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Smart Language: How to Address an Inherent Weakness Undermining the Implementation of U.N. Sanctions on North Korea

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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, nor those of the Government of Japan or the 1874 Panel of Experts, United Nations.

I. INTRODUCTION

In addressing the nuclear and ballistic missile programs of the Democratic People's Republic of Korea (DPRK/North Korea), the U.N. Security Council has adopted ten resolutions imposing sanctions of increasing breadth since 2006.¹ While they look comprehensive, the DPRK still is advancing its programs and procurement prohibited by the relevant U.N. resolutions, according to the Panel of Experts established pursuant to the U.N. Security Council resolution 1874 (the 1874 Panel of Experts). The country is apparently taking advantage of the insufficient implementation of the resolutions. There are constant discussions on the way to improve the U.N. Member States' implementation of the obligation of the resolutions. However, the shortcomings of the language of the resolutions should also be examined, as they effect U.N. Member States' implementations. Sometimes the elements of the sanctions are left to be determined by each Member States to leave room to be adapted to each State's administrative and legal system. However, often, ambiguities and lack of definitions are the result of compromises in the U.N. Security Council.

Implementation by the Member States is a key element of effective sanctions, and international awareness of the sanctions affects the implementation. In case of the DPRK sanction, awareness of the issue itself among Member States looks high. Eight of the ten relevant resolutions require U.N. Member States to provide reports to the Security Council of the measures taken to implement its provisions.² The number of reports submitted evidences the general international recognition of the necessity of the sanction regimes. For example, as of February 3, 2020, 92 States have submitted reports on the implementation of Resolution 2375³ and 114 States have submitted reports on the implementation of Resolution 2270.⁴ Nonetheless, how States implement the sanctions varies considerably.

1. S.C. Res. 1718 (Oct. 14, 2006); S.C. Res. 1874 (Jun. 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 (Jun. 2, 2017); S.C. Res. 2371 (Aug. 5, 2017); S.C. Res. 2375 (Sep. 11, 2017), S.C. Res. 2397 (Dec. 22, 2017).

2. S.C. Res. 1718, *supra* note 1, ¶ 11; S.C. Res. 1874, *supra* note 1, ¶ 22; S.C. Res. 2270, *supra* note 1, ¶ 40; S.C. Res. 2371, *supra* note 1, ¶ 18; S.C. Res. 2375, *supra* note 1, ¶¶ 8, 17.

3. S.C. Res. 2375, *supra* note 1.

4. S.C. Res. 2270, *supra* note 1. See *Implementation Reports*, UNITED NATIONS SECURITY COUNCIL 1718 SANCTIONS COMMITTEE (DPRK), <https://www.un.org/securitycouncil/sanctions/1718/implementation-reports> (last visited Mar. 23, 2020). When compared to the

The Security Council initially imposed sanctions through Resolution 1718 in 2006.⁵ Subsequent resolutions adopted new methods to clarify what the sanction measures require and States' obligations. To enhance sanctions compliance, the obligations of States must be clear. At present, it is difficult for Member States to obtain interpretative guidance of certain operative paragraphs, as these paragraphs resulted from negotiation. As such, States are unlikely to reach consensus on the precise requirements of these sanctions measures. Moreover, the Committee established by Security Council Resolution 1718 (1718 Committee) to implement the sanctions, consists of the same members as the Security Council, which only replicates the already existing interpretive issues.

This article provides examples of operative paragraphs within Security Council resolutions that lack determinative language and shows how smart language can improve implementation. Part II outlines the development of sanction measures imposed by relevant U.N. Security Council resolutions. Part III identifies deficiencies in the language and failures by the Security Council to provide sufficiently specific definitions, thereby hindering the effective implementation of sanctions. Part IV concludes.

II. U.N. SECURITY COUNCIL RESOLUTION PRACTICE SINCE 2006

The U.N. Charter vests the Security Council with the authority and responsibility of maintaining and restoring international peace and security.⁶ In exercising this responsibility, the Security Council determines, first, that there is a "threat to the peace, breach of the peace, or act of aggression," and second, where there is a threat, breach, or act of aggression, "decide(s) what measures shall be taken in accordance with Articles 41 and 42" to restore or maintain international peace and security.⁷ The Security Council's authority to impose economic sanctions flows from Article 41, which states:

submission of reports under U.N. Security Council resolutions imposing sanctions on Yemen (twenty-nine State reports) and South Sudan (twenty-four State reports) the number of States complying is significantly greater. For Yemen, see *Implementation Reports*, UNITED NATIONS SECURITY COUNCIL 2140 SANCTIONS COMMITTEE (YEMEN), <https://www.un.org/securitycouncil/sanctions/2140/implementation-reports> (last visited Mar. 23, 2020); for South Sudan, see *Implementation Reports*, UNITED NATIONS SECURITY COUNCIL SOUTH SUDAN SANCTIONS COMMITTEE, <https://www.un.org/securitycouncil/sanctions/2206/implementation-reports> (last visited Mar. 23, 2020).

5. S.C. Res. 1718, *supra* note 1.

6. U.N. Charter art. 39.

7. *Id.*

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.⁸

The Security Council first imposed sanctions in 1966 and has since established thirty sanctions regimes against a wide range of States, groups, and individuals, including apartheid South Africa, Iraq, the former Yugoslavia, Libya, and Iran.⁹ On July 5, 2006, the DPRK launched seven ballistic missiles.¹⁰ To condemn this act, the Security Council adopted Resolution 1695 on July 15.¹¹ However, this resolution does not impose sanctions under Chapter VII of Charter of the United Nations. Instead, the resolution urges the DPRK to “return immediately to the Six-Party Talks without precondition,” “to abandon all nuclear weapons and existing nuclear programmes,” and “to return at an early date to the Treaty on the Non-Proliferation of Nuclear Weapons and International Atomic Energy Agency safeguards.”¹² To achieve these objectives, this resolution requires Member States to prevent the procurement for this country’s missile development and the transfer of financial resources related to its missile or WMD programs.¹³

On October 9, 2006, the DPRK conducted its first nuclear weapons test.¹⁴ The Security Council condemned this act and issued Resolution 1718, which determined that the increased tension created by the DPRK’s nuclear

8. *Id.* art. 41.

9. See generally *Sanctions*, UNITED NATIONS SECURITY COUNCIL, <https://www.un.org/securitycouncil/sanctions/information> (last visited Mar. 23, 2020).

10. Press Release, USNORTHCOM Public Affairs, USNORTHCOM Statement on DPRK Missile Launches (July 4, 2006), <https://www.northcom.mil/Newsroom/Article/563300/usnorthcom-statement-on-dprk-missile-launches/>; Press Release, USNORTHCOM Public Affairs, U.S. Northern Command Confirms 7th Missile Launch by DPRK (July 5, 2006), <https://www.northcom.mil/Newsroom/Article/563299/us-northern-command-confirms-7th-missile-launch-by-dprk/>; see also Norimitsu Onishi & David E. Sanger, *Missiles Fired by North Korea; Tests Protested*, NEW YORK TIMES, July 5, 2006, <https://www.nytimes.com/2006/07/05/world/asia/05-missile.html>.

11. S.C. Res. 1695 (July 15, 2006).

12. *Id.* ¶ 5.

13. *Id.* ¶¶ 3–4.

14. *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 Mar. 23, 2020).

weapons test constituted a “clear threat to international peace and security.”¹⁵ Resolution 1718 imposed numerous sanctions, including a ban on the import of and export to the DPRK of major military equipment, such as tanks, armored vehicles, combat aircraft, and missiles.¹⁶ It also prohibited items, materials, equipment, goods, and technology that could contribute to the DPRK’s nuclear, missile, and other weapons of mass destruction (WMD) programs.¹⁷ Further, it imposed a ban on the import of luxury goods by the DPRK and froze the assets of persons and entities involved in the nuclear program.¹⁸ Lastly, it established the 1718 Committee, a committee consisting of the members of the Security Council to monitor and oversee the sanctions program.¹⁹

The next resolution, Resolution 1874,²⁰ followed the DPRK’s second nuclear test conducted on May 25, 2009.²¹ This resolution expanded the arms embargo to include all arms, related materiel, and relevant services.²² It also established the 1874 Panel of Experts to assist the 1718 Committee in carrying out its mandate.²³ By 2012, the 1718 Committee designated five individuals and eleven entities as engaging in or providing support for the country’s nuclear, ballistic missiles, or other WMD programs, and applied Resolution 1718 to freeze these assets and impose travel bans.²⁴

The Security Council adopted Resolution 2087²⁵ on January 22, 2013, condemning the DPRK’s test launch using ballistic missile technology on

15. S.C. Res. 1718, *supra* note 1, pmbl.

16. *Id.* ¶¶ 8(a)(i)–(ii), 8(b).

17. *Id.*

18. *Id.* ¶¶ 8(a)(iii), (d). The resolution also banned the travel of the individuals identified as participating in the program. *Id.* ¶ 8(e).

19. *Id.* ¶ 12.

20. S.C. Res. 1874, *supra* note 1.

21. *Overview: DPRK 2009 Announced Test*, COMPREHENSIVE NUCLEAR-TEST-BAN TREATY ORGANIZATION, <https://www.ctbto.org/the-treaty/developments-after-1996/2009-dprk-announced-nuclear-test/> (last visited Mar. 23, 2020); *see also* Choe Sang-Hun, *North Korea Claims to Conduct 2nd Nuclear Test*, NEW YORK TIMES, May 24, 2009, <https://www.nytimes.com/2009/05/25/world/asia/25nuke.html>.

22. *Id.* ¶ 9 (noting that the embargo did not include light arms).

23. *Id.* ¶ 26.

24. *Sanctions List Materials*, UNITED NATIONS SECURITY COUNCIL 1718 SANCTIONS COMMITTEE (DPRK), <https://www.un.org/securitycouncil/sanctions/1718/materials> (last updated Aug. 8, 2018) [hereinafter 1718 SANCTIONS LIST].

25. S.C. Res. 2087, *supra* note 1.

December 12, 2012.²⁶ This resolution expanded the individuals and entities subject to the asset freeze to include individuals who had assisted in sanctions evasion²⁷ and extended the travel ban to the individuals concerned.²⁸ It also clarified the methods of disposal of seized material.²⁹

Resolution 2094³⁰ quickly followed the DPRK's third nuclear test on February 12, 2013.³¹ This resolution broadened the restrictions on the individuals and entities falling within the definitions of Resolution 1718³² by directing States to prevent the provision of financial services and the transfer of assets that could contribute to the DPRK's nuclear or ballistic missile programs.³³ Resolution 2094 further expanded the criteria of the individuals and entities subject to the asset freeze to individuals or entities acting on behalf or at the direction of the designated individuals and entities, as well as entities owned and controlled by the designated individuals and entities.³⁴ A non-exhaustive list of prohibited luxury goods and a list of additional items, materials, equipment, goods, and technology that could contribute to the DPRK's WMD and missile programs were annexed.³⁵

26. *Id.* ¶ 1; see also Choe Sang-Hun & David E. Sanger, *North Koreans Launch Rocket in Defiant Act*, NEW YORK TIMES, Dec. 11, 2012, <https://www.nytimes.com/2012/12/12/world/asia/north-korea-launches-rocket-defying-likely-sanctions.html>.

27. *Id.* ¶ 12.

28. *Id.*

29. *Id.*, Annex 1.

30. S.C. Res. 2094, *supra* note 1.

31. *North Korea Announced Nuclear Test*, COMPREHENSIVE NUCLEAR-TEST-BAN TREATY ORGANIZATION, <https://www.ctbto.org/the-treaty/developments-after-1996/2013-dprk-announced-nuclear-test/> (last visited Mar. 23, 2020); see also David E. Sanger & Choe Sang-Hun, *North Korea Confirms It Conducted 3rd Nuclear Test*, NEW YORK TIMES (Feb. 11, 2013), <https://www.nytimes.com/2013/02/12/world/asia/north-korea-nuclear-test.html>.

32. See *supra* note 18 and accompanying text.

33. S.C. Res. 2094, *supra* note 1, ¶¶ 11. As with Resolution 2087, Resolution 2094 included those individuals and entities that assisted in the evasion of sanctions. *Id.*

34. *Id.* ¶¶ 8, 10. Travel bans were also imposed on the individuals.

35. *Id.*, Annex III, IV.

Resolution 2270,³⁶ which followed a fourth nuclear test conducted on January 6, 2016³⁷ and a ballistic missile test on February 7, 2016,³⁸ drastically expanded the economic measures imposed by previous resolutions. One of the most significant measures was a ban on the export of coal, iron and iron ore (with limited exceptions), gold, titanium ore, vanadium ore, and rare earth minerals.³⁹ This resolution also requires States to prevent its nationals from selling aviation fuel to the DPRK.⁴⁰ Further, small arms and light weapons, which had been exempt from earlier bans, were made subject to the arms embargo.⁴¹ Finally, a catchall provision banned the export of any item that a State considered as contributing to the development of the DPRK's WMD programs (e.g., nuclear weapons, ballistic missiles, chemical weapons) or the operational capabilities of the DPRK's armed forces.⁴²

The resolution expanded the financial services measures to include a prohibition on the opening and operation of new overseas branches, subsidiaries, and representative offices of DPRK banks and the opening of new branches of foreign States' banks in the DPRK.⁴³ It further required States to close existing financial offices and subsidiaries in the DPRK if the financial services provided could contribute to prohibited nuclear and ballistic missile programs or other activities banned by Security Council resolutions.⁴⁴

36. S.C. Res. 2270, *supra* note 1.

37. *6 January 2016 North Korea Announced Nuclear Test*, COMPREHENSIVE NUCLEAR-TEST-BAN TREATY ORGANIZATION, <https://www.ctbto.org/the-treaty/developments-after-1996/2016-dprk-announced-nuclear-test/> (last visited Mar. 23, 2020); *see also North Korea Nuclear: State Claims First Hydrogen Bomb Test*, BBC NEWS (Jan. 6, 2016), <https://www.bbc.com/news/world-asia-35240012>.

38. Press Release, USPACOM Public Affairs, USPACOM Vigilant During North Korean Missile Launch (Feb. 6, 2016), <https://www.pacom.mil/Media/News/News-Article-View/Article/651573/uspacom-vigilant-during-north-korean-missile-launch/>; *see also North Korea Fires Long-Range Rocket Despite Warnings*, BBC NEWS (Feb. 7, 2016), <https://www.bbc.com/news/world-asia-35515207>.

39. S.C. Res. 2270, *supra* note 1, ¶¶ 29–30.

40. *Id.* ¶ 31. The prohibition does not apply to the fueling of civilian passenger aircraft outside the DPRK. *See id.* (noting that Council “*decides* also that this provision shall not apply with respect to the sale or supply of aviation fuel to civilian passenger aircraft outside the DPRK exclusively for consumption during its flight to the DPRK and its return flight”).

41. *Id.* ¶ 6.

42. *Id.* ¶¶ 8, 27.

43. *Id.* ¶¶ 33–34.

44. *Id.* ¶ 35.

The Security Council adopted Resolution 2321 on November 30, 2016, after the DPRK's fifth nuclear test.⁴⁵ The Resolution directed the 1718 Committee to adopt a new conventional arms dual-use list encompassing materials, equipment, goods, and technology.⁴⁶ It clarified multiple obligations imposed by Resolution 2270 and it prohibited the provision of insurance or re-insurance services to vessels owned, controlled, or operated by the DPRK.⁴⁷ Moreover, the resolution introduced procedures to designate vessels that were or had been related to prohibited programs or activities, and requires the flag State to de-flag such vessels and subject them to the asset freeze.⁴⁸ It placed an annual cap on the export of coal by the DPRK and established a real-time system on reporting and monitoring the export of coal.⁴⁹ The DPRK's supply, sale, or transfer of copper, nickel, silver, and zinc were newly banned.⁵⁰ Finally, the resolution strengthened the existing financial measures, including the prohibition of public and private financial support of trade with the DPRK,⁵¹ and required States to expel individuals believed to be working on behalf of or at the direction of a DPRK bank or financial institution.⁵²

Following Resolution 2321, the Security Council adopted Resolution 2356⁵³ on June 2, 2017, condemning the DPRK's nuclear-weapon and ballistic-missile-development activities, including a series of launches and other related activities conducted since September 9, 2016.⁵⁴ This resolution newly designated fourteen individuals and four entities.⁵⁵

The Council then adopted Resolution 2371⁵⁶ on August 5, 2017, condemning the launches on July 3 and July 28 of what the DPRK described as

45. *9 September 2016 North Korea Announced Nuclear Test*, COMPREHENSIVE NUCLEAR-TEST-BAN TREATY ORGANIZATION, <https://www.ctbto.org/the-treaty/developments-after-1996/2016-sept-dprk-announced-nuclear-test/> (last visited Mar. 23, 2020).

46. S.C. Res. 2321, *supra* note 1, ¶ 7.

47. *Id.* ¶ 22. For a discussion of the importance of prohibitions on marine insurance as a source of economic coercion, see Richard L. Kilpatrick, Jr., *Marine Insurance Prohibitions in Contemporary Economic Warfare*, 95 INTERNATIONAL LAW STUDIES 272 (2019).

48. S.C. Res. 2321, *supra* note 1, ¶ 12.

49. *Id.* ¶ 26(b).

50. *Id.* ¶ 28.

51. *Id.* ¶ 32.

52. *Id.* ¶ 33.

53. S.C. Res. 2356, *supra* note 1.

54. *Id.* pmb.

55. *Id.* ¶ 3, Annex I, II.

56. S.C. Res. 2371, *supra* note 1.

intercontinental ballistic missiles.⁵⁷ The resolution imposed a full ban on the export of coal, iron, and iron ore,⁵⁸ added lead and lead ore to the export ban,⁵⁹ and banned the export of seafood.⁶⁰ It provides new authority to the 1718 Committee to designate vessels related to prohibited activities and requires States to prohibit the entry of designated vessels into their ports.⁶¹ The resolution restricts the number of DPRK nationals working in other States⁶² and prohibits new or expanded joint ventures and cooperative commercial entities with the DPRK.⁶³

Resolution 2375⁶⁴ followed the DPRK's sixth nuclear test on September 2, 2017.⁶⁵ It prohibited the DPRK's import of all condensates and natural gas liquids.⁶⁶ It restricts the annual supply, sale, or transfer of all refined petroleum products to the DPRK to two million barrels and requires the 1718 Committee and the Committee Secretary to monitor and periodically report the amount of refined petroleum products provided to the DPRK.⁶⁷ The resolution limits the annual amount of crude oil supplied, sold, or transferred to the DPRK by a State to that amount supplied, sold, or transferred in the twelve months preceding the resolution's adoption.⁶⁸ It also introduced a ban on the export of textile products⁶⁹ and banned new overseas work authorizations for the DPRK nationals.⁷⁰ Finally, it required States to prohibit

57. *Id.* ¶1; see also David E. Sanger, Choe Sang-Hun & William J. Broad, *North Korea Tests a Ballistic Missile That Experts Say Could Hit California*, NEW YORK TIMES, July 28, 2017, <https://www.nytimes.com/2017/07/28/world/asia/north-korea-ballistic-missile.html>.

58. S.C. Res. 2371, *supra* note 1, ¶ 8.

59. *Id.* ¶ 10.

60. *Id.* ¶ 9.

61. *Id.* ¶ 6.

62. *Id.* ¶ 11.

63. *Id.* ¶ 12.

64. S.C. Res. 2375, *supra* note 1.

65. *DPRK Sept. 2017 Unusual Seismic Event*, COMPREHENSIVE NUCLEAR-TEST-BAN TREATY ORGANIZATION, <https://www.ctbto.org/the-treaty/developments-after-1996/2017-sept-dprk/> (last visited Mar. 23, 2020); see also David E. Sanger & Choe Sang-Hun, *North Korean Nuclear Test Draws U.S. Warning of 'Massive Military Response'*, NEW YORK TIMES, Sept. 2, 2017, <https://www.nytimes.com/2017/09/03/world/asia/north-korea-tremor-possible-6th-nuclear-test.html>.

66. S.C. Res. 2375, *supra* note 1, ¶ 13.

67. *Id.* ¶ 14.

68. *Id.* ¶ 15.

69. *Id.* ¶ 16.

70. *Id.* ¶ 17.

their nationals from engaging in joint ventures or cooperative entities, both existing and new, with DPRK entities or individuals.⁷¹

The final resolution in the series, Resolution 2397,⁷² was adopted on December 22, 2017, condemning a ballistic missile launch conducted on November 28.⁷³ This resolution reduced the annual cap on the refined petroleum products transferred to the DPRK to 500,000 barrels.⁷⁴ It also set a cap on crude oil transfers of four million barrels or 525,000 tons.⁷⁵ Sectoral sanctions were expanded through a ban on the DPRK export of food and agricultural products, machinery, electrical equipment, earth and stone (including magnesite and magnesia), wood, and vessels.⁷⁶ The resolution prohibits the export of all industrial machinery, transportation vehicles, iron, steel, and other metals to the DPRK.⁷⁷ It strengthened the prohibition on the overseas work of DPRK nationals by requiring States to repatriate all such workers within the State and all DPRK government attachés monitoring the workers within twenty-four months from the date the Council adopted the resolution.⁷⁸ It also strengthened the vessel-related measures by obligating States to prohibit the provision of insurance or re-insurance services by its nationals, and persons and entities subject to its jurisdiction of vessels believed to be involved in activities or the transport of items prohibited by Security Council resolutions.⁷⁹ Further, it requires States to de-register vessels involved in prohibited activities.⁸⁰

Over thirteen years and through the adoption of ten resolutions, the Security Council has employed a combination of persuasive and coercive techniques to convince the DPRK to abandon “all nuclear weapons and existing nuclear programs” and “any other existing weapons of mass destruction and ballistic missile programs.”⁸¹ Exercising its authority under Article 41, the

71. *Id.* ¶ 18.

72. S.C. Res. 2397, *supra* note 1.

73. *Id.* ¶ 1; see also Mark Landler, Choe Sang-Hun & Helene Cooper, *North Korea Fires a Ballistic Missile, in a Further Challenge to Trump*, NEW YORK TIMES, Nov. 28, 2017, <https://www.nytimes.com/2017/11/28/world/asia/north-korea-missile-test.html>.

74. S.C. Res. 2397, *supra* note 1, ¶ 5.

75. *Id.* ¶ 4.

76. *Id.* ¶ 6.

77. *Id.* ¶ 7. An exception was made for spare parts needed to maintain the safety of commercial civilian passenger aircraft.

78. *Id.* ¶ 8.

79. *Id.* ¶ 11.

80. *Id.* ¶ 12.

81. *Id.* ¶ 2.

Security Council's imposition of economic sanctions of increasing severity has been a key feature of its efforts to achieve this objective.

There are now restrictions or prohibitions on the export to the DPRK of a wide range of goods. These sweeping resolutions restrict or ban aviation fuel, condensates and natural gas, crude oil, luxury goods, refined petroleum products, all arms, any item contributing to the military capabilities of its armed forces, and WMD-related and dual-use items. Likewise, the resolutions restrict or prohibit imports from the DPRK including, coal, iron, iron ore, lead, lead ore, textiles, food and agricultural products, seafood, machinery, earth, stone, wood, vessels, copper, nickel, silver, zinc, gold, titanium ore, vanadium ore, rare earth minerals, and all arms.

The financial and economic restrictions now include an asset freeze that covers eighty designated individuals and seventy-five entities, individuals or entities acting on their behalf or at their direction, and entities owned or controlled by them.⁸² DPRK banks are prohibited from operating branches, subsidiaries, and representative offices in other States. Prohibitions on support for the DPRK's trade, engaging in joint ventures with designated individuals and entities, permitting DPRK nationals to work within a State, and transferring assets or resources to the DPRK that could contribute to nuclear or ballistic missile programs are among the many financial and economic restrictions placed on the DPRK.

Despite the severity of these economic measures and the wide-ranging targets of these sanctions, the DPRK has not abandoned its nuclear weapons program or its other WMD programs. Indeed, writing for the Council of Foreign Relations, Eleanor Albert observed,

World powers have pursued economic sanctions for more than a dozen years While these measures have exacted a heavy toll on the North Korean economy, experts say their effectiveness has been undermined by the failure of some countries to enforce them and the willingness of some companies to flout them. . . .⁸³

Unsurprisingly, Albert concludes that enforcement remains the largest obstacle to effectiveness.

82. See 1718 SANCTIONS LIST, *supra* note 24.

83. Eleanor Albert, *What to Know About Sanctions on North Korea*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/backgrounder/what-know-about-sanctions-north-korea> (last updated July 16, 2019).

The biggest challenge is enforcement, which is the responsibility of individual states. National authorities often have insufficient resources to inspect shipments of ports of entry, carry out complex investigations, and perform other enforcement activities. Some individuals and entities, motivated by financial gain, do business with North Korea outside the law, and smugglers take advantage of lax inspections . . . [and] [b]lack market activities often go undetected.⁸⁴

III. RESOLUTION TERMINOLOGY: GOOD PRACTICES AND DEFICIENCIES

The measures, and consequently, the terminology used in U.N. Security Council resolutions demonstrate an increased level of complexity and sophistication. The expansion of the sanction measures from Resolution 1718's relatively straightforward restriction on items contributing to the DPRK's nuclear, missile, and WMD programs to the subsequent restrictions and prohibitions placed on a wide variety of imports, exports, and financial services required a corresponding increase in the complexity of the language used to articulate these restrictions and prohibitions. Negotiations over these expanded sanctions measures are highly politicized and compromises create ambiguous terminologies or lack clear definitions in the operative paragraphs. However, to incorporate the provision of the resolutions into domestic law, legal bases, which should be the resolutions themselves, are required. This definitional clarity has resulted in inconsistencies between the Security Council's objectives in adopting the resolutions and States' implementation of them. As such, this Part discusses four examples where language challenges the effective implementation of the sanctions.

A. Inconsistency in Reporting Units of Refined Petroleum Products

Resolution 2397 restricts the total supply, sale, or transfer of all refined petroleum products to the DPRK to 500,000 barrels during a twelve-month period beginning January 1, 2018 and for twelve-month periods thereafter.⁸⁵ To implement this restriction, States are to notify the 1718 Committee of the amount of petroleum products supplied, sold, or transferred to the DPRK, along with the information of the parties to the transaction, every thirty days.⁸⁶ Based on the notification, the 1718 Committee issues notices

84. *Id.*

85. S.C. Res. 2397, *supra* note 1, ¶ 5.

86. *Id.*

when the aggregated amount has reached 75 percent and 90 percent of the 500,000 barrels.⁸⁷ When the aggregated amount reaches 95 percent of the annual cap, the 1718 Committee Secretariat informs all States that they must immediately cease selling, supplying, or transferring refined petroleum to the DPRK for the remainder of the year.⁸⁸

However, whereas the resolution set the refined petroleum products cap by barrels, the unit used in the notifications submitted by States to the 1718 Committee is tons.⁸⁹ This inconsistency, combined with the lack of a conversion rate of tons to barrels, impedes the Secretariat's obligations to aggregate the amount of petroleum products and undermines the efforts to restrict the transfer of refined petroleum products to the DPRK.⁹⁰

Refined petroleum products include gasoline, diesel, and kerosene, but the publicized State reports do not include information on the type of refined petroleum product transferred. This makes the conversion from tons to barrels impossible. Therefore, the State that exports the petroleum product is the only party able to report in barrel units.

One alternative would be for the 1718 Committee to set a uniform conversion rate from ton to barrel to estimate the barrel-equivalent volume. However, items within the category of refined petroleum products have a different density. For example, based on the conversion rates published by Qatar Petroleum and BP, one ton of gasoline, kerosene, and diesel are approximately 7.7 barrels, 7.1 barrels, and 6.8 barrels, respectively.⁹¹

To illustrate the problem that this inconsistency creates, from January to June 2019, the amount of refined petroleum products that States reported as

87. *Id.*

88. *Id.*

89. *2019 Monthly Reports Received from Member States: Supply, Sale or Transfer of All Refined Petroleum Products to the DPRK*, UNITED NATIONS SECURITY COUNCIL 1718 SANCTIONS COMMITTEE (DPRK), <https://www.un.org/securitycouncil/sanctions/1718/supply-sale-or-transfer-of-all-refined-petroleum/> (last visited Mar. 23, 2020).

90. Panel of Experts, Report dated Feb. 21, 2019, from the Panel of Experts Established Pursuant to Resolution 1874 (2009) addressed to the President of the Security Council, transmitted by Note by the President of the Security Council, U.N. Doc. S/2019/171, enclosure, annex 21 (Mar. 5, 2019) [hereinafter 2019 Panel of Experts Final Report]. In its report, the Panel of Experts pointed out this problem and recommended the 1718 Committee agree on a single conversion rate between tons and barrels for all refined petroleum rates. *Id.*

91. For example, one metric ton of gasoline is 8.5 barrels, whereas one metric ton of kerosene is 7.8 barrels and one metric ton of diesel is 7.5 barrels. *See* QATAR PETROLEUM, CONVERSION FACTORS, <https://qp.com.qa/en/Pages/ConversionFactor.aspx> (last visited Mar. 23, 2020).

transferred to the DPRK was 29,044.15 tons.⁹² If only diesel was transferred, the total volume is about 197,500 barrels, however, if only gasoline was transferred, the total volume is about 223,639 barrels. The latter estimated volume represents nearly half of the 500,000-barrel limit only six months into the year, thus requiring close monitoring for the remainder of the year.

Because of the lack of information on the volume in barrels, the 1718 Committee is unable to monitor the volume of petroleum products transferred to the DPRK with the rigor that the task requires.⁹³ Therefore, States should report transfers in barrels to allow the 1718 Committee to monitor the aggregate volume more accurately. Alternatively, the Committee could designate a conversion rate for estimating the amount, although, as noted above, given the different conversion rates this would only provide a rough estimate of the amount of refined petroleum product transferred.

B. Repatriation of DPRK Overseas Workers and Reporting

A similar issue arises for reporting the repatriation of DPRK nationals earning income aboard. Resolution 2397 requires States to repatriate DPRK nationals earning income within their territory, as well as DPRK government safety oversight attachés monitoring DPRK workers abroad, and to report these repatriations to the 1718 Committee.⁹⁴ However, some States have disputed the meaning of this obligation. Shortly after the repatriation deadline, a letter co-signed by twenty-eight States, which stated that based on paragraph eight of the resolution, DPRK nationals earning income overseas should be repatriated regardless of their occupation, employer, and type of visa, was circulated at the General Assembly.⁹⁵ But, the Russian Federation issued a commentary stating that the letter misread this operative paragraph.⁹⁶

92. *Supply, Sale or Transfer of All Refined Petroleum Products to the DPRK*, UNITED NATIONS SECURITY COUNCIL 1718 SANCTIONS COMMITTEE (DPRK), <https://www.un.org/securitycouncil/sanctions/1718/supply-sale-or-transfer-of-all-refined-petroleum> (last visited Mar. 23, 2020).

93. This is illustrated in the 1718 Committee website, which lists the amounts of petroleum products transferred to the DPRK each month in tons, but lists the amount in barrels as “pending.” *Id.*

94. S.C. Res. 2397, *supra* note 1, ¶ 8.

95. Letter Dated 2 January 2020 from the Chargé d'affaires a.i. of Germany to the United Nations Addressed to the Secretary-General, U.N. Doc. A/74/639 (Jan. 6, 2020).

96. Комментарий Департамента информации и печати МИД России относительно направленного в Генеральную Ассамблею ООН письма группы

The Security Council governs the interpretation of Security Council resolutions. However, where there is a dispute on the interpretation among Members of Security Council, it is unlikely that the Security Council can issue an official interpretation for Member States to follow. The absence of unified official interpretation makes Member States' implementation difficult, as competent authorities generally need a legal basis to incorporate the elements of the resolution into domestic law. In this situation, DPRK individuals and entities could use States with narrower interpretations of the restrictions as a haven. Furthermore, the resolution does not clarify what to report (for example, the number of repatriated DPRK nationals or the date of repatriation) in the implementation reports with one exception of requiring an explanation if less than half of such DPRK nationals were repatriated within twelve months of the resolution's adoption.

As a result of these deficiencies, the States' reports vary, and several reports contain no specific information, such as the number of the DPRK nationals within the country or the number repatriated.⁹⁷ Furthermore, two States' reports are not published on the 1718 Sanctions Committee website,⁹⁸ which could create the risk that other countries will follow this approach, thereby damaging the transparency of the Committee's work. Left unaddressed, this practice may discourage other States' implementation of the resolutions. As such, the 1718 Committee should provide better guidance on the required reporting details for their repatriation reports.

C. *Adoption of HS Code and System Limitations*

As these Security Council resolutions restrict such a wide range of items, one of the challenges States face is the incorporation of the restricted items into

государств по вопросу северокорейских трудовых мигрантов [Russian Ministry of Foreign Affairs, Information and Press Department, Commentary Regarding a Letter from a Group of States to the U.N. General Assembly on the Issue of the Overseas Workers from the DPRK], MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FEDERATION (Jan. 30, 2020), https://www.mid.ru/ru/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/4014034.

97. Panel of Experts, Report dated Aug. 30, 2019, from the Panel of Experts Established Pursuant to Resolution 1874 (2009) addressed to the President of the Security Council, transmitted by Note by the President of the Security Council, U.N. Doc. S/2019/691 (Aug. 30, 2019) ¶85 [hereinafter 2019 Panel of Experts Midterm Report].

98. *See Implementation Reports*, UNITED NATIONS SECURITY COUNCIL 1718 SANCTIONS COMMITTEE (DPRK), <https://www.un.org/securitycouncil/sanctions/1718/implementation-reports> (last visited Mar. 23, 2020).

their custom control system. To address this problem, Resolution 2397 attempted to clarify the restricted items by incorporating the first two digits of the Harmonized Commodity Description and Coding System (HS) codes.⁹⁹

The HS coding system is an international product nomenclature developed by the World Customs Organization (WCO) to classify goods on a common basis.¹⁰⁰ In this system, each commodity group is identified by a six-digit HS code.¹⁰¹ As of July 2019, it was used as the basis for customs tariffs and the compilation of international trade statistics by 211 countries and customs and economic unions.¹⁰² Over 98 percent of the commodities traded internationally are classified by an HS code. While incorporating the HS code to identify products and clarify the restricted goods was a step forward, further improvement is necessary.

Before the adoption of Resolution 2397, resolutions imposing restrictions of goods did not provide corresponding HS codes and States showed considerable variance in their designations of what they believed to be banned items. This discrepancy mainly resulted from States arriving at different interpretations of the resolution language. For example, for the rare earth minerals banned by Resolution 2270,¹⁰³ the WCO recommended including minerals: uranium or thorium ores and concentrates (HS Codes 261210 and 261220); other ores and concentrates (HS Code 261790); alkali metals, rare-earth metals, mercury (HS Code 2805); and radioactive chemical

99. S.C. Res. 2397, *supra* note 1, ¶ 6.

100. The coding system contains approximately 5,300 product descriptions. *See Harmonized Commodity Description and Coding Systems (HS)*, UNITED NATIONS INTERNATIONAL TRADE STATISTICS KNOWLEDGEBASE, <https://unstats.un.org/unsd/tradekb/Knowledgebase/50018/Harmonized-Commodity-Description-and-Coding-Systems-HS> (last visited Mar. 23, 2020).

101. The first two digits identify the chapter in which the goods are classified, the next two digits identify groupings within that chapter, and the final two digits provide greater specificity as to the goods. As an example, 090210 would be broken down as follows: 09 (coffee, tea, mate, and spices); 02 (tea, whether or not fermented); and 10 (green tea not fermented). *Id.* Individual countries can then make the six-digit code even more specific by adding additional digits.

102. *List of 212 Countries, Territories or Customs or Economic Unions Applying the Harmonized System (159 Contracting Parties)*, WORLD CUSTOMS ORGANIZATION (Feb. 21, 2020), http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/nomenclature/overview/hs-contracting-parties/list-of-countries/countries_applying_hs.pdf.

103. S.C. Res. 2270, *supra* note 1, ¶ 30.

elements & isotopes, etc. (HS Code 2844).¹⁰⁴ The Panel of Experts reported, however, that the European Union defined rare earth minerals as ores of the rare earth metals (HS Code 25309000) and monazites, and other ores used solely or principally for the extraction of uranium or thorium (HS Code 2612).¹⁰⁵ China defined them only as other rare earth metals (HS Code 2530902000).¹⁰⁶ Russia defined them as mixtures or alloys (HS Code 2805301000); radioactive chemical elements and radioactive isotopes and their compounds, etc. (HS Code 2844); compounds, inorganic or organic, of rare earth metals, of yttrium, or of scandium, or of mixtures of these metals (HS Code 2846); ferrocerium and other pyrophoric alloys in all forms; and articles of combustible materials (HS Code 3606).¹⁰⁷ The Security Council attempted to address discrepancies such as these by employing HS codes in Resolution 2397.

While this decision was helpful, it did not adequately communicate to States which items fell within the resolution's ban on DPRK exports. For example, the resolution bans "food and agricultural products," defined as items found in HS code chapters 07, 08, and 12.¹⁰⁸ These chapters encompass "vegetables and certain roots and tubers, edible," "fruits and nuts, edible; peel of citrus fruit or melons," and "oil seeds and oleaginous fruits; miscellaneous grains, grains, seeds and fruit industrial or medical plants; straw and fodder."¹⁰⁹ However, these are only three of the twenty three HS code chapters for items possibly defined as food and agricultural products, except for seafood, which Resolution 2371 prohibits.¹¹⁰ Not included are such export items as "products of the milling industry" (HS code 11) and "animal or vegetable fats and oils and their cleavage products" (HS code 15).¹¹¹

104. Panel of Experts, Report dated Feb. 17, 2017, from the Panel of Experts Established Pursuant to Resolution 1874 (2009) addressed to the President of the Security Council, transmitted by Note by the President of the Security Council, at 317, U.N. Doc. S/2017/150 (Feb. 27, 2017) [hereinafter 2017 Panel of Experts Final Report]; *see also id.* Annex 16-1.

105. *Id.* at 84; *see also id.* Table 15.

106. *Id.* at 84.

107. *Id.*

108. S.C. Res. 2397, *supra* note 1, ¶ 6.

109. *HS Nomenclature 2017 Edition*, WORLD CUSTOMS ORGANIZATION, <http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs-nomenclature-2017-edition.aspx> (last visited Mar. 23, 2020).

110. Items fall under HS Codes 01 to 24.

111. S.C. Res. 2397, *supra* note 1, ¶ 6 (noting the sectoral ban on seafood); *see also HS Nomenclature 2017 Edition*, *supra* note 109.

In 2017, products classified with HS codes 07, 08, and 12 were the DPRK's top three export products among the items covered by HS Codes 06 through 15.¹¹² However, in 2016 and 2015, products classified with aforementioned HS codes 11 and 15 were the DPRK's third and fourth-largest agricultural export products, exceeding HS code 07 product exports.¹¹³ Thus, the exports of agricultural products unrestricted by the resolution are still a significant source of income to the DPRK.

Furthermore, it is highly likely that the DPRK will undermine the sanctions by strategically increasing the export of agricultural products that do not fall under HS codes 07, 08, and 12. Indeed, in its report published in 2017, the Panel of Experts noted a DPRK university study that concluded with a recommendation to evade the mineral bans by decreasing exports of raw materials and increasing exports of processed products.¹¹⁴ In fact, according to UN Comtrade, export of by the DPRK to China of the items of HS codes 11 and 14 has increased from 2017 to 2018 (which are not restricted by the resolution), whereas those of HS codes 07, 08, and 11 has decreased.¹¹⁵ Although the trend cannot be confirmed until the 2019 data becomes available, the HS codes could create a loophole to acquire revenue by exporting agricultural products that do not fall under the designated HS codes. Furthermore, the mismatch of the title in the resolution created by the detailed designation for the specific HS code could cause confusion when incorporating this prohibition into a Member States' trade controls.

Another example of the limitation of the designation of restricted items by HS codes is that certain products prohibited by Resolution 2397 can be categorized as products not listed in the resolutions. For example, beverages in aluminum cans were still being exported to the DPRK in 2018,¹¹⁶ at a time

112. *North Korea*, OBSERVATORY OF ECONOMIC COMPLEXITY (OEC), <https://oec.world/en/profile/country/prk/> (last visited Mar. 23, 2020).

113. *Id.*

114. See 2017 Panel of Experts Final Report, *supra* note 104, at 85, ¶ 260.

115. According to UN Comtrade, the export of HS code 11 items from the DPRK to China increased from \$657,300 in 2017 to \$1,067,848 in 2018, while HS code 14 items increased from \$188,331 in 2017 to \$254,895 in 2018. In contrast, HS code 07 items and HS code 08 items sharply decreased between 2017 and 2018, from \$12,974,664 to \$4,754,371 and from \$79,045,575 to \$4,313,828, respectively. The DPRK's export of HS code 12 items to China also decreased from \$13,050,469 in 2017 to \$1,090,766 in 2018. The DPRK's export value of HS code 15 items from 2017 to 2018 is not available. See UN COMTRADE DATABASE, <https://comtrade.un.org/> (last visited Mar. 23, 2020).

116. Chad O'Carroll, *No Can Do: How Tinned Coffee Exposes the Myth of Targeted North Korea Sanctions*, NKNEWS (Aug. 1, 2019), <https://www.nknews.org/2019/08/no-can-do-how-tinned-coffee-exposes-the-myth-of-targeted-north-korea-sanctions/>.

when the export of aluminum (HS code 76) to the DPRK was prohibited. The Security Council's intent to ban the export of metals is clear: "[A] Member States shall prohibit the direct or indirect supply, sale or transfer to the DPRK, through their territories or by their nationals [of] . . . iron, steel, and other metals (HS codes 72 through 83) . . ." ¹¹⁷ Products made of metals are restricted under those HS codes. However, when used as a part of the final product or a container that is in a different, permitted code, metals can pass through export controls. In the case of the beverages in aluminum cans, they fall within HS code 22, which is not restricted. Although it is not confirmed that the DPRK uses this loophole strategically to acquire prohibited metal, as noted in the university study discussed above, ¹¹⁸ the DPRK is actively seeking to evade sanctions. This strategic evasion demonstrates the challenges of regulating an export control system based on HS codes.

To avoid this shortcoming, the resolution should be written such that States can recognize the intent of the restriction and apply the relevant HS codes in its screening system. For example, if a State noticed an item that is purchased using large metal tanks or containers, then even if the final product usually falls under an unrestricted HS code category, the State should take action to avoid the risk of exporting restricted items.

D. *Definitional Issues*

Resolution 2375 prohibits the opening, maintenance, and operation of joint ventures and cooperative entities with DPRK individuals or entities, and obligates States to close those ventures and entities that already exist. ¹¹⁹ However, the resolution fails to define what constitutes a joint venture or cooperative entity. On the one hand, a specific definition could create loopholes that would permit modification of the organizational structure or ownership of the entity to fall outside the prohibition. On the other hand, a lack of definition of joint ventures and cooperative entities allows States to make their own definitions, which also risks abuse, including creating a haven for businesses operated by the DPRK citizens living abroad. For example, the Russian Federation informed the Panel of Experts of a Russian company, whose sole founder was a DPRK citizen, which was registered as a Russian

117. S.C. Res. 2397, *supra* note 1, ¶ 7.

118. *See* 2017 Panel of Experts Final Report, *supra* note 104, at 85, ¶ 260.

119. S.C. Res. 2375, *supra* note 1, ¶ 18.

limited liability company not subject to the prohibition on joint ventures and cooperative entities.¹²⁰

IV. CONCLUSION

This article discussed the development of the U.N. economic sanctions regime designed to address the DPRK's nuclear and ballistic missile programs. It focused on how the language used in these U.N. Security Council resolutions affect implementation. To address the DPRK's repeated nuclear weapon and ballistic missile tests, the Security Council expanded sanction measures drastically, and as a result, State obligations increased significantly. At the same time, due to the political sensitivity of this issue and disagreements among the members of the Security Council, the resolution's language sometimes lacks clarity or leaves room for ambiguity. Thus, States' obligations are not always clearly specified, which in turn creates problems for the competent authorities that need specific legal grounds to establish domestic law to implement U.N. resolution obligations. Furthermore, the ambiguity of the language permits interpretations inconsistent with the Security Council's intent. Both deficiencies result in what is essentially the partial implementation of the sanctions.

Since these ambiguities and lack of adequately detailed obligations are mostly the result of compromises among the Security Council members, it is very difficult for the 1718 Committee to provide more comprehensive guidance on the prohibitions and restrictions of a resolution when requested by States. In the absence of 1718 Committee clarification, the States themselves must interpret the language, and, as has been shown, this has resulted in varied interpretations. Further, the uncertainty of its obligations discourages States from providing substantial information in the reports it submits. Definitional inconsistency is also seen in designations based on the HS codes. HS codes, which are supposed to be a tool for clarification, can limit the items the Security Council seeks to restrict when the listing of HS codes is not comprehensive.

Most importantly, the DPRK is still actively seeking ways to evade the sanctions and enhanced implementation by States is vital to addressing these attempts.¹²¹ And, as this article has illustrated, in some instances the language

120. 2019 Panel of Experts Final Report, *supra* note 90, at 61, ¶ 150.

121. *See id.* at 375–78, Annex 89: Recommendations; *see also* 2019 Panel of Experts Midterm Report, *supra* note 97, at 33–34. The 2019 Final Report provides thirty-three rec-

employed by the Security Council has hindered effective enforcement. To remedy these shortcomings, the Security Council should take practical steps, such as establishing a useable unit of measure for refined petroleum products, employing use of HS codes to specify sanctioned products, improving definitions of prohibited activities, and requiring more detailed State reports on the implementation of sanctions.

As of this writing, DPRK nuclear and missile programs are intact, and the DPRK continues to defy Security Council resolutions directing it to abandon these programs. The effective implementation of sanctions by Member States is the key to their success. The DPRK sanctions regime is well established and widely recognized by U.N. Member States and to facilitate a more effective implementation of these sanctions, the Security Council must provide clearer expectations and use smarter language so Member States have less uncertainty as to their obligations under these resolutions. Absent that change, there is little reason to believe that the U.N. resolutions will accomplish their objective to convince the DPRK to discontinue these prohibited programs and, therefore, the country will remain a threat to international peace and security.

ommendations and the 2019 Midterm Report provides thirteen recommendations to address implementation challenges and shortcomings. Carrying out these and other Panel recommendations are essential to improving the effectiveness of the sanctions.