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## DPRK Maritime Sanctions Enforcement

*Raul (Pete) Pedrozo*

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*Raul (Pete) Pedrozo\**

### CONTENTS

I. Situation.....	99
II. Solution .....	100
III. Maritime Sanctions Enforcement .....	101
A. Ship-to-Ship Transfers.....	101
B. Deceptive Shipping Practices .....	101
C. Flag State Jurisdiction .....	104
D. Universal Jurisdiction.....	104
E. Areas of Operation .....	105
F. Implementation of U.N. Security Council Resolutions .....	109
G. Bilateral Shiprider and Boarding Agreements.....	113
H. Stateless Vessels and Vessels without Nationality Indicators .....	115
I. Manipulation of AIS Transmissions.....	116
IV. Conclusion .....	117

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The thoughts and opinions expressed are those of the author and not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

## I. SITUATION

On October 9, 2006, the Democratic People's Republic of Korea (DPRK) conducted a nuclear weapons test.<sup>1</sup> In response to this provocative act, on October 14, 2006, the United Nations Security Council (UNSC) imposed sanctions on the DPRK pursuant to Chapter VII of the U.N. Charter.<sup>2</sup> Because of subsequent nuclear and ballistic missile tests by the DPRK since 2006, the UNSC enhanced these sanctions on a number of occasions, most recently in 2017.<sup>3</sup>

Despite these robust measures, the DPRK continues to evade sanctions, particularly through illicit ship-to-ship transfers of refined petroleum products and coal.<sup>4</sup> These sanctions also failed to deter DPRK President Kim Jung-un from conducting further ballistic missile tests. Indeed, between July 25, 2019 and March 31, 2020, the DPRK has conducted twenty-three ballistic missile tests in violation of numerous UNSC resolutions.<sup>5</sup>

Given the DPRK's economic reliance on maritime activities as well as its use of maritime tactics to evade sanctions, the UNSC included detailed maritime provisions within the sanctions to address these issues. Here, maritime interdiction is perhaps the most important effective way to counter illicit DPRK maritime activities. Current maritime interdiction authorities under the various UNSC resolutions (UNSCR) are based on port State control, coastal State jurisdiction in the territorial sea and contiguous zone, flag State consent beyond the territorial sea, and universal jurisdiction over stateless vessels. While important, this approach remains flawed.

This article examines how the international community can better enforce these sanctions at sea. Part II sets out a solution, while Part III discusses key aspects of maritime sanctions enforcement. Part IV concludes.

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1. *9 October 2006 – First DPRK Nuclear Test*, COMPREHENSIVE NUCLEAR-TEST-BAN TREATY ORGANIZATION, <https://www.ctbto.org/specials/testing-times/9-october-2006-first-dprk-nuclear-test> (last visited May 5, 2020).

2. S.C. Res. 1718 (Sept. 14, 2006); *see also* U.N. Charter art. 41.

3. S.C. Res. 1874 (June 12, 2009); S.C. Res. 2087 (Jan. 22, 2013); S.C. Res. 2094 (Mar. 7, 2013); S.C. Res. 2270 (Mar. 2, 2016); S.C. Res. 2321 (Nov. 30, 2016); S.C. Res. 2356 (June 2, 2017); S.C. Res. 2371 (Aug. 5, 2017); S.C. Res. 2375 (Sept. 11, 2017); S.C. Res. 2397 (Dec. 22, 2017).

4. U.S. DEP'T OF STATE, U.S. DEP'T OF TREASURY & U.S. COAST GUARD, NORTH KOREA SANCTIONS ADVISORY: UPDATED GUIDANCE ON ADDRESSING NORTH KOREA'S ILLICIT SHIPPING PRACTICES (2019) 1 [hereinafter NORTH KOREA SANCTIONS ADVISORY].

5. *Chronology of U.S.-North Korean Nuclear and Missile Diplomacy*, ARMS CONTROL ASSOCIATION, <https://www.armscontrol.org/factsheets/dprkchron> (last updated Apr. 2020).

## II. SOLUTION

1. Maritime sanctions enforcement would be enhanced by a UNSCR that authorizes “all necessary means.” A variation of this solution would be to allow for nonconsensual boardings of DPRK-flagged vessels. Given the current political dynamics in the UNSC, passage of such a resolution is not realistic in the near term.
2. Alternatively, a UNSCR that requires flag States and masters to grant consent for boardings of their flag vessels by a foreign warship would enhance maritime sanctions enforcement beyond the territorial sea. Although this solution would provide advance notice to the flag State, given the sanctity of exclusive flag state jurisdiction on the high seas, it is unclear whether a majority of States within the international community would support such a resolution.
3. Interpret manipulation of an Automatic Identification System (AIS) or the alteration of a vessel’s identification as equivalent to flying more than one flag in order to apply Article 92(2) to establish stateless vessel status. Stateless vessels and ships without nationality are subject to the jurisdiction of all States without master consent.<sup>6</sup>
4. Publicly denounce Member States at the UN that are not fully executing enforcement actions within their internal waters, territorial sea, and contiguous zone, as required by UNSCR 2397.
5. Publicly denounce flag States at the International Maritime Organization (IMO) that have failed to take corrective actions against their flag vessels that manipulate their AIS transmissions and physically alter their IMO number.
6. Have the UNSC call on Member States operating ships in the Asia-Pacific region to enter into bilateral or multilateral ship rider agreements to facilitate boarding of suspect vessels beyond the territorial sea.

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6. NORTH KOREA SANCTIONS ADVISORY, *supra* note 4, at 1.

### III. MARITIME SANCTIONS ENFORCEMENT

#### A. Ship-to-Ship Transfers

Despite the longstanding, robust trade and arms embargoes, and associated financial and diplomatic measures and shipping restrictions, the DPRK continues to evade sanctions, particularly through illicit ship-to-ship (STS) transfers of refined petroleum and coal. UNSCR 2375 specifically prohibits such STS transfers:

*Decides* that all Member States shall prohibit their nationals, persons subject to their jurisdiction, entities incorporated in their territory or subject to their jurisdiction, and vessels flying their flag, from facilitating or engaging in ship-to-ship transfers to or from DPRK-flagged vessels of any goods or items that are being supplied, sold, or transferred to or from the DPRK.<sup>7</sup>

Nonetheless, in 2018, more than 260 tankers laden with refined petroleum procured from UN-prohibited STS transfers made deliveries at DPRK ports.<sup>8</sup> If these tankers were fully laden, the DPRK acquired more than seven-and-a-half-times (3.78 million barrels) the annual amount of refined petroleum allowed under UNSCR 2397 (500,000 barrels).<sup>9</sup> The DPRK has also resumed exporting coal to the Gulf of Tonkin region in violation of UNSCR 2371 (2017), which prohibits the purchase of DPRK-origin coal.<sup>10</sup> These illicit activities generate revenue to fund the DPRK's nuclear weapons and ballistic missile programs.

#### B. Deceptive Shipping Practices

The DPRK and other illicit actors employ a number of tactics to mask identities of vessels and cargo. Five such tactics are discussed below.

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7. S.C. Res. 2375, *supra* note 3, ¶ 11.

8. NORTH KOREA SANCTIONS ADVISORY, *supra* note 4, at 1.

9. S.C. Res. 2397, *supra* note 3, ¶ 11.

10. NORTH KOREA SANCTIONS ADVISORY, *supra* note 4, at 1.

## 1. Disabling Automatic Identification System

Automatic Identification System (AIS) is designed to automatically provide information about the ship to other ships and coastal authorities. In 2000, Chapter V of the International Convention for the Safety of Life at Sea (SOLAS) was amended to require all ships of 300 gross tonnage and upwards engaged on international voyages, cargo ships of 500 gross tonnage and upwards not engaged on international voyages, and all passenger ships irrespective of size, to be fitted with AIS.<sup>11</sup> Ships fitted with AIS are required to maintain AIS in operation at all times except where international agreements, rules, or standards provide for the protection of navigational information.<sup>12</sup> DPRK-flagged vessels routinely obfuscate their movements by intentionally disabling their AIS transponders.<sup>13</sup> Similarly, third-State flag vessels conducting STS transfers with the DPRK often disable their AIS to evade detection. This illicit tactic conceals the origin or destination of cargo associated with the DPRK and is a direct violation of SOLAS Regulation V/19.<sup>14</sup> The UNSC has called on Member States to exercise enhanced vigilance with regard to such practices.<sup>15</sup>

## 2. Physically Altering Vessel Identification

Passenger ships of 100 gross tonnage and upwards and all cargo ships of 300 gross tonnage and upwards are required to prominently display their name and IMO number either on the ship's hull or superstructure to facilitate the prevention of maritime fraud.<sup>16</sup> This unique, seven-digit number is a permanent vessel identification code that remains unchanged even if the

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11. See *AIS Transponders: Regulations for Carriage of AIS*, INTERNATIONAL MARITIME ORGANIZATION, <http://www.imo.org/en/OurWork/Safety/Navigation/Pages/AIS.aspx> (last visited May 6, 2020).

12. *Id.*

13. NORTH KOREA SANCTIONS ADVISORY, *supra* note 4, at 2.

14. *Id.*

15. S.C. Res. 2397, *supra* note 3.

16. Int'l Maritime Org. [IMO] Circular Letter No.1886/Rev.6, *Implementation of Resolution A.1078(28) – IMO Ship Identification Number Scheme* (Aug. 8, 2016), <http://www.iuuwatch.eu/wp-content/uploads/2016/11/FINAL-Circular-Letter-No.-No.1886-Rev.6-Implementation-Of-Resolution-A.107828-IMO-Ship-Identification-Number-Scheme-Secretariat.pdf>.

vessel transfers its flag or changes ownership or name.<sup>17</sup> DPRK-flagged vessels illegally paint over their vessel names and IMO numbers to conceal their identities and pass themselves off as different vessels.<sup>18</sup>

### 3. Ship-to-Ship Transfers

A ship-to-ship transfer occurs when cargo is moved from one ship to another while at sea, rather than in port, and can be used to conceal the origin or destination of the transferred cargo. The DPRK is currently operating at least 28 tankers that can engage in STS of refined petroleum products, and at least 33 cargo ships that can transport coal.<sup>19</sup> Most STS transfers of refined petroleum products occur in the East China Sea off the coast of China, and to a lesser extent in the Yellow Sea off the Chinese and DPRK coasts, and the Sea of Japan off the coasts of Russia and DPRK.<sup>20</sup>

### 4. Falsifying Cargo and Vessel Documents

Without complete and accurate shipping documentation, parties to a transaction cannot fully understand all of the parties, goods, and vessels involved in a given shipment. Some of the documentation that typically accompanies a shipping transaction includes bills of lading, certificates of origin, invoices, packing lists, proof of insurance, and lists of last ports of call. The DPRK regularly falsifies these documents to conceal the origin or destination of cargo.<sup>21</sup>

### 5. Manipulating AIS

DPRK-flagged vessels often manipulate their AIS transmissions to conceal the vessel's next port of call or other information regarding the voyage. This tactic includes altering vessel names, IMO numbers, Maritime Mobile Service Identities (MMSIs), or other unique identifying information.<sup>22</sup>

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17. Int'l Maritime Org. [IMO] A. 600 (15), *IMO Ship Identification Number Scheme* (Jan. 4, 1988), <http://www.imo.org/en/OurWork/MSAS/Pages/IMO-identification-number-scheme.aspx>.

18. NORTH KOREA SANCTIONS ADVISORY, *supra* note 4, at 2.

19. *Id.* at 3.

20. *Id.*

21. *Id.* at 3–4.

22. *Id.* at 4.

### C. Flag State Jurisdiction

Unless otherwise provided for in a treaty or under UNCLOS, a flag State exercises exclusive jurisdiction over vessels that fly its flag on the high seas.<sup>23</sup> The same rule applies in the exclusive economic zone (EEZ).<sup>24</sup> If the flag State receives a report that proper jurisdiction and control has not been exercised over one of its flag vessels, the flag State has an obligation to “investigate the matter and, if appropriate, take any action necessary to remedy the situation.”<sup>25</sup>

### D. Universal Jurisdiction

Ships shall sail under the flag of only one State, and may not change their flag during a voyage or while in a port of call, unless there is a real transfer of ownership or change of registry.<sup>26</sup> If a ship sails under “the flags of two or more States, using them according to convenience, [the ship] may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.”<sup>27</sup> Because the vessel is stateless, it is not entitled to the protection of any State, and is subject to the jurisdiction of all States. Accordingly, a stateless vessel may be boarded and searched beyond the territorial sea by any State without the consent of the master.

A warship that encounters a foreign ship, other than a sovereign immune vessel, beyond the territorial sea of another State may board the vessel if there are reasonable grounds to suspect that the ship is without nationality. The boarding party may check the suspect ship’s documents, and if suspicion remains as to its status, the boarding party may proceed to a

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23. United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 92(1), 1833 U.N.T.S. 397 [hereinafter UNCLOS].

24. UNCLOS Article 58(2) provides that Articles 88 to 115 apply to the exclusive economic zone (EEZ) insofar as they are not incompatible with Part V of the treaty. In addition, the high seas provisions of the convention (Articles 86–120) apply to all parts of the sea that are not included in the EEZ, territorial sea, internal waters, or archipelagic waters. However, Article 86 provides that it does not abridge the freedoms enjoyed by all States in the EEZ in accordance with Article 58. *See id.* arts. 58(2), 85.

25. *Id.* art. 94.

26. *Id.* art. 92.

27. *Id.*

further examination of the ship.<sup>28</sup> Indicators that a vessel may be without nationality include:

1. The vessel displays no name, flag, or other identifying characteristics.
2. The master, upon request, makes no claim of nationality or registry for the vessel.
3. The master's claim of nationality differs from the vessel's papers.
4. The claim of registry or the vessel's display of registry is either denied or not affirmatively and unequivocally confirmed by the State whose registry is claimed.
5. The vessel changes flags during a voyage without flag State approval.
6. The vessel carries removable signboards showing different vessel names and/or homeports.<sup>29</sup>

#### E. Areas of Operation

##### 1. Internal Waters and Ports

Waters landward of the baseline used to measure the territorial sea are internal waters and are subject to the sovereignty of the coastal State.<sup>30</sup> Hence, a coastal State may impose on a nondiscriminatory basis any condition on ships entering its ports or internal waters, to include a requirement that all ships entering port, except sovereign immune vessels, will be subject to boarding and inspection without flag State consent.<sup>31</sup> The coastal State also has the right to take necessary action against ships entering its ports and internal waters to prevent any breach of the conditions of port entry.<sup>32</sup>

In the United States, the Secretary of Homeland Security is authorized to prescribe and enforce regulations on the boarding of a vessel at a U.S. port before the vessel been inspected and secured.<sup>33</sup> Customs officers may board any vessel at any place in the United States or within U.S. customs waters and “examine the manifest and other documents and papers and

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28. *Id.* art. 110.

29. U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCWP 5-12/COMDTPUB P5800.7A, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (2017), §§ 3.11.2.3–3.11.2.4 [hereinafter THE COMMANDER'S HANDBOOK].

30. UNCLOS, *supra* note 23, art. 8.

31. THE COMMANDER'S HANDBOOK, *supra* note 29, § 4.4.4.1.6.

32. UNCLOS, *supra* note 23, art. 25.

33. 46 U.S.C. § 60101.

examine, inspect, and search the vessel . . . and any person, trunk, package, or cargo on board, and to this end may . . . use all necessary force to compel compliance.”<sup>34</sup> Customs officers may also seize and secure the vessel or cargo, “which shall become liable to seizure, and to arrest any person who shall become liable to arrest . . . and to use all necessary force to seize or arrest the same.”<sup>35</sup> The only persons authorized to board a vessel in a U.S. port are customs officers, U.S. Coast Guard personnel, immigration and health officers, U.S. Department of Agriculture investigators, or “an agent of the vessel or consular officer exclusively for purposes relating to customs formalities . . . .”<sup>36</sup>

## 2. Territorial Sea

Coastal States may claim a 12-nautical mile (nm) territorial sea beyond its land territory and internal waters.<sup>37</sup> Coastal States exercise sovereignty over the territorial sea, as well as its bed and subsoil, and the air space above the territorial sea.<sup>38</sup> Accordingly, coastal States may enact laws and regulations related to the territorial sea to prevent, *inter alia*, the infringement of its customs, fiscal, immigration, or sanitary laws and regulations.

Coastal State sovereignty is subject to the right of innocent passage by all ships through the territorial sea for the purpose of navigating through the territorial sea or proceeding to or from internal waters or a call at a roadstead or port facility.<sup>39</sup> Passage must be continuous and expeditious, but includes stopping and anchoring if incidental to ordinary navigation or rendered necessary by force majeure, distress, or providing assistance to persons, ships or aircraft in danger or distress at sea.<sup>40</sup> Passage is considered innocent so long as it is not prejudicial to the peace, good order, or security of the coastal State.<sup>41</sup>

Stopping to conduct an illicit STS transfer would not be considered incidental to ordinary navigation and would be inconsistent with the innocent passage regime. Similarly, ships engaged in innocent passage may not load

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34. 19 U.S.C. § 1581(a); 19 C.F.R. § 4.1(a).

35. 19 U.S.C. § 1581(f).

36. 19 C.F.R. § 4.1(b)(1).

37. UNCLOS, *supra* note 23, art. 3.

38. *Id.* art. 2.

39. *Id.* arts. 17, 18.

40. *Id.* art. 18.

41. *Id.* art. 19.

or unload any “commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.”<sup>42</sup> An illicit STS transfer would be prejudicial to the peace, good order, and security of the coastal State and therefore inconsistent with the innocent passage regime. Because coastal States may take the necessary steps in the territorial sea to prevent passage that is not innocent,<sup>43</sup> coastal State authorities could board and seize the vessel without flag State consent.

U.S. Customs officers are authorized to board any vessel within the customs waters—waters within four leagues (12 nautical miles) of the coast of the United States<sup>44</sup>—without flag State consent to “examine the manifest and other documents papers and examine, inspect, and search the vessel . . . and every part thereof and any person . . . or cargo on board, and to this end . . . use all necessary force to compel compliance.”<sup>45</sup> Similarly, the Coast Guard “may make inquiries, examinations, inspections, searches, seizures, and arrests upon . . . waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States.”<sup>46</sup> In such cases, Coast Guard officers may board any vessel subject to U.S. jurisdiction or the operation of any U.S. law, without flag State consent to “address inquiries to those on board, examine the ship’s documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance.”<sup>47</sup> Further, U.S. federal law provides:

If upon the examination of any vessel or vehicle it shall appear that a breach of the laws of the United States is being or has been committed so as to render such vessel or vehicle, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel or vehicle, liable to forfeiture or to secure any fine or penalty, the same shall be seized and any person who has engaged in such breach shall be arrested.<sup>48</sup>

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42. *Id.*

43. *Id.* art. 21.

44. 19 U.S.C. § 1709(c).

45. *Id.* § 1581(a).

46. 14 U.S.C. § 89.

47. *Id.*

48. *Id.*

### 3. Contiguous Zone

Coastal States may claim a 24-nm contiguous zone from the baseline from which the territorial sea is measured. Within this zone, the coastal State “may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.”<sup>49</sup> An illicit STS transfer would constitute an infringement of a coastal State’s customs or fiscal laws or regulations, which would entitle the coastal State to board and search the vessel without flag State consent.

### 4. Exclusive Economic Zone

A coastal State may claim a 200-nm exclusive economic zone (EEZ) in which the State enjoys sovereign resource rights, as well as jurisdiction over off-shore installations and structures, marine scientific research (MSR), and the protection and preservation of the marine environment.<sup>50</sup> Coastal States, however, do not exercise the much broader and more comprehensive right of sovereignty over the zone.<sup>51</sup> In contrast, within the EEZ, all States enjoy high seas freedoms of “navigation and overflight . . . and other internationally lawful uses of the seas related to those freedoms, such as those associated with the operation of ships, aircraft . . . and [which are] compatible with the other provisions of the Convention”<sup>52</sup>

All States may also conduct a number of non-resource-related maritime law enforcement activities in foreign EEZs without coastal State consent. UNCLOS Article 58(2) specifically provides, “Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part [Part V].”<sup>53</sup> These constabulary operations include, *inter alia*, the right of approach and visit (Article 110), as confirmed by Article 86.<sup>54</sup> Although the first sentence of Article

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49. UNCLOS, *supra* note 23, art. 33.

50. *Id.* arts. 56, 57.

51. *Id.* art. 89. Article 19 applies to the EEZ pursuant to Article 58, which confirms this conclusion. Further, the Article provides, “no State may validly purport to subject any part of the high seas to its sovereignty.” *Id.*

52. *Id.* art. 58.

53. *Id.* art. 58(2).

54. *See id.* arts. 110, 86.

86 specifies that the EEZ is *sui generis*, and that certain resource-related high seas freedoms, such as resource exploitation, fishing, and MSR do not apply in the EEZ, the second sentence clarifies that nothing in Article 86 abridges the high seas “freedoms enjoyed by all States in the EEZ in accordance with Article 58.” Consequently, even though the maritime interdiction provisions of UNSCR 2375 and 2397 refer to the “high seas,” they should be interpreted to include the EEZ.

## 5. High Seas

Unless otherwise provided for in an international treaty, ships on the high seas are subject to the exclusive jurisdiction of the flag State.<sup>55</sup> The maritime interdiction provisions of UNSCR 2375 and 2397 are based on this long-standing principle of international law. Thus, unless the suspect vessel is stateless or is assimilated to be stateless, vessels enforcing the UN sanctions must have flag State consent to board and search a suspect vessel.<sup>56</sup>

Only warships and other duly authorized ships or aircraft may execute the right of visit under Article 110.<sup>57</sup> In the United States, although Navy warships can exercise the right of visit, the Coast Guard is the primary law enforcement agency to make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas to prevent, detect, and suppress violations of U.S. laws, and may use all necessary force to compel compliance.<sup>58</sup>

### F. Implementation of U.N. Security Council Resolutions

The maritime interdiction provisions of the UNSCRs are consistent with UNCLOS and are based on port State, coastal State, and flag State consent. These resolutions do not preclude States from exercising jurisdiction over stateless vessels. In this regard, operative paragraph 12 of UNSCR 2375

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55. *Id.* art. 92.

56. *Id.* arts. 92, 110.

57. Security Council Resolution 2375 confirms this requirement. *See* S.C. Res. 2375, *supra* note 3, ¶ 10.

*Affirms* that paragraph 7 contemplates only inspections carried out by warships and other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect, and *underscores* that it does not apply with respect to inspection of vessels entitled to sovereign immunity under international law.

58. 14 U.S.C. § 89.

specifically provides that the maritime interdiction provisions of the UNSCR do not “affect the rights, obligations, or responsibilities of Member States under international law, including . . . UNCLOS, with respect to any other situation . . . .”<sup>59</sup>

UNSCR 2375 calls on Member States to board and inspect vessels on the high seas if they have reasonable grounds to believe that the cargo of the vessel contains items that are prohibited by applicable UNSCRs. Such boardings and inspections, however, require prior flag State consent. Flag States are encouraged to cooperate with requests for inspections, and if they do not consent, they are required to divert the vessel to an appropriate and convenient port for an inspection by local authorities.<sup>60</sup> If the flag State neither consents to the inspection nor diverts the vessel to an appropriate port for inspection, or the master refuses to allow a flag State-approved inspection on the high seas or refuses to proceed to a designated port for inspection as directed by the flag State, the UN Sanction Committee shall consider designating the vessel for measures under UNSCR 1718 (asset freeze) and UNSCR 2321 (universal denial of port entry), and the flag State shall deregister the vessel.<sup>61</sup> If a requesting State does not receive the cooperation of the flag State, the requesting State shall submit a report to the Committee and request that the Committee publicly release information regarding the vessel and flag State involved.<sup>62</sup>

UNSCR 2397 requires port States to seize, inspect, and impound any vessel in their ports that has illicitly exported coal and other prohibited items through deceptive maritime practices and illegally engaged in STS transfers.<sup>63</sup> UNSCR 2397 further requires Member States to share maritime and shipping information regarding illicit cargo transfers, and prohibits Member States from providing insurance or re-insurance services to vessels they have reasonable grounds to believe were involved in activities, or the transport of items, prohibited by applicable UNSCRs.<sup>64</sup> The resolution also mandates that Member States de-register any vessel they have reasonable grounds to believe was involved in activities, or the transport of items, prohibited by relevant UNSCRs, and further prohibits Member States from

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59. S.C. Res. 2375, *supra* note 3.

60. These inspections are conducted pursuant to Security Council Resolution 2270. See S.C. Res. 2270, *supra* note 3, ¶ 18.

61. S.C. Res. 1874, *supra* note 3, ¶ 13.

62. *Id.* ¶ 16.

63. S.C. Res. 2397, *supra* note 3, ¶ 9.

64. *Id.* ¶ 11.

providing classification services to such a vessel and from registering any vessel that has been de-registered by another Member State for violating the UN sanctions.<sup>65</sup> Further, the resolution prohibits the sale or transfer of new or used vessels to the DPRK.<sup>66</sup> Finally, if a Member State has information regarding a vessel that has been designated by the UNSC or the Sanctions Committee as subject to an asset freeze or the port entry ban, the Member State shall notify the Committee.<sup>67</sup>

UNSCR 2375 and UNSCR 2397 suffer from the same weakness—they are based on flag State consent and are adopted pursuant to Article 41 of the U.N. Charter, which only allows measures not involving the use of force. Although UNSCR 2375 calls on flag States to cooperate with requests to board their vessels on the high seas, it is unlikely that the DPRK, China, or Russia will accede to such a request. Nor is it likely that these States, having failed to give consent for a third-party boarding, would direct one of their vessels to proceed to an appropriate and convenient port for an inspection by local authorities, as required by UNSCR 2375.

The UNSC has broad authority under Chapter VII of the Charter to maintain or restore international peace and security. Pursuant to Article 39, “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”<sup>68</sup> Article 41 includes a list of measures that do not involve the use of force, which may be applied to give effect to its decisions, stating:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.<sup>69</sup>

If the UNSC considers that Article 41 measures “would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land

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65. *Id.* ¶ 12.

66. *Id.* ¶ 14.

67. *Id.* ¶ 15.

68. U.N. Charter art. 39.

69. *Id.* art. 41.

forces as may be necessary to maintain or restore international peace and security.”<sup>70</sup> The UNSC has authorized maritime enforcement action under Article 42 in only five situations: Southern Rhodesia (1965), Iraq (1990), Federal Republic of Yugoslavia (1991–93), Haiti (1994), and Libya (2011).<sup>71</sup> Each of these operations used ships and aircraft from the armed forces of Member States to interdict maritime shipping beyond the territorial sea without flag State consent.

It is obvious from the DPRK’s recent actions that U.N. sanctions and enforcement measures under Article 41 have been inadequate to convince Kim Jung-un to abandon his nuclear weapons program or dissuade the North Korean leader from conducting further ballistic missile tests. Accordingly, the DPRK government remains a threat to the peace under Article 39. The only way to achieve the desired end state—the denuclearization of the Korean Peninsula and a restoration of international peace and security—is to impose enforcement measures under Article 42, to include non-consensual boardings beyond the territorial sea.

The best model for such enforcement action is the maritime interdiction operation against Iraq in 1990. Iraq invaded Kuwait on August 2, 1990 and the UNSC adopted UNSCR 660 the same day. This resolution condemned the invasion and demanded that Iraq withdraw immediately and unconditionally all Iraqi military forces from Kuwait.<sup>72</sup> After Iraq refused to withdraw its forces, the UNSC passed UNSCR 661 on August 6, which imposed a general embargo on all trade with Iraq and Kuwait to induce Iraq to comply with UNSCR 660.<sup>73</sup> The embargo specifically called on States to refrain from using their flag vessels to trade with Iraq.<sup>74</sup> Continued noncompliance from the Iraqi government led to the adoption of UNSCR 665 on August 25, 1990, which imposed a traditional maritime blockade.<sup>75</sup> Member States were authorized to “use such measures commensurate to the . . . circumstances as may be necessary . . . to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations . . . .”<sup>76</sup> The phrase—“such measures . . . as may be neces-

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70. *Id.* art. 42.

71. JAMES KRASKA & RAUL PEDROZO, INTERNATIONAL MARITIME SECURITY LAW 903–21 (2013).

72. S.C. Res. 660 (Aug. 2, 1990).

73. S.C. Res. 661 (Aug. 6, 1990).

74. *Id.* ¶ 3(c).

75. S.C. Res. 665 (Aug. 25, 1990).

76. *Id.* ¶ 1.

sary”—removed any doubt that the UNSCR 661 embargo was an enforcement action under Article 42, which would be implemented by military force.

Under the coordination of the Commander, Middle East Force, 165 ships from fourteen coalition partners conducted maritime interception operations (MIO) in the Persian Gulf, the Red Sea, and the Gulf of Oman to halt oil exports from Iraq and prevent the importation of war materials into the country.<sup>77</sup> Merchant ships in the area of operation were tracked and identified, and ships suspected of containing contraband bound for Iraq or Kuwait were boarded, searched, and diverted to a convenient port if they were found to have violated the UN sanctions.<sup>78</sup> The MIO campaign successfully stopped the flow of oil out of Iraq, which accounted for 95 percent of the country’s revenue.<sup>79</sup> The Maritime Interdiction Force (MIF) also prevented resupply of much needed war materiel for the Iraqi Armed Forces. Over an eight-month period, the MIF challenged more than 9,000 commercial vessels, boarded and inspected 1,100 of these vessels, and diverted more than sixty ships transporting over one million tons of prohibited cargo.<sup>80</sup>

#### *G. Bilateral Shiprider and Boarding Agreements*

International cooperation is essential to the successful enforcement of UN sanctions at sea. To facilitate that cooperation, Member States should be encouraged to enter into bilateral shiprider and boarding agreements that provide authority on a bilateral basis to board and search ships beyond the territorial sea suspected of violating the UN sanctions against the DPRK. Such agreements can be used to streamline the lengthy diplomatic process required to obtain flag State consent for sanctions enforcement against suspect vessels on the high seas.

Obtaining flag State consent to board and search a vessel at sea can be extremely time consuming. Once a suspect vessel is detected and a request is made to board, it may take several hours before the flag State grants au-

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77. Letter from Chief of Naval Operations, U.S. Navy, The United States Navy in “Desert Shield”/“Desert Storm,” (May 15, 1991) Ser 00/IU500179, <https://www.history.navy.mil/content/history/nhhc/research/library/online-reading-room/title-list-alphabetically/u/us-navy-in-desert-shield-desert-storm.html>.

78. *Id.*

79. *Id.*

80. *Id.*

thorization to board and search the vessel. During non-working hours or weekends and holidays, the lag time between request and response can be compounded. Suspect vessels exploit these delays by fleeing into the territorial sea of a nearby country, thus precluding enforcement action by the requesting State unless the affected coastal State authorizes hot pursuit of the suspect vessel into its territorial sea. Bilateral agreements can provide the necessary advance authorization to ensure the requesting State can effectively intervene while the suspect ship is still on the high seas.

Shiprider and boarding agreements facilitate bilateral cooperation by establishing procedures to board and search suspect vessels on the high seas in order to prevent sanctions violations. If a ship registered in Country X or Country Y is suspected of violating the UN sanctions, either Party to the agreement can request the other to confirm the nationality of the ship and, if needed, authorize the boarding, search, and possible detention of the vessel and its cargo.

To illustrate, the United States maintains forty counterdrug bilateral agreements and operational procedures with partner States throughout the world that allow the U.S. Coast Guard “to board suspect vessels, facilitate interdictions in under-patrolled territorial waters of partner nations, and coordinate interdiction and apprehension operations in the transit zone.”<sup>81</sup> Such agreements increase the business risk for drug smugglers and are a force multiplier for U.S. interdiction efforts. In fiscal year 2018, 66 percent of all Coast Guard drug interdictions involved the use of a bilateral or operational procedures agreement.<sup>82</sup>

The United States has also entered into eleven bilateral boarding agreements under the Proliferation Security Initiative with Antigua and Barbuda, Bahamas, Belize, Croatia, Cyprus, Liberia, Malta, Marshall Islands, Mongolia, Panama, and Saint Vincent and the Grenadines, which allow for the boarding and inspection of suspect vessels seaward of the territorial sea.<sup>83</sup> These countries represent over 60 percent of the world’s shipping in terms of deadweight tonnage.<sup>84</sup>

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81. *Western Hemisphere Drug Interdictions: Why Maintaining Coast Guard Operations Matter: Hearing Before the Subcomm. on Coast Guard and Maritime Transportation of the H. Comm. on Transportation and Infrastructure*, 116th Cong. 11 (2019) (statement of Vice Admiral Daniel B. Abel, Deputy Commandant for Operations, U.S. Coast Guard).

82. *Id.*

83. KRASKA & PEDROZO, *supra* note 71, at 788.

84. *Id.*

Based on its experience, the United States has developed a comprehensive model boarding agreement that enables U.S. maritime interdiction forces to work more effectively and efficiently with other nations. The model agreement includes standing authority to take the following actions:

1. Board and search foreign flag vessels of a signatory nation;
2. Embark a shiprider empowered to authorize patrols, boardings, searches, seizures, and arrests in the signatory's territorial sea;
3. Pursuit of suspect vessels into the signatory's territorial sea, with permission to stop, board, and search the vessel;
4. Entry into the signatory's territorial sea to investigate suspect vessels and aircraft, with permission to stop, board, and search;
5. Overflight by state aircraft in the signatory's national airspace in support of interdiction operations, and authority to relay orders to land in the territory of a signatory nation.<sup>85</sup>

The model agreement also contains provisions that allow the flag or coastal State to exercise or waive prosecutorial jurisdiction over a suspected vessel or persons if contraband is found on board. The agreements may additionally contain "provisions for disposition of seized assets, including transfer of forfeited assets or proceeds of their sale as a consequence of any interdictions."<sup>86</sup> Bilateral agreements can also provide the basis for professional education and training for partner States, thereby fusing capacity building with operational collaboration.

The United States recognizes, however, that not all bilateral boarding agreements will be the same. Understandably, some agreements will be "more limited in scope than others, depending on the threat, the views or concerns of sovereignty by the partner nation, and the operational imperative to reach agreement."<sup>87</sup>

#### *H. Stateless Vessels and Vessels without Nationality Indicators*

As discussed above, stateless vessels and vessels without nationality are subject to the enforcement jurisdiction of all States beyond the territorial

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85. *International Law: The Importance of Extradition: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the H. Comm. on Government Reform*, 106th Cong. 72 (1999) (statement of Rear Admiral Ernest R. Riutta, Assistant Commandant for Operations, U.S. Coast Guard).

86. *Id.*

87. *Id.*

sea. To facilitate the identification of stateless vessels, the UNSC should develop a checklist of conduct that could lead a vessel to be treated as stateless or without nationality. Some of the factors the UNSC should consider include:

1. The vessel is not legitimately registered in any one State.
2. The vessel is not displaying a name, flag, or other identifying characteristics.
3. The master, upon request, makes no claim of nationality or registry for the vessel.
4. The master, upon request, makes a claim of nationality or registry that is inconsistent with the ship's documents.
5. The claim of registry or the vessel's display of registry is either denied or not confirmed by the State whose registry is claimed.
6. The vessel changes flags during a voyage without flag State approval.
7. The vessel is carrying removable signboards showing different vessel names or homeports.
8. The vessel physically alters its IMO number or Maritime Mobile Service Identities (MMSI) number.
9. The vessel sails under two or more flags, using them according to convenience.

Note that a ship that sails under two or more flags may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.<sup>88</sup> Under such circumstances, further action by a warship to verify the status of the ship is not required, and the ships may be immediately boarded, searched, and its crew detained without the consent of the master.<sup>89</sup>

### *I. Manipulation of AIS Transmissions*

AIS provides information about the ship to other ships and to coastal authorities automatically. SOLAS Regulation V/19 requires that AIS automatically provide information, including the ship's identity, type, position, course, speed, navigational status, and other safety-related information to appropriately equipped shore stations, other ships, and aircraft.<sup>90</sup> An AIS

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88. UNCLOS, *supra* note 23, art. 92(2).

89. THE COMMANDER'S HANDBOOK, *supra* note 29, § 4.4.4.1.5.

90. International Convention for the Safety of Life at Sea reg. V/19, § 2.4.5, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 278.

transceiver sends data every two to ten seconds depending on a vessel's speed while underway, and every three minutes while a vessel is at anchor, including the vessel's MMSI number. Additional data is broadcast every six minutes, including IMO ship identification number, international radio call sign assigned to the vessel by the country of registry, and the name of the vessel. Manipulating this data to reflect a different flag State is effectively equivalent to flying more than one flag, thus allowing the vessel to be assimilated to a vessel without nationality under UNCLOS Article 92.

#### IV. CONCLUSION

DPRK sanctions evasion, particularly as it relates to maritime activities, remains a critical issue that allows the DPRK government to continue its pursuit of nuclear weapons and its testing and amassment of ballistic missiles. The UNSC continues to consider these activities a threat to international peace and security. A stronger application of maritime sanctions enforcement through the adoption of the proposals described above will better enforce UNSCRs and push the DPRK to abandon these activities. Doing so will result in a more stable and secure international order.