Imposing Additional Sanctions with Respect to North Korea, 82 Fed. Reg. 44705, 44705 (Sept. 21, 2017); North Korea Sanctions Regulations, 83 Fed. Reg. 9182, 9182–83 (Mar. 5, 2018), 31 C.F.R. pt. 510.

73. Costas Paris & Joanne Chiu, *U.S. Sanctions Start to Pinch Shipping in Iran*, *WALL ST. J.* (May 29, 2018), <https://www.wsj.com/articles/u-s-sanctions-start-to-pinch-shipping-in-iran-1527586200>.

74. *Id.*

75. *Id.*

### III. NORTH KOREAN NUCLEAR SANCTIONS

Nowhere is the threat of the proliferation of WMD, and in particular, nuclear weapons, more evident today than the case of the DPRK. On February 19, 1992, South Korea and North Korea issued a joint declaration renouncing the testing, manufacturing, production, receipt, possession, storing, deploying, or use of nuclear weapons. Both parties agreed to use nuclear energy solely for peaceful purposes and not even possess nuclear enrichment facilities.<sup>76</sup> A year later, in March 1993, North Korea sent a letter to the President of the Security Council stating its intent to withdraw from the NPT.<sup>77</sup> The Security Council responded with the adoption of Resolution 825 on May 11, 1993, in which it called on the DPRK to reconsider its decision, reaffirm its commitment to the NPT, and honor its safeguards agreement with the IAEA.<sup>78</sup> In response, Pyongyang suspended its withdrawal from the NPT on June 9, 1993.<sup>79</sup> Thus began the saga of broken promises, noncompliance with numerous UN security council and IAEA resolutions, and other unsuccessful international efforts to convince the DPRK to abandon its nuclear ambitions. Slowly, North Korea became more belligerent, with its ballistic missiles overflying Japan for the first time on August 31, 1998.<sup>80</sup>

In January 2003, North Korea finally made good on its threat from 1993 and withdrew from the NPT, coming out from under a legally binding IAEA Safeguards Accord.<sup>81</sup> Even so, the DPRK stated that it did not intend to produce nuclear weapons.<sup>82</sup> Following the fourth round of the Six-Party Talks in Beijing in September 2005, the regime reaffirmed this pledge and committed to abandoning all nuclear weapons and rejoin the NPT and implement IAEA safeguards.<sup>83</sup> International expectations for a more stable Korean Peninsula were shattered, however, on July 5, 2006 when North Korea launched a series of

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76. Joint Declaration of South and North Korea on the Denuclearization of the Korean Peninsula, Feb. 19, 1992, available at [http://www.nti.org/e\\_research/official\\_docs/inventory/pdfs/aptkoreanuc.pdf](http://www.nti.org/e_research/official_docs/inventory/pdfs/aptkoreanuc.pdf).

77. Robert A. Manning, *Testing a Post-Cold War World: A Nuclear Standoff in North Korea*, L.A. TIMES (May 9, 1993), at M2; Robert A. Manning, *A Nuclear Standoff in North Korea: Pyongyang is Threatening to Withdraw from the Nuclear Non-Proliferation Treaty unless Concerns are Addressed*, L.A. TIMES, May 12, 1993, at WA2.

78. S.C. Res. 825, ¶ 2 (May 11, 1993).

79. *Joint Declaration of South and North Korea on the Denuclearization of the Korean Peninsula*, NUCLEAR THREAT INITIATIVE (Oct. 26, 2011), <https://www.nti.org/learn/treaties-and-regimes/joint-declaration-south-and-north-korea-denuclearization-korean-peninsula/>.

80. Sheryl WuDunn, *North Korea Fires Missile Over Japanese Territory*, N.Y. TIMES (Sept. 1, 1998), <https://www.nytimes.com/1998/09/01/world/north-korea-fires-missile-over-japanese-territory.html>.

81. *Text of North Korea's Statement on NPT Withdrawal*, ATOMIC ARCHIVE (Jan. 10, 2003), <http://www.atomicarchive.com/Docs/Deterrence/DPRKNPTstatement.shtml>.

82. *Id.*

83. *Joint Statement of the Fourth Round of the Six-Party Talks*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (Sept. 19, 2005), <http://www.acronym.org.uk/docs/0509/doc04.htm>.

ballistic missiles into the Sea of Japan in violation of a self-proclaimed moratorium.<sup>84</sup>

The Security Council reacted ten days later by condemning the multiple missile launches and demanding that the DPRK suspend all activities related to its ballistic missile program.<sup>85</sup> Resolution 1695 reaffirmed Resolutions 825 and 1540, and it concluded that North Korea's proliferation of nuclear, chemical, and biological weapons and delivery systems constituted a threat to international peace and security. Once this condition predicate for action under Chapter VII of the UN Charter was invoked, the Security Council authorized all states to halt the transfer of ballistic missiles and technology to North Korea. Pyongyang responded with its first clear-cut nuclear weapons test three months later, on October 9, 2006. One week later the Security Council adopted Resolution 1718, which condemned the nuclear test and demanded that the DPRK halt further tests or ballistic missile launches.<sup>86</sup> This resolution formed the regime to contain North Korea that persists to the present.

Acting under Chapter VII (Article 41) of the Charter, Resolution 1718 further directed the DPRK to abandon all nuclear weapons, WMD, and ballistic missile programs in a complete, verifiable, and irreversible manner.<sup>87</sup> The resolution imposed sanctions on North Korea, and obligated all member states of the United Nations to prevent the supply, sale, or transfer of three classes of cargo: (1) a range of heavy conventional weapons, including warships, military aircraft, and armored vehicles and artillery; (2) technology related to chemical, biological, or nuclear weapons and ballistic missiles; and (3) luxury goods, which are enjoyed by the ruling clique even as the impoverished population struggled to survive.<sup>88</sup> Resolution 1718 also stopped the export of North Korean materials used for WMD and imposed travel restrictions on persons engaged in WMD programs.

True to form, North Korea conducted a second nuclear test on May 25, 2009.<sup>89</sup> The Security Council tightened sanctions even further. Resolution 1874 expanded the arms embargo and established an inspection regime.<sup>90</sup> The resolution called on states to search ships on the high seas if they were believed to carry illicit cargo from the DPRK. States also were required to inspect cargo bound for and from the DPRK, including goods flowing through their seaports and airports, if there was a reasonable belief that the cargo violated UN

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84. Norimitsu Onishi & David E. Sanger, *Missiles Fired by North Korea; Tests Protested*, N.Y. TIMES (July 5, 2006), <https://www.nytimes.com/2006/07/05/world/asia/05missile.html>.

85. S.C. Res. 1695, ¶ 2 (July 15, 2006).

86. S.C. Res. 1718, ¶¶ 1, 2 (Oct. 14, 2006).

87. *Id.*

88. *Id.*

89. Choe Sang-Hun, *North Korea Claims to Conduct 2nd Nuclear Test*, N.Y. TIMES (May 24, 2009), <https://www.nytimes.com/2009/05/25/world/asia/25nuke.html>.

90. S.C. Res. 1874, ¶¶ 9–15 (June 12, 2009).

sanctions.<sup>91</sup> The resolution directed states to inspect vessels in such circumstances, with the consent of the flag state.<sup>92</sup> Leveraging port state control measures and a regime of ship inspection incumbent on exclusive flag state jurisdiction did not introduce any new enforcement authority for states per se, however.

The entire framework for maritime sanctions against the DPRK is integrated with flag state rights and duties under UNCLOS.<sup>93</sup> Flag states always have the authority to inspect or search ships that fly their flag. Port states have inherent authority to inspect ships arriving in their ports as a condition of port entry. But the resolution imposed due diligence on flag and port states to implement these two principles in a coherent manner against North Korean ships. In doing so, the resolution provides a justification and the political cover of the Security Council mandate for port states and flag states to implement such stringent measures, which could affect exports and undermine national industries.<sup>94</sup> Furthermore, if a flag state did not consent to the inspection on the high seas of its ship under suspicion, it now had a duty to direct the ship to proceed to port for inspection by local authorities. If an inspection discovers prohibited items, member states are authorized to seize and dispose of them. These provisions shield ports from liability for seizures, making seizure more likely. Yet while responsible flag states will, in all probability, observe this requirement and divert their vessels to a convenient port for inspection, it is highly unlikely that rogue states such as Syria, Iran, Myanmar, and the DPRK will do so. Failing to do so, however, raises the diplomatic costs of defiance faced by noncompliant states, and it raises the prospect that they may have sanctions imposed on them. Violations by Syrian, Russian, and Chinese ships make apparent that some states either flagrantly ignore sanctions for their ships as a matter of government policy in order to erode the U.S.-led security architecture on the Korean Peninsula, or simply lack proper oversight of their shipping industry.<sup>95</sup>

Resolution 1874 also includes a novel provision to bar bunkering or other services for North Korean ships.<sup>96</sup> Operative paragraph 17 prohibits member states from providing bunkering services, such as fuel or other supplies or vessel services to ships, if there are reasonable grounds to believe they are in violation of Security Council sanctions. This provision was instrumental in preventing at least two suspected weapons shipments to Myanmar—one in July 2009 and one

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91. *Id.* at ¶ 11.

92. *Id.* at ¶ 12.

93. *Id.* at ¶¶ 12–13, 16.

94. Keith Johnson & Dan De Luce, *Busting North Korea's Sanctions-Evading Fleet*, FOREIGN POL'Y (Feb. 28, 2018), <https://foreignpolicy.com/2018/02/28/busting-north-koreas-sanctions-evading-fleet-ofac-treasury-shipping/#>.

95. Ian Talley et al., *World News: Pyongyang Skirts Curbs, U.N. Says—Report Alleges China, Russia Maintain Trade Ties Despite Sanctions; a Blow to U.S. Goals*, WALL ST. J., Sept. 17, 2018, at A6.

96. Res. 1874, *supra* note 90, at ¶ 17.

in May 2011. These instances provide case studies for effective interdiction against North Korea's efforts to violate UN sanctions.

In June 2009, satellite intelligence detected the tramp steamer *Kang Nam I* being loaded with a cache of weapons in North Korea bound for Myanmar.<sup>97</sup> The steamer got underway, shadowed by the USS *John S. McCain* (DDG 56) over the course of several days. When it became apparent to the North Korean ship's master that he would not be able to refuel in Singapore as originally planned, the ship reversed course and returned to North Korea.<sup>98</sup> (Once the ship was detected by the U.S. Navy and lost anonymity, the Singaporeans would have been alerted and would have imposed port state control measures on the ship under Resolution 1874 if it entered into port). Thus, delivery of the cargo was thwarted merely by the likelihood that the ship could not take on fuel and would be followed every step of the way by U.S. naval forces.

In May 2011 a suspected transshipment of military hardware on board the Motor Vessel (M/V) *Light* was disrupted in a similar operation.<sup>99</sup> The ship was Chinese owned and operated but was registered in Belize and manned by a North Korean crew. Pursuant to the bilateral U.S.-Belize PSI boarding agreement, Belize granted permission for U.S. naval forces to board and inspect the ship on the high seas.<sup>100</sup> On May 26, the USS *McCampbell* (DDG 85) intercepted the cargo vessel south of Shanghai and requested permission to board. At the same time, Washington received assurances from Singapore and Malaysia that the vessel would not be allowed to enter any of their ports consistent with Resolution 1874. The North Korean master declined the request to board and claimed the vessel was carrying industrial chemicals to Bangladesh. Despite having received permission to board from the flag state, U.S. authorities declined to conduct an opposed boarding of the vessel in an effort to minimize risk to the crew and de-escalate the situation.<sup>101</sup> The USS *McCampbell* and American military aircraft kept the ship under surveillance, however. Fearing that he would not be able to secure fuel for the ship in Singapore or Malaysia, the master reversed course on May 29, and returned to port in North Korea.<sup>102</sup> Assuming regional coastal nations such as China, Indonesia, Malaysia, and Singapore continue to comply with UN sanctions, it will be extremely difficult, if not impossible, for North Korean vessels to make long voyages because they will be unable to stop for fuel en route.

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97. Choe Sang-Hun, *South Korea Says Freighter from North Turns Back*, N.Y. TIMES (July 6, 2009), <https://www.nytimes.com/2009/07/07/world/asia/07korea.html>.

98. *Id.*

99. David E. Sanger, *U.S. Said to Turn Back North Korea Missile Shipment*, N.Y. TIMES (June 12, 2011), <https://www.nytimes.com/2011/06/13/world/asia/13missile.html>.

100. *Id.*

101. *Id.*

102. *Id.*



Resolutions 1718 and 1874 invoke the earlier authorities to counter nuclear proliferation, including the NPT, the Biological Weapons Convention, the Chemical Weapons Convention, and Resolution 1540. While neither the resolutions nor the treaties authorize the use of force to compel compliance, all states have the inherent right of self-defense, which is reflected in article 51 of the Charter.<sup>103</sup> And follow-on resolutions continue to tighten the noose. Resolution 1718 established a “1718 Committee” to oversee sanctions measures imposed on North Korea.<sup>104</sup> Following a trail of noncompliance by the DPRK, the 1718 Committee has been granted progressively greater power to authorize states to take action to enforce UN sanctions.

On December 11, 2012 North Korea conducted another ballistic missile test.<sup>105</sup> The following month the Security Council adopted Resolution 2087 to condemn this violation of Resolutions 1718 and 1874.<sup>106</sup> The new resolution expanded the list of entities and individuals placed under sanction for assisting the regime’s efforts to evade Security Council action.<sup>107</sup> Resolution 2087 also directed the 1718 Committee to issue an Implementation Assistance Notice in cases where a vessel has declined to permit an inspection after such inspection had been approved by the vessel’s flag state, or in the case of any DPRK-flagged vessel refusing inspection.<sup>108</sup> Later that same year the Security Council passed Resolution 2094, which expanded the sanctions even further, to include two new entities and three individuals under sanction for contributing to North Korea’s prohibited programs.<sup>109</sup> The resolution also imposed targeted financial sanctions related to North Korea’s prohibited activities.<sup>110</sup>

Resolution 2270 sustained the requirement for states to inspect cargo within or transiting through their territory, including airports, seaports, and free trade zones, that originated in North Korea or are bound for North Korea, on North Korean-registered ships or aircraft, or are brokered or facilitated by North Korean agents or companies.<sup>111</sup> Nationals of all UN member states are also prohibited from leasing or chartering vessels or aircraft or providing crew services to North Korea.<sup>112</sup> States are called upon to deregister any vessel owned, operated, or crewed by North Korea, and to not register any such vessel that is

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103. UN Charter, *supra* note 62, at art. 51.

104. Res. 1718, *supra* note 86, at ¶ 12.

105. Choe Sang-Hun & David E. Sanger, *North Koreans Launch Rocket in Defiant Act*, N.Y. TIMES (Dec. 11, 2012), <https://www.nytimes.com/2012/12/12/world/asia/north-korea-launches-rocket-defying-likely-sanctions.html>.

106. S.C. Res. 2087, ¶ 1 (Jan. 22, 2013).

107. *Id.* at ¶ 12.

108. *Id.* at ¶ 7.

109. S.C. Res. 2094, ¶ 27 (Mar. 7, 2013).

110. *Id.* at ¶¶ 11–13.

111. S.C. Res. 2270, ¶ 20 (Mar. 2, 2016).

112. *Id.* at ¶ 18.

deregistered by another state.<sup>113</sup> The only exception is for vessels that demonstrate they are used exclusively for livelihood purposes of North Korean citizens and that are not generating revenue for the DPRK, such as coastal fishing vessels. All states now are required to prohibit their nationals, persons, and corporations subject to their jurisdiction from registering vessels in North Korea. These stricter search measures extend to all cargo bound for North Korea, not just suspected vessels. The resolution also banned construction of new vessels by the regime and broadened the range of banned armaments.<sup>114</sup>

Not only is the DPRK not permitted to register foreign-owned ships, North Korean ships are barred from ports worldwide if there are reasonable grounds to believe they are involved in sanctions violations.<sup>115</sup> This rule may be waived in case of emergency or humanitarian purposes. Resolution 2270 proscribes the sale or transfer of coal, iron, and iron ore from North Korea, except for special limitations. For example, raw materials that originated outside North Korea and transhipped through the country solely for export from the Port of Rajin (Rason) are permitted, provided that the state notifies the 1718 Committee in advance and such transactions are unrelated to generating revenue for the nation's nuclear or ballistic missile programs.<sup>116</sup> Furthermore, economic sanctions prohibit states from importing a list of minerals from North Korea: coal, iron and iron ore, gold titanium ore, vanadium ore, and rare earth metals—materials that typically travel in bulk carriers. DPRK sanctions work on both sides of the trade. North Korea is likewise barred from selling gold, titanium ore, vanadium ore, and rare earth minerals, or using its ships and aircraft to transport these materials to any state.

Resolution 2321 also was adopted under article 41 and it requires flag states to designate and then de-flag vessels supporting the DPRK ballistic missile and nuclear programs.<sup>117</sup> These ships are then banned from ports worldwide. For humanitarian reasons, the resolution permitted some coal exports from North Korea so long as they did not exceed a specified value and were disconnected from the nuclear and ballistic programs.<sup>118</sup> Similarly, iron and iron ore imports could resume if they also were not associated with illegal activity.<sup>119</sup> The resolution also imposed stricter measures on ships used in the DPRK's nuclear weapons activities.

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113. *Id.* at ¶¶ 19–20.

114. *Id.* at ¶ 29.

115. *Id.* at ¶ 22.

116. *Id.* at ¶ 29(a).

117. S.C. Res. 2321, ¶ 12 (Nov. 30, 2016).

118. *Id.*

119. *Id.* at ¶ 26.

North Korea conducted additional launches of ballistic missiles on July 4 and 28, 2017 in violation of Security Council resolutions.<sup>120</sup> In response, the Security Council adopted Resolution 2371, which authorized the 1718 Committee to designate additional goods to be banned from individuals and entities associated with the DPRK nuclear program.<sup>121</sup> The resolution also implemented a complete ban on coal, iron, and iron ore imports into any state from the DPRK.<sup>122</sup>

The third resolution of 2017, Resolution 2375, reduced the oil imports allowed to North Korea by about 30 percent and cut off over half of the refined petroleum products bound for the DPRK.<sup>123</sup> The Security Council imposed an annual cap of two million barrels per year on all refined petroleum products into the DPRK. The resolution also banned all joint ventures with the DPRK, depriving the regime of foreign investment and infusions of foreign technology transfers.<sup>124</sup>

Resolution 2375 broadens the maritime interdiction regime to counter Pyongyang's smuggling at sea, progressively authorizing greater jurisdiction over North Korean ships involved in proscribed activities.<sup>125</sup> Substantively, ship-to-ship transfers of any goods are prohibited with North Korean vessels or ships operating on behalf of North Korea.<sup>126</sup> All states are authorized to conduct inspection of any ships on the high seas if there is suspicion that they are somehow tied to the regime's nuclear infrastructure. The inspections require the consent of the flag state and do not apply to sovereign immune vessels, such as warships. Resolution 2375 also applies to the ships of any flag state, although it was adopted under article 41, which means that only nonforceful measures may be used implement it.<sup>127</sup> If a flag state refuses such a search of one of its ships, however, it is required to direct the ship to a port so that it may be inspected by local authorities. If a flag state fails to authorize inspection or divert the ship to port for inspection, then the 1718 Committee may designate the vessel in violation of UN sanctions.<sup>128</sup> These "designated vessels" must be immediately deregistered by the flag state, taking them out of the stream of maritime commerce.<sup>129</sup> On a regular basis, the 1718 Committee shall release the names of

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120. David E. Sanger et al., *North Korea Tests a Ballistic Missile That Experts Say Could Hit California*, N.Y. TIMES (July 28, 2017), <https://www.nytimes.com/2017/07/28/world/asia/north-korea-ballistic-missile.html>.

121. S.C. Res. 2371, ¶ 3 (Aug. 5, 2017).

122. *Id.* at ¶ 8.

123. S.C. Res. 2375, ¶ 14 (Sept. 11, 2017).

124. *Id.* at ¶ 18.

125. *Id.*; Res. 2371, *supra* note 121, at ¶ 6.

126. Res. 2375, *supra* note 123, at ¶ 11.

127. *Id.* at ¶ 7.

128. *Id.* at ¶ 8.

129. While Resolution 2321 required that the flag state shall deflag the vessel, Resolution 2375 requires that the flag state shall *immediately* deregister it. *Id.* at ¶ 8.

ships and flag states that are uncooperative.<sup>130</sup> The inspections regime may be carried out only by warships and other ships on government service, such as maritime law enforcement vessels.<sup>131</sup>

North Korea conducted a ballistic missile test once again on November 28, 2017, causing the Security Council to further increase pressure. Resolution 2397 cut refined petroleum to North Korea to just 500,000 barrels for twelve months, starting on January 1, 2018.<sup>132</sup> Sixteen regime officials, mostly in the banking industry, were added to the sanctions list as well.<sup>133</sup> The package of sanctions contained in resolutions 2375 and 2397 have widespread support and were endorsed by a group of seventeen influential PSI maritime states in January 2018.<sup>134</sup> On April 10, 2019, the Security Council extended North Korean sanctions through April 24, 2020, continuing the saga of ratcheting up the costs of noncompliance.<sup>135</sup>

#### CONCLUSION: ARE THE MARITIME SANCTIONS EFFECTIVE?

Will UN maritime sanctions be successful against the DPRK? We can assess the effectiveness of the sanctions regime by looking to two significant examples of maritime sanctions—the first to control a rebellious colony, Rhodesia (today Zimbabwe), and the second to halt development of WMD in Saddam Hussein's Iraq. In Southern Rhodesia, the white minority population unilaterally declared its independence from the United Kingdom on November 11, 1965. The United Kingdom rejected the pronouncement and ushered through UN Security Council Resolution 217 (1965).<sup>136</sup> The resolution condemned the declaration of independence and authorized the U.K. armed forces to use force to prevent the importation of oil into Rhodesia, especially through the port of Beira, in present-day Mozambique and then under Portuguese colonial rule. These terms included an arms embargo and economic sanctions, which were enforced by the Royal Navy from March 1, 1966 to June 25, 1975, when Mozambique became an independent state and assured the United Kingdom that

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130. *Id.* at ¶ 9.

131. *Id.* at ¶ 10.

132. S.C. Res. 2397, ¶ 5 (Dec. 22, 2017). *See also* Mark Landler et al., *North Korea Fires a Ballistic Missile in a Further Challenge to Trump*, N.Y. TIMES (Nov. 28, 2017), <https://www.nytimes.com/2017/11/28/world/asia/north-korea-missile-test.html>.

133. Res. 2397, *supra* note 132, at Annex I.

134. Joint Statement from Proliferation Security Initiative (PSI) Partners in Support of United Nations Security Council Resolutions 2375 and 2397 Enforcement, Jan. 12, 2018, <https://www.state.gov/t/pa/prs/ps/2018/01/277419.htm>. The states are: Australia; Argentina; Canada; Denmark; France; Germany; Greece; Italy; Japan; Republic of Korea; Netherlands; New Zealand; Norway; Poland; Singapore; United Kingdom; and the United States.

135. S.C. Res. 2464, ¶ 1 (Apr. 10, 2019).

136. S.C. Res. 217, (Nov. 20, 1965).

it would not allow the transshipment of oil into Rhodesia.<sup>137</sup> During the Beira Patrol, the Royal Navy maintained a blockade in the Mozambique Channel with a flotilla that initially included an aircraft carrier.<sup>138</sup> This economic stranglehold contributed to the fall of white Rhodesia in 1979.<sup>139</sup> The sanctions, while imperfectly enforced, were effective at imbuing a sense of isolation among the minority white regime and destabilizing its hold on power.<sup>140</sup> Yet the Beira Patrol lasted nearly a decade and was only a supporting element in bringing about majority rule in Zimbabwe.

The example of Iraq provides a similarly circumspect lesson: maritime sanctions enforcement is a useful tool for controlling rogue behavior, but by itself is not dispositive. After Iraq invaded Kuwait in August 1990, the UN Security Council adopted Resolution 661 to prevent the importation of commodities to or from Iraq or Kuwait.<sup>141</sup> Four months later the Security Council authorized “all necessary means” to enforce UN mandates against Iraq.<sup>142</sup> The multinational Maritime Interception Force kept pressure on Iraq until the coalition invasion of 2003 toppled the regime, thirteen years later.<sup>143</sup> Like the Beira Patrol, the hardships imposed by the Iraq sanctions often fell on the people and not the regime.<sup>144</sup> Although the sanctions did not force the regime of Saddam Hussein out of power, they were effective at helping to contain the spread of WMD.<sup>145</sup> This success, however, was only possible because of the work of the UN Monitoring, Verification, and Inspection Commission (UNMOVIC), which imposed a comprehensive in-country inspection regime.<sup>146</sup> Sadly, the success of the sanctions was unclear until after the invasion. As former chief UN weapons inspector Hans Blix observed, “the UN and the world had succeeded in disarming Iraq without knowing it.”<sup>147</sup>

While the numerous sanctions and Security Council resolutions have decimated the DPRK’s international shipping industry and hobbled its economy, they have not been watertight. The greatest obstacle has been to entice states that

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137. *Britain Ends a Blockade on Oil Bound for Rhodesia*, N.Y. TIMES, July 3, 1975, at 63; John F. Burns, *Rhodesia Restored to Colonial Status*, N.Y. Times, Dec. 13, 1979, at A1.

138. The aircraft carriers Royal Navy HMS *Eagle* and Royal Navy HMS *Ark Royal* both participated in the Beira Patrol. See Richard Mobley, *The Beira Patrol*, 55 NAVAL WAR C. REV. 63, 68–70 (2002).

139. William Minter & Elizabeth Schmidt, *When Sanctions Worked: The Case of Rhodesia Reexamined*, 87 AFR. AFF. 207, 231–232 (1988); Johan Galtung, *On the Effects of International Economic Sanctions: With Examples from the Case of Rhodesia*, 19 WORLD POL. 378, 414–15 (1967).

140. Minter & Schmidt, *supra* note 139, at 231–34.

141. S.C. Res. 661, ¶ 3 (Aug. 6, 1990).

142. S.C. Res. 678, ¶ 2 (Nov. 29, 1990).

143. Alix M. Freedman & Bhushan Bahree, *Iraq is Shipping Large Cargoes of Crude, Violating U.N. Rules*, WALL ST. J., Feb. 21, 2003, at A1.

144. Barbara Crossette, *Iraq Sanctions Kill Children*, U.N. Reports, N.Y. TIMES, Dec. 1, 1995, at A9.

145. George A. Lopez & David Cortright, *Containing Iraq: Sanctions Worked*, 83 FOREIGN AFF. 90, 91 (2004).

146. S.C. Res. 1284, ¶ 1 (Dec. 17, 1999).

147. Lopez & Cortright, *supra* note 145, at 92.

trade with North Korea to stick with the sanctions regime, especially China. In 2000, China, Japan, and South Korea each accounted for about 20 percent of trade with North Korea.<sup>148</sup> Over time, however, Japan and South Korea have eliminated their commercial ties so that today China accounts for some 90 percent of trade with the DPRK.<sup>149</sup> China had permitted microcommerce with North Korea, but in 2016 agreed to the major sanctions against trade in raw materials. The following year, China consented to a ban on other commerce, including textiles and marine products.<sup>150</sup>

But China continues to struggle to comply with DPRK sanctions. Japan has detected Chinese vessels involved in ship-to-ship transfers of oil to North Korean ships, in violation of UN sanctions.<sup>151</sup> Chinese business networks in Taiwan, Hong Kong, and Mainland China, coupled with offshore corporations, appear to be complicit in ship-to-ship oil transfers in violation of UN sanctions. China also slowed efforts by the 1718 Committee to ban ships engaged in sanctions busting. In early 2018, China stalled a U.S. proposal to ban thirty-three ships from ports worldwide and blacklist twenty-seven shipping firms involved in circumventing Security Council resolutions.<sup>152</sup>

Russian ships are also involved in violating sanctions. In early 2018, the Russian-flagged tanker, *Patriot*, made two ship-to-ship transfers of oil—the first to the North Korea-flagged M/V *Chong Rim 2* and the second to the North Korea-flagged vessel M/V *Chon Ma San*. Both ships were under sanction by the Security Council, as was the purchaser of the oil, Taesong Bank, a North Korean company. On April 10, the *Patriot* conducted another ship-to-ship transfer with the North Korean tanker *Wan Heng 11*, which then entered port at Nampo, North Korea.<sup>153</sup> Ships operating out of Vladivostok, Russia for Primorye Maritime Logistics Company and Gudzon Shipping Company have also engaged in ship-to-ship transfers of oil to North Korean ships to circumvent UN sanctions. In

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148. Stephen M. Haggard, *Those North Korea Sanctions Might be Working. Here's Why*, WASH. POST (Apr. 6, 2018), [https://www.washingtonpost.com/news/monkey-cage/wp/2018/04/06/those-north-korea-sanctions-might-be-working-heres-why/?utm\\_term=.2ff5717c6d39](https://www.washingtonpost.com/news/monkey-cage/wp/2018/04/06/those-north-korea-sanctions-might-be-working-heres-why/?utm_term=.2ff5717c6d39).

149. *Id.*

150. Sue-Lin Wong & Richa Naidu, *U.N. Ban on North Korean Textiles will Disrupt Industry and Ordinary Lives, Experts Say*, REUTERS (Sept. 12, 2017), <https://www.reuters.com/article/us-northkorea-missiles-sanctions-textile/u-n-ban-on-north-korean-textiles-will-disrupt-industry-and-ordinary-lives-experts-say-idUSKCN1BN1SI>.

151. Alastair Gale, *North Korea Skirts Sanctions with Ship Transfers Over Wider Area*, WALL ST. J. (May 29, 2018), <https://www.wsj.com/articles/north-korea-skirts-sanctions-with-ship-transfers-over-wider-area-1527606731>.

152. *China Holds Up US bid for UN Ban of Ships Circumventing North Korea Sanctions*, S. CHINA MORNING POST (Mar. 6, 2018), <https://www.scmp.com/news/china/article/2135847/china-holds-us-bid-un-ban-ships-circumventing-north-korea-sanctions>.

153. S.C. Press Release, *Security Council 1718 Sanctions Committee Updates One Designated Vessel*, U.N. Press Release SC/13505, (Sept. 14, 2018). The ship was added to the sanctions list.

response, the United States imposed unilateral sanctions on those Russian businesses.<sup>154</sup>

One Security Council diplomat said on condition of anonymity, “Russia and China have never been fully committed to North Korean sanctions . . . they are trying to do whatever it takes to get away with it rather than a full implementation.”<sup>155</sup> While Russia and China have been problematic, they are not alone in either intentionally or unwittingly helping the DPRK avoid sanctions. Vessels flagged in states stretching from Dominica, Panama, and Sierra Leone are also involved in violating sanctions.<sup>156</sup> Some of these states operate open registries or “flags of convenience” that often lack the administrative capacities to exercise effective oversight over all of the ships that fly their flag, making sanctions violations more likely. Problematic vessels also appear to be affiliated with business networks in the Marshall Islands and the British Virgin Islands.<sup>157</sup>

The violations involving ship-to-ship transfers of oil products have permitted the DPRK to exceed the annual cap of 500,000 barrels of imported fuel, which caused the United States in July 2018 to call for a ban on any new oil flowing into the country.<sup>158</sup> The United States believes North Korean tankers accepted ship-to-ship transfers at least eighty-nine times in the first five months of 2018, and that the annual cap would have been busted even if the ships unloaded only one-third of their capacity.<sup>159</sup>

There is no doubt that maritime interception operations can serve as an effective means of at least weakening recalcitrant regimes and slowing the development of WMD programs. The maritime interception operations against Iraq were effective in arresting Saddam Hussein’s WMD programs, but only when coupled with a verifiable inspection regime inside the country. In the case of North Korea, intrusive inspections could also be effective in at least hampering

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154. Gardiner Harris, *New U.S. Sanctions Target Russia for Defying Rules on North Korea*, N.Y. TIMES (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/us/politics/new-us-sanctions-target-russia-for-defying-rules-on-north-korea.html>.

155. Chris Horton et al., *Trump Rebuked China for North Korea’s Oil Smuggling. It’s More Complicated*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/world/asia/north-korea-oil-smuggling.html>.

156. *Id.*; Niharika Mandhana, *Fake Signals and Illegal Flags: How North Korea Uses Clandestine Shipping to Fund Regime*, WALL ST. J. (Nov. 28, 2018), <https://www.wsj.com/articles/fake-signals-and-illegal-flags-how-north-korea-uses-clandestine-shipping-to-fund-regime-1543402289>; Alastair Gale & Costas Paris, *North Korean Tanker Seen Flouting Sanctions, Japan Says*, WALL ST. J. (Jan. 24, 2018), <https://www.wsj.com/articles/japan-flags-possible-violation-of-north-korean-sanctions-1516797380?mod=searchresults&page=3&pos=6>.

157. Horton et al., *supra* note 155.

158. Carol Morello, *U.S. Urges U.N. to Halt All Oil Transfers to North Korea*, WASH. POST (July 12, 2018), [https://www.washingtonpost.com/world/national-security/us-urges-un-to-halt-all-oil-transfers-to-north-korea/2018/07/12/db70a144-85e5-11e8-8f6c-46cb43e3f306\\_story.html?utm\\_term=.8c46039b99e9](https://www.washingtonpost.com/world/national-security/us-urges-un-to-halt-all-oil-transfers-to-north-korea/2018/07/12/db70a144-85e5-11e8-8f6c-46cb43e3f306_story.html?utm_term=.8c46039b99e9).

159. *Id.*

WMD development and proliferation. If the DPRK acquiesces to such inspections, it would be a game-changer on the peninsula.<sup>160</sup>

Even without any additional movement toward denuclearization of North Korea, however, the maritime regime in place has made it impossible for the DPRK to use the oceans freely. The regime in Pyongyang may not transport weapons or WMD and their associated materials and components by sea, either for export or import. North Korean ships are barred from carrying all but the most carefully prescribed humanitarian cargo and limited fuel oil. DPRK ships cannot lawfully obtain certificates of compliance with IMO conventions, which means they are driven “out of class” as certificates expire, making them ineligible for entry into foreign ports. Its vessels may not fly the flag of any other national registry, or obtain cargo and hull insurance, so the entire maritime industry of the DPRK is slowly dying. The DPRK is also forbidden from chartering foreign vessels. While small numbers of ships, notably registered in Russia and China, appear to be noncompliant by conducting ship-to-ship transfers of oil, the cost of these operations is high. Russia and China face considerable scrutiny and criticism for such actions, and it is unclear whether the operations of these noncompliant ships are a matter of state policy.<sup>161</sup> In either event, however, transaction costs for North Korea now pose an enormous obstacle to developing and trafficking in WMD, and perhaps even an existential challenge to the regime itself.

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160. Choe Sang-Hun & David E. Sanger, *North Korea Agrees to Allow Inspectors into Nuclear Testing Site, Pompeo Says*, N.Y. TIMES (Oct. 8, 2018), <https://www.nytimes.com/2018/10/07/world/asia/pompeo-north-korea-visit.html>.

161. Ian Talley, *U.S. Calls Out China, Russia on North Korea Energy Caps, Urges U.N. Action*, WALL ST. J. (July 13, 2018), <https://www.wsj.com/articles/u-s-urges-u-n-to-reprimand-china-and-russia-for-selling-oil-products-to-north-korea-1531411312>.