

FOIA MARKER

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Folder Title:

North Korea [6]

Staff Office-Individual:

Legal Advisor-Derosa, Mary

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3500

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39	5	11	1	V

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. memo	information, Daniel Poneman to Anthony Lake re North Korea: Next Steps (3 pages)	05/31/1994	P1/b(1)
001b. letter	Hans Blix to Boutros Boutros Ghali (3 pages)	05/27/1994	P1/b(1)
001c. cable	re UN Security Council Statement (5 pages)	05/31/1994	P1/b(1)
001d. statement	UN Security Council (4 pages)	05/00/1994	P1/b(1)
001e. paper	presented by DPRK to IAEA re fuel (2 pages)	05/27/1994	P1/b(1)
001f. paper	discussion re North Korea (3 pages)	05/31/1994	P1/b(1)
001g. statement	UN Security Council [duplicate of 001d but missing page 4] (3 pages)	05/00/1994	P1/b(1)
002. fax	cover w handwritten notes (2 pages)	03/17/1993	P1/b(1)
003. cable	re May 30 UNSC Presidential Statement (5 pages)	05/31/1993	P1/b(1)
004a. memo	Barbara Starr to William Itoh re Legal Memoranda on North Korera (1 page)	04/13/2993	P1/b(1)
004b. memo	Mary Hoinkes to the Deputies Group re Implications (9 pages)	04/13/2993	P1/b(1)
005a. memo	Gary Samore to SSKWG re LWR Supply Agreement (1 page)	12/12/1994	P1/b(1)

COLLECTION:

Clinton Presidential Records
National Security Council
Mary Derosa (Legal Advisor)
OA/Box Number: 3500

FOLDER TITLE:

North Korea [6]

2009-0528-F

kc1449

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

P1 National Security Classified Information [(a)(1) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
005b. draft	paper re terms and conditions (7 pages)	12/12/1994	P1/b(1)
006. draft	statement, USA - DPRK joint communique (4 pages)	00/00/1994	P1/b(1)

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TO: LAKE

FROM: PONEMAN

DOC DATE: 31 MAY 94
SOURCE REF:

KEYWORDS: KOREA NORTH
NUCLEAR WEAPONS

UN

PERSONS:

SUBJECT: PC BRIEFING ON NEXT STEPS / NORTH KOREA

ACTION: NOTED BY LAKE

DUE DATE: 03 JUN 94 STATUS: C

STAFF OFFICER: PONEMAN

LOGREF:

FILES: IFG

NSCP:

CODES: KOR

D O C U M E N T D I S T R I B U T I O N

FOR ACTION

FOR CONCURRENCE

FOR INFO

BERGER

DARBY

~~KREZKO~~

LAKE

MILLISON

NSC CHRON

PONEMAN

SODERBERG

DECLASSIFIED E.O. 13526

White House Guidelines,

September 11, 2006

By W NARA, Date 03/24/15

2009-0528-F

COMMENTS: _____

DISPATCHED BY _____ DATE _____ BY HAND W/ATTCH

OPENED BY: NSJEB

CLOSED BY: NSJEB

DOC 1 OF 1

~~SECRET~~

RECORD ID: 9420678

ACTION DATA SUMMARY REPORT

DOC ACTION OFFICER

CAO ASSIGNED ACTION REQUIRED

001 LAKE

Z 94060215 FOR INFORMATION

001

X 94060215 NOTED BY LAKE

~~SECRET~~

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001a. memo	information, Daniel Poneman to Anthony Lake re North Korea: Next Steps (3 pages)	05/31/1994	PI/b(1)

COLLECTION:

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Mary Derosa (Legal Advisor)
OA/Box Number: 3500

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North Korea [6]

2009-0528-F
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001b. letter	Hans Blix to Boutros Boutros Ghali (3 pages)	05/27/1994	P1/b(1)

COLLECTION:

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National Security Council
Mary Derosa (Legal Advisor)
OA/Box Number: 3500

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2009-0528-F
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II

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001c. cable	re UN Security Council Statement (5 pages)	05/31/1994	P1/b(1)

COLLECTION:

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National Security Council
Mary Derosa (Legal Advisor)
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FOLDER TITLE:

North Korea [6]

2009-0528-F
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RESTRICTION CODES

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001d. statement	UN Security Council (4 pages)	05/00/1994	P1/b(1)

COLLECTION:

Clinton Presidential Records
National Security Council
Mary Derosa (Legal Advisor)
OA/Box Number: 3500

FOLDER TITLE:

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2009-0528-F
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001e. paper	presented by DPRK to IAEA re fuel (2 pages)	05/27/1994	P1/b(1)

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001f. paper	discussion re North Korea (3 pages)	05/31/1994	P1/b(1)

COLLECTION:

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National Security Council
Mary Derosa (Legal Advisor)
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**Department of State
Office of the Legal Adviser**

① JB-FYE
② North Korea

**FAX
COVERSHEET**



FROM: *SL*

Ph#202-647-7838 Fax# 202-736-7620

TO: *Alan K. & Dan Ponneman*

Ph#

Fax#

Comments:

**Please acknowledge when received. There is a total of
___ pages being transmitted.**

U.S. View on North Korea's Current NPT Status

In the view of the United States, North Korea remains a party to the NPT and has no special status under the Treaty. If North Korea decides to withdraw from the NPT, it will be obliged to follow the withdrawal procedures of Article X of the Treaty, which provides that withdrawal will be effective three months after a withdrawing party provides notice to the Security Council and each of the parties to the Treaty. The notice of withdrawal must include "a statement of the extraordinary events it regards as having jeopardized its supreme interests." The three-month notice period is measured from the date of the last legally required notice.

North Korea gave notice to the Security Council on March 12, 1993, of its intent to withdraw from the NPT. (It notified many NPT parties as well, but it is not clear whether it notified all parties.) On June __, 1993, in a joint statement with the United States, North Korea:

. . . decided unilaterally to suspend as long as it considers necessary the effectuation of its withdrawal from the Treaty on the Nonproliferation of Nuclear Weapons.

Subsequently, it entered into discussions with other parties and with the IAEA to resolve issues related to inspections under the North Korea-IAEA safeguards agreement -- an agreement that is based on NPT adherence and that expires upon withdrawal from the NPT.

Thus, North Korea has made clear that it remains a party to the NPT. A decision by North Korea to withdraw from the NPT would be subject to Article X, including the three-month notice period. The NPT does not provide for delaying and subsequently restarting the notice period for withdrawal, nor is there any applicable procedure in international law. Indeed, such a practice would be contrary to the basic objective of providing at least three months clear notice before termination and would set an unwelcome precedent for this and many other treaties with "notice of termination" time periods. It would allow a party to undermine the integrity of such a notice provision, in an extreme case, by delaying the effective date of its withdrawal with one day left in the notice period, after which it could withdraw with one day's notice sometime in the future. This approach clearly would be inconsistent with the language of Article X and the intent of the negotiators of the NPT.

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COPIES TO



United States Department of State

Washington, D.C. 20520

'93 MAR 17 PM 10:03

March 17, 1993

MEMORANDUM FOR WILLIAM H. ITOH
EXECUTIVE SECRETARY
NATIONAL SECURITY COUNCIL

SUBJECT: Legal Issues Raised by North Korean Withdrawal
From the Nuclear Non-Proliferation Treaty

The attached paper, as requested by National Security Council staff, discusses legal issues raised by North Korea's announcement that it intends to withdraw from the Nuclear Non-Proliferation Treaty.


Marc Grossman
Executive Secretary

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**LEGAL ISSUES RAISED BY NORTH KOREA'S
ANNOUNCEMENT CONCERNING WITHDRAWAL FROM THE NPT**

The following is a preliminary discussion of the legal issues raised by the DPRK's announcement that it intends to withdraw from the NPT:

-- Article X(1) of the NPT provides for withdrawal as follows:

Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.

Grounds for Withdrawal

-- The language of this provision is drawn primarily from the Limited Test Ban Treaty. The withdrawal clause in the LTBT was a compromise between the U.S. desire to list specific, treaty-related grounds for withdrawal and the Soviet view that the right to withdraw is inherent in sovereignty. The U.S. succeeded in limiting extraordinary events to those "related to the subject matter of" the LTBT.

-- While the extraordinary events justifying withdrawal must be "related to the subject matter of" the NPT, this issue is left to the judgment of the withdrawing party. (The DPRK statement concerning withdrawal alleges that Operation Team Spirit is a nuclear war exercise and that recent IAEA inspection efforts have been aimed at sensitive, nonnuclear military facilities. It argues that these events jeopardize its supreme national interest.)

Withdrawal Procedures

-- The DPRK must provide notice of withdrawal and a statement of the extraordinary events justifying its action to all parties to the treaty and to the U.N. Security Council. These procedures were intentionally designed to provide the withdrawing party an opportunity to reconsider its action, as well as an opportunity for consultations and an explicit role for the U.N.

- The DPRK's submission to the Security Council on March 12 partially satisfies the notice requirement.

-2-

- Notice to the parties should be provided in writing. The negotiators of the NPT rejected a proposal that would have substituted notice to the depositaries for notice to the parties. Accordingly, we could argue that each of the more than 150 parties to the NPT must be notified directly.
- In any case, withdrawal will not be effective until three months after all the parties and the Security Council have been notified.

Effect of NPT Withdrawal on the IAEA-DPRK Safeguards Agreement

- Article III(1) of the NPT requires fullscope safeguards for parties that are nonnuclear weapon states (NNWS).
- The safeguards agreement between the DPRK and the IAEA provides that it shall "remain in force as long as the [DPRK] is party to the [NPT]."
- Thus, the DPRK's obligations under both the NPT and the safeguards agreement continue until its withdrawal from the NPT is effective.

DPRK Noncompliance with NPT and Safeguards Agreement

- If the DPRK were found to be concealing nuclear weapons manufacturing activities that occurred after 1985, it would be in violation of article II of the NPT (the basic obligation of nonnuclear-weapon states not to acquire or seek to acquire nuclear weapons).
- The IAEA may soon find that the DPRK has materially violated its NPT safeguards agreement with the IAEA. Such a violation would in turn constitute a violation of its obligation under NPT article III(1) to accept safeguards as set forth in an IAEA safeguards agreement.
 - In February, the IAEA Board of Governors gave the DPRK 30 days to comply with the Director General's request for special inspection of a suspected nuclear waste storage site. (Special inspections are authorized for facilities that were not declared to the IAEA as nuclear facilities.) The 30 days will expire approximately March 25.
 - The DPRK has so far refused the special inspection on the grounds that the facility is nonnuclear, but militarily sensitive.
 - The DPRK refusal to allow the inspection, which is likely to continue, will provide a basis for the Board to report

-3-

to "all [IAEA] members and to the Security Council and General Assembly of the United Nations" that the DPRK is not in compliance with its safeguards agreement (Note: The DPRK has already admitted to actions that violated an earlier, non-NPT safeguards agreement -- specifically, removing safeguarded spent fuel from a Soviet-supplied reactor for reprocessing.)

- This decision by the 35-member Board of Governors may be the first multilateral decision concerning the DPRK's recent actions. The Board's decision would be by majority vote. The current members of the Board are:

United States	South Korea	Canada
United Kingdom	North Korea	Australia
Russia	Sweden	Norway
China	Japan	Romania
France	Argentina	Finland
India	Germany	Greece
Pakistan	Mexico	Hungary
Syria	Nigeria	Brazil
Paraguay	Algeria	Bulgaria
Indonesia	Saudi Arabia	Spain
Zaire	Egypt	Chile
Thailand	Ecuador	

Sanctions in the UNSC

-- The U.N. Security Council (UNSC) could impose mandatory economic sanctions (or recommend nonbinding sanctions) under Chapter VII of the U.N. Charter if it determined that the DPRK's actions constitute a threat to international peace and security.

-- Such a determination might be based on an overall evaluation of DPRK actions, including: violations of (and withdrawal from) the NPT; noncompliance with its NPT safeguards agreement with the IAEA; and continuation of a suspected clandestine nuclear weapons program.

- The DPRK's withdrawal from the NPT is not unlawful and it is unlikely that most Security Council members would consider such action, in and of itself, to be a basis for mandatory sanctions. It might, however, be seen as one indication that North Korea is engaging in activities that threaten the peace.
- The DPRK's violations of the NPT and the safeguards agreement are (or will soon be) unambiguous. However, it would be difficult to establish that such violations per se constitute a threat to international peace and security.

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- The Security Council might, however, make such a determination in this case if it were to conclude that these NPT and safeguards violations resulted from DPRK's efforts to shield nuclear weapons activities.
- On the other hand, although a DPRK nuclear weapons program might provide the primary justification for imposing mandatory sanctions, some UNSC members may be unwilling to impose sanctions based solely on such a program. (Pakistan has a nuclear weapons program and would likely oppose sanctions on that basis alone. Pakistan will be president of the Security Council in April.) Accordingly, a case for sanctions would have to be based on the cumulative effect of the DPRK's activities.

NPT Status of UNSC Members

-- The following UNSC members are parties to the NPT: the Perm Five plus Cape Verde, Hungary, Japan, Morocco, New Zealand, Sudan, and Venezuela.

-- The following are not parties to the NPT: Djibouti and Pakistan.

-- Brazil is not a party to the NPT, but recently announced that it is bringing into force (for Brazil) the Treaty of Tlatelolco. (This treaty seeks to create a nuclear weapons free zone in Latin America. It imposes obligations on its parties comparable to those in the NPT. The U.S. and other states treat parties to the Treaty of Tlatelolco the same as parties to the NPT.)

-5-

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for

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National Security Council
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OA/Box Number: 3500

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NATIONAL SECURITY COUNCIL

File - North Korea: NPT

April 15, 1993

TO: Distribution
FROM: L/PM - Tony Perez
SUBJECT: North Korea Briefing Memo - Legal Issues

We request your comments/clearance on the attached by OOB Friday April 16, if at all possible. Our apologies for the abbreviated notice.

LEGAL ISSUES CONCERNING
THE DPRK'S WITHDRAWAL FROM THE NPT

Withdrawal

- o Article X of the NPT provides for withdrawal as follows:

Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.

- o Because this provision requires North Korea to notify both the Security Council and all the parties to the NPT, there is some uncertainty concerning when withdrawal is effective.

- The DPRK notified the Security Council on March 12 of its intention to withdraw (citing, inter alia, "Team Spirit" and unwarranted IAEA requests for special inspections at the behest of "third parties" as the extraordinary events triggering its right to withdraw).
- We have been unable to determine whether all parties have received the required notice, which the NPT's negotiating history indicates must be in writing.
- Accordingly, it is possible that, contrary to widespread opinion, the 3 months-notice period will not end on June 12.
- The NPT does not appear to provide a mechanism for resolving this uncertainty.

- o On the other hand, it is doubtful a persuasive legal argument can be made substantively challenging the DPRK's exercise of its right of withdrawal.

- By its terms, Article X allows a state to withdraw if "it decides," and the U.S. has taken the view that a withdrawal clause of this kind is self-judging (although, in theory, one might contest blatant bad faith, such as references to plainly irrelevant matter).

-2-

- o A departure from that approach in this case would have significant implications for U.S. interest:
 - similar withdrawal clauses appear in virtually all of our arms control agreements (bilateral and multilateral), which reciprocally determine our own right to withdraw;
 - many agreements, including GAA, also have reservations or exceptions for "national security" which we consider to be self-judging and have on occasion invoked.
 - Russia and China would almost certainly challenge any assertion that a withdrawal decision could be legally questioned (although we understand the U.K. may not); and
 - the Senate might well question the consistency of such a position with Secretary Rogers' representations to the SFRC in hearings for the Senate's advice and consent to NPT ratification. (See attachment, excerpting the relevant testimony.)
- o Even if we advanced the view that NPT parties could, in some extreme cases, reject a party's assertion that an event is "extraordinary" or "related the subject matter" of the NPT, it would appear unpersuasive to make this claim in this case.
 - In particular, the IAEA's request for special inspections are likely to be seen by most NPT parties both as extraordinary and related to the subject matter of the NPT.
- o Nonetheless, as a political matter, the parties can question or disagree with the justifications it has offered.

Continuing IAEA Safeguards Rights

- o Once the DPRK's withdrawal becomes effective, it is no longer bound by the NPT not to manufacture a nuclear explosive device and its NPT fullscope safeguards agreement that verified this undertaking terminates.
 - Termination of the agreement would eliminate the IAEA's right to make new requests for special inspections at undeclared DPRK nuclear facilities.
- o It might be possible to advance a strained legal argument that North Korea is still obligated to fulfill the specific request made for a special inspection while the fullscope safeguards agreement remained in force.

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- However, it is unlikely the IAEA Secretariat would take the position that it retains a continuing right to secure the DPRK's compliance, and questionable whether support for this proposition could be secured at the IAEA Board of Governors.
- Moreover, advancing such an argument could have reciprocal implication for U.S. duties after withdrawal from arms control treaties having inspection regimes.
- o On the other hand, once the NPT safeguards agreement terminates, the IAEA would assert that its earlier facility-specific safeguards agreement with the DPRK continues (was concluded in 1977 for Russian-supplied material).
 - The IAEA's normal practice is, with the agreement of a new NPT party, to suspend the operation of any existing safeguards agreements while the NPT safeguards agreement is in force. (We are unaware of any attempt by the DPRK to terminate this agreement as well.)
 - However, even if the IAEA takes the position that the earlier agreement revives, the inspection rights under any such agreement would not extend to undeclared nuclear facilities that were the subject of IAEA request for special inspection.

IAEA Sanctions

- o Pursuant to Article 18 of the DPRK-IAEA NPT safeguards agreement, on February 25, 1993, the IAEA Board of Governors determined that it was "essential and urgent" that the DPRK allow access within one month to two sites requested by the IAEA pursuant to its special inspection authority.
- o In the face of DPRK's refusal to permit the special inspection, on April 1, 1993, the Board adopted a resolution reporting the DPRK's noncompliance to the Security Council and General Assembly of the U.N., as required by Article XII.C. of the IAEA Statute.
 - The Board may also have had a sufficient basis to determine that past DPRK reprocessing campaigns outside of safeguards may have violated the DPRK's pre-NPT safeguards agreement, but no explicit finding on this point was made.
 - The DPRK's failure to apply safeguards on all its nuclear facilities also violates article III(4) of the NPT, and the IAEA (and/or the Security Council) could make such a finding as well.

- o The Board could take additional measures under article XII of the Statute, including: the curtailment or suspension of IAEA assistance to the DPRK; a call for the return of materials or equipment made available to the DPRK (if any); or the suspension of the DPRK's exercise of the privileges and rights of membership in the IAEA (the DPRK has not withdrawn from membership).
- The Board could take these steps with respect to North Korean actions while still an NPT party even after withdrawal has become effective.

UN Security Council Options

- o Although neither the NPT itself nor the general law of treaty interpretation would appear to suggest an effective remedy for these violations, there does not appear to be any barrier to the parties seeking any relief available under international law, including action by the Security Council.
- The Security Council has authority to act in response to North Korea's actions if it determines that such actions create a threat to or breach of international peace and security.
- The UN Charter sets out the parameters for Council action, which generally ranges from recommendations to binding decisions relating to economic or diplomatic sanctions through the use of military force. In addition, the Charter provides for suspension or even expulsion of member states from the UN.
- The Security Council could impose mandatory sanctions on the DPRK under Chapter VII (Article 41) of the UN Charter if it determined that there was a threat to international peace and security. Such a determination might be based upon a cumulative evaluation of DPRK actions indicating that the DPRK is engaging in activities that threaten the peace.
- The Council could consider a range of sanctions. A possible strategy could link sanctions to the issues faced by connecting them to North Korea's nuclear program, or it could impose more comprehensive embargoes, or reduce or cut-off air and sea transport and diplomatic relations.
- As an alternative to binding sanctions, the Council could also consider imposing voluntary or non-binding sanctions.
- The Security Council's power to make this determination is not limited by whether the DPRK's notice of withdrawal has become effective, nor whether the DPRK is in continuing breach of any legal obligation.

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- The Security Council's practice in this area is discussed further in the attached memorandum.

U.S. Sanctions

- o Comprehensive sanctions already exist on virtually all U.S. trade and investment with North Korea, and there are very few areas in which these sanctions can be tightened. There is a general embargo on financial and property transactions.
- o There are also missile proliferation sanctions, shipping restrictions and sanctions flowing from North Korea's designation as a "terrorist country." Some licenses are currently granted on a case-by-case basis for humanitarian goods, and some very minor exceptions from the embargo also exist for items such as baggage of persons travelling to North Korea.
- o Comprehensive restrictions are also in place if bilateral or multilateral assistance for North Korea were contemplated.

Armistice

- o The U.S. should not seek to assert that North Korean actions are evidence of an attempt to violate the 1953 Korean Armistice Agreement.
- o Paragraph 13.d of the Armistice calls on both armies not to introduce into Korea "reinforcing combat aircraft, armored vehicles, weapons, and ammunition," unless they are replacing worn out or destroyed equipment "on the basis of piece-by-piece of the same effectiveness and the same type," but this provision has become inoperative through practice by both armies.
 - The Neutral Nations Supervisory Commission, which is charged under paragraph 13.d with monitoring the movement of such materiel, is also no longer permitted effectively to carry out this task.
 - Moreover, there may be a question whether development of a domestic weapon would be considered "introduction into Korea" under paragraph 13.d.

Attachments

1. Excerpts from NPT ratification SFRC hearings
2. UN Security Council Options Paper

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EXCERPTS FROM SFRC NPT HEARING

In Senate hearings on the NPT, the withdrawal provision was discussed as follows:

Senator JAVITS: Now, the technical provision which is article X, I am very interested in because I think that is the real safeguard in this treaty in terms of the national security of the United States - the right to pull out on rather short notice. That says each party shall, exercising its national sovereignty, have the right to withdraw from the treaty if it decides that extraordinary events related to the subject matter of this treaty have jeopardized the supreme interests of its country. That is a completely unilateral decision, is it not?

Secretary ROGERS: That is right.

Senator JAVITS: And not subject to contest?

Secretary ROGERS: That is right.

Hearings on the Treaty on the Nonproliferation of Nuclear Weapons (Part 2), Committee on Foreign Relations, U.S. Senate, at 367 (Feb. 18 and 20, 1969). After further discussion, Secretary Rogers insisted that a decision to withdraw would not be taken lightly and that the terms of the withdrawal provision would have to be met:

Senator JAVITS: And we would endeavor to hold the Soviet Union to the same standard?

Secretary ROGERS: Well, we would --

Senator JAVITS: And it should really be honestly something that they could claim, with at least some color of plausibility, represented a jeopardy to the supreme interests of their country?

Secretary ROGERS: Yes. . . .

Thus, the U.S. view has been that a state's reasons for withdrawal from the NPT can be questioned, if at all, on only the most limited grounds.

UN SECURITY COUNCIL OPTIONS FOR ADDRESSING NORTH KOREA

BACKGROUND

On March 12, 1993, North Korea provided a statement to the UN Security Council of its intent to withdraw from the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). Article X of the NPT provides that notice of such withdrawal be made to all other Parties to the Treaty and to the United Nations Security Council three months in advance. North Korea provided notice of its withdrawal to the United States on April 1, 1993 and we understand that notice also has been given to the UK and France. We do not know whether and to what extent North Korea has provided notification to other states party to the NPT.

Article III(1) of the NPT requires non-nuclear weapon states to undertake safeguards in agreement with the IAEA. The NPT safeguards agreement between the DPRK and the IAEA provides that it shall "remain in force as long as the [DPRK] is party to the [NPT]." Art. 25. Article 19 of the IAEA-DPRK safeguards agreement states that, if the IAEA Board of Governors finds that "the Agency is not able to verify that there has been no diversion of nuclear material required to be safeguarded under this Agreement to nuclear weapons or other nuclear explosive devices," the Board may make a report as provided for in article XII.C. of the IAEA statute. Article XII.C., in turn, provides that the Board of Governors "shall" report any noncompliance with a safeguards agreement to the UN Security Council and General Assembly.

On February 25, 1993, the IAEA Board of Governors determined that it was "essential and urgent" that the DPRK allow access within one month to two sites requested by the IAEA pursuant to its special inspection authority. The DPRK refused to give IAEA inspectors access to these sites. Accordingly, on April 1, 1993, the Board adopted a resolution reporting the DPRK's noncompliance to the UN Security Council and General Assembly, as required by article XII.C. of the IAEA statute.

The Security Council adopted a Presidential Statement on April 8 indicating its concern at the situation and welcoming efforts aimed at resolving the situation, in particular, continued consultations between the IAEA and the DPRK. This paper discusses the full range of possible Security Council options in response to the recent actions of the DPRK and the IAEA.

SUMMARY

The Security Council can act in response to North Korea's actions if it determines that such actions create a threat to or breach of international peace and security.. The UN Charter sets out the parameters for Security Council action, which generally ranges from recommendations to binding decisions relating to economic or diplomatic sanctions through the use of military force. In addition, the Charter provides for suspension or even expulsion of member states from the UN.

ANALYSIS

The Council's actions are not limited by any time constraints, including the date on which North Korea's withdrawal from the NPT may become effective. Assuming that the Council is proceeding under the UN Charter, we do not consider NPT's notification of withdrawal from the NPT to be a violation of the Treaty or the per se threat to international peace and security. Rather, we would look to its non-compliance with its obligations under the safeguards agreement with the IAEA (which noncompliance remains a fact even after withdrawal from the treaty), in combination with several other factors present in the overall situation, to provide the basis for Security Council action.

I. Settlement by peaceful means.

First and foremost, the Security Council, where possible, seeks solutions to disputes by peaceful means, for example, through negotiations or mediation. The Security Council may investigate the situation and make recommendations. Recommendations could address any matters.

II. Sanctions.

If the Council determines that a threat to or breach of the peace exists, it may under Chapter VII recommend or require member states to impose sanctions. Recommendations are not binding on states. Article 39 of the UN Charter provides that:

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.

- 3 -

Article 41 of the UN Charter provides that:

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 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.

1. Mandatory Sanctions

The Security Council could impose mandatory sanctions on the DPRK under Chapter VII (Article 41) of the UN Charter if it determined that there was a threat to international peace and security. Such a determination might be based upon a cumulative evaluation of DPRK actions that indicate that the DPRK is engaging in activities that threaten the peace, including: violations of the NPT; noncompliance with its NPT safeguards agreement with the IAEA; continuation of a suspected clandestine nuclear weapons program, particularly in view of the NPT and safeguards violations; and the overall situation in the region, taking into account the history of hostilities between the North and the South and the current legal state of war between the two.

The Security Council has imposed mandatory sanctions in connection with the situations in South Africa; Rhodesia; Liberia; Mozambique; Iraq; Libya; and the former Republic of Yugoslavia. While the finding of a threat to international peace and security has varied in connection with the circumstances of each of these situations, in both the South Africa and Iraq situations the Council has addressed nuclear weapons concerns, although in each instance within a much broader context.

In 1977, the Security Council, acting under Chapter VII, specifically determined that South Africa's actions, including its military build-up and persistent acts of aggression against neighboring states constituted a threat to international peace and security. It imposed an embargo on arms and related material and in the process, specifically prohibited states from any cooperation with South Africa in the manufacture and development of nuclear weapons after noting its grave concern that South Africa was at the threshold of producing nuclear weapons (Resolution 418, November 4, 1977).

- 4 -

In 1991, the Security Council, again acting under Chapter VII, condemned Iraq's non-compliance with its obligations under Resolution 687 (the cease-fire resolution) relating to the destruction of Iraq's weapons of mass destruction. The Council also condemned Iraq's non-compliance with its safeguards agreement with the IAEA as a violation of its obligations under the NPT. It demanded that Iraq, among other requirements, provide full disclosure of its weapons programs, allow for inspections by the IAEA and the Special Commission, and halt all nuclear activities, including those relating to the peaceful uses of nuclear energy, until the Council determined that it was in full compliance with that resolution, the cease-fire resolution and its safeguards agreement with the IAEA (Resolution 707, August 15, 1991).

Were the Security Council to determine that North Korea's actions constitute a threat to international peace and security, it could consider a range of sanctions. A possible strategy could link sanctions to the issues faced by connecting them to North Korea's nuclear program. For example, sanctions could be formulated to prohibit the supply of any materials or assistance having potential application to nuclear weapons as was done in regard to South Africa or it could bar all cooperation on nuclear matters as was done in regard to Iraq. The Council could also impose a more comprehensive embargo, for example, against the import or export of arms or related materials, or target key imports or exports; or bar all imports or exports (with the possible exception of food, medicine and humanitarian goods).

The Council could also take measures cutting off or limiting air and sea transport, as well as reducing or cutting off diplomatic relations. For example, in the Libya situation, the Council, in addition to imposing an arms embargo, limited air traffic and diplomatic relations in response to Libya's refusal to comply with Council demands with respect to the bringing those to justice responsible for the 1988 and 1989 bombings of airliners.

2. Voluntary Sanctions

As an alternative to mandatory sanctions, the Security Council could also consider voluntary or non-binding sanctions. Again, the Council could consider a range of complete or partial sanctions as noted above. As would be expected in the case of imposing voluntary sanctions, they would be effective only if key states were prepared to carry them out.

- 5 -

III. Use of Force.

If the Council deems appropriate, it may authorize the use the force necessary to restore international peace and security (e.g., Iraq/Kuwait) or determine that UN itself will use such measures (e.g., Somalia).

IV. Suspension/Expulsion.

The UN Charter provides that the Security Council may recommend that a member state against which preventive or enforcement action has been taken be suspended from the exercise of the rights and privileges of membership by the General Assembly (art. 5), or it may recommend to the General Assembly that a member state be expelled from the UN for persistently violating UN Charter principles (art. 6). Alternatively, the Security Council acting with the General Assembly, might simply suspend North Korea's right to participate in the work of the General Assembly, as was recently done in regard to the Federal Republic of Yugoslavia.

DEPARTMENT OF STATE
Office of the Legal Adviser (L)

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CONTENTS / COMMENTS

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**SUMMARY OF LEGAL ISSUES CONCERNING
THE DPRK'S WITHDRAWAL FROM THE NPT**

- o On March 12, 1993 North Korea gave notice to the Security Council of its intent to withdraw from the NPT. The Treaty, however, makes this notice effective three months after both the Security Council and all the parties to the Treaty receive notice. Because it is not clear when (and perhaps that) all the parties have been separately notified, it is possible that the withdrawal notice will not become effective on June 12.
- o It is doubtful that a persuasive legal argument can be made challenging the DPRK's right to withdraw, however. The NPT leaves this question to the discretion of the withdrawing party.
 - A legal argument that the DPRK is exercising its withdrawal argument in bad faith would have implications for the U.S. exercise of similar withdrawal rights found in arms control treaties.
- o NPT withdrawal will terminate the DPRK-IAEA fullscope safeguards agreement.
 - However, an argument might be advanced by the IAEA (although the IAEA may well resist doing so) that the DPRK remains required to comply with the special inspection request made by the IAEA while the agreement was in force.
 - The IAEA itself could also take further sanctions against the DPRK, such as suspending its membership or denying technical assistance, regardless of whether the NPT withdrawal is effective or the DPRK is still required to comply with the special inspection request.
 - The 1977 safeguards agreement for a Russian-supplied reactor and uranium will continue in force, although this agreement provides no special inspection rights.
- o UN Security Council sanctions are legally available based on a finding of a threat to international peace and security, and this finding could lawfully be made regardless of whether the DPRK's NPT withdrawal is effective or the DPRK is in breach of a legal obligation.
 - Options for additional unilateral U.S. sanctions, given the extensive current sanctions regime, are limited.
 - Also, a claim that the DPRK has breached the Armistice Agreement's ban on the introduction of new weapons would be difficult to maintain, since both sides have essentially treated this provision as inoperative and there would be a question whether indigenous development of a weapon would constitute "introduction into Korea" under the Armistice Agreement.

LEGAL ISSUES CONCERNING
THE DPRK'S WITHDRAWAL FROM THE NPT

Withdrawal

- o Article X of the NPT provides for withdrawal as follows:

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- o Because this provision requires North Korea to notify both the Security Council and all the parties to the NPT, there is some uncertainty concerning when withdrawal is effective.

- The DPRK notified the Security Council on March 12 of its intention to withdraw (citing, inter alia, "Team Spirit" and unwarranted IAEA requests for special inspections at the behest of "third parties" as the extraordinary events triggering its right to withdraw).
- We have been unable to determine whether all parties have received the required notice, which the NPT's negotiating history indicates must be in writing.
- Accordingly, it is possible that, contrary to widespread opinion, the three months-notice period will not end on June 12.
- The NPT does not appear to provide a mechanism for resolving this uncertainty.

- o On the other hand, it is doubtful a persuasive legal argument can be made substantively challenging the DPRK's exercise of its right of withdrawal.

- By its terms, Article X allows a state to withdraw if "it decides," and the U.S. has taken the view that a withdrawal clause of this kind is essentially self-judging (although, in theory, one might contest the most transparent failure to cite even arguably "extraordinary events," such as references to fictional events or plainly irrelevant matters).

-2-

- o A departure from that approach in this case would have significant implications for U.S. interests:
 - similar withdrawal clauses appear in virtually all of our arms control agreements (bilateral and multilateral), which reciprocally determine our own right to withdraw;
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- o Even if we advanced the view that NPT parties could, in some extreme cases, reject a party's assertion that an event is "extraordinary" or "related the subject matter" of the NPT, it would appear unpersuasive to make this claim in this case.
 - In particular, the IAEA's request for special inspections are likely to be seen by most NPT parties both as extraordinary and related to the subject matter of the NPT.
- o Nonetheless, as a political matter, the parties can question or disagree with the justifications the DPRK has offered.

Continuing IAEA Safeguards Rights

- o Once the DPRK's withdrawal becomes effective, it is no longer bound by the NPT not to manufacture a nuclear explosive device, and its NPT fullscope safeguards agreement verifying this undertaking terminates.
 - Termination of the agreement would eliminate the IAEA's right to make new requests for special inspections at undeclared DPRK nuclear facilities.
- o It is possible to argue, however, that North Korea is still obligated to fulfill the specific request made while the fullscope safeguards agreement remained in force for a special inspection.

-3-

- However, it is unlikely the IAEA Secretariat would take the position that it retains a continuing right to secure the DPRK's compliance, and questionable whether support for this proposition could be secured at the IAEA Board of Governors.
- Advancing such an argument could have reciprocal implications for U.S. duties after withdrawal from arms control treaties having inspection regimes.
- o On the other hand, once the NPT safeguards agreement terminates, the IAEA would assert that its earlier facility-specific safeguards agreement with the DPRK continues. (One was concluded in 1977 for a Russian-supplied reactor and related nuclear material.)
 - The IAEA's normal practice is, with the agreement of a new NPT party, to suspend the operation of any existing safeguards agreements while the NPT safeguards agreement is in force.
 - The 1977 agreement expressly bars use of the Russian reactor or material for military or nuclear explosive purposes.
 - However, the inspection rights under this agreement would not extend to undeclared nuclear facilities that were the subject of IAEA request for special inspection.

IAEA Sanctions

- o Pursuant to paragraph 18 of the DPRK-IAEA NPT safeguards agreement, on February 25, 1993, the IAEA Board of Governors determined that it was "essential and urgent" that the DPRK allow access to two sites requested by the IAEA pursuant to its special inspection authority under that safeguards agreement.
- o In the face of the DPRK's refusal to permit the special inspection, on April 1, 1993, the Board adopted a resolution reporting the DPRK's noncompliance to the Security Council and General Assembly of the U.N., as required by Article XII.C. of the IAEA Statute. (The resolution includes, pursuant to paragraph 19 of the agreement, a finding that the IAEA is unable to verify non-diversion of nuclear material.)
 - The Board may also have had a sufficient basis to determine that past DPRK reprocessing campaigns outside of safeguards may have violated the DPRK's pre-NPT safeguards agreement, but no explicit finding on this point was made.

- The DPRK's failure to apply safeguards on all its nuclear facilities also violates article III(4) of the NPT, and the IAEA (and/or the Security Council) could make such a finding as well.
- o The Board could take additional measures under Article XII of the Statute, including: the curtailment or suspension of IAEA assistance to the DPRK; a call for the return of materials or equipment made available to the DPRK (if any); or the suspension of the DPRK's exercise of the privileges and rights of membership in the IAEA (the DPRK has not withdrawn from membership).
- Even after the DPRK's withdrawal becomes effective, the Board could take these steps with respect to North Korean actions while still an NPT party.
- o Although the fullscope safeguards agreement's arbitration clause is expressly inapplicable to disputes concerning paragraph 19 (including IAEA reports to the Security Council and IAEA sanctions), Article XVII of the Statute provides for arbitration by the ICJ of disputes concerning interpretation or application of the Statute. (The U.S. is a party to the Statute without reservation.)

UN Security Council Options

- o Although the NPT does not suggest an effective remedy for these violations, there does not appear to be any barrier to the parties seeking any relief available under international law, including action by the Security Council.
- The Security Council has authority to act in response to North Korea's actions if it determines that such actions create a threat to or breach of international peace and security.
- The UN Charter sets out the options for Council action, which generally range from recommendations to binding decisions relating to economic or diplomatic sanctions through the use of military force. In addition, the Charter provides for suspension or even expulsion of member states from the UN.
- The Security Council could impose mandatory sanctions on the DPRK under Chapter VII (Article 41) of the UN Charter if it determined that there was a threat to international peace and security. Such a determination might be based upon a cumulative evaluation of DPRK actions indicating that the DPRK is engaging in activities that threaten the peace.
- The Council could consider a range of sanctions. A possible strategy could link sanctions to the issues faced by connecting them to North Korea's nuclear

-5-

program, or it could impose more comprehensive embargoes, or reduce or cut-off air and sea transport and diplomatic relations. (A decision requiring North Korea to comply with the IAEA special inspection request would also be possible.)

- As an alternative to binding sanctions, the Council could also consider imposing voluntary or non-binding sanctions.
- The Security Council's power to make this determination is not limited by whether the DPRK's notice of withdrawal has become effective, nor whether the DPRK is in continuing breach of any legal obligation.
- The Security Council's practice in this area is discussed further in the attached memorandum.

U.S. Sanctions

- o Comprehensive sanctions already exist on virtually all U.S. trade and investment with North Korea, and there are very few areas in which these sanctions can be tightened. There is a general embargo on trade, financial and property transactions.
 - Some licenses are currently granted on a case-by-case basis for humanitarian goods, and some very minor exceptions from the embargo also exist for items such as baggage of persons travelling to North Korea.
- o There are also in effect missile proliferation sanctions, shipping restrictions and sanctions flowing from North Korea's designation as a "terrorist country."
- o Comprehensive restrictions are also in place if bilateral or multilateral assistance for North Korea were contemplated.

Armistice

- o The U.S. should not seek to assert that North Korean actions are evidence of an attempt to violate the 1953 Korean Armistice Agreement.
- o Paragraph 13.d of the Armistice calls on both armies not to introduce into Korea "reinforcing combat aircraft, armored vehicles, weapons, and ammunition," unless they are replacing worn out or destroyed equipment "on the basis of piece-by-piece of the same effectiveness and the same type," but this provision has become inoperative through practice by both armies.

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- The Neutral Nations Supervisory Commission, which is charged under paragraph 13.d with monitoring the movement of such material, is also no longer permitted effectively to carry out this task.
- Moreover, there may be a question whether development of a domestic weapon would be considered "introduction into Korea" under paragraph 13.d.

Attachments

1. Excerpts from NPT ratification SFRC hearings
2. UN Security Council Options Paper

EXCERPTS FROM SFRC NPT HEARING

In Senate hearings on the NPT, the withdrawal provision was discussed as follows:

Senator JAVITS: Now, the technical provision which is article X, I am very interested in because I think that is the real safeguard in this treaty in terms of the national security of the United States - the right to pull out on rather short notice. That says each party shall, exercising its national sovereignty, have the right to withdraw from the treaty if it decides that extraordinary events related to the subject matter of this treaty have jeopardized the supreme interests of its country. That is a completely unilateral decision, is it not?

Secretary ROGERS: That is right.

Senator JAVITS: And not subject to contest?

Secretary ROGERS: That is right.

Hearings on the Treaty on the Nonproliferation of Nuclear Weapons (Part 2), Committee on Foreign Relations, U.S. Senate, at 367 (Feb. 18 and 20, 1969). After further discussion, Secretary Rogers insisted that a decision to withdraw would not be taken lightly and that the terms of the withdrawal provision would have to be met:

Senator JAVITS: And we would endeavor to hold the Soviet Union to the same standard?

Secretary ROGERS: Well, we would --

Senator JAVITS: And it should really be honestly something that they could claim, with at least some color of plausibility, represented a jeopardy to the supreme interests of their country?

Secretary ROGERS: Yes. . . .

Thus, the U.S. view has been that a state's reasons for withdrawal from the NPT can be questioned, if at all, on only the most limited grounds.

UN SECURITY COUNCIL OPTIONS FOR ADDRESSING NORTH KOREA

SUMMARY

The Security Council has authority to act in response to North Korea's actions if it determines that such actions create a threat to or breach of international peace and security. The UN Charter sets out the options for Council action, which generally range from recommendations to binding decisions relating to economic or diplomatic sanctions through the use of military force. In addition, the Charter provides for suspension or even expulsion of member states from the UN.

BACKGROUND

On March 12, 1993, North Korea provided a statement to the Security Council of its intent to withdraw from the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). Article X of the NPT provides that notice of such withdrawal be made to all other Parties to the Treaty and to the Security Council three months in advance. North Korea provided notice of its withdrawal to the United States on April 1, 1993 and we understand that notice also has been given to the U.K. and France. We do not know to what extent North Korea has provided notification to other states party to the NPT.

Article III(1) of the NPT requires non-nuclear weapon states to undertake safeguards in agreement with the IAEA. The NPT safeguards agreement (paragraph 25) between the DPRK and the IAEA provides that it remains in force as long as the DPRK is party to the NPT. Paragraph 19 of the IAEA-DPRK safeguards agreement states that, if the IAEA Board of Governors finds that the Agency is not able to verify that there has been no diversion of nuclear material required to be safeguarded under this Agreement to nuclear weapons or other nuclear explosive devices, the Board may make a report as provided for in article XII.C. of the IAEA Statute. Article XII.C., in turn, provides that the Board of Governors report any noncompliance with a safeguards agreement to the UN Security Council and General Assembly.

On February 25, 1993, the IAEA Board of Governors determined that the DPRK allow access to two sites requested by the IAEA pursuant to its special inspection authority. The DPRK refused to give IAEA inspectors access to these sites. Accordingly, on April 1, 1993, the Board adopted a resolution reporting the DPRK's noncompliance to the UN Security Council and General Assembly, as required by Article XII.C. of the IAEA Statute.

The Security Council adopted a Presidential Statement on April 8, 1993 indicating its concern at the situation and welcoming efforts aimed at resolving the situation, in particular, continued consultations between the IAEA and the DPRK. Following is a discussion of the range of possible Security Council options in response to the recent actions of the DPRK and the IAEA.

ANALYSIS

While the Security Council could take action before North Korea's withdrawal from the NPT becomes effective, it need not do so. Assuming that the Council is proceeding as authorized under the UN Charter, we do not consider the DPRK's notification of withdrawal from the NPT to be a violation of the Treaty or per se a threat to international peace and security. Rather, we would look to its non-compliance with its obligations under the safeguards agreement with the IAEA (which noncompliance remains a fact even after withdrawal from the treaty), in combination with several other factors present in the overall situation, to provide the basis for Security Council action.

I. Settlement by peaceful means.

First and foremost, the Security Council, where possible, seeks solutions to disputes by peaceful means, for example, through negotiations or mediation. The Security Council may investigate the situation and make recommendations. Recommendations could address any matter.

II. Sanctions.

If the Council determines that a threat to or breach of the peace exists, it may under Chapter VII recommend or require member states to impose sanctions. Recommendations are not binding on states. Article 39 of the UN Charter provides that:

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.

Article 41 of the UN Charter provides that:

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 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.

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1. Mandatory Sanctions

The Security Council could impose mandatory sanctions on the DPRK under Chapter VII (Article 41) of the UN Charter if it determined that there was a threat to international peace and security. Such a determination might be based upon a cumulative evaluation of DPRK actions that indicate that the DPRK is engaging in activities that threaten the peace, including: violations of the NPT; noncompliance with its NPT safeguards agreement with the IAEA; continuation of a suspected clandestine nuclear weapons program, particularly in view of the NPT and safeguards violations; and the overall situation in the region, taking into account the history of hostilities between the North and the South and the current legal state of war between the two.

The Security Council has imposed mandatory sanctions in connection with the situations in Rhodesia, South Africa, Liberia, Mozambique, Iraq, Libya, Somalia, and the former Republic of Yugoslavia. While the finding of a threat to international peace and security has varied in connection with the circumstances of each of these situations, in both the South Africa and Iraq situations the Council has addressed nuclear weapons concerns, although in each instance within a much broader context.

In 1977, the Security Council, acting under Chapter VII, specifically determined that South Africa's actions, including its military build-up and persistent acts of aggression against neighboring states constituted a threat to international peace and security. It imposed an embargo on arms and related materiel and in the process, specifically prohibited states from any cooperation with South Africa in the manufacture and development of nuclear weapons after noting its grave concern that South Africa was at the threshold of producing nuclear weapons (Resolution 418, November 4, 1977).

In 1991, the Security Council, again acting under Chapter VII, condemned Iraq's non-compliance with its obligations under Resolution 687 (the cease-fire resolution) relating to the destruction of Iraq's weapons of mass destruction. The Council also condemned Iraq's non-compliance with its safeguards agreement with the IAEA as a violation of its obligations under the NPT. It demanded that Iraq, among other requirements, provide full disclosure of its weapons programs, allow for inspections by the IAEA and the Special Commission, and halt all nuclear activities, including those relating to the peaceful uses of nuclear energy, until the Council determined that it was in full compliance with that resolution, the cease-fire resolution and its safeguards agreement with the IAEA (Resolution 707, August 15, 1991).

- 4 -

Were the Security Council to determine that North Korea's actions constitute a threat to international peace and security, it could consider a range of sanctions. A possible strategy could link sanctions to the issues faced by connecting them to North Korea's nuclear program. For example, sanctions could be formulated to prohibit the supply of any materials or assistance having potential application to nuclear weapons as was done in regard to South Africa or it could bar all cooperation on nuclear matters as was done in regard to Iraq. The Council could also impose a more comprehensive embargo, for example, against the import or export of arms or related materials, or target key imports or exports; or bar all imports or exports (with the possible exception of food, medicine and humanitarian goods).

The Council could also take measures cutting off or limiting air and sea transport, as well as reducing or cutting off diplomatic relations. For example, in the Libya situation, the Council, in addition to imposing an arms embargo, barred air travel to and from Libya, banned the export of all aircraft and aircraft components to Libya, barred all services, new insurance contracts, and payment of claims on existing contracts for Libyan aircraft, and limited diplomatic relations in response to Libya's refusal to comply with Council demands with respect to the bringing to justice those responsible for the 1988 and 1989 bombings of U.S. and French airliners.

2. Voluntary Sanctions

As an alternative to mandatory sanctions, the Security Council could also consider voluntary or non-binding sanctions. Again, the Council could consider a range of complete or partial sanctions as noted above. As would be expected in the case of imposing voluntary sanctions, they would be effective only if key states were prepared to carry them out.

III. Use of Force.

If the Council deems appropriate, it may authorize the use of the force necessary to restore international peace and security (e.g., Iraq/Kuwait) or determine that UN itself will use such measures (e.g., Somalia).

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IV. Suspension/Expulsion.

The UN Charter provides that the Security Council may recommend that a member state against which preventive or enforcement action has been taken be suspended from the exercise of the rights and privileges of membership by the General Assembly (art. 5), or it may recommend to the General Assembly that a member state be expelled from the UN for persistently violating UN Charter principles (art. 6). Alternatively, the Security Council acting with the General Assembly, might simply suspend North Korea's right to participate in the work of the General Assembly, as was recently done in regard to the Federal Republic of Yugoslavia.

ted: L/PM:AFPerez/HHighsmith; L/UNA:BRashkow/KNSkipper;
L/EAP:JKovar
ESN488:4/16/93:647-1043
red: L - JSelby
PM/PNW - GSamore
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
004a. memo	Barbara Starr to William Itoh re Legal Memoranda on North Korera (1 page)	04/13/2993	P1/b(1)

COLLECTION:

Clinton Presidential Records
National Security Council
Mary Derosa (Legal Advisor)
OA/Box Number: 3500

FOLDER TITLE:

North Korea [6]

2009-0528-F
kc1449

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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RR. Document will be reviewed upon request.

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- b(1) National security classified information [(b)(1) of the FOIA]
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- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
004b. memo	Mary Hoinkes to the Deputies Group re Implications (9 pages)	04/13/2993	P1/b(1)

COLLECTION:

Clinton Presidential Records
National Security Council
Mary Derosa (Legal Advisor)
OA/Box Number: 3500

FOLDER TITLE:

North Korea [6]

2009-0528-F
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RESTRICTION CODES

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BRIEFING MEMORANDUM

UNITED STATES ARMS CONTROL
AND DISARMAMENT AGENCY



MAR 29 P2:05

DIRECTOR

March 29, 1993

MEMORANDUM

TO: The Acting Director

FROM: GC - Mary Elizabeth Hoinkes, Acting *MEH*

SUBJECT: Whether a Party's Right to Withdraw from the Treaty on Non-Proliferation of Nuclear Weapons is Within its Sole and Absolute Discretion

ISSUE: Can a case be made that a party's right to withdraw from the Treaty on Non-Proliferation of Nuclear Weapons (the "NPT") is not within its sole and absolute discretion?

INTRODUCTION: Some legal opinion holds that a party's right to withdraw from the NPT is absolute or virtually so--that only the withdrawing party may make the necessary decision required by Article X, 1. of the NPT and that once such a decision is made, all that remains is the procedural question of whether the notice of withdrawal was proper in form and correctly delivered. Nonetheless, a case can be made that there is at least an implicit right held by the UN Security Council and/or the parties to review the stated purposes for the withdrawal, and that any withdrawal--as with almost every action taken under a treaty--must meet a basic test of good faith in order to be effective.

APPLICABLE TREATY PROVISION:

ARTICLE X, PARAGRAPH 1.

Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.

ANALYSIS: That the right to withdraw is not within the sole and absolute discretion of the withdrawing party is suggested by the very complexity of Article X, 1. Having placed conditions on the right to withdraw, the Treaty requires their fulfillment before withdrawal can occur. If ease of withdrawal (and minimal scrutiny by the other parties) was being sought, Article X, 1. would read roughly as follows: "if a party decides that extraordinary events related to the subject matter of the treaty have jeopardized its supreme interests, it shall, as an exercise of its national sovereignty, have the right to withdraw by giving three months prior notice to all other parties." This is in fact a paraphrase of the withdrawal provision of the Limited Test Ban Treaty (the "LTBT"), which was concluded some five years before the NPT.

The drafters of the NPT could have used the LTBT language, but did not. A fair conclusion would be that their intent was to require something more than that required by the LTBT. What was added, of course, is the requirement that the withdrawal notice specify the extraordinary events the withdrawing party "regards" as having jeopardized its supreme interests. Unless this was done for purely informational or cosmetic purposes, it seems fair to conclude that something more is implied for NPT withdrawal. Article 31 of the 1969 Vienna Convention on the Law of Treaties requires that a treaty "be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose" (emphasis added). Thus it seems safe to conclude that the enhanced notice provision of the NPT was put there for a reason, and that it ought not be glossed over as mere decoration.

The precise wording of Article X, 1. is critical, particularly the relationship of the word "decides" to the rest of the paragraph. The decision that is clearly a subjective one, within the sole prerogative of the withdrawing party, is not whether "extraordinary events" have occurred (i.e. whether a particular fact pattern constitutes "extraordinary events"). Instead, the decision to be made by the withdrawing party is whether extraordinary events have jeopardized its supreme interests. In other words, the withdrawing party may indeed have sole and absolute discretion as to whether its supreme interests are being jeopardized, but the withdrawing party does not, alone, make the decision that any given fact pattern constitutes "extraordinary events related to the subject matter of [the] Treaty." That this is so under the NPT seems much more likely because of the additional requirement in NPT that the withdrawing party identify the extraordinary events before the eyes of the world. Requiring such publicizing of the purported extraordinary events almost seems to beg review of some kind by the other parties--if no review was intended, there would seemingly be little if any need for the withdrawing party to give any explanation, except, perhaps, to satisfy the curiosity of future

academics.

Also of considerable significance is that the notice identifying the purported extraordinary events goes not only to the other parties but to the UN Security Council as well. If there were no intended purpose in informing this body, presumably the requirement would not have been added. In this case, a logical explanation of such purpose results from the relationship between the parties and the International Atomic Energy Agency (the "IAEA"), the IAEA, of course, being absolutely integral to the operation of the NPT. The IAEA has a close relationship with the United Nations. Assuming an allegation of misconduct by the IAEA proffered by a treaty party as "extraordinary events" justifying withdrawal, who better than the UN Security Council to bring the IAEA to task, if such is appropriate, and eliminate the "extraordinary events?"

Thus, there would seem to be a dual purpose behind the enhanced withdrawal provisions for the NPT: first, to enable review of whether particular facts do indeed constitute "extraordinary events related to the subject matter of [the] treaty," and second, to enable the UN Security Council, if indeed there are such events, to attempt to eliminate them and thereby remove any need for an aggrieved party to withdraw from the treaty. Viewed in this context, the additional NPT withdrawal language seems highly meaningful.

Another aspect of "extraordinary events" is based on the doctrine of pacta sunt servanda, set forth in Article 26 of the 1969 Vienna Convention on the Law of Treaties: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." This would seem to suggest that even if the withdrawing party were the sole determiner of whether a particular fact pattern constitutes "extraordinary events," such a determination, to have validity, must be made in good faith.

For example, what if a party attempted to withdraw from the NPT by citing the occurrence of a lunar eclipse, or a loss by its national soccer team, or even something entirely non-factual, as being "extraordinary events, related to the subject matter of the Treaty [that] have jeopardized [its] supreme interests"? To be sure, there is much subjectivity involved in all of the Article X, 1. process, but surely there must be some things--some distortions, trivialities, or outright frauds--that would not constitute "extraordinary events" determined on the basis of good faith. Acknowledgment of this leads compellingly to the conclusion that the other NPT parties have at least an implied right to review whether a cited fact pattern meets a minimal good faith test for designation as "extraordinary events." Such a review would presumably be absolutely minimal; the good faith test ought to be easy to meet; but there can and indeed must be at least some right on the part of the other parties to review if

not the question of whether "extraordinary events" jeopardize a state's supreme interests, then surely the question of whether a particular fact pattern is in fact "extraordinary events related to the subject matter of [the] Treaty."

North Korea's withdrawal notice to the UN Security Council, in pertinent part, reads as follows:

The United States together with south Korea has resumed the "Team Spirit" joint military exercises, a nuclear war rehearsal, threatening the DPRK, and instigated some officials of the IAEA Secretariat and certain member States to adopt an unjust "resolution" at the meeting of the IAEA Board of Governors on February 26, 1993 demanding us to open our military sites that have no relevance at all to the nuclear activities, in violation of the IAEA Statute, the Safeguards Agreement and the agreement the IAEA had reached with the DPRK.
(verbatim rendering of North Korean original)

Passing over the question of whether any of the foregoing jeopardizes the supreme interests of North Korea, are any of the foregoing "extraordinary events related to the subject matter of [the] Treaty?" Assuming, arguendo, that good faith is the only test by which the other parties could attempt to review the North Korea decision, even then there would seem to be serious deficiencies. As for the "Team Spirit" joint military exercises, is there any evidence whatsoever that they are "a nuclear war rehearsal threatening [North Korea]" or that they are related to the subject matter--nuclear non-proliferation--of the NPT? If not, good faith would seem to be lacking.

Similarly, an IAEA inspection request to North Korea is part of the very substance of the NPT, part of the bargain and covenant made by that state when it joined the regime. North Korea can hardly cite performance under the treaty as being in any way "extraordinary;" good faith is lacking. Absent good faith, there would seem to be serious doubt that the ("factual") events cited by North Korea are "extraordinary events" for purposes of Article XI, 1. If they are not such events, then North Korea's attempt to withdraw is invalid.

CONCLUSION: A case can be made that a party's right to withdraw from the NPT is not within its sole and absolute discretion. If such right were meant to be absolute, or virtually so, the NPT could have used the language of the LTBT. Instead, by requiring there to be a recital by the withdrawing party of "extraordinary events related to the subject matter of [the] Treaty," the NPT impliedly grants the other parties some right of review. Even if the decision as to whether "extraordinary events" jeopardize a party's supreme interests is within the sole discretion of that state, the language of Art. X, 1. is far less clear that the

withdrawing party has the sole and absolute say as to whether any given factual pattern is in fact "extraordinary events." The close relationship between the UN Security Council, a designated recipient of the withdrawal notice, and the IAEA further suggests intent by the drafters that there be at least some review by the other parties of part or all of the withdrawal decision. The good faith standard, generally regarded as a basic part of customary international law and practice, would not be an unreasonable basis for such review.

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005a. memo	Gary Samore to SSKWG re LWR Supply Agreement (1 page)	12/12/1994	P1/b(1)
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COLLECTION:

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National Security Council
Mary Derosa (Legal Advisor)
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2009-0528-F
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P1 National Security Classified Information [(a)(1) of the PRA]
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RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
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005b. draft	paper re terms and conditions (7 pages)	12/12/1994	P1/b(1)

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Clinton Presidential Records
National Security Council
Mary Derosa (Legal Advisor)
OA/Box Number: 3500

FOLDER TITLE:

North Korea [6]

2009-0528-F
kc1449

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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Agreed Statement
Between The United States of America and
The Democratic Peoples' Republic of Korea

Geneva, August 12, 1994

The delegations of the United States of America (U.S.) and the Democratic People's Republic of Korea (DPRK) met in Geneva from August 5-12, 1994, to resume the third round of talks.

Both sides reaffirmed the principles of the June 11, 1993, U.S.-DPRK joint statement and reached agreement that the following elements should be part of a final resolution of the nuclear issue:

(1) The DPRK is prepared to replace its graphite-moderated reactors and related facilities with light water reactor (LWR) power plants, and the U.S. is prepared to make arrangements for the provision of LWRs of approximately 2,000 MW(e) to the DPRK as early as possible and to make arrangements for interim energy alternatives to the DPRK's graphite-moderated reactors. Upon receipt of U.S. assurances for the provision of LWRs and for arrangements for interim energy alternatives, the DPRK will freeze construction of the 50 MW(e) and 200 MW(e) reactors, forego reprocessing, and seal the Radiochemical Laboratory, to be monitored by the IAEA.

(2) The U.S. and the DPRK are prepared to establish diplomatic representation in each other's capitals and to reduce barriers to trade and investment, as a move toward full normalization of political and economic relations.

(3) To help achieve peace and security on a nuclear-free Korean Peninsula, the U.S. is prepared to provide the DPRK with assurances against the threat or use of nuclear weapons by the U.S., and the DPRK remains prepared to implement the North-South Joint Declaration on the Denuclearization of the Korean Peninsula.

(4) The DPRK is prepared to remain a party to the Treaty on the Non-Proliferation of Nuclear Weapons and to allow implementation of its safeguards agreement under the Treaty.

Important issues raised during the talks remain to be resolved. Both sides agree that expert-level discussions are necessary to advance the replacement of the DPRK's graphite-moderated program with LWR technology, the safe storage and disposition of the spent fuel, provision of alternative energy, and the establishment of liaison offices. Accordingly, expert-level talks will be held in the U.S. and

DPRK or elsewhere as agreed. The DPRK and U.S. agreed to recess their talks and resume in Geneva on September 23, 1994.

In the meantime, the U.S. will pursue arrangements necessary to provide assurances for the LWR project to the DPRK as part of a final resolution of the nuclear issue, and the DPRK will observe the freeze on nuclear activities and maintain the continuity of safeguards, as agreed in the June 20-22, 1994, exchange of messages between Assistant Secretary of State Robert L. Gallucci and First Vice Minister of Foreign Affairs Kang Sok Ju.

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006. draft	statement, USA - DPRK joint communique (4 pages)	00/00/1994	P1/b(1)
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Clinton Presidential Records
National Security Council
Mary Derosa (Legal Advisor)
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