

Analysis

**THE RIGHT TO WITHDRAW
FROM THE NUCLEAR
NON-PROLIFERATION TREATY
(NPT): THE VIEWS
OF TWO NPT NEGOTIATORS**

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Nuclear Non-Proliferation Treaty Art.X.1:
“Each Party shall in exercising its national
sovereignty have the right to withdraw
from the Treaty if it decides that extraor-
dinary 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 state-
ment of the extraordinary events it regards
as having jeopardized its supreme interests.”

This quotation is the “withdrawal clause”
from the NPT. It shows that the “right to
withdraw” from the NPT is *qualified*. An
NPT party may not withdraw unless “it
decides that extraordinary events, related to
the subject matter” of the treaty “have jeop-
ardized the supreme interests of its country.”
Even then, it is required by the treaty,
before withdrawing, to give three-months
notice to all the more than 180 other nations
belonging to the treaty “and to the United
Nations Security Council.” The notice must
include “a statement of the extraordinary
events it regards as having jeopardized its
supreme interests.” This clearly suggests that
the adequacy of the withdrawing party’s
stated reasons for withdrawal may be judged
by the Security Council as well as by the
other parties to the NPT.

What can the NPT parties do if they
regard the reasons as inadequate? Suppose
some NPT parties decide that the “extraor-
dinary events” specified by the withdraw-
ing party do not relate to nuclear non-pro-

liferation as required by the treaty lan-
guage, or have not, in fact, “jeopardized”
the withdrawing party’s “supreme interests.”
If they so conclude, what could they do?
If they petitioned the Security Council to
take action to prevent or condition the
withdrawal, what could the Council do?

This article will look at why this language
qualifying the “right to withdraw” from the
NPT was included in the treaty, and, how
it was intended to limit or condition that
right. Does the history of the withdrawal
clause negotiations suggest that the parties
wanted to inhibit withdrawals by requiring
that a statement of reasons for withdrawal
by the withdrawing party be sent to the
Security Council as well as to the other
NPT parties? What powers does the with-
drawal clause give to the NPT parties and
the Security Council to deal with the
withdrawal of North Korea, and perhaps,
one day, Iran or some other party?

THE RIGHT TO WITHDRAW

*Do NPT parties like North Korea have a
right to withdraw from the NPT for any
reason? What does the history of the with-
drawal clause suggest?*

The Vienna Convention on the Law of
Treaties says that that a party may with-
draw from a treaty “in conformity with the
provisions of the treaty...” or with the con-
sent of all the parties.¹ The second of these
two justifications for withdrawal is clearly
not applicable if some parties object, and
some did object to North Korea’s with-
drawal. The first of these two justifications
requires compliance with the NPT’s with-
drawal provisions. (At the 2005 NPT
Review Conference, the United States took
the position that NPT parties had a “sov-
ereign right” to withdraw, apparently for
any reason.² This is not consistent with the
position the United States took in negoti-
ating the NPT or with the generally
accepted international law of treaties, quot-
ed at the beginning of this paragraph.)

Did North Korea’s withdrawal satisfy the
NPT withdrawal clause? The reasons for
withdrawal that North Korea gave were
two: *first*, a South Korean-U.S. military
exercise of 1993 that North Korea said was
threatening, and, *second*, the lack of objec-
tivity of IAEA inspectors who, in 1993, had
been given authority by the IAEA to con-
duct a special inspection in North Korea
outside the boundary of the research reac-

tor and small reprocessing plant that North Korea had declared open for inspection a few years earlier.³ These two reasons were given in its 1993 notice. This notice was itself withdrawn a day before the withdrawal would have become effective in 1993 because three months—less one day—had gone by since the notice of withdrawal was given. In 2003, however, North Korea reinstated the 1993 notice taking the position that the only notice required in 2003 was one day because all but one day of the NPT three-month period had gone by in 1993 before North Korea retracted its notice of withdrawal that year. Given North Korea's view that it was simply reinstating its 1993 notice of withdrawal, the reasons given in North Korea's 1993 notice to justify withdrawal must be taken as North Korea's reasons for withdrawal in 2003.⁴

In 1993, North Korea had refused to permit IAEA inspectors to inspect beyond the boundaries of the site that it had declared open for inspection. At this site were a nuclear reactor, a plutonium-separation plant and some other nuclear facilities. The inspectors concluded from evidence collected at this site that North Korea had probably separated more plutonium than it had reported to the IAEA. The inspectors wanted to inspect other sites nearby in order to look for other evidence relating to plutonium separation. North Korea refused.⁵ After the IAEA Board of Governors's decision to support the inspectors request to inspect additional sites, North Korea gave its 1993 notice of withdrawal to the other NPT parties and to the UN Security Council. It did not propose to permit any IAEA inspections during the three-month withdrawal period that followed its 1993 notice.

The reasons for withdrawal cited by North Korea in 1993 were two: a U.S.-South Korean military exercise in South Korea called "Team Spirit" that North Korea said was threatening to its security, and the "lack of impartiality" on the part of the IAEA inspectors who asked in 1993 to inspect the new sites that North Korea then refused to let them inspect. Were these reasons "extraordinary events related to the subject matter" of the NPT that "jeopardized the supreme interests" of North Korea, as the NPT withdrawal clause requires? How did one of many U.S.-South Korean military exercises in South Korea and the alleged "lack of impartiality" of the IAEA inspec-

tors "jeopardize" North Korea's "supreme interests"? If North Korea's claim had any merit in 1993, did it still have merit in 2003? In North Korea's 2003 letter to NPT parties, it complained of President Bush's inclusion of it within his "axis of evil" category and it maintained that the United States was targeting it for a preemptive strike.⁶ But, since it did not provide a new three-month withdrawal period, it had to have been relying on its 1993 notice of withdrawal as justification, and that notice did not contain these reasons.

To answer the questions stated above, let us look at the history of the NPT withdrawal clause. The language came, with two important modifications, from the text that the Soviet Union, the United States and the United Kingdom had agreed upon in Moscow when they negotiated the Partial Test Ban Treaty (PTBT) in 1963. The original U.K.-U.S. PTBT draft brought to Moscow by these two delegations had a much more detailed withdrawal clause than what was finally agreed with the Soviet Union. The U.K.-U.S. draft listed several specific reasons that could justify withdrawal, including: "(a) that any other Party has not fulfilled its obligations under this Treaty" or "(b) that nuclear explosions have been conducted by a State not a Party to this Treaty under circumstances which might jeopardize the determining [withdrawing] Party's national security..."⁷ Thus, the American and British delegations to the Moscow negotiations felt that the their countries needed a right to withdraw if another PTBT party [the Soviet Union?] violated its treaty obligations by testing, or if a "State not a party [China?]" conducted tests that might "jeopardize" the "national security" of the withdrawing party.

For the U. S. negotiators, a right to withdraw from the PTBT was important to gaining the consent of the U.S. Senate for ratification in order to bring the PTBT into force in 1963. Some Senators might insist that the United States have a right to withdraw to resume U.S. above-ground testing if , for example, China soon began testing above ground (as it did in 1964). Such testing would be prohibited by the PTBT, but China was not expected to join the treaty.⁸

In the Moscow negotiations, Soviet Foreign Minister Gromyko took the position that any country had a right to avoid treaty obligations that became contrary to its supreme national interests.⁹ Gromyko offered a for-

mulation about withdrawal based not on any violation of the treaty but on the right of a party to withdraw from it in exercising the party's national sovereignty. Gromyko wanted to formulate the right of withdrawal in a more general way. The Soviet Union had no objection to inclusion in the treaty of a reference to events that might compel a party to decide to withdraw from the treaty in exercising its national sovereignty due to the existence of a threat to its supreme interests. However, Gromyko sought to avoid any formulation that might contain a hint to China that its future actions were considered. Therefore, the compromise formula about "extraordinary events, related to the subject matter of this Treaty" appeared in the text.¹⁰

The compromise was less detailed than the U.K.-U.S. draft, but similar in that it required a statement of reasons justifying withdrawal. The compromise limited the reasons for which withdrawal would be permitted to "extraordinary events related to the subject matter" of the PTBT. Its subject matter was, of course, above-ground nuclear testing. It did not contain U.K.-U.S. proposed language saying that a party desiring to withdraw would be able to request the convening of a conference of all the parties to "assess the significance of the situation."¹¹ It did require, as the U.K.-U.S. draft had, that a party intending to withdraw "give notice of such withdrawal to all other parties to the Treaty three months in advance."¹²

Later, this PTBT language became the basis for the NPT withdrawal clause. The PTBT language was revised in two important respects before it was presented to the other countries represented at Geneva Disarmament Committee by the American and Soviet delegations in 1968. Like the PTBT (which many of these countries had already joined), the NPT draft said that the "right to withdraw" from the NPT could only be exercised if the withdrawing state decided that "extraordinary events related to the subject matter of the Treaty" had "jeopardized the supreme interests of its country." Unlike the PTBT, the notice of withdrawal had to be sent to the Security Council as well as to the other parties, and it had to describe the "extraordinary events" that the withdrawing party thought had "jeopardized its supreme interests." Thus, the draft provided a fairly high standard for withdrawal ("extraordinary events related to

[nuclear nonproliferation] ... jeopardized supreme interests"). Most importantly, it required notice to the Security Council in addition to the NPT parties (because the Security Council had authority under the UN Charter to deal with threats to the peace such as a withdrawal from the NPT might cause). In addition, it required a statement of the reasons to be given to the Council and the other parties. The reasons could then be judged against the standard of "extraordinary events" that "jeopardized its supreme interests."

At the Geneva Disarmament Committee NPT negotiations, this American-Soviet withdrawal language was generally accepted by most delegations. For example, Egypt (then the United Arab Republic) agreed that withdrawal should "not be a matter of absolute discretionary power [of the withdrawing party] but should depend on non-observance of the treaty arising from its non-application or violation by a contracting party, or from the fact that a third State is supplying nuclear weapons to some other State."¹³ Many seemed to agree with Egypt's support for the draft. Brazil, however, wanted to make it *easier* to withdraw by adding more reasons that would justify withdrawal¹⁴. However, it got little support. These negotiations and debates produced no change in the withdrawal language that had been tentatively agreed between the Soviet Union and the United States.

This was the language applicable to North Korea's withdrawal. Did it permit withdrawal for the reasons North Korea gave? North Korea's 1993 reasons for withdrawing from the NPT were a U.S.-South Korean military exercise in South Korea, and the lack of objectivity, in North Korea's view, of the IAEA inspectors who sought a special inspection outside the perimeter of its regularly-inspected nuclear reactor and plutonium separation facility at Yongbyon.¹⁵ North Korea's reasons were hardly "extraordinary events related to the subject matter" of the NPT even in 1993, much less in 2003 when North Korea announced that its 1993 notice of withdrawal, which had itself been ineffective for ten years, would be effective again almost immediately. The 1993 notice of withdrawal had been withdrawn by North Korea a day before the three-month notice period expired. In 2003, North Korea gave notice of withdrawal to be effective in one day, a notice which seemed to reinstate its 1993

notice because it was to be effective in the one day left of the three-month notice period for the 1993 notice.

In a 2003 press statement, North Korea announced “an automatic and immediate effectuation of its withdrawal from the NPT” (effective on the next day). Withdrawal, the press release said, was justified “[u]nder the grave situation where our state’s supreme interests are most seriously threatened.”¹⁶ This quoted conclusion was, of course, based upon the withdrawal clause language. On the same day, North Korea sent a notice to the UN Security Council saying that its withdrawal was effective immediately for these reasons. In North Korea’s view, by its 2003 announcement and a one-day notice period, it had fulfilled the NPT’s three-month notice requirement because it was relying on the 89 days that had gone by after the 1993 notice was given before North Korea announced that the 1993 notice was no longer in effect.

There were reasons in 2003 to challenge whether North Korea could complete a 1993 three-month notice of withdrawal in 2003 with one day’s notice. But many more than three months have gone by since the 2003 North Korean press release and the new notice of withdrawal.¹⁷ Let us turn then to the substantive adequacy of North Korea’s reasons for withdrawal.

First, the 1993 U.S. military exercises with South Korean forces in South Korea that North Korea’s 1993 notice gave as a reason for withdrawal were not “extraordinary” events in 1993 or in 2003. Nor did they appear to relate to the “subject matter” of the NPT, preventing nuclear proliferation. Military exercises had happened in South Korea many times before and after 1993 without causing North Korea’s withdrawal. They did not involve nuclear weapons or relate to nuclear nonproliferation, as required by the NPT’s withdrawal clause. Indeed, U.S. nuclear weapons that once were deployed in South Korea had been withdrawn from that country in 1991. Moreover, a military exercise in 1993 could hardly justify North Korea’s withdrawal in 2003. Thus the exercises did not present a nuclear threat in 1993 or 2003.

Second, the “lack of impartiality” of the IAEA inspectors alleged by North Korea, even if true, did not seem, in 1993 when North Korea claimed the inspectors lacked impartiality, to relate to the “subject mat-

ter” of the NPT. Thus, if the Security Council had taken jurisdiction and made a judgment resolving the dispute in 1993 or 2003, it probably would not have concluded that North Korea had adequate justification for withdrawal based on its notice of withdrawal’s contention that the IAEA inspectors were biased in 1993.

Third, North Korea’s 2003 claim that its withdrawal was justified “[u]nder the grave situation where our state’s supreme interests are most seriously threatened” was inadequate in 2003 to justify withdrawal (even in 90 days rather than one).¹⁸

Why did the Security Council not take action against North Korea’s withdrawal in 1993 or 2003?

In 1993, China could not be persuaded to agree with the other P-5 permanent, veto-holding members of the UN Security Council that the Council should take action to *compel* North Korea to stay within the NPT, at least for the time being while the controversy was being discussed in capitals and in the Security Council. All that was agreed was that the Council would *call upon* North Korea to permit IAEA inspections. North Korea refused to accept this call.¹⁹ The Council took no further action after North Korea refused.

In 1993, after the Security Council failed to act, U.S. Secretary of Defense William Perry and his assistants presented to President Clinton a justification for the use of force to restrain North Korea from acquiring nuclear weapons. During the White House discussion, Clinton received a call from former President Carter, then in North Korea. Carter said that he was sure North Korea would negotiate and that it would probably take back its NPT withdrawal notice. Carter had been talking to North Korea’s then supreme leader, Kim Il Sung. Clinton asked Carter to explore the possibilities with Kim Il Sung and then, based on Carter’s discussions, decided not to use force against North Korea, at least for the time being. Negotiations followed, and, as we have seen, North Korea pulled back its 1993 NPT withdrawal notice just before the end of the three-month notice period.²⁰ The result of the negotiations was the Agreed Framework of 1994 between North Korea and the United States. This restrained North Korea’s plutonium production for weapons, but apparently did not prevent what now appear

to be hidden efforts to enrich uranium, perhaps also to make weapons.²¹

Beginning in 2002, secret negotiations with North Korea by the United States joined by North Korea's neighbors (China, Japan, Russia and South Korea) seemed to produce little beyond North Korea's apparent admission of its uranium enrichment activities.²² In 2003, as we have seen, North Korea renewed its notice of withdrawal from the NPT. Because of China's and Russia's insistence upon negotiations with North Korea rather than the issuance of a Security Council order to North Korea, and because of China's likely veto of an order to North Korea, the Council did not take action to restrain North Korea.²³ What should the Council's role be in a case where all five permanent members of the Council (the P-5) agree that withdrawal might threaten international peace and security, as many believed was true of North Korea's withdrawal in 2003? What is the power of the Security Council in such a case?

Generally, for *bilateral* treaties without any clause on withdrawal, international law permits withdrawal based on the circumstances existing between the two parties. On the other hand, modern *multilateral* treaties (where withdrawal of one party may affect two or more other parties) often contain a withdrawal clause, as the NPT does. The right of withdrawal then depends upon what the agreement says, including what it says about the rights of all the parties.²⁴ As we have seen, the NPT gives a right to withdraw to a party if that party "decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country." Who besides the withdrawing party may then judge if withdrawal is permitted? The NPT says that the withdrawing party must give three months notice of its intention to withdraw to all the other NPT parties "and to the United Nations Security Council..." including a statement of the "extraordinary events" described above. The PTBT did not require notice to the Security Council, only to the other parties. This important addition seems to have been intended to give the Security Council the opportunity to deal with the withdrawal if withdrawal would constitute a "threat to the peace" within the meaning of the UN Charter provisions giving the Security Council wide authority to deal with such threats.²⁵

North Korea's stated reasons for withdrawal apparently seemed inadequate to the permanent members of the Council except perhaps for China and maybe Russia in 1993 and 2003, although the discussions among the P-5 have not been made public. In 1993, China apparently wanted to stimulate negotiations by the United States with North Korea and refused to agree with the United States not to veto a Security Council resolution against North Korea if one was presented to the Security Council. (Thereafter, as we have seen, negotiations did result, ultimately producing the U.S.-North Korea Agreed Framework of 1994. After negotiations had begun in 1993, North Korea prevented its own withdrawal from becoming effective by pulling back its earlier withdrawal notice – on the last day of the three-month notice period.) In 2003, negotiations were going on periodically but, as North Korea apparently saw it, they were not producing enough of value for it to stay within the NPT. So, as we have seen, in 2003, it announced that its 1993 suspension of its withdrawal was now ending, and it did not give another three-month notice. However, North Korea's stated reasons for withdrawal were inadequate to satisfy the standards of the NPT withdrawal clause in 1993 or 2003.

*What is the appropriate role for the Security Council in a case of withdrawal, assuming the P-5 can agree and at least four other Council members do as well?*²⁶

As we have seen, the Soviet Union and the United States followed *some* of the PTBT language in negotiating their proposal for the NPT withdrawal clause. But they added language that showed a change of meaning. One addition was language adding the Security Council as a required recipient of the notice of withdrawal. No reference to the Security Council had appeared in the PTBT withdrawal clause. Secondly, the NPT added language saying that the withdrawing party must include in the notice "a statement of the extraordinary events it regards as having jeopardized its supreme interests." The PTBT contained no such requirement. The requirement was clearly added to give the Security Council notice of withdrawal and a statement of reasons because withdrawal could threaten international security. The UN Charter gives the Council authority to take action to deal with such a threat if nine members including the P-5 agree.²⁷

Toward the end of the NPT negotiations at the Geneva Disarmament Committee, Brazil asked why the draft NPT added, to the PTBT withdrawal language, notice to the Security Council of reasons for withdrawal. Brazil said that the "UN Charter entrusts the Security Council with functions specifically related to the maintenance of world peace and security and not with participating in the mechanism of withdrawal from any treaty."²⁸ The Romanian representative asked a similar question. The American representative replied that it would be "important to have a situation which could affect international peace and security discussed in the Security Council."²⁹ In a more detailed response at the end of the debates, the Soviet representative said:

"[The Security Council] has been entrusted by the States Members of the United Nations with the primary responsibility for the maintenance of international peace and security. [He cited several treaty precedents that required international organizations to give notice or reports to the UN Security Council concerning actions that might create threats to international security.] The appropriateness of the inclusion of such an obligation in the [NPT] treaty derives from the fact that in the event of the withdrawal of any State from the non-proliferation treaty, the other parties to this treaty must receive an explanation of the reasons for withdrawal from the treaty, not from any other source, but from the State itself that withdraws from the treaty. Receipt by the Security Council of such notice together with a statement of the reasons directly from the State concerned would help the Security Council to fulfill its functions [including its "reaction ... to such a notice"] more effectively."³⁰

The final NPT withdrawal clause language, reported to the UN General Assembly by the Geneva Disarmament Committee, was the same as that debated in Geneva. As we have seen, it required notice to the Council together with a statement of reasons for withdrawal. The UN Charter authorizes the Council to take action, if necessary, to maintain international peace and security. Since the Council has such authority under the UN Charter, it could take action to restrain withdrawal in appropriate circumstances, if given the required notice and the reasons for the intended withdrawal. The three-month notice would give Council members time to consult, to acquire further information about the consequences of the party's

withdrawal, and to negotiate a Council action resolution if that was appropriate.

Thus, the NPT withdrawal clause's requirement that the UN Security Council be notified of a withdrawal was intended to provide information to the Council of a withdrawal since it was likely to be based on "security considerations" and clearly could result in a "threat to the peace" within the meaning of provisions of the UN Charter giving the Council authority to act against such threats.³¹ If the Council then found that the withdrawal might foreshadow such a threat, it would have authority to take action to delay or prevent withdrawal, or to require other action by the withdrawing party to keep the peace before it would have permission to withdraw. A withdrawal from the NPT that might constitute or produce a threat to the peace would presumably be the test of whether the UN Security Council should take action to restrain or otherwise deal with the withdrawal.

Did North Korea's withdrawal produce a threat to the peace? A likely reason for North Korea's initial withdrawal was to pursue nuclear weapons without IAEA inspection. By 2003, that had become reasonably clear. China, Russia, South Korea and Japan, North Korea's neighbors, were sufficiently concerned that year that they pushed the United States into serious negotiations with North Korea in the Six-Party talks in which they also participated. They seemed concerned that DPRK's acquisition of nuclear weapons could threaten the peace in their region.

How would the NPT withdrawal provision limit Iran's right to withdraw from the NPT, if that is what it decides to do?

There has been a fear that Iran might withdraw from the NPT if it did not get a right to enrich uranium in its negotiations with the EU-3: Britain, France and Germany. Would the NPT withdrawal clause inhibit Iran's withdrawal from the NPT? If Iran only proposed to enrich uranium for peaceful purposes, its current position, it would not violate the NPT as that treaty has been interpreted for many years. The new idea that enrichment by a non-nuclear-weapon NPT party that does not already engage in it should be prohibited has not, of course, been popular with non-nuclear-weapon NPT parties that do not already have such facilities.³² Germany and the Netherlands, for example, have common ownership with

Britain in Urenco, a multilateral organization which operates a large enrichment plant in the Netherlands. This plant has employees from all three countries. The chance are good that, for example, an employee from the Netherlands would find out if employees from Germany operated the plant to produce highly enriched uranium to use in making nuclear weapons. Moreover, inspections are conducted regularly by Euratom, the nuclear regulatory agency in which some EU members are participants. In addition, there are independent inspections by IAEA inspectors. If this is adequate for Germany and the Netherlands, would the EU-3 and the United States accept something like it for Iran?

When EURODIF, another multilaterally-owned uranium enrichment organization was first created; France, Italy, Spain, Belgium and Iran were participating countries. EURODIF now has one enrichment plant in France. As was the case with some other EURODIF members, Iran was unable to absorb its share of the costs of the enriched uranium produced by the plant in France, and Iran dropped out of EURODIF years ago.³³ Suppose that Iran joined EURODIF again, and that the enrichment plant in France was under Euratom and IAEA inspection as well as observation by employees or observers from the various EURODIF members. Would this satisfy the United States and the EU-3? What if a new multilateral, owning and operating, organization with inspectors from a multilateral organization similar to Euratom as well as independent IAEA inspectors was created by Middle Eastern states and some other countries with nuclear reactors, plus Russia in place of France, EURODIF's nuclear-weapon state? (Russia is to supply Iran's new power reactor and its fuel). Perhaps questions such as these could be considered by the EU-3 negotiators, Russia and Iran.

WHAT IMPORTANT ACTIONS HAVE BEEN PROPOSED TO DEAL MORE EFFECTIVELY WITH WITHDRAWALS FROM THE NPT?

Questions on the minds of many after North Korea's withdrawal were:

How was North Korea's withdrawal from the NPT different from the United States' earlier withdrawal from the Anti-Ballistic Missile (ABM) Treaty?³⁴ The ABM Treaty is bilateral; only Russia and the United States were parties. The negotiations between the

two that took place before U.S. withdrawal from the ABM Treaty were not public. However, negotiation of the Moscow Treaty of 2002 to replace the earlier START II treaty was probably part of the consideration paid by the United States for withdrawal from the ABM Treaty.³⁵ Moreover, the withdrawal clauses of these two treaties and of the NPT are different. The ABM Treaty requires no notification to the UN Security Council, and thus did not suggest Security Council participation in withdrawal decisions.³⁶ Whether U.S. withdrawal from the ABM Treaty was justified by the ABM Treaty language is not therefore relevant to whether North Korea's withdrawal from the NPT could be justified to the Security Council by the NPT's language.

How could a consensus among NPT parties on the power and purposes of UN Security Council action in the event of NPT withdrawals be achieved? Several NPT parties suggested ideas on withdrawal for consideration by the 2005 NPT Review Conference, but the failure of that conference precluded consensus on any of them.³⁷ Are there other ways of achieving such a consensus? We will discuss this in a moment.

Would North Korea's past membership in the NPT inhibit it from using the materials, technology and equipment it had acquired for peaceful purposes while a member of the NPT to make nuclear weapons after it had withdrawn from the NPT? Some of the nuclear assistance that North Korea received, *because* it was a non-nuclear-weapon party to the NPT, could be used to help make nuclear weapons. In the 1950s North Korean engineering students were trained in the USSR on nuclear processes and technology. In 1964, Moscow provided a research reactor with fuel rods. China also provided assistance to North Korea's nuclear activities.³⁸ But North Korea could not be persuaded by Moscow to join the NPT until 1985 and it refused to accept IAEA safeguards until 1992. It became increasingly independent of countries that had provided assistance by learning how to mine and refine its own uranium, and how to build its own reactors and a plutonium separation facility.

How could this third issue be resolved? Nuclear-related exports that could assist a non-nuclear-weapon NPT party to make nuclear weapons are prohibited by the NPT – unless the nuclear facilities are to be under IAEA safeguards.³⁹ As a result,

should not the nuclear materials or components resulting from these exports remain under IAEA safeguards even though North Korea has withdrawn from the NPT? The European Union (EU) has proposed a “yes” answer to this question.

Before the 2005 NPT Review Conference, the 25 European Union (EU) members had agreed among themselves upon a “common approach” to NPT withdrawals.⁴⁰ This approach said:

“[A]s a matter of principle all nuclear materials, equipment, technologies and facilities, developed for peaceful purposes, of a State party to the [NPT] remain, in case of withdrawal from the Treaty, restricted to peaceful uses only and as a consequence have to remain subject to safeguards. ...

[A]s a matter of principle, a State withdrawing from the Treaty should no longer use nuclear materials, facilities, equipment and technologies acquired from a third country prior to withdrawal; and ... such facilities, equipment and materials must be frozen [after withdrawal], with a view to having them dismantled and/or returned to the supplier State, under IAEA control.”⁴¹

These conclusions seem to have been precipitated by North Korea’s withdrawal. Pointing to the importance of Security Council review of NPT withdrawals, the EU proposals also said that NPT parties should affirm “that a withdrawal from the Treaty should in a given case constitute a *threat to international peace and security*.” (Italics added). The italicized language is, of course, from UN Charter provisions describing the circumstances in which the Council may order the use of force.⁴² Thus, the EU is on record as supporting the use of force, if authorized by the Council, when necessary to deal with possible threats to international security posed by a state’s withdrawal from the NPT.

In addition, Australia and New Zealand argued at the NPT Review Conference that “NPT parties should not be able to evade their commitments under the Treaty by withdrawal. ...”⁴³ Japan, like the EU, proposed that the NPT Review Conference “reaffirm that a State party which has withdrawn from the Treaty remains responsible for violations it committed while being a party. [The] Conference [should urge] any supplier country ... to make necessary arrangements entitling it to require the return or neutralization of any

such materials, facilities, equipment etc. transferred prior to their withdrawal.”⁴⁴

The Russian Federation in its national report on the implementation of the Nuclear Non-Proliferation Treaty, presented to the Review Conference, stated: “Recognizing its responsibility as a party to the Treaty as well as its depository, the Russian Federation underlines the exceptional sensitivity of the issue of the withdrawal from the NPT. We consider it necessary to minimize the possibility of situations where States refuse to fulfill their obligations under the Treaty. We believe that enhancing the responsibility of States for making a decision to withdraw from the Treaty in accordance with article X could be one of the ways to strengthen the NPT. This objective could be achieved through the adoption of a number of political measures and procedures which would be applied in such cases. However, such actions should not lead to a revision of the provisions of the NPT.”⁴⁵

Because the NPT Review Conference could not reach consensus on any substantive conclusions, there was no report covering any of these proposals.

Even before this Review Conference, a report by a distinguished panel of 12 former world leaders that the UN Secretary General had appointed to a “High-Level Panel on Threats, Challenges and Change” recognized the power of the Security Council under the UN Charter to deal with an NPT party’s withdrawal if the withdrawal could constitute a threat to international peace. The report proposed that, in such a case, the Security Council should hold a state withdrawing from the NPT “responsible for violations committed while still a party to the Treaty.” It added: A State’s notice of withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons should prompt immediate verification of its compliance with the Treaty, if necessary mandated by the Security Council.⁴⁶

The negotiations of the EU-3 (Britain, France and Germany) with Iran will likely continue. The EU-3 (representing the EU as a whole) have clearly been influenced in their pursuit of negotiations with Iran by North Korea’s withdrawal from the NPT, and the failure of the Security Council or the Six-Party Talks or the NPT Review Conference to deal with that withdrawal effectively. The EU proposals to the NPT Review Conference that we just quoted

seem to have had both North Korea and Iran in mind. The EU-3's negotiating position with Iran would clearly have been strengthened by an NPT Review Conference agreement to these principles.

Suppose there had been general agreement with the EU's "common approach" to NPT withdrawals which said, among other things, that "all nuclear materials, equipment, technologies and facilities developed for peaceful purposes, of a State party to the [NPT] remain, in case of withdrawal from the Treaty, restricted to peaceful uses only and as a consequence have to remain under safeguards..." Suppose the members of the Security Council could adopt such a principle for their future guidance in dealing with cases of withdrawal. In 1992, the member states of the UN Security Council agreed that the spread of nuclear and other weapons of mass destruction constituted a "threat to international peace and security" within the meaning of the UN Charter.

At their 2005 meeting in Gleneagles, Scotland, G-8 members took a strong position against North Korea's withdrawal from the NPT, even implying that the DPRK was still a member of the Treaty: "We reiterate the necessity for the DPRK promptly to return to full compliance with the NPT, and dismantle all its nuclear weapons-related programmes in a complete, verifiable and irreversible manner." The G-8 affirmed their support for the Six-Party talks between North Korea and China, Japan, Russia, South Korea and the USA to achieve the goal of "full compliance with the NPT."⁴⁷

In the case of Iran, the G-8 statement said: "We remain united in our determination to see the proliferation implications of Iran's advanced nuclear programme resolved." The statement proposed rewarding Iran with "long term...political and economic cooperation" if Iran stayed within the NPT and refrained from uranium enrichment and plutonium reprocessing activities. By its strong support for the EU-3 negotiations with Iran, negotiations which are of course based on assumption that Iran remains a party to the NPT, the G-8 are clearly warning Iran of the serious economic and political consequences of its withdrawal from the NPT.⁴⁸

CONCLUSIONS AND RECOMMENDATIONS

The language and history of the negotiation of the NPT withdrawal clause suggests that the NPT negotiators wanted to

inhibit withdrawals from the treaty by requiring:

- that a statement of reasons for withdrawal by the withdrawing party describing the "extraordinary events" relating to its "supreme interests" that justified withdrawal be sent to all the other NPT parties and to the UN Security Council;
- that when the other parties were unable to persuade a withdrawing party not to withdraw, the Security Council should nevertheless consider whether the withdrawal could constitute a "threat to the peace," and, if so, what action the Council and UN members should take against it.

We agree with the EU conclusion that, if an NPT party insists upon withdrawal and its withdrawal would not threaten the peace, its nuclear facilities that were used for peaceful purposes must nevertheless be restricted to peaceful purposes in the future. Thus, these facilities would remain under IAEA safeguards even after withdrawal. Having acquired them while representing to the world, by its joining the NPT, that it will use them for peaceful purposes, the withdrawing party should be prohibited from using them to make nuclear weapons.

We recommend that the Security Council and the IAEA consider the NPT withdrawal issues raised by North Korea's withdrawal. We urge the adoption of statements by these bodies to provide guidance on the consequences of withdrawal from the NPT and what should be done by the Security Council to inhibit future withdrawals and to deal with that of North Korea.

¹ Vienna Convention on the Law of Treaties, Art. 54.

² See Sally Horn, "NPT Article X", Statement to the 2005 Conference on the Nonproliferation of Nuclear Weapons for the United States, May 23, 2005, <http://www.state.gov/t/vc/rls/rm/46644.htm>, available as of June 1, 2005: "The right to withdraw from the Treaty [NPT] remains a sovereign right."

³ These reasons are discussed in more detail below.

⁴ A view held by some was that the 2003 notice was a new notice of withdrawal that could only become effective three months after it was given. However, more than three months have gone by since the 2003 notice was given. See Jean du Preez & William Potter, "North Korea's Withdrawal from the NPT" (Monterey, CA: Monterey Institute Center for Nonproliferation Studies, 2003), <http://cns.miis.edu/pubs/week030409.htm>, available as of June 9, 2003.

⁵ See George Bunn, "A Brief History of DPRK's Nuclear Weapons-Related Efforts," in Michael May, et. al, *Verifying the Agreed Framework* (Livermore and Stanford, CA: Lawrence Livermore Laboratory Center for Global Security Research and Stanford University Center for International Security and Cooperation, 2001), pp.15-16

⁶ See du Preez and Potter, *supra*.

⁷ See Anglo-American Proposal Submitted to the 18 Nation Disarmament Committee: Draft Treaty Banning Tests in the Atmosphere, Outer Space and Underwater, August 27, 1962, Documents on Disarmament, 1962 (U.S. Arms Control and Disarmament Agency 1963), p.804-805. (This was the draft, already agreed within the U.S. Government and with the United Kingdom, that the two countries offered in Moscow.)

⁸ See George Bunn, *Arms Control by Committee* (Stanford University Press, 1992), p.38.

⁹ *Ibid*.

¹⁰ See Roland Timerbaev, *Russia and Nuclear Nonproliferation, 1945-1968* (Nauka Publishers, 1999), p. 320 (in Russian).

¹¹ Anglo-American Proposal *supra*.

¹² Anglo-American Proposal, *supra*.

¹³ Eighteen Nation Disarmament Committee Provisional Verbatim 245 (March 3, 1966), p.10.

¹⁴ See, e.g., Brazil, Eighteen-Nation Disarmament Committee/Provisional Verbatim 363, Feb 8 1968, par. 17.

¹⁵ See George Bunn, "A Brief History ..." *supra*.

¹⁶ See Claire Applegarth and Rhianna Tyson, *Major Proposals to Strengthen the Nuclear Nonproliferation Treaty: A Resource Guide* (Arms Control Association and Women's International League for Peace and Freedom, 2005), p. 30.

¹⁷ See Jean du Preez and Willam Potter, *supra*.

¹⁸ See Applegarth and Tyson, *supra*, p.30.

¹⁹ See Bunn, "A Brief History..." *supra*.

²⁰ See Ashton B. Carter and William J. Perry, *Preventive Defense: A New Security Strategy for America* (Washington, DC: Brookings, 1999), pp. 129-133.

²¹ See Bunn, "A Brief History..." *supra*.

²² See du Preez and Potter, *supra*.

²³ *Ibid*.

²⁴ The Vienna Convention on the Law of Treaties provides that a right of denunciation may be implied by the nature of the agreement, particularly in the case of bilateral treaties. Art. 56. On the other hand, with multilateral treaties such as the NPT, where termination of its obligations by one party may effect not only a particular other party with whom it has had a dispute but still more parties, the right of withdrawal depends upon what the agreement says, including the treaty rights of other parties. See Articles 57 and 58(1) of the Vienna Convention. Clearly North Korea's withdrawal affected other parties, including its neighbors with whom it was negotiating (South Korea, Japan, China, and Russia) as well as the United States.

²⁵ U.N. Charter, Arts. 1.1, 24, 39, 42.

²⁶ Article 27 of the UN Charter gives the Council power to act on substantive matters by a vote of nine members including all of the P-5.

²⁷ See UN Charter Art. 1.1, 24, 27, 39, and 42.

²⁸ Statement of Brazilian Representative (de Araujo Castro) to the Geneva Disarmament Conference, February 8, 1968, Documents on Disarmament, 1968 (Washington, DC: U.S. Arms Control and Disarmament Agency, U.S. GPO, 1969) p. 56.

²⁹ Statement of U. S. Representative De Palma to the Geneva Disarmament Conference, Feb. 20, 1968, Documents on Disarmament, 1968 (Washington, D.C. U.S. Arms Control and Disarmament Agency, U.S. GPO, 1969), pp. 92, 94.

³⁰ Statement of Soviet Representative Roshchin to the Geneva Disarmament Conference, March 12, 1968 during final explanations before the NPT was reported by the Conference to the UN General Assembly, Documents on Disarmament, 1968 (Washington, D.C. U.S. Arms Control and Disarmament Agency, U.S. GPO, 1969), pp. 177, 181-84.

³¹ UN Charter Art. 24, 39, 41-42,

³² See President George W. Bush's speech proposing to prohibit enrichment by any non-nuclear-weapon country

that does not already have an enrichment plant. "President Announces New Measures to Counter the Threat of WMD," National Defense University, Feb. 11, 2004

³³ See IAEA Expert Group, *Multilateral Approaches to the Nuclear Fuel Cycle: Report to IAEA Director General*, INFCIRC/640 (Feb. 22, 2005), pp. 48-49.

³⁴ See Christer Ahlstrom, "Withdrawal from Arms Control Treaties," *SIPRI Yearbook 2004* (Oxford: Oxford University Press), chapter 19.

³⁵ The Russian Duma had made adherence to the ABM Treaty a condition of its approval of the START II treaty. Thus, U.S. withdrawal from the ABM Treaty had ended the START II treaty. The Moscow (or SORT) Treaty thus replaced the START II treaty.

³⁶ Anti-Ballistic Missile Treaty, Art. XV.2, START II, Art. VI.4.

³⁷ The United States, for example, urged a prompt UN Security Council meeting after any notice of withdrawal to identify steps to deal with the notice and to engage the withdrawing state in dialogue. It also urged the NPT Review Conference to decide that the withdrawing party would remain accountable for any violations of the NPT. "Strengthening the implementation of article X ..." 2005 NPT Review Conference, NPT/CONF.2005/WP.59. The European Union proposed stronger measures some of which are quoted in the text below. The EU also asked the Review Conference to reiterate that the Security Council was the "final arbiter" in maintaining international peace and security. See "Withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons," European Common Approach, NPT/CONF.2005/WP.32. Australia and New Zealand proposed some similar and some stronger measures. See "Working Paper on Article X submitted by Australia and New Zealand" NPT/CONF.2005/WP.16.

³⁸ See Center for Defense Information, "Summary of North Korea's Nuclear Arsenal," May 31, 2005, http://www.cdi.org/friendlyversion/printversion.cfm?documentID=3032&from_page=.progr...

³⁹ NPT, Arts. I, II, III, IV, particularly Art. III.2

⁴⁰ Withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons, NPT/CONF. 2005/WP.32.

⁴¹ *Ibid*.

⁴² See UN Charter, Chap. VII. Useful proposals on NPT withdrawal were also provided by Australia and New Zealand. See Working Paper on Article X (NPT withdrawal) submitted by Australia and New Zealand. NPT/CONF.2005/WP.16. In a statement on NPT withdrawal, the United States said that "The Security Council has made clear that the proliferation of nuclear weapons constitutes a threat to international peace and security. [T]he Council should consider the full range of options provided by the Charter...Withdrawal by a party in breach of commitments freely undertaken - commitments that other Parties based their security calculations on - would further underscore the need for consideration of options by the UNSC." Statement of Sally Horn, Senior Advisor, Bureau of Verification and Compliance, to the 2005 Review Conference, May 23, 2005.

⁴³ See Working Paper on article X (NPT withdrawal) submitted by Australian and New Zealand, NPT/CONF.2005/WP.16.

⁴⁴ Working Paper submitted to NPT Conference by Japan, NPT/CONF.2005/WP 21, www.reachingcriticawill.org/legal/npt/RevCon05/wp/wp21.pdf, available as of June 10, 2005.

⁴⁵ See National Report on the Implementation by the Russian Federation of the Nuclear Non-Proliferation Treaty (NPT/CONF.2005/29, par. 87).

⁴⁶ A/59/565 of Dec 2, 2004, par. 134.

⁴⁷ G-8 Gleneagles Statement on Non-Proliferation, July 2005, par.16.

⁴⁸ G-8 Gleneagles Statement on Non-Proliferation, par. 17.