

FOIA MARKER

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North Korea, 1993-95 [9]

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Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. cable	re draft resolution (4 pages)	05/04/1993	P1/b(1)
002. paper	re US-North Korea dialogue (6 pages)	00/00/1993	P1/b(1)
003. paper	re draft resolution (2 pages)	04/29/1993	P1/b(1)
004a. memo	Mary Elizabeth Hoinkes to Mr Mcneill and Mr Matheson re draft legal memorandum (1 page)	04/13/1993	P1/b(1)
004b. draft	legal memo, Mary Elizabeth Hoinkes to the Deputies Group re implications of North Korean nuclear issue (9 pages)	04/13/1993	P1/b(1)
004c. memo	Mary Elizabeth Hoinkes to the Acting Director re withdrawal of party from NPT (5 pages)	03/29/1993	P1/b(1)
005. paper	re NPT withdrawal (2 pages)	00/00/1993	P1/b(1)
006. cable	re US - North Korea talks (3 pages)	11/13/1993	P1/b(1)
007. cable	re New York channel meeting (4 pages)	10/27/1993	P1/b(1)
008. cable	re New York channel meeting (4 pages)	10/20/1993	P1/b(1)
009. cable	re North Korea communication (2 pages)	11/03/1993	P1/b(1)
010. cable	re IAEA response (2 pages)	11/06/1993	P1/b(1)

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FOLDER TITLE:

North Korea, 1993-95 [9]

2009-0528-F

kc1540

RESTRICTION CODES

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

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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011. list	re IAEA inspection (5 pages)	11/15/1993	P1/b(1)
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004b. draft	legal memo, Mary Elizabeth Hoinkes to the Deputies Group re implications of North Korean nuclear issue (9 pages)	04/13/1993	P1/b(1)

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004c. memo	Mary Elizabeth Hoinkes to the Acting Director re withdrawal of party from NPT (5 pages)	03/29/1993	P1/b(1)

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Copy to Aoki*

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CONTENTS / COMMENTS

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).

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- 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.

-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.
- 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.

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- 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

Drafted: L/PM:AFPerez/HHighsmith;L/UNA:BRashkow/KNSkipper;
L/EAP:JKovar (647-1043)

Cleared: L - JSelby
PM - G. Samore
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IO/T - J.Campbell
EAP/K - Ken Quinones
P - E. Revere
ACDA/GC - M.E. Hoinkes
NSC - Dan Poneman
NSC/GC:AKreczko
DOD - EHaddad
JCS - LtCol Guy Roberts

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:

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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.

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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).

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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.

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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).

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.

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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:

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 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).

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- 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;
 - many agreements, including for example GATT, 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 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.

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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.
- 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.

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- 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 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

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?

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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.

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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.

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- 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).

- 5 -

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.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
006. cable	re US - North Korea talks (3 pages)	11/13/1993	P1/b(1)

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FOLDER TITLE:

North Korea, 1993-95 [9]

2009-0528-F
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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]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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007. cable	re New York channel meeting (4 pages)	10/27/1993	P1/b(1)

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FOLDER TITLE:

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
008. cable	re New York channel meeting (4 pages)	10/20/1993	P1/b(1)

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RESTRICTION CODES

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

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
009. cable	re North Korea communication (2 pages)	11/03/1993	P1/b(1)

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
010. cable	re IAEA response (2 pages)	11/06/1993	P1/b(1)

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011. list	re IAEA inspection (5 pages)	11/15/1993	P1/b(1)

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