THE NORTH KOREAN CRISIS

Can UN sanctions make a difference?

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For The Straits Times


Since China and Russia would not support the authorisation of military force under Article 42 of the UN Charter, it was not surprising that SCR 1718 referred specifically to the legal basis for the sanctions being imposed under Article 41, which provides for measures not involving the use of force.

The sanctions will make it extremely difficult for North Korea to obtain any assistance or technology from other countries for its nuclear weapons and ballistic missile programmes.

Further, it requires member states to freeze funds and other assets in their territories that the Security Council designates as being engaged in or providing support for North Korea’s weapons of mass destruction (WMD) or ballistic missile programmes.

There are also restrictions on the transfer of conventional weapons to and from North Korea. This includes tanks, artillery systems, combat air-craft, attack helicopters, warships, missiles and missile systems. Finally, the sanctions also require states to prohibit the entry into their territory of persons designated by the Security Council as being responsible for North Korea’s WMD and ballistic missile programmes.

As to enforcement, the major issue was whether the Security Council would authorise the interdiction and inspection of ships and planes coming in and out of North Korea. Significantly, the draft resolution submitted by the United States and Japan on Oct 10 contained no provision authorising the interdiction of ships. This is likely because the US knew that China would not support the resolution if it contained language authorising the interdiction of ships in international waters.

But it did contain a paragraph on inspections. It was obviously very difficult for the permanent members to reach agreement on this. The final text read as follows: “(f) in order to ensure compliance with the requirements of this paragraph, and thereby preventing illicit trafficking in nuclear, chemical or biological weapons, their means of delivery and related materials, all Member States are called upon to take, in accordance with their national authorities and legislation, and consistent with international law, cooperative action including thorough inspection of cargo to and from the DPRK, as necessary.”

There are several significant points about paragraph (f). First, it calls for cooperative action. It is likely that the US will want to use the Proliferation Security Initiative (PSI) as the major mechanism for the cooperative action called for in the resolution, as the PSI contains principles on the interdiction, boarding and search of ships. However, given that China and South Korea are not members of the PSI, negotiations will be required to convince them to cooperate with the PSI or not oppose cooperative action among other states through the PSI.

Second, the language used in this paragraph makes it “non-mandatory”. In the paragraphs on inspections, the language used is “Member States are called upon” whereas in the other operative paragraphs in SCR 1718, the language used is “Member States shall”. Therefore, this paragraph was intended to give Member States some leeway as to whether and how they will take cooperative action with respect to inspections.

Therefore, negotiations will be required between the US and other major stakeholders such as China and North Korea.

Third, the paragraph makes it clear that any cooperative action must be consistent with international law. Therefore, the principle that ships in international waters cannot be boarded without the consent of the flag state remains unchanged.

Fourth, the cooperative action is limited to preventing trafficking in WMD. It does not cover two other categories of items that are included in the sanctions—conventional weapons and luxury goods.

Although SCR 1718 is silent on the interdiction of ships, interdictions can take place under the PSI by cooperating states. Interdictions under the PSI must also be consistent with international law. Most inspections under the PSI will take place when ships are in ports.

SCR 1718 will make it easier to interdict and inspect ships suspected of carrying prohibited items or from North Korea under the PSI. All members of the UN are legally obliged under SCR 1718 to cut off all transactions with North Korea relating to WMD material or technology. They are also legally obliged to take cooperative action to ensure that no WMD material or technology is shipped into or out of North Korea by their national vessels or aboard ships flying their flag.

Therefore, all UN members are likely to take cooperative action to inspect suspect ships in their ports and permit the interdiction and inspection of ships flying their flag if there is evidence that their ships are violating SCR 1718.

One possible loophole remains. This is when the suspect material is shipped from North Korea on a ship flying the North Korean flag. Since SCR 1718 was not intended to change the existing state of international law on this issue, it will not be possible to legally interdict ships flying the North Korean flag in international waters. Therefore, the only recourse will be to inspect North Korean ships if they enter the port (or possibly the territorial waters) of another state.

All in all, if SCR 1718 is enforced through cooperative action under the PSI, it will show that the major powers can work together to deal with common threats to international peace and security.

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