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Balancing Collective Security and National Sovereignty: Does the United Nations Have the Right to Inspect North Korea's Nuclear Facilities?

Susan Carmody*

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Susan Carmody

Abstract

This Note examines the legal conflicts in the nuclear nonproliferation regime that developed due to the Agency's attempt to verify North Korea's compliance with the NPT. Part I reviews the history of the nonproliferation regime, as well as the pertinent textual provisions of the IAEA Statute, the NPT, and the North Korean-Agency Safeguards Agreement. Part II reviews the events leading up to North Korea's alleged withdrawal from the NPT and discusses the DPRK's and the Agency's legal arguments concerning North Korea's rights under the regime. Part III argues that the Agency has the right to inspect the DPRK's facilities because: (i) every law in the regime must be read in light of the other regime laws, and (ii) the regime as a whole mandates that an NPT signatory relinquish its sovereign rights as necessary to ensure global collective security. This Note concludes that delegates attending the upcoming 1995 NPT renewal conference should develop regime laws that: (i) regulate the Agency's administration of intelligence received from third parties, and (ii) unify the regime's emphasis on global rights to collective security over national rights of sovereignty.

NOTES

BALANCING COLLECTIVE SECURITY AND NATIONAL SOVEREIGNTY: DOES THE UNITED NATIONS HAVE THE RIGHT TO INSPECT NORTH KOREA'S NUCLEAR FACILITIES?

*Susan Carmody**

INTRODUCTION

The global community has sought a collective security¹ from the threatening spread of nuclear weapons and the corresponding likelihood of nuclear war² since the Atomic Age³ began.⁴

* J.D. Candidate, 1995, Fordham University.

1. *See* U.N. CHARTER art. I(1). As defined by the United Nations, collective security is the maintenance of international peace and security by taking effective collective measures for the prevention and removal of threats to the peace, by suppressing acts of aggression, and by bringing about, in conformity with the principals of international law, settlement of international disputes that might lead to a breach of the peace. *Id.* The maintenance of collective security is the first listed purpose of the United Nations. *Id.*

2. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, pmb., 21 U.S.T. 483, 484, 729 U.N.T.S. 161, 169 [hereinafter NPT or Treaty]. The term "nuclear proliferation" refers to the spread of nuclear weapons, by purchase or technological development, among nations. *See id.* (discussing dangers that nuclear proliferation brings). The spread of nuclear weapons raises many fears among nations that possess nuclear weapons as well as nations that lack them. *Id.* One fear is that the likelihood of nuclear warfare increases as the number of nations possessing nuclear weapons grows. *Id.* Another fear is that the risk of nuclear war increases as nations that already possess nuclear weapons acquire more nuclear weapons. *See id.* 21 U.S.T. at 485, 729 U.N.T.S. at 171 (stating one purpose of Treaty is to cease nuclear arms race). Finally, some nations fear that the increasing number of nuclear weapons development programs increases the risk of a nuclear accident because some nations may not implement adequate nuclear safety controls in their drive to develop atomic weapons. *See, e.g.,* Statute of the International Atomic Energy Agency, July 29, 1957, art. III(A), 8 U.S.T. 1093, 1095-96, 276 U.N.T.S. 3, 6 (amended Oct. 4, 1961, 14 U.S.T. 135, 471 U.N.T.S. 333) [hereinafter IAEA Statute] (stating that International Atomic Energy Agency function is to provide safe standards of using nuclear materials for peaceful purposes).

3. In this Note, the "Atomic Age" began when the United States dropped an Atomic Bomb on Hiroshima, Japan, on August 6, 1945. *See* SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE, 1869-1963, at 407-08 (1972). The bomb dropped on Hiroshima was the first nuclear weapon used in combat. *Id.* at 408. A few days after the Hiroshima bombing, the United States also dropped the only other nuclear weapon ever used in warfare on Nagasaki, Japan. *Id.*

4. *See* 1 DOCUMENTS ON DISARMAMENT, 1945-1959 7-16 [hereinafter DISARMAMENT] (reviewing initial American nuclear nonproliferation proposal); U.S. ARMS CONTROL

The United Nations has attempted to achieve such security by making the proliferation of nuclear weapons among nations a violation of international law⁵ through the development of a nuclear weapons nonproliferation regime.⁶ This regime is composed of customary international law⁷ and three sources of treaty law: the Statute of the International Atomic Energy Agency⁸

AND DISARMAMENT AGENCY, INTERNATIONAL NEGOTIATIONS ON THE TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS, 1 (1969) [hereinafter INTERNATIONAL NEGOTIATIONS].

5. *E.g.*, NPT, *supra* note 2, 21 U.S.T. at 483, 729 U.N.T.S. at 161; IAEA Statute, *supra* note 2, 8 U.S.T. at 1093, 276 U.N.T.S. at 3. A rule of international law is one that has been accepted as such by the international community of States in the form of customary international law, by international agreement, or by derivation from general principles common to the major legal systems of the world. RESTATEMENT (THIRD) OF FOREIGN LAW § 102(1) (1986).

6. *E.g.*, NPT, *supra* note 2, 21 U.S.T. at 483, 729 U.N.T.S. at 161; IAEA Statute, *supra* note 2, 8 U.S.T. at 1093, 276 U.N.T.S. at 3; *Agreement of 30 January 1992 between the Government of the Democratic People's Republic of Korea and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, Jan. 30 1992, IAEA Doc. INFCIRC/403 (May 1992) [hereinafter INFCIRC/403 or North Korean-Agency Safeguards Agreement]. For the purposes of this Note, a regime is a system of laws. *See generally* Bill Monahan, Note, *Giving the Non-Proliferation Treaty Teeth: Strengthening the Special Inspection Procedures of the International Atomic Energy Agency*, 33 VA. J. INT'L. L. 161 (1992) (describing laws of nuclear non-proliferation regime and how these laws apply to Agency's verification of facilities in Iraq).

7. *See* J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 34 (1984) [hereinafter STARKE]. Until recently, international law mostly consisted of customary rules. *Id.* Customary international law is the unified and self-consistent practice of nations that is not codified in written law. *Id.* The practice of international organizations, whether by conduct or declaration, may lead to the development of customary international law concerning their powers or responsibilities. *Id.* at 110. Unanimous United Nations General Assembly resolutions may become customary international law. Schachter, *International Law in Theory and Practice*, 178 REC. DES COURS 111-21 (1982-V), *reprinted in* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 114-15 (1991).

According to the Restatement, customary international law results when States follow a general and consistent practice due to a sense of legal obligation. RESTATEMENT (THIRD) OF FOREIGN LAW § 102(2) (1986). International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted. *Id.*

For example, as of December 31, 1993, there were 162 signatories to the NPT. 1993 U.N. Disarmament Y.B. 12, U.N. Sales No. E.94.IX.1. Thus, the NPT is widely accepted by the global community. Furthermore, NPT signatories intend that the other signatories, which also compose the majority of states in the global community, adhere to the nuclear nonproliferation agreement. *See generally* NPT, *supra* note 2, 21 U.S.T. at 483, 729 U.N.T.S. at 161.

8. IAEA Statute, *supra* note 2, 8 U.S.T. at 1093, 276 U.N.T.S. at 3. The International Atomic Energy Agency is the international organization that monitors use of nuclear materials to promote safety and peaceful nuclear technological developments. *See*

("IAEA Statute"), the Nuclear Nonproliferation Treaty⁹ ("NPT" or "Treaty"), and individually-negotiated bilateral safeguards agreements¹⁰ between the International Atomic Energy Agency¹¹ ("Agency") and each NPT signatory state.¹²

Generally, the regime created by these international laws requires a signatory without nuclear weapons ("non-nuclear signatory") to relinquish its sovereign¹³ right to develop or to acquire nuclear weapons.¹⁴ In addition, non-nuclear signatories must re-

generally id. The International Atomic Energy Agency also works under the NPT to prevent an illegal spread of nuclear weaponry by transfer or technological development. See *generally* NPT, *supra* note 2, 21 U.S.T. at 483, 729 U.N.T.S. at 161.

9. NPT, *supra* note 2, 21 U.S.T. at 483, 729 U.N.T.S. at 161.

10. *Id.* art. III(1), 21 U.S.T. at 487-88, 729 U.N.T.S. at 172; see *The Structure and Contents of Agreements Between the Agency and States Required in Connection With the Treaty on the Non-Proliferation of Nuclear Weapons*, ¶ 2, IAEA Doc. INFCIRC/153 at 1 (June 1972, reprinted Feb. 1983) [hereinafter INFCIRC/153] (describing provisions that bilateral Agency-signatory safeguards agreement should contain); see, e.g., INFCIRC/403, *supra* note 6, at 1 (bilateral safeguard agreement between Agency and DPRK). The NPT requires each NPT signatory to begin negotiating an individualized safeguards agreement with the Agency within 180 days of the signatory's ratification of the Treaty. NPT, *supra* note 2, art. III(1), 21 U.S.T. at 487-88, 729 U.N.T.S. at 172.

Safeguards are the tools that the Agency uses to verify that an NPT signatory is not secretly violating the Treaty by covertly diverting nuclear materials towards the production of nuclear weapons. INFCIRC/153, *supra*, ¶ 2, at 1. Safeguards include: (i) the Agency's ability to account for the amount of nuclear material coming in and out of the signatory's territory by reviewing the signatory's reports to the Agency, *id.* ¶¶ 59-69, at 16-18; (ii) the Agency's ability to conduct announced and unannounced inspections of the signatory's territory to confirm the signatory's reports, *id.* ¶¶ 70-89, at 18-24; and (iii) the Agency's ability to place, leave, and retrieve containment and surveillance devices upon the signatory's nuclear materials and processing facilities, such as cameras and container seals, that independently account for the signatory's nuclear materials while the Agency inspectors are absent. *Id.* ¶ 74, at 19.

11. IAEA Statute, *supra* note 2, art. II, 8 U.S.T. at 1095, 276 U.N.T.S. at 4. The International Atomic Energy Agency was created by the IAEA Statute to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world. *Id.*

12. *E.g.*, INFCIRC/403, *supra* note 6, pmb1.

13. PHILIP C. JESSUP, A MODERN LAW OF NATIONS 41 (1968). Sovereignty is, in its traditional connotation, the ultimate freedom of national will unrestricted by law. *Id.* In its newer connotations, sovereignty is the exclusiveness of jurisdiction in a defined domain. *Id.* at 41. Every foreign policy assumes the integrity and inviolability of the national territory. L. HENKIN, HOW NATIONS BEHAVE 13-27 (2nd ed. 1979). Nonetheless, Henkin also acknowledges that internal sovereignty can be limited by treaty or international law. *Id.*

14. NPT, *supra* note 2, art. II, 21 U.S.T. at 487-88, 729 U.N.T.S. at 171-72. The NPT only bans the acquisition or development of nuclear weapons among non-nuclear-weapon signatories ("NNWS"). See NPT, *supra* note 2, pmb1., 21 U.S.T. at 489-90, 729 U.N.T.S. at 172-73 (stating that Treaty encourages peaceful uses of atomic power but bans development of nuclear weapons). An NPT signatory receives Agency assistance

frain from exercising certain sovereign rights that would impede the Agency's ability to verify that the non-nuclear signatory is not secretly attempting to develop nuclear weapons.¹⁵ In consideration of a signatory's concession of these sovereign rights, the regime allows the non-nuclear signatory to make use of the Agency's technical and financial expertise in the development of non-proscribed¹⁶ nuclear programs.¹⁷

Unfortunately, the regime's different laws, such as the NPT and IAEA Statute, do not uniformly define what sovereign rights a signatory relinquishes when it signs the regime's treaties.¹⁸ This lack of uniformity between the regime's laws has enabled one non-nuclear signatory, the Democratic People's Republic of Korea¹⁹ ("DPRK" or "North Korea"), to argue that the NPT allows the DPRK to deny the Agency's inspectors access to some suspected North Korean nuclear-weapon sites.²⁰ The DPRK

in the development of nuclear technology for purposes not proscribed by the NPT. IAEA Statute, *supra* note 2, art. III(A)(1), 8 U.S.T. at 1095, 276 U.N.T.S. at 6-8. For example, the Agency could help a NNWS develop a nuclear power plant. *See id.* art. III(A)(1)-(3) (describing Agency functions that help build signatory's ability to harness nuclear power for peaceful purposes).

Furthermore, not all military uses of nuclear power are impermissible under the NPT. INFCIRC/403, *supra* note 6, art. 14(a). Article 14 of INFCIRC/403 is entitled "Non-application of Safeguards to Nuclear Material to Be Used in Non-Peaceful Activities." *Id.* art. 14(a). Thus, for example, a NNWS could legally develop a nuclear-powered submarine. *See id.* (discussing permissible uses of nuclear materials in military applications). Because the NPT bans a non-nuclear signatory's development of nuclear weapons, however, such a signatory could not permissibly develop nuclear missiles to place on that submarine. *See* NPT, *supra* note 2, pmb., 21 U.S.T. 483, 729 U.N.T.S. 161 (prohibiting non-nuclear signatory development of nuclear weapons).

15. *See, e.g.*, NPT, *supra* note 2, art. I, 21 U.S.T. at 487, 729 U.N.T.S. at 171 (requiring that NNWS refrain from producing nuclear weapons); IAEA Statute, *supra* note 2, art. III(D), 8 U.S.T. at 1095-96, 276 U.N.T.S. at 6-8 (stating that some signatory sovereign rights are subject to terms of IAEA statute).

16. *See supra* note 14 and accompanying text (describing proscribed and non-proscribed uses of nuclear materials under nuclear nonproliferation regime).

17. IAEA Statute, *supra* note 2, art. III, 8 U.S.T. at 1095-96, 276 U.N.T.S. at 6-8.

18. *Compare, e.g.*, IAEA Statute, *supra* note 2, art. III(D), 8 U.S.T. at 1095-96, 276 U.N.T.S. at 6-8 (Agency's activities will be carried out with due observance to sovereign rights of States) *and id.*, *supra* note 2, art. XII, 8 U.S.T. at 1105-08, 276 U.N.T.S. at 26-30 (providing that Agency only has right to enter signatory's territory if signatory requests safeguards) *with* INFCIRC/403, *supra* note 6, art. 2 (stating that Agency shall have right to apply safeguards anywhere in North Korean territory for purpose of verifying NPT compliance).

19. This Note also refers to the DPRK by the name of its capital, Pyongyang.

20. *See, e.g.*, Statement of the Government of the Democratic People's Republic of Korea (Mar. 12, 1993) [hereinafter DPRK Withdrawal Statement], *in Report by the Director General of The International Atomic Energy Agency on Behalf of the Board of Governors to All*

raised this argument after learning that the Agency had received third-party intelligence that claimed the DPRK was building nuclear weapons at a hidden and previously uninspected location.²¹

This Note examines the legal conflicts in the nuclear non-proliferation regime that developed due to the Agency's attempt to verify North Korea's compliance with the NPT. Part I reviews the history of the nonproliferation regime, as well as the pertinent textual provisions of the IAEA Statute, the NPT, and the North Korean-Agency Safeguards Agreement.²² Part II reviews the events leading up to North Korea's alleged withdrawal from the NPT²³ and discusses the DPRK's and the Agency's legal arguments concerning North Korea's rights under the regime. Part III argues that the Agency has the right to inspect the DPRK's

Members of the Agency on the Non-compliance of the Democratic People's Republic of Korea with the Agreement Between the IAEA and the Democratic People's Republic of Korea for the Application of Safeguards in Connection with the Treaty of the Non-Proliferation of Nuclear Weapons (INFCIRC/403) and on the Agency's Inability to Verify the Non-Diversion of Material Required to Be Safeguarded, IAEA Doc. INFCIRC/419, annex 7, at 4 (Apr. 8, 1993) [hereinafter INFCIRC/419] (containing documents from DPRK that allege North Korea can withdraw to protect its "supreme interests"); accord NPT, supra note 2, art. X, 21 U.S.T. at 493-94, 729 U.N.T.S. at 175 (providing that signatory can withdraw from NPT in furtherance of signatory's "supreme interests"); see also supra note 18 and accompanying text (discussing incongruity between different legal sources of nonproliferation regime).

The DPRK has an unusual history with the other parties involved in this legal dispute, i.e. the United Nations, the United States, and the Republic of Korea. See generally LYOU BYUNG-HWA, PEACE AND UNIFICATION IN KOREA AND INTERNATIONAL LAW (1986). In 1950, the United Nations authorized the use of force against communist forces from northern Korea that had invaded southern Korea. S.C. Res. 1588, U.N. SCOR, 5th Sess., 476 mtg., U.N. Doc. S/1588 (1950) [hereinafter S.C. Res. 1588]. After three years of fighting, the United Nations concluded an armistice agreement that divided Korea into two distinct territories. See generally *The Korean Question*, G.A. Res. 711, U.N. GAOR, 7th Sess., Supp. No. 20B at 1, U.N. Doc. A/Res/711 (1953) (approving Korean Armistice Agreement). However, the United Nations did not formally recognize the DPRK as an independent and sovereign state until 1991. *Admission of The Democratic People's Republic of Korea and the Republic of Korea to Membership in the United Nations*, G.A. Res. 1, U.N. GAOR, 46th Sess., Supp. No. 49, U.N. Doc. A/46/L.1 and Add.1) (1991).

21. See INFCIRC/419, *supra* note 20, at 2-3; see also DPRK Withdrawal Statement, *supra* note 20, at 2.

22. See *supra* notes 1-2, 6 and accompanying text (introducing IAEA Statute, NPT, and North Korean-Agency Safeguards Agreement).

23. See *supra* note 20 and accompanying text (discussing NPT's allowance for States to withdraw in light of their supreme interests and North Korea's attempt to make such withdrawal). The Agency alleges that North Korea's withdrawal statement is ineffective and considers the DPRK to be a NPT signatory. Telephone Interview with Marlene O'Dell, Press Officer, International Atomic Energy Agency, Sep. 15, 1994.

facilities because: (i) every law in the regime must be read in light of the other regime laws, and (ii) the regime as a whole mandates that an NPT signatory relinquish its sovereign rights as necessary to ensure global collective security. This Note concludes that delegates attending the upcoming 1995 NPT renewal conference²⁴ should develop regime laws that: (i) regulate the Agency's administration of intelligence received from third parties, and (ii) unify the regime's emphasis on global rights to collective security over national rights of sovereignty.

I. HISTORY OF THE NUCLEAR NONPROLIFERATION REGIME

Although the desire to prevent the spread of nuclear weapons among the nations of the world is as old as the Atomic Age,²⁵ the creation of the International Atomic Energy Agency in 1957²⁶ was the first step toward the establishment of a global nonproliferation regime. Created by the IAEA Statute,²⁷ the Agency offers technical and financial assistance in the development of nuclear capabilities for non-proscribed purposes²⁸ to Member States. To ensure that the Agency's assistance would not be used to develop nuclear weapons, the IAEA Statute also gave the Agency a limited ability to monitor the member's use of the Agency's assistance.²⁹ Even after the Agency's creation, however, the world community still lacked an agreement that defined nuclear proliferation and pledged to halt the spread of nuclear weapons.³⁰

As the rate of nuclear weapons proliferation increased among nations during the 1960s, the corresponding need for an international nuclear nonproliferation law compelled most nations to consent to a global agreement.³¹ The result was the Nu-

24. NPT, *supra* note 2, art. X(2), 21 U.S.T. at 494, 729 U.N.T.S. at 175. The NPT is scheduled to be renewed in 1995. *Id.*

25. *See supra* note 3 (defining Atomic Age).

26. IAEA Statute, *supra* note 2, 8 U.S.T. 1093, 276 U.N.T.S. 3.

27. *Id.*

28. *See supra* note 14 (discussing non-proscribed purposes of nuclear materials).

29. *See* IAEA Statute, *supra* note 2, art. XII(A)(6), 8 U.S.T. at 1106, 276 U.N.T.S. at 28 (allowing Agency to send inspectors into Member State's territory after consultation with Member State).

30. INTERNATIONAL NEGOTIATIONS, *supra* note 4, at ix.

31. *See id.* (reviewing global efforts to reach nonproliferation agreement after French and Chinese nuclear explosions).

clear Nonproliferation Treaty of 1968.³² The NPT seeks to decrease the risk of nuclear warfare by prohibiting the spread of nuclear weapons to signatories that do not possess them.³³ The NPT also uses the Agency as the organization responsible for verifying that a signatory is not secretly producing or acquiring nuclear weapons.³⁴ Yet the NPT does not contain a provision defining the specific rights that the Agency has, and thus the specific rights that the signatory relinquishes, when the Agency carries out its verification duties.³⁵ Instead, the NPT only requires that a signatory begin negotiating its own safeguards³⁶ agreement with the Agency.³⁷ North Korea concluded its safeguards agreement with the Agency seven years after it ratified the NPT.³⁸

A. *The Creation of the International Atomic Energy Agency*

The United States wanted to establish a combined global nonproliferation regime and international monitoring agency as soon as the Atomic Age dawned.³⁹ The first U.S. proposal, combining both a nuclear nonproliferation regime and a monitoring agency, was unsuccessful.⁴⁰ As its initial plan lost momentum, the United States suggested that the United Nations create an

32. NPT, *supra* note 2, 21 U.S.T. 483, 729 U.N.T.S. 161.

33. *Id.* arts. I-II, 21 U.S.T. at 487, 729 U.N.T.S. at 171. The NPT also requires nuclear weapon signatories to pursue good faith negotiations relating to the end of the arms race. *Id.* art. VI, 21 U.S.T. at 490, 729 U.N.T.S. at 173.

34. *Id.* art. III(1), 21 U.S.T. at 487-88, 729 U.N.T.S. at 172.

35. *Id.*

36. *See supra* note 10 (discussing definition of safeguards).

37. NPT, *supra* note 2, art. III(4), 21 U.S.T. at 488, 729 U.N.T.S. at 172. The NPT also requires that the signatory's bilateral safeguard agreement with the Agency be concluded within one hundred and eighty days of the signatory's NPT ratification. *Id.*

38. INFCIRC/419, *supra* note 20, at 2.

39. *See* 1 DISARMAMENT, *supra* note 4, at 7-16 (reviewing first U.S. nuclear nonproliferation proposal); *see also* INTERNATIONAL NEGOTIATIONS, *supra* note 4, at 1-2 (summarizing history of initial U.S. disarmament plans).

40. *See* 1 DISARMAMENT, *supra* note 4, at 7-16 (reviewing early U.S. nuclear nonproliferation proposal); *see also* INTERNATIONAL NEGOTIATIONS, *supra* note 4, at 1-2 (summarizing first U.S. nuclear nonproliferation proposals). This early U.S. proposal is commonly referred to as the Baruch Plan. INTERNATIONAL NEGOTIATIONS, *supra* note 4, at 2. *Id.* The monitoring agency proposed under the Baruch Plan could impose sanctions directly upon signatories that committed minor transgressions regarding nuclear nonproliferation as well as refer States that committed major violations to the U.N. Security Council for reprisal. *Id.* The majority of United Nations Member States endorsed the Baruch Plan, but failed to nurture it beyond the draft treaty stage due to superpower bickering in the face of the intensifying arms race. *Id.* Nine years later, the United States dropped the plan. *Id.*

agency to monitor the peaceful uses of atomic energy.⁴¹ This proposal led to the 1957 birth of the International Atomic Energy Agency ("Agency"),⁴² the only organization ever created under the aegis,⁴³ but not as a "specialized agency,"⁴⁴ of the United Nations.

The Agency serves two purposes.⁴⁵ First, the Agency is to accelerate and enlarge peaceful uses of atomic energy.⁴⁶ Second, the Agency must ensure, as far as it is able under the IAEA Statute, that any assistance it provides, supervises, or controls is not used to further any military purpose.⁴⁷ However, the IAEA Statute does not contain provisions to stop the proliferation of nuclear weapons if those weapons are being built without Agency assistance.⁴⁸

Operating under the terms of the IAEA Statute, the Agency strikes a balance between its duty to effectuate the global drive for collective security with the signatory's desire to retain national sovereignty.⁴⁹ On one hand, Article XII of the IAEA Statute grants the Agency certain rights and responsibilities anytime the Agency applies safeguards.⁵⁰ One such right is the Agency's ability to send inspectors into a signatory's territory.⁵¹ Under the

41. See generally INTERNATIONAL NEGOTIATIONS, *supra* note 4, at 2. The Agency can assist Member States with peaceful uses of atomic power, such as power plants, by providing members with the material, equipment, and technical advice necessary to develop such uses. IAEA Statute, *supra* note 2, art. XII, 8 U.S.T. at 1095, 276 U.N.T.S. at 6.

42. IAEA Statute, *supra* note 2, 8 U.S.T. 1093, 276 U.N.T.S. 3.

43. CARTER & TRIMBLE, *supra* note 7, at 463. In carrying out its functions, the Agency must act within the United Nations' purposes of international cooperation, policies of safeguarded world-wide disarmament, and in conformity with any subsequent international agreements. IAEA Statute, *supra* note 2, art. III(B)(1), 8 U.S.T. at 1096, 276 U.N.T.S. at 8.

44. CARTER & TRIMBLE, *supra* note 7, at 462. Because the Agency is not a specialized agency of the United Nations, it reports directly to the U.N. General Assembly and, when appropriate, to the U.N. Security Council. *Id.* at 463.

45. IAEA Statute, *supra* note 2, art. II, 8 U.S.T. at 1095, 276 U.N.T.S. at 4.

46. *Id.*

47. *Id.*

48. See *id.* art. III, 8 U.S.T. at 1095-96, 276 U.N.T.S. at 6 (lacking prohibition on building nuclear weapons without direct or indirect Agency assistance).

49. Compare *id.* art. XII, 8 U.S.T. at 1105-08, 276 U.N.T.S. at 26 (giving Agency right to apply safeguards only when requested by parties concerned) with *id.*, art. III(D), 8 U.S.T. at 1097, 276 U.N.T.S. at 8 (stating that, subject to IAEA Statute provisions, Agency functions shall be carried out with due observance of sovereign rights of States).

50. *Id.* art. XII(A), 8 U.S.T. at 11-15, 276 U.N.T.S. at 26-30.

51. *Id.* art. XII(A)(6). The provision's text states that the Agency has the right

terms of IAEA Statute, Agency inspectors have access at all times to all places, data, and persons who deal with nuclear materials, equipment, or facilities in their occupations.⁵² On the other hand, Agency inspectors only have access to these persons, data, and places if that access is necessary to ensure that the nuclear materials supplied by the Agency are being used for peaceful purposes only.⁵³ In addition, the Agency only has the right to such access after consulting with the signatory.⁵⁴ Thus, a signatory to the IAEA Statute may deny Agency inspectors access by refusing to consult with the Agency regarding access and safeguard issues.⁵⁵ A signatory can also probably curtail the effectiveness of safeguards by limiting the scope of inspections during the consultation session.⁵⁶ Most importantly, the IAEA Statute also guarantees its signatories that, subject to the IAEA Statute's provisions, the activities of the Agency shall be carried out in due observance of the sovereign rights of states.⁵⁷ Only an additional Agency-signatory agreement can augment the Agency's power to enter the signatory's territory.⁵⁸

[t]o send into the territory of the recipient State or States inspectors, . . . after consultation with the State . . . , who shall have access at all times to all places and data and to any person who by reason of their occupation deals with materials, equipment, or facilities which are required by this Statute to be safeguarded, as necessary to account for source and special fissionable materials supplied . . . and to determine whether there is compliance with the undertaking against use in furtherance of any military purpose

Id.

52. *Id.*

53. *Id.*

54. *Id.* art. XII(A).

55. *See id.* (giving signatory right to deny Agency inspectors access by giving signatory right to refuse safeguards).

56. *See id.* Article XII(A) (6) does not specify whether the Agency-signatory consultation allows the consulting parties to define where inspections will occur. *Id.* However, as the inspections can only occur with places, data, and people that deal with nuclear materials in their occupation, *id.*, the signatory state can probably limit the scope of inspections by arguing that the Agency inspections exceed the statutory scope. *See id.*

57. *Id.* art. III(D), 8 U.S.T. at 1095, 276 U.N.T.S. at 8. The text of Article III(D), states that:

Subject to the provisions of this Statute and to the terms of agreements concluded between a State or group of States and the Agency which shall be in accordance with the provisions of this Statute, the activities of this Agency shall be carried out with due observance of the sovereign rights of States.

Id.

58. *Id.* (requiring that, subject to terms of agreement with signatory or terms of

The IAEA Statute also gives the Agency certain duties.⁵⁹ First, the Agency is obligated to treat all its members as equally sovereign nations.⁶⁰ Second, the Agency must perform certain duties if the Agency is confronted with a member's refusal to implement safeguards.⁶¹ When a Member State refuses to implement mandated safeguards, the IAEA Statute requires the Agency's inspectors to report any non-compliance to the Agency's Director-General.⁶² The Director-General then submits the inspectors' report to the Agency's Board of Governors⁶³ ("Board"). The Board must then report the non-compliance to all Agency members, the United Nations Security Council ("U.N. Security Council") and the United Nations General Assembly

IAEA Statute, Agency shall function with due observance of Member State's sovereign rights).

59. *E.g.*, *id.* art. IV(C), 8 U.S.T. at 1097, 276 U.N.T.S. at 10; *id.* art. XII(C), 8 U.S.T. at 1107, 276 U.N.T.S. at 28.

60. *Id.* art. IV(C), 8 U.S.T. at 1097, 276 U.N.T.S. at 108.

61. *Id.* art. XII(C), 8 U.S.T. at 1107, 276 U.N.T.S. at 28. The pertinent part of Article XII, paragraph C states that:

The [Agency] inspectors shall report any noncompliance to the Direct General who shall thereupon transmit the report to the Board of Governors. The Board shall call upon the recipient State or States to remedy forthwith any non-compliance which it finds to have occurred. The Board shall report the non-compliance to all members and to the Security Council and the General Assembly of the United Nations. In event of failure of the recipient State or States to take fully corrective action within a reasonable amount of time, the Board may take one or both of the following measures: direct curtailment or suspension of assistance being provided by the Agency or by a member, and call for the return of materials and equipment made available to the recipient member or group of members. The Agency may also . . . suspend any non-complying member from the exercise of the privileges and rights of membership.

Id.

62. *Id.* The Director-General is the chief administrative officer of the Agency. *Id.* art. VII(A), 8 U.S.T. at 1101, 276 U.N.T.S. at 15. The Director-General is responsible for the appointment, organization, and functioning of the staff. *Id.* art. VII(B), 8 U.S.T. at 1101, 276 U.N.T.S. at 15.

63. *Id.* art. XII(C), 8 U.S.T. at 1107, 276 U.N.T.S. at 30. The Board also has the responsibility of preparing and submitting reports to the United Nations. *Id.* art. VI(J), 8 U.S.T. at 1101, 276 U.N.T.S. at 17. Each Governor on the Board has one vote. *Id.* art. VI, 8 U.S.T. at 1100, 276 U.N.T.S. at 17. Votes of the Board constitute Agency resolutions. *See, e.g., Report on the Implementation of the Agreement Between the Agency and the Democratic People's Republic of Korea for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, Bd. of Governors Res. 2636, IAEA Doc. GOV/2636 (Feb. 25, 1993) [hereinafter GOV/2636], in INFCIRC/419, *supra* note 20, annex 3 (calling upon DPRK to discharge North Korean responsibilities under INFCIRC/403, requiring Director-General to report such resolution to DPRK, and deciding to remain seized of such matter).

("U.N. General Assembly").⁶⁴

B. *The Creation of the Nuclear Nonproliferation Treaty*

Although the IAEA Statute contained provisions to verify that the nuclear materials provided by the Agency were being used only for peaceful purposes,⁶⁵ there was no international law that prohibited the spread of nuclear weapons among nations if that spread occurred without Agency assistance.⁶⁶ The international proposals and draft treaties offered between 1956 and 1966 were quashed by the conflicting military interests of the Cold War⁶⁷ superpowers.⁶⁸ Yet, throughout the 1960s, nuclear weapons spread among nations at a steadily increasing rate.⁶⁹ By 1968, world fear of nuclear proliferation was great enough to create a global agreement banning the proliferation of nuclear weapons.⁷⁰

1. Global Drives for a Nonproliferation Treaty, 1956-1967

As nuclear weapons proliferated at a steadily increasing rate during the 1960s, the world community felt increasingly

64. IAEA Statute, *supra* note 2, art. XII(C), 8 U.S.T. at 1107, 276 U.N.T.S. at 30. If the non-compliance continues for an unreasonable time, the Agency may also call for the return of materials and equipment as well as suspend the Member State's privileges. *Id.* art. XII(C), 8 U.S.T. at 1107-08, 276 U.N.T.S. at 30.

65. IAEA Statute, *supra* note 2, art III(A) (2), 8 U.S.T. at 1095, 276 U.N.T.S. at 6; *see supra* note 14 (describing proscribed and non-proscribed uses of nuclear materials under nonproliferation regime).

66. INTERNATIONAL NEGOTIATIONS, *supra* note 4, at ix-x.

67. Frank Whelon Wayman, *Protecting American Security Interests: An Arms Control Agenda*, in THROUGH THE STRAIGHTS OF ARMAGEDDON: ARMS CONTROL ISSUES AND PROSPECTS 234-35 (Paul F. Diehl & Loch K. Johnson eds., 1991). This Note uses the term "Cold War" to refer to the political and military tensions between the United States and the Soviet Union that arose between 1945 to 1988. *See id.*

68. INTERNATIONAL NEGOTIATIONS, *supra* note 4, at ix. In 1956, the Eisenhower administration tried an approach that was more limited than the Baruch Plan. *Id.*; *see supra* note 40 and accompanying text (discussing Baruch Plan). Eisenhower's proposal called for a production cessation of nuclear materials for military purposes. INTERNATIONAL NEGOTIATIONS, *supra* note 4, at ix. In 1957, four members of the five-nation Subcommittee of the United Nations Disarmament Commission ("UNDC") merged this "cutoff" proposal into the first multilateral nuclear nonproliferation measure and submitted it to the UNDC. *Id.* The fifth nation on the subcommittee, the Soviet Union, rejected the proposal. *Id.*

69. *See id.* at ix-x (relating how nuclear bombs were detonated by France in 1960 and China in 1964).

70. *See, e.g., id.* at 12 (summarizing how world distress at rate of nuclear proliferation urged states to conclude nuclear nonproliferation agreement).

threatened by the prospect of nuclear war.⁷¹ In 1961, the U.N. General Assembly "unanimously"⁷² adopted a resolution⁷³ calling upon all states to conclude a nuclear nonproliferation agreement.⁷⁴ In 1962, the Soviet Union and the United States entertained private bilateral talks on the nuclear nonproliferation issue.⁷⁵ In 1964, in Cairo, nonaligned⁷⁶ nations issued a declaration that urged all states to agree upon a nuclear nonproliferation and disarmament treaty.⁷⁷ Six days after the Cairo declaration, however, the People's Republic of China exploded a nuclear bomb.⁷⁸

The Chinese explosion increased world-wide fears of nu-

71. INTERNATIONAL NEGOTIATIONS, *supra* note 4, at ix. In 1960, France became the fourth nuclear-weapon state. *Id.* Furthermore, the world community strongly and correctly suspected that the People's Republic of China's nuclear program was only a few years behind France's. *Id.*

72. *Prevention of the Wider Dissemination of Nuclear Weapons*, G.A. Res 1665, U.N. GAOR, 16th Sess., Supp. No. 17 at 5, U.N. Doc. A/5100 (1961) [hereinafter G.A. Res. 1665]. There was one vote against the resolution, but the U.S. Arms Control and Disarmament Agency considers the vote to be unanimous. INTERNATIONAL NEGOTIATIONS, *supra* note 4, at 5.

73. G.A. Res. 1665, *supra* note 72.

74. G.A. Res. 1665, art. 1, at 6. The U.N. General Assembly "[b]elieved in the necessity of an international agreement, subject to inspection and control," *id.* pmb., at 6, and called upon all nations

to use their best endeavors to secure the conclusion of an international agreement containing provisions under which the nuclear States would refrain from relinquishing control of nuclear weapons and from transmitting the information necessary for their manufacture to States not possessing such weapons, and provisions under which States not possessing nuclear weapons would undertake not to manufacture or otherwise acquire control of such weapons.

Id. art. 1, at 6. That same day, Sweden's Foreign Minister Osten Uldén suggested that the non-nuclear nations take the initiative from the nuclear club. INTERNATIONAL NEGOTIATIONS, *supra* note 4, at ix. Hours later, the General Assembly also passed a Swedish-sponsored resolution, *Question of Disarmament*, G.A. Res 1664, U.N. GAOR, 16th Sess., Supp. No. 17 at 5, U.N. Doc. A/5100 (1965), asking the Secretary-General to inquire into conditions under which the non-nuclear states would agree not to acquire or produce nuclear weapons. *Id.*; INTERNATIONAL NEGOTIATIONS, *supra* note 4, at ix.

75. INTERNATIONAL NEGOTIATIONS, *supra* note 4, at ix.

76. Ted Greenwood, *Discouraging Proliferation in the Next Decade and Beyond*, in NUCLEAR PROLIFERATION: MOTIVATIONS, CAPABILITIES AND STRATEGIES FOR CONTROL 112-113 (Council of Foreign Relations ed., 1977). In this Note, the term "nonaligned" nations refers to nations that did not politically align themselves with either the Soviet Union or the United States. *See id.* (discussing impact of non-nuclear state decision whether to align with nuclear superpower upon same non-nuclear state's decision whether to acquire nuclear weapons or not).

77. INTERNATIONAL NEGOTIATIONS, *supra* note 4, at x.

78. *Id.* at xi.

clear war and global desire for a nuclear nonproliferation pact.⁷⁹ The United States and the Soviet Union tried to respond to these fears and desires in 1965 by submitting draft nonproliferation treaties in the United Nations.⁸⁰ The 1965 negotiations be-

79. *Id.*

80. *See id.* at x-xi (outlining superpowers desire to respond to international pressure demanding that nonproliferation agreement be reached). In 1965, the United States submitted a nonproliferation draft treaty. U.S. Proposal Submitted to ENDC: Draft Treaty to Prevent the Spread of Nuclear Weapons, Aug. 17, 1965, U.N. Doc. ENDC/152, in U.N. Doc. A/5986 (1965), 4 I.L.M. 1149 (1965) [hereinafter 1965 U.S. Draft Treaty]. The 1965 U.S. Draft Treaty did not require safeguards but did urge states to apply either Agency's or an equivalent safeguards system. *Id.* art. III, U.N. Doc. ENDC/152 at 2, 4 I.L.M. at 1149. The 1965 U.S. Draft Treaty defined proliferation as the numerical increase of states with independent power to fire nuclear weapons. *Id.* art. I, U.N. Doc. ENDC/152 at 1, 4 I.L.M. at 1149. The 1965 U.S. Draft Treaty also allowed for a signatory's withdrawal with three months' notice to all signatory and acceding states, as well as the U.N. Security Council, if such notice included a statement of the extraordinary events related to the subject matter that the state regarded as having jeopardized its supreme interest. *Id.* art. VI, U.N. Doc. ENDC/152 at 3, 4 I.L.M. at 1149.

Again, superpower disagreements over the definition of proliferation as it pertained to military alliances killed the proposal. INTERNATIONAL NEGOTIATIONS, *supra* note 4, at x-xi. The Soviet Union opposed the 1965 U.S. Draft Treaty because of the treaty's definition of proliferation. *Id.* at x. The Soviets thought that the 1965 U.S. Draft Treaty's definition of proliferation allowed the North Atlantic Treaty Organization ("NATO") to establish a multilateral nuclear force that would, in turn, give the Federal Republic of Germany ("FRG") indirect access to nuclear weaponry. *Id.* The United States replied that under the 1965 Draft Treaties definition, the FRG could not fire U.S. missiles without U.S. consent. *Id.* While publicly applauding other nonproliferation goals achieved by the 1965 U.S. Draft Treaty, the Soviet Union refused to agree to any provision allowing such "indirect access." *Id.*

One month later, the Soviet Union submitted its own draft treaty. Soviet Draft Treaty on the Nonproliferation of Nuclear Weapons, Sept. 24, 1965, U.N. GAOR, 1st Comm., 20th Sess., Annex, Agenda Item 160 at 2, U.N. Doc. A/5976, 4 I.L.M. 1141 [hereinafter Soviet 1965 Draft Treaty]. The 1965 Soviet Draft Treaty differed from the U.S. proposal in several important areas. *Compare, e.g., id.* art II(1), U.N. Doc. A/5976 at 2, 4 I.L.M. at 1142, with 1965 U.S. Draft Treaty, *supra*, art. III, U.N. Doc. ENDC/152 at 2, 4 I.L.M. at 1149 (providing for safeguards in 1965 U.S. Draft Treaty but not in Soviet 1965 Draft Treaty). First, the Soviet version prohibited non-nuclear-weapon states from the direct or indirect right to participate in the ownership, control or use of nuclear weapons. Soviet 1965 Draft Treaty, *supra*, art. II(1), U.N. Doc. A/5976 at 2, 4 I.L.M. at 1142. Second, the 1965 Soviet Draft Treaty had no provision for safeguards. INTERNATIONAL NEGOTIATIONS, *supra* note 4, at xi. *See generally* Soviet 1965 Draft Treaty, *supra*, U.N. Doc. A/5976, 4 I.L.M. at 1141. Also unlike its elder American cousin, the Soviet 1965 Draft Treaty emphasized that each treaty party had the right, in exercising its national sovereignty, to withdraw from the treaty with three months notice to other signatories. Soviet 1965 Draft Treaty, *supra*, art. VI, ¶ 2, U.N. Doc. A/5976 at 3, 4 I.L.M. at 1143. Finally, the Soviet 1965 Draft Treaty allowed signatories to withdraw without explanation of the extraordinary events that jeopardized the state's supreme interest. *Id.*

tween the United States and Soviet Union failed because the two countries could not agree upon a definition of proliferation, a safeguards provision, and how much weight national sovereignty should be given in the Treaty's withdrawal clause.⁸¹ The nonaligned nations' demand for complete disarmament also helped to destroy the 1965 negotiations.⁸² Nonetheless, the global community called for the continuation of nuclear non-proliferation treaty negotiations.⁸³ The superpowers also helped to break the cycle of disagreement by holding private discussions during the United Nation's 21st General Assembly.⁸⁴ After intensive consultations with allies and interested parties,⁸⁵ in 1967 the United States and the Soviet Union submitted the result of their private discussions to the U.N. General Assembly in the form of identical draft treaties.⁸⁶

81. See *supra* note 80 (discussing history of 1965 negotiations).

82. *Disarmament Commission "Omnibus" Resolution*, U.N. G.A., 1st Comm. Res.—, 102nd mtg., U.N. Doc. 225 (1965) [hereinafter *Omnibus Resolution*]. During the debate surrounding the June 15, 1965 Omnibus Resolution, Sweden, India and other countries stated that a nonproliferation agreement should have disarmament measures linked to it. INTERNATIONAL NEGOTIATIONS, *supra* note 4, at x. Both the Soviet Union and the United States expressed their desire to keep the nonproliferation issue separate. *Id.* Nonetheless, all eight non-aligned Eighteen Nation Disarmament Commission States submitted a joint memorandum declaring that nonproliferation was not an end in itself. See generally *Omnibus Resolution*, *supra*, at 1-2 (noting with regret that no measures for disarmament were developed during the nonproliferation negotiations of 1964).

83. *Non-proliferation of Nuclear Weapons*, G.A. Res. 2028, U.N. GAOR, 1st Comm., 20th Sess., Supp. No. 14 at 7, U.N. Doc. A/6014 (1965), 5 I.L.M. 169 (1965) [hereinafter G.A. Res 2028]. In November 1965, the U.N. General Assembly unanimously approved a resolution calling upon ENDC to negotiate a nonproliferation agreement. *Id.* The resolution was sponsored by the eight nonaligned ENDC nations: Brazil, Burma, Ethiopia, India, Mexico, Nigeria, Sweden, and the United Arab Emirates. INTERNATIONAL NEGOTIATIONS, *supra* note 4, at 138, FN. 15. The resolution passed by a 93-0 vote, with 5 abstentions by Cuba, France, Guinea, Pakistan, and Romania. *Id.*

84. INTERNATIONAL NEGOTIATIONS, *supra* note 4, at xiii. As a first step, the United States and Soviet Union co-sponsored a U.N. General Assembly resolution asking all nations to refrain from taking any actions that might damage the nonproliferation treaty's development. *Renunciation by States of Actions Hampering the Conclusion of an Agreement on the Nonproliferation of Nuclear Weapons, November 4th, 1966*, U.N. GAOR, 21st Sess., Supp. No. 16, at 9, U.N. Doc. A/6316 (1966). 110 members voted for the measure, Cuba abstained, and Albania voted against it. INTERNATIONAL NEGOTIATIONS, *supra* note 4, at 141.

85. INTERNATIONAL NEGOTIATIONS, *supra* note 4, at xiii-xiv.

86. *Draft Treaty on the Nonproliferation of Nuclear Weapons*, August 24, 1967, U.N. Doc. DC/192 (1967), 7 I.L.M. 155 (1967) [hereinafter 1967 U.S.-Soviet Draft Treaty].

2. The 1968 Nuclear Nonproliferation Treaty

After the world community commented upon the 1967 draft treaties, the United States and Soviet Union made the final changes to what then became the 1968 Nuclear Nonproliferation Treaty.⁸⁷ Most importantly, the NPT prohibits: (i) the distribution of nuclear weapons by signatories that already possess them to signatories that lack them,⁸⁸ and (ii) the acquisition of nuclear weapons among signatories that had not yet created them.⁸⁹ To induce non-nuclear nations to sign the Treaty, the NPT contains indirect security pledges from nuclear to non-nuclear signatories.⁹⁰ The NPT also allows a signatory to withdraw when withdrawal would be in the signatory's supreme interests.⁹¹ Finally, although the NPT uses the Agency as a monitoring organization to verify Treaty compliance, the NPT itself does not contain a provision stating what measures the Agency may take to monitor the signatory.⁹² Rather, the NPT mandates that each signatory conclude a safeguards agreement with the Agency within eighteen months of the signatory's Treaty ratification.⁹³ The NPT drafters envisioned that these provisions, taken together, would halt the spread of nuclear weapons.⁹⁴

87. See INTERNATIONAL NEGOTIATIONS, *supra* note 4, at 117-26 (reviewing history of 1967 U.S.-Soviet Draft Treaty); NPT, *supra* note 2, 21 U.S.T. 483, 729 U.N.T.S. 161. The withdrawal clause remained unchanged from the 1967 U.S.-Soviet Draft Treaty. NPT, *supra* note 2, art. X(1), 21 U.S.T. at 493, 729 U.N.T.S. at 173. Article X(1) of the NPT states that:

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.

Id.

88. *Id.* art. I, 21 U.S.T. at 483, 729 U.N.T.S. at 161.

89. *Id.* The NPT also requires nuclear weapon signatories to negotiate an agreement to cease the nuclear arms race. *Id.* art. VI, 21 U.S.T. at 490, 729 U.N.T.S. at 173.

90. *E.g.*, *id.* pmb., 21 U.S.T. at 484-86, 729 U.N.T.S. at 162-63; *id.* art. VII, 21 U.S.T. at 491, 729 U.N.T.S. at 173; *Question Relating to Measures to Safeguard Non-Nuclear-Weapons States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, U.N. SCOR, 23rd Sess., U.N. Doc. No. S/255 (1968), 7 I.L.M. 895 (1968) [hereinafter S.C. Res. 255].

91. *Id.* art. X, 21 U.S.T. at 493, 729 U.N.T.S. at 175.

92. *Id.* art. III, 21 U.S.T. at 487-89, 729 U.N.T.S. at 172.

93. *Id.*

94. *Id.* pmb., 21 U.S.T. at 484-86, 729 U.N.T.S. at 169-71. The final version of the NPT also reflects the nonaligned nations' demand for a global disarmament campaign.

The NPT defines nuclear proliferation.⁹⁵ Under the NPT, nuclear-weapon signatories agree not to transfer nuclear weapons or control over such weapons to any recipient.⁹⁶ Nuclear-weapon NPT signatories also agree not to assist, encourage, or induce any non-nuclear-weapon state to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or exercise control over such weapons or explosive devices.⁹⁷ Similarly, non-nuclear-weapon states agree not to receive the transfer or control of such devices.⁹⁸

The NPT's references that allow non-nuclear signatories to be more secure from nuclear attacks are indirect.⁹⁹ The NPT's Preamble explicitly refers to the collective security pledge of the U.N. Charter.¹⁰⁰ Article VII of the NPT guarantees that nothing

Id. art. VI, 21 U.S.T. at 490, 729 U.N.T.S. at 173. The Treaty's Article VI, entitled "Disarmament Negotiations," never appeared in prior treaty drafts. INTERNATIONAL NEGOTIATIONS, *supra* note 4, at xv-xvi. Nonetheless, Article VI requires all parties to the Treaty to pursue "negotiations in good faith on effective measures relating to cessation of the nuclear arms race . . . and to nuclear . . . general and complete disarmament under strict and effective international control." NPT, *supra* note 2, art. VI, 21 U.S.T. at 490, 729 U.N.T.S. at 173. Several nations wanted the NPT to contain specific disarmament measures, but both superpowers stated that such provisions could lead to a failure of negotiations. INTERNATIONAL NEGOTIATIONS, *supra* note 4, at xv.

95. NPT, *supra* note 2, arts. I-II, 21 U.S.T. at 487, 729 U.N.T.S. at 171.

96. *Id.* art. I, 21 U.S.T. at 487, 729 U.N.T.S. at 171. The text of Article I states that:

Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.

Id.

97. *Id.*

98. *Id.* art. II, 21 U.S.T. at 487, 729 U.N.T.S. at 171. Article II states that:

Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.

Id.

99. *Id.* pmb., 21 U.S.T. at 484-86, 729 U.N.T.S. at 171; *id.* art. VII, 21 U.S.T. at 491, 729 U.N.T.S. at 173; see S.C. Res. 255, *supra* note 90 (granting security assurances to non-nuclear weapon signatories).

100. See NPT, *supra* note 2, pmb., 21 U.S.T. at 486, 729 U.N.T.S. at 171. Specifically, the pertinent parts of the Preamble state that the signatories:

Desir[e] to further the easing of international tension and the strengthen-

in the Treaty affects the right of any group of States to conclude regional treaties in order to ensure the total absence of nuclear weapons in their respective territories.¹⁰¹ Because many non-nuclear nations demanded a more explicit security pledge from nuclear nations, the United States, the United Kingdom, and the Soviet Union jointly sponsored a linked¹⁰² resolution¹⁰³ in the U.N. Security Council.¹⁰⁴

The NPT's withdrawal clause¹⁰⁵ merged U.S. and Soviet views¹⁰⁶ by allowing each signatory, in exercising its national sovereignty, to withdraw from the Treaty if that party decided that

ing of trust between States in order to facilitate the cessation of the manufacture of nuclear weapons

Recall[] that, in accordance with the Charter of the United Nations, States must refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations, and that the establishment and maintenance of international peace and security are to be promoted with the least diversion for armaments of the world's human and economic resources.

Id.

101. *Id.* art. VII, 21 U.S.T. at 491, 729 U.N.T.S. at 173.

102. INTERNATIONAL NEGOTIATIONS, *supra* note 4, at xv. The linked security resolution was annexed with the final NPT draft as part of the 1968 ENDC report to the General Assembly. *Id.*

103. S.C. Res. 255, *supra* note 90, 7 I.L.M. at 895. The pertinent part of the resolution says that:

The Security Council

1. *Recognizes* that aggression with nuclear weapons or the threat of such aggression against a non-nuclear-weapon State would create a situation in which the Security Council, and above all its nuclear-weapon State permanent members, would have to act immediately in accordance with their obligations under the United Nations Charter;

Id.

104. *Id.*; see INTERNATIONAL NEGOTIATIONS, *supra* note 4, at xv-xvi (describing vote count). The resolution passed 10-0 with 5 abstentions. *Id.* at xvi; see *supra* note 103 (stating S.C. Res. 255's text).

105. NPT, *supra* note 2, art. X, 21 U.S.T. at 493, 729 U.N.T.S. at 175. The text of the withdrawal clause states that:

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 interest.

Id.

106. See *supra* notes 80-81 and accompanying text (discussing differing Soviet and American views on possible withdrawal provision).

events related to the NPT jeopardized the signatory's supreme interests.¹⁰⁷ In such circumstances, a signatory may withdraw by giving three months notice to the other NPT signatories and the U.N. Security Council.¹⁰⁸ Such notice of withdrawal must also describe the extraordinary events that created the signatory's intent to withdraw.¹⁰⁹ The withdrawal clause's language seems to reflect the U.S. desire to temper unforeseen national developments and sudden withdrawals with the U.N. system of international regulation and collective security.¹¹⁰

Finally, the NPT contains a provision that requires only non-nuclear-weapon states to accept Agency safeguards.¹¹¹ However, the Treaty does not define the safeguards to which the new signatory must agree.¹¹² Rather, the NPT only requires that each new signatory individually negotiate a safeguards agreement with the Agency¹¹³ within eighteen months of ratifying the NPT.¹¹⁴

107. NPT, *supra* note 2, art. X, 21 U.S.T. at 493, 729 U.N.T.S. at 175; *see supra* note 105 (reviewing text of Article X).

108. NPT, *supra* note 2, art. X, 21 U.S.T. at 493, 729 U.N.T.S. at 175.

109. *Id.*

110. *See supra* notes 80-81 (discussing language contained in Article VI of U.S. 1965 Draft Treaty).

111. NPT, *supra* note 2, art. III(1), 21 U.S.T. at 487, 729 U.N.T.S. at 172.

112. INFCIRC/153, *supra* note 10, ¶ 74, at 19. Safeguards could include measures such as placing cameras in the signatory's nuclear sites and seals on its nuclear material containers. *Id.*

113. NPT, *supra* note 2, art. III(1), 21 U.S.T. at 487, 729 U.N.T.S. at 172. Article III states:

1. Each non-nuclear-weapon State Party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency and the Agency's safeguard system, for the exclusive purpose of verification of the fulfillment of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices. Procedures for the safeguards required by this article shall be followed with respect to source or special fissionable material whether it is being produced, processed or used in any principal nuclear facility or is outside any such facility. The safeguards required by this article shall be applied on all source or special fissionable material in all peaceful nuclear activities within the territory of such State, under its jurisdiction, or carried out under its control anywhere.

2. Each State Party to the Treaty undertakes not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this article.

C. *The DPRK's Ratification of the NPT and the North Korean-Agency Safeguards Agreement*

In 1985, the DPRK ratified the NPT.¹¹⁵ The DPRK's individually-negotiated safeguards agreement with the Agency entered into force on April 10, 1992.¹¹⁶ The North Korean-Agency Safeguards Agreement is explicitly promulgated under the NPT's safeguards provision.¹¹⁷ Moreover, the North Korean-Agency Safeguards Agreement fills in the blanks intentionally left by the

3. The safeguards required by this article shall be implemented in a manner designed to comply with article IV of this Treaty, and to avoid hampering the economic or technological development of the Parties or international cooperation in the field of peaceful nuclear activities . . . in accordance with the provisions of this article and the principle of safeguarding set forth in the Preamble of the Treaty.

4. Non-nuclear-weapons States Party to the Treaty shall conclude agreements with the International Atomic Energy Agency to meet the requirements of this article . . . in accordance with the Statute of the International Atomic Energy Agency. Negotiation of such Agreements shall commence within 180 days from the original entry into force of this Treaty. For States depositing their instruments of ratification or accession after the 180-day period, negotiation of such agreements shall commence not later than the date of such deposit. Such agreements shall enter into force not later than eighteen months after the date of the initiation of negotiations.

Id.

114. *Id.* art. III(4), 21 U.S.T. at 487, 729 U.N.T.S. at 172. To assist each new non-nuclear signatory State in its safeguard agreement negotiation, in 1972 the Agency published a model safeguard agreement known as INFCIRC/153. INFCIRC/153, *supra* note 13. Each new non-nuclear NPT signatory and the Agency use INFCIRC/153 as a starting point in their bilateral safeguard agreement negotiations. *See id.* ¶ 28, at 8 (IAEA document to be used as "a basis for negotiating safeguards agreements between the Agency and non-nuclear States"). Whatever final revisions and/or deletions to INFCIRC/153 that the new non-nuclear signatory and Agency ultimately agree upon then constitute their individualized safeguard agreement. *Id.*

115. INFCIRC/419, *supra* note 20, at 2.

116. INFCIRC/403, *supra* note 6, pmb1.

117. *Id.* art. 1. The North Korean-Agency Safeguards Agreement is explicitly promulgated to fulfill the requirements of the NPT and its safeguards provision. Article 1 of the North Korean-Agency Safeguards Agreement, entitled "Basic Undertaking," states that:

The Democratic People's Republic of Korea undertakes, pursuant to paragraph 1 of Article III of the Treaty, to accept safeguards . . . on all source or special fissionable material in all peaceful nuclear activities within its territory, under its jurisdiction or carried out under its control anywhere, for the exclusive purpose of verifying that such material is not diverted to nuclear weapons or other nuclear explosive devices.

Id.

NPT¹¹⁸ regarding what safeguards¹¹⁹ the Agency will use and how the Agency will apply them.¹²⁰

Under the terms of its safeguards agreement with the Agency, the DPRK accepted safeguards on nuclear materials used in all peaceful activities that are undertaken anywhere in its territory.¹²¹ By signing the North Korean-Agency Safeguards Agreement, the DPRK also acknowledged that the objective of safeguards is to allow the Agency to verify that the DPRK is not diverting significant amounts of nuclear materials from peaceful nuclear activities to proscribed uses.¹²² To protect against the Agency being unnecessarily obtrusive in the DPRK's national affairs when verifying compliance, however, the North Korean-Agency Safeguards Agreement prioritizes different safeguards measures.¹²³ According to the North Korean-Agency Safeguards Agreement, material accountancy is the Agency's safeguards measure of fundamental importance, and containment and surveillance are complementary measures.¹²⁴ Finally, under the terms of the North Korean-Agency Safeguards Agreement, the DPRK and the Agency acknowledge that any amendments to the safeguards agreement must be agreed upon by both the Agency and the DPRK.¹²⁵

1. Article 14 of the North Korean-Agency Safeguards Agreement: Establishing Conditions for the Use of Nuclear Materials in Military Applications

Article 14 of the North Korean-Agency Safeguards Agreement contains a provision concerning the application of safe-

118. See *supra* notes 111-14 and accompanying text (discussing lack of specific safeguards mentioned in NPT).

119. See *supra* note 10 (defining safeguards); *supra* note 112 (discussing newer forms of safeguards).

120. E.g., INFCIRC/403, *supra* note 6, art. 14 (describing safeguards to be applied when nuclear materials are used in non-proscribed military applications); *id.* arts. 18-19 (describing Agency's reporting duties when Agency is unable to verify DPRK compliance).

121. *Id.* art. 1.

122. *Id.* art. 28; see *supra* note 14 (describing proscribed and non-proscribed uses of nuclear materials). The Agency is also obliged to detect any such prohibited diversions in a timely manner. INFCIRC/403, *supra* note 6, art. 28.

123. *Id.* art. 29.

124. *Id.*

125. *Id.* art. 24(b).

guards¹²⁶ when North Korea uses nuclear materials in military applications.¹²⁷ Article 14 allows the suspension of Agency safeguards when nuclear materials are used in military applications.¹²⁸ To suspend safeguards on nuclear materials being used in military applications, Article 14 explicitly requires Pyongyang to inform the Agency clearly that: (i) the nuclear materials' use will not conflict with another activity for which Agency safeguards apply;¹²⁹ and (ii) that the materials will not be used for the production of nuclear weapons.¹³⁰ Under Article 14, the DPRK has an express duty to make arrangements with the Agency that identify the period or circumstances in which safeguards shall be suspended, as well as a duty to keep the Agency informed of the quantity and composition of the unsafeguarded materials.¹³¹ Pyongyang must also allow the Agency to re-apply safeguards as soon as the material is re-introduced into a peaceful nuclear activity.¹³² In any event, at all times, the DPRK must keep the Agency informed of the total quantity and composition of such unsafeguarded materials.¹³³ Such information, however, does not need to involve any Agency approval or classified knowledge of the military activity therein.¹³⁴

2. The North Korean-Agency Safeguards Agreement's Provisions for North Korean Non-Compliance with Agency Safeguards

The North Korean-Agency Safeguards Agreement has two articles that grant the Agency powers to enforce the Treaty when the Agency determines that it cannot verify North Korea's compliance with the NPT.¹³⁵ First, Article 19 of the North Korean-Agency Safeguards Agreement¹³⁶ provides that the Agency can

126. See *supra* note 10 (defining safeguards); *supra* note 112 (discussing alternative forms of safeguards).

127. INFCIRC/403, *supra* note 6, art. 14; see *supra* note 14 (discussing which uses of nuclear materials are proscribed by nuclear nonproliferation regime).

128. INFCIRC/403, *supra* note 6, art. 14(a). The article is entitled "The Non-application of Safeguards to Nuclear Material to Be Used in Non-peaceful Activities." *Id.*

129. *Id.* art. 14(a)(i).

130. *Id.* art. 14(a)(ii).

131. *Id.* art. 14(b)-(c).

132. *Id.* art. 14(b).

133. *Id.* art. 14(b)-(c).

134. *Id.* art. 14 (b)-(c).

135. *Id.* art. 18-19.

136. *Id.* art. 19.

take the measures outlined in Article XII of the IAEA Statute when the Agency feels that it cannot verify the DPRK's compliance.¹³⁷ Thus, if the Agency's Board determines that the information reported by the Agency's Director-General is insufficient to ensure verification, the Board can take the measures outlined in the Article XII of the IAEA Statute, including reporting the non-compliance to the U.N. Security Council.¹³⁸

Second, Article 18 of the North Korean-Agency Safeguards Agreement provides that the Board may "call upon"¹³⁹ the DPRK to take an action required by the Agency if the Board deems that

137. *Id.*; see *supra* notes 61-64 and accompanying text (discussing Agency's duty to report signatory non-compliance verify under Article XII(C) of IAEA Statute).

Article 19 of the North Korean-Agency Safeguards Agreement states:

If the Board, upon examination of relevant information reported to it by the Director General, 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, it may make the reports provided for in paragraph C of Article XII of the Statute of the Agency (hereinafter referred to as "the Statute") and may also take, where applicable, other measures provided for in that paragraph. In taking such action the Board shall take account of the degree of assurance provided by the safeguards measures that have been applied and shall afford the Democratic People's Republic of Korea every reasonable opportunity to furnish the Board with any necessary reassurance.

INFCIRC/403, *supra* note 6, art. 19

138. *Id.*; see IAEA Statute, *supra* note 2, art. XII(C) (describing mandatory Agency duty to call upon member to remedy non-compliance with safeguards and then, if member refuses, to report member's continuing non-compliance to U.N. Security Council and U.N. General Assembly). Although the North Korean-Agency Safeguards Agreement allows for the Agency to exercise some discretion when deciding whether to report North Korea's non-compliance to the United Nations, see INFCIRC/403, *supra* note 6, art. 19 (Agency "may" report inability to verify to United Nations), under the IAEA Statute, this duty is mandatory. See IAEA Statute, *supra* note 2, art. XII(C) (Agency "shall" report non-compliance to United Nations). Thus, when the Agency's inability to verify is due to a signatory's non-compliance, the Agency must report the member's non-compliance to the United Nations. Compare IAEA Statute, *supra* note 2, art. XII(C) (Agency "shall" report non-compliance to United Nations) with INFCIRC/403, *supra* note 6, art. 19 (Agency "may" report inability to verify to United Nations).

The North Korean-Agency Safeguards Agreement also provides dispute resolution mechanisms for less urgent disagreements. INFCIRC/403, *supra* note 6, arts. 20-22. Article 21 guarantees the DPRK the right to request that any question arising out of the North Korean-Agency Safeguards Agreement's interpretation or application be put to the Board. *Id.* art. 21. Article 22 provides that, except when the Agency reports to the U.N. Security Council that it is unable to verify the DPRK's NPT compliance, a three-member panel of arbitrators may be appointed at the request of either the DPRK or the Agency to make a binding decision regarding the dispute. *Id.* art. 22.

139. INFCIRC/403, *supra* note 6, art. 18.

the action is "essential and urgent"¹⁴⁰ in order to ensure verification.¹⁴¹ The DPRK cannot delay taking any action, even by calling for arbitration, if the Agency's Board has deemed that the action is "essential and urgent."¹⁴² Thus, once the Board resolves that compliance is "essential and urgent," the Board may "call upon" the DPRK to take whatever measures the Board resolves as necessary to ensure immediate compliance.¹⁴³ In such an Article 18 situation, the DPRK cannot appeal the Board's resolution until the Agency-required measures are completed.¹⁴⁴

In sum, the North Korean-Agency Safeguards Agreement allows the DPRK to use nuclear materials in military applications as long as those applications do not include the production of nuclear weapons.¹⁴⁵ Within the scope of Article 14, the North Korean-Agency Safeguards Agreement limits the Agency's powers to verify that the DPRK's nuclear materials are being used in military applications.¹⁴⁶ Nonetheless, if the Agency's powers to verify a signatory's compliance under Article 14 are insufficient, Articles 18 and 19 of the North Korean-Agency Safeguards Agreement give the Agency broad powers to use should the Board deem that the Agency's verification needs are "essential and urgent."¹⁴⁷

140. *Id.*

141. *Id.* The full text of Article 18 states:

If the Board, upon report of the Director General, decides that an action by the Democratic People's Republic of Korea is essential and urgent in order to ensure verification that nuclear material subject to safeguards under this Agreement is not diverted to nuclear weapons or other nuclear explosive devices, the Board may call upon the Democratic People's Republic of Korea to take the required action without delay, irrespective of whether procedures have been invoked pursuant to Article 22 of this agreement for the settlement of a dispute [by means of arbitration].

Id.

142. *Id.*

143. *Id.*

144. *See id.* (seeking dispute resolution is not option for DPRK if Board decides matter is essential and urgent).

145. *See supra* notes 126-34 and accompanying text (discussing DPRK's rights to use nuclear materials in military applications).

146. *See supra* notes 126-34 and accompanying text (discussing Agency's curtailed power to conduct safeguards when DPRK uses nuclear materials in military applications).

147. *See supra* notes 135-46 and accompanying text (discussing Agency's powers to call upon DPRK to take immediate action when need to conduct safeguards is considered by Board to be "essential and urgent").

II. LEGAL ISSUES RAISED BY THE CURRENT NORTH KOREAN CRISIS

Seven years after ratifying the NPT, but otherwise in accordance with the Treaty,¹⁴⁸ the DPRK signed an individually-negotiated safeguards agreement¹⁴⁹ with the Agency.¹⁵⁰ However, interpretation disputes arose between the Agency and DPRK nearly as soon as the agreement entered into force. Behind these disputes lie differing views of how the NPT and the nuclear nonproliferation regime should be interpreted.

A. *The Problematic Implementation of the North Korean-Agency Safeguards Agreement*

Until the 1990s, the Agency never found a case of non-compliance among NPT signatories.¹⁵¹ Despite several years of Agency inspections in Iraq,¹⁵² in 1992 the Agency discovered a clandestine nuclear weapons program that was several years old.¹⁵³ To enable the Agency to verify Treaty compliance more effectively than it had in Iraq, Agency Director-General Hans Blix proposed that the Agency allow members to submit intelligence concerning other member's nuclear activities.¹⁵⁴ The Agency's Board rejected this proposal because many Member States opposed it.¹⁵⁵ Nonetheless, one month after North Korea signed its safeguards agreement with the Agency, the Agency an-

148. NPT, *supra* note 2, art. III(4), 21 U.S.T. at 489, 729 U.N.T.S. at 172. The NPT requires parties that ratify the NPT to conclude safeguard agreements with the International Atomic Energy Agency within eighteen months of becoming an NPT party. *Id.*

149. INFCIRC/403, *supra* note 6.

150. INFCIRC/419, *supra* note 20, at 2.

151. Monahan, *supra* note 6, at 162.

152. Rolf Ekeus, *The U.N. Prevailed: Iraq had to Stand Down*, WASH. POST, Aug. 6, 1992, at A25.

153. *Id.*

154. See Monahan, *supra* note 6, at 163.

155. Michael Wise, *U.N. Agency Tightens Rules for Nuclear Inspection*, INDEPENDENT, Feb. 27, 1992, at 14.

Agency members already have a duty to make available such information as would, in the judgement of that member, be helpful to the Agency. IAEA Statute, *supra* note 6, art. VIII(A), 8 U.S.T. at 1102, 729 U.N.T.S. at 18. However, under the terms of the IAEA Statute, the Agency must use such data to promote peaceful uses of atomic energy, *id.* art. VIII(C), 8 U.S.T. at 1102, 729 U.N.T.S. at 18, rather than collective security issues. *Id.* Specifically,

[t]he Agency shall assemble and make available in an accessible form the information made available to it under paragraphs A and B of this article. It shall take positive steps to encourage the exchange among its members of

nounced that it would begin using data from third-party intelligence sources¹⁵⁶ when enforcing safeguards.¹⁵⁷

Pursuant to the North Korean-Agency Safeguards Agreement, the Agency began to confirm the DPRK's initial NPT compliance report of May 1992¹⁵⁸ ("Initial Report") with ad hoc inspections of North Korea's declared nuclear sites.¹⁵⁹ The Agency inspectors immediately found inconsistencies between their own data and the DPRK's Initial Report.¹⁶⁰ In an effort to resolve those inconsistencies, the Agency requested and received from North Korea permission to inspect a one-story building under military control in the Nyongbyon Research Center.¹⁶¹ During their brief visit to and limited inspection of Nyongbyon in September 1992, the Agency inspectors found no signs of a North Korean nuclear weapons program.¹⁶²

Despite the September inspection, the Agency still could not resolve the original discrepancy between the Agency's and the DPRK's data.¹⁶³ Moreover, subsequent information given to the Agency by a third party¹⁶⁴ indicated that the Nyongbyon building had a secret, additional basement level that the Agency had never inspected.¹⁶⁵ Two months later, the Agency asked for additional data and inspection privileges, including the right to inspect the alleged bottom floor of the

information relating to the nature and peaceful uses of atomic energy and shall serve as an intermediary among its members for this purpose.

Id.

156. In this Note, a third-party intelligence source means that a first party (here, the Agency) received intelligence information about a second party (here, the DPRK) from a third party.

157. IAEA Press Release, IAEA Doc. PR 92/12 (Feb. 26, 1992).

158. INFCIRC/419, *supra* note 20, at 2-3. The DPRK has an obligation to account for its nuclear materials in reports to the Agency. INFCIRC/403, *supra* note 6, art. 69.

159. INFCIRC/419, *supra* note 20, at 2-3.

160. *Id.* at 3.

161. *Id.*

162. *Id.*

163. *Id.* at 2. The DPRK claimed that the missing fuel from Nyongbyon's radiochemical laboratory was reprocessed, but the Agency could not find evidence confirming that explanation. *Id.*

164. INFCIRC/419, *supra* note 20, at 3. The DPRK insists that the United States was the third party which gave the Agency intelligence concerning Nyongbyon. DPRK Withdrawal Statement, *supra* note 20, at 2. However, neither the Agency nor the United States have ever confirmed or denied the DPRK's assertion that the third-party intelligence source was the United States. *See, e.g.*, INFCIRC/419, *supra* note 20, at 3 (admitting third-party sources used but not identifying third-party).

165. *Id.* at 3.

Nyongbyon facility.¹⁶⁶

The North Koreans denied the Agency a second visit to Nyongbyon but agreed to discuss the issue of access.¹⁶⁷ At the January 1993 Agency-DPRK meeting, the Agency revealed that a third party had passed intelligence to the Agency.¹⁶⁸ The third-party intelligence indicated that a DPRK nuclear weapons facility existed in Nyongbyon's secret second basement.¹⁶⁹ The DPRK responded first by objecting strenuously to the use of third-party sources.¹⁷⁰ The DPRK also stated that the Nyongbyon building was a military site not relevant to the DPRK's nuclear activities.¹⁷¹ The Agency responded that it had reason to believe that access to the Nyongbyon site was relevant to the implementation of the North Korean-Agency Safeguards Agreement.¹⁷² The Agency also stated that, in view of the discrepancies between the DPRK Initial Report and the Agency's inspections, the Agency could not ignore the third-party information in its possession.¹⁷³

After the January 1993 meeting, the situation became increasingly confrontational.¹⁷⁴ In February 1993, the Agency's Board of Governors passed a resolution¹⁷⁵ declaring that access to Nyongbyon was "essential and urgent."¹⁷⁶ The United States and South Korea announced the resumption of the Team

166. *Id.* Later that month, the IAEA was careful to stress that its visit was only to "ascertain[] the purpose and use of the spaces under the floor of the building." *Id.* at 4.

167. *Id.* A sixth team of IAEA inspectors were allowed into North Korea in January 1993. *Id.* Although the DPRK provided additional information at this meeting, the IAEA inspectors felt that the DPRK officials nonetheless failed to provide satisfactory answers and complete documentation. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *See id.* (stating that without better DPRK explanations of inconsistencies, Agency could not ignore discrepancies).

174. *See, e.g., A Chronology of the North Korean Nuclear Impasse*, Agence France Presse, Feb. 16, 1994, available in LEXIS, Nexis Library, WORLD News File [hereinafter *Chronology*] (reporting that Republic of Korea and United States decided to re-implement Team Spirit); INFCIRC/419, *supra* note 20, at 6 (declaring that, in DPRK view, state of "semi-war" existed).

175. GOV/2636, *supra* note 63, at 1. Most importantly, the resolution stated that the Board of Governors "[d]ecide[d] that access to additional information and [the] two additional sites . . . [was] essential and urgent in order to resolve differences and to ensure verification of compliance with [the North Korean-Agency Safeguards Agreement]." *Id.* at 2.

176. INFCIRC/419, *supra* note 20, at 5.

Spirit¹⁷⁷ joint military exercises on the southern Korean peninsula.¹⁷⁸ In response, less than two weeks later the DPRK declared a "state of semi-war"¹⁷⁹ and Pyongyang denied Agency inspectors entry into North Korea.¹⁸⁰

On March 12, 1993, the Agency received a DPRK statement declaring Pyongyang's withdrawal from the NPT ("DPRK Withdrawal Statement").¹⁸¹ The DPRK Withdrawal Statement de-

177. See generally *Chronology*, *supra* note 174. Team Spirit is an annual military exercise that the United States conducted with the Republic of Korea on the Republic of Korea's Territory. *Id.* The United States and the Republic of Korea suspended Team Spirit when the DPRK ratified INFCIRC/403. *Id.*

178. *Chronology*, *supra* note 174. The two countries had canceled Team Spirit as a symbolic gesture after Pyongyang ratified INFCIRC/403. *Id.*

179. INFCIRC/419, *supra* note 20, at 6; see Letter of Choi Hak Gun, DPRK Minister of Atomic Energy, to Dr. Hans Blix, Director-General of the International Atomic Energy Agency (March 10, 1993) [hereinafter Choi March 10 Letter], in INFCIRC/419, *supra* note 20, Annex 5. The text of Choi's letter alleges that:

I have several times mentioned our view, position and the solution regarding [the] clarification of "inconsistencies" and access of two additional sites requested by you. Nevertheless some officials in the IAEA Secretariat involved in the superpower's strategy against Korea presented the problems which could have been solved without any difficulties through the ad hoc inspections exaggeratedly in difference with reality to the February Board meeting, and thereby [sic] Board adopt unjust resolution. It is very regretful for us.

Now the U.S. and South Korean authorities reopened the joint military exercise "Team Spirit" which was ceased [sic] and they are conducting the [sic] nuclear war exercise mobilizing the [sic] large-scale forces against us.

In this context our country has been put in the state of semi-war by the order of the [DPRK's] Supreme Commander on March 8, 1993

I have to inform you under the such political and military circumstances created in our country that we could not but reserve consideration of the receipt of the [Agency's] inspection team concerning the implementation of the unjust resolution of the February [Agency] Board meeting.

Choi March 10 Letter, *supra*.

180. INFCIRC/419, *supra* note 20, at 6.

181. DPRK Withdrawal Statement, *supra* note 20, at 1-4. The Statement says in part:

A grave situation has been created today in our country, which threatens its national sovereignty and the security of our State.

The United States and the south Korean authorities have defiantly resumed the "Team Spirit" joint military exercises, a nuclear war rehearsal against the Democratic People's Republic of Korea (DPRK), and, in coincidence with this, some officials of the Secretariat of the International [sic] Atomic Energy Agency (IAEA) and certain member nations following the lead of the United States has a "resolution" adopted at the February 25 meeting of the IAEA Board of Governors, demanding a special inspection of our military sites unrelated to nuclear activities.

This is an encroachment on the sovereignty of the DPRK, an interference in its internal affairs and a hostile act aimed at stifling our socialism.

clared that North Korea intended to withdraw from the NPT because the Agency was acting with bias against the DPRK by using third-party intelligence against the DPRK and by demanding special inspections of a military facility.¹⁸² Four days later, the DPRK asserted that the NPT's withdrawal clause precluded Agency inspections during the three-month notice period.¹⁸³

Without inspections during the three-month notice period, the Agency did not consider the DPRK's Withdrawal Statement to be an effective statement of intent to withdraw from the NPT.¹⁸⁴ One week after receiving the DPRK Withdrawal State-

The DPRK government . . . decisively rejects the unjust resolution of the meeting of the IAEA Board of Governors.

Proceeding from its anti-nuclear, peace policy, the DPRK Government joined the Nuclear Non-Proliferation Treaty (NPT) and had since fulfilled its obligations under the NPT in good faith. It was on the premise that the depository States of the NPT should neither deploy their nuclear weapons on the Korean peninsular [sic] nor pose any nuclear threat against the DPRK that the DPRK signed, the Safeguards Agreement with the IAEA and accepted IAEA inspections.

Nevertheless, the United States remains unchanged, . . . far from fulfilling its obligations under the NPT as a nuclear-weapon [sic] State to withdraw its nuclear weapons from south Korea and remove its nuclear war threats against the DPRK. . . .

If we submissively accept an unjust inspection by the IAEA, it would legitimize [sic] the espionage acts by the United States, a belligerent party vis-a-vis the DPRK, and set the beginning of the full exposure of all our military installations. Under our specific conditions in which the country still remains divided and exposed to the constant nuclear threats from the United States, it will be totally inconceivable to lay our military sites open to the enemies. . . .

All these facts evidently show that the United States, those forces hostile to the DPRK and some officials of the IAEA secretariat are misapplying the NPT to jeopardize the sovereignty and security of our country, a non-nuclear weapon State, and stifle our socialist system. . . .

The Government of the Democratic People's Republic of Korea declares its decision to withdraw unavoidably from the Nuclear Non-Proliferation Treaty as a measure to defend its supreme interests.

Id.

182. *Id.* at 2.

183. See Letter from Choi Hak Gun, DPRK Minister of Atomic Energy, to Dr. Hans Blix, Director-General of the International Atomic Energy Agency (Mar. 16, 1993) [hereinafter Choi March 16 Letter], in INFCIRC/419, *supra* note 20, annex 9, at 2 ("In such circumstances, I make it clear that we cannot receive the Agency inspection teams."); Letter from Choi Hak Gun, DPRK Minister of Atomic Energy, to Dr. Hans Blix, Director-General of the International Atomic Energy Agency (Mar. 30, 1993), in INFCIRC/419, *supra* note 20, annex 12 ("I would like to reaffirm that the issue of 'special inspection' you insist [upon] could not be a matter of discussion.").

184. Report by the Director General on the Implementation of the Resolution Adopted by the Board on 25 February 1993 (GOV/2636) and of the Agreement between the Agency and the Democratic People's Republic of Korea for the Application of Safeguards in Connection with the Treaty

ment, the Agency's Board responded by passing a resolution¹⁸⁵ calling for the inspectors' immediate admission to Nyongbyon.¹⁸⁶ On April 1, the Board resolved¹⁸⁷ to report the DPRK's non-compliance to the U.N. Security Council and the U.N. General Assembly.¹⁸⁸

In May 1993, the U.N. Security Council passed a resolution¹⁸⁹ calling for the DPRK to reconsider its March 12 Withdrawal Statement and to honor its continuing NPT and North Korean-Agency Safeguards Agreement obligation to permit inspections during the three-month notice period.¹⁹⁰ For the remainder of 1993, the Agency and sometimes the United States tried unsuccessfully to negotiate with the DPRK.¹⁹¹ Meanwhile, the Agency safeguards that remained in North Korea, such as cameras and nuclear seals, expired.¹⁹² In November 1993, the

on the Non-Proliferation of Nuclear Weapons, Bd. of Governors Res. 2639, IAEA Doc. GOV/2639 (Mar. 29, 1993), in INFCIRC/419, *supra* note 20, annex 10, at 1 [hereinafter IAEA Doc. GOV/2639]. The Board's resolutions also confirmed that the matter of Nyongbyon's inspection was still "essential and urgent." *Id.* at 2. The resolution also stated that it found the Director-General's work to be "impartial and objective." *Id.* at 1.

185. *Id.* at 1.

186. *Id.* at 2.

187. *Report by the Director General on the Implementation of the Resolution Adopted by the Board on 25 February 1993 (GOV/2636) and of the Agreement between the Agency and the Democratic People's Republic of Korea for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons (INFCIRC/403)*, Bd. of Governors Res. 2645, IAEA Doc. GOV/2645 (Apr. 1, 1993), in INFCIRC/419, *supra* note 20, annex 1, at 1-2 [hereinafter IAEA Doc. GOV/2645].

188. *Id.* at 2.

189. S.C. Res. 825, U.N. SCOR, 20 Sess., 3212th mtg., U.N. Doc. S/Res/825 (1993) [hereinafter S.C. Res. 825]. Of the Security Council's fifteen members, thirteen voted for the measure. *U.N. Asks North Korea to Reverse Nuclear Nonproliferation Decision*, Agence Presse France, May 11, 1993, available in LEXIS, Nexis library, CURNWS file. The other two Security Council members, China and Pakistan, abstained. *Id.*

190. S.C. Res. 825, *supra* note 189, at 2.

191. See generally *Chronology*, *supra* note 174. The DPRK will not allow the Agency to inspect Nyongbyon until the United States formally recognizes the DPRK's statehood. See Telex from DPRK Ho Jin Yun, Embassy Counselor, to the International Atomic Energy Agency (February 20, 1994), quoted in Douglas Hamilton, *Inspection on Hold as IAEA Awaits North Korea-U.S. Talks*, Reuters, Ltd., Feb. 21, 1994, available in LEXIS, Nexis Library, WORLD News File ("The date of inspections must be coordinated with the date when the United States will take other measure[s]" related to DPRK, such as economic aid or diplomatic recognition).

192. Anthony Goodman, *U.N. Calls on N. Korea to Comply with Nuclear Treaty*, Reuters, Nov. 1, 1993, available in LEXIS, Nexis Library, WORLD News File [hereinafter *U.N. Calls on N. Korea*]. IAEA Director-General Hans Blix said, referring to the cameras: "I can tell you that we believe they have run out probably several weeks ago—run out of film and run out of electricity. So they are no longer taking any pictures." *Id.*

U.N. General Assembly passed a resolution¹⁹³ noting that the DPRK's area of non-compliance was widening and called upon the DPRK to comply with the North Korean-Agency Safeguards Agreement.

As of October 1994, North Korea still considers itself withdrawn¹⁹⁴ from the NPT.¹⁹⁵ Yet the Agency still denies that the DPRK's Withdrawal Statement started the three-month notice period running¹⁹⁶ and insists that the NPT and the North Korean-Agency Safeguards Agreement require the DPRK to allow Agency inspectors to enter Nyongbyon.¹⁹⁷ As of October 1994, the DPRK has refused to allow Agency inspectors into Nyongbyon.¹⁹⁸

193. *Report of the International Atomic Energy Agency*, G.A. Res. 48, U.N. GAOR, 48th Sess., Supp. No. ___ at ___, U.N. Doc. A/Res/48 (1993) [hereinafter G.A. Res. 48]. The vote was 140-1-9. *U.N. Calls on N. Korea*, *supra* note 192. The only nation opposing the measure was the DPRK itself. *Id.* Speaking before the vote, DPRK U.N. envoy Pak Gil Yon stated that the General Assembly's draft was "an insidious political offensive aimed at international pressure and [North Korea] categorically rejects it." *Id.*

194. *See supra* note 181 (reiterating text of DPRK Withdrawal Statement and DPRK assertion of right to partially withdraw).

195. *Hubbard in Seoul for Talks on North Korean Nuclear Issue*, Agence France Presse, Jan. 24, 1994, available in LEXIS, Nexis Library, WORLD News File (quoting Korean Central News Agency, official DPRK news agency).

196. Telephone interview with Marlene O'Dell, IAEA Press Officer, International Atomic Energy Agency (Sep. 15, 1994).

197. *Id.* As of September 1994, the Agency recognizes that the DPRK is no longer a signatory to the IAEA Statute, but is still a NPT signatory. *Id.*

198. Evan S. Medeiros, *North Korea Plays the Same Old Hand*, SAN DIEGO UNION-TRIB., Oct. 16, 1994, at G4, available in LEXIS, Nexis Library, WORLD News File.

At this Note's press time, the United States reached an agreement with the DPRK concerning the "nuclear tensions" on the Korean Peninsula. Philippe Debeusscher, *US, Pyongyang Sign Nuclear Accord, Pledge Normalization Efforts*, Agence Press France (Oct. 21, 1994), available in LEXIS, Nexis World News File [hereinafter *US, Pyongyang Sign*]. Two of the agreement's six pages are confidential. *Id.* According to the public pages of the pact, the United States pledged oil deliveries to North Korea in return for a freeze on the DPRK's current nuclear program. *Id.* While the agreement gives the Agency some immediate inspection rights, *id.*, North Korea does not need to open up Nyongbyon to full Agency inspections until 1999. *Korea Risked War if Negotiations Had Not Succeeded: Gallucci*, Agence Press France (Oct. 21, 1994), available in LEXIS, Nexis World News File. Agency Director-General Hans Blix has expressed concern about the five-year delay in inspections. *Id.*

In addition, the United States will lead an international consortium that will build and pay for a US\$4 billion light water reactor in North Korea. *US, Pyongyang Sign, supra*. North Korea will not be able to reprocess radioactive waste from the light-water reactors into materials required for nuclear weapon production. *Id.* In return for the light-water reactors, the DPRK will be required to dismantle its current nuclear reactors. *Id.*

B. *The DPRK's and the Agency's Differing Interpretations of Their Legal Rights Under the Nonproliferation Regime*

The current dispute sets the DPRK's alleged right not to allow the Agency's inspectors into military bases¹⁹⁹ against the Agency's claim that its inspectors have the right to enter any territory under Pyongyang's control.²⁰⁰ At the core of the controversy, however, lies an important and unresolved issue in international law: defining the legal scope of a state's sovereignty when that sovereignty conflicts with a law of global collective security. The establishment of the regime represented the first time that such national and international security issues had been regulated, thereby creating binding international law for a score of years before the current conflict arose.²⁰¹

1. The DPRK's View: The Withdrawal Is Effective Because the Agency Has Violated North Korea's Sovereignty

North Korea argues that not only has the Agency violated the DPRK's national sovereignty but also that the Agency's violations permits the DPRK to withdraw from the NPT.²⁰² To support this position, the DPRK first contends that Article 14 of the North Korean-Agency Safeguards Agreement allows the DPRK to suspend safeguards when using nuclear materials in non-proscribed military activities.²⁰³ Second, the DPRK alleges that the Agency violated its duty to treat its members as equally sovereign

199. See INFCIRC/403, *supra* note 6, art. 14 (agreeing to re-arrange safeguard procedures when nuclear materials are used in military applications).

200. See *id.* art. I (DPRK "undertakes . . . to accept safeguards, in accordance with the terms of this Agreement, on all source or special fissionable materials in all peaceful nuclear activities within its territory . . . for the exclusive purpose of verifying that such material is not diverted to nuclear weapons or other nuclear explosive devices").

201. See, e.g., S.C. Res. 1588, *supra* note 20. The law of global collective security seems ready to halt a violation of such security before that violation is fully completed and thus requires force to remedy. See *id.* (mandating need for United Nations to respond with force to remedy North Korean breach of global collective security because United Nations could only remedy situation *after* breach was committed).

202. DPRK Withdrawal Statement, *supra* note 20; see *supra* note 181 (reiterating text of DPRK Withdrawal Statement).

203. INFCIRC/403, *supra* note 6, art. 14.

nations²⁰⁴ by accepting third-party information.²⁰⁵ Third, Pyongyang asserts that a state of hostilities²⁰⁶ exists that allows the DPRK, under customary international law,²⁰⁷ to withdraw from the Treaty.²⁰⁸ Under the North Korean interpretation, these developments permit the DPRK to withdraw from the NPT.²⁰⁹

a. The DPRK Satisfied Article 14 of the North Korean-Agency Safeguards Agreement

The DPRK argues that it had met the terms of Article 14²¹⁰ in good faith.²¹¹ As the DPRK points out, Article 14 recognizes Agency safeguards cannot be applied in their usual method when nuclear materials are used in military applications.²¹² Article 14 guarantees that any DPRK arrangement with the Agency regarding nuclear materials used in military applications shall not involve any approval or classified knowledge of the military activity.²¹³ Article 14 only requires the DPRK to identify, to the

204. See *supra* note 60 and accompanying text (discussing Agency duty to treat all members as equally sovereign).

205. See *supra* note 164 and accompanying text (detailing how Agency received intelligence pertaining to North Korea from third party).

206. See *supra* notes 179-81 and accompanying text (describing North Korean view that "state of semi-war" exists).

207. See *supra* note 7 (defining customary international law).

208. See *supra* notes 179-81 and accompanying text (containing North Korea's assertion that "state of semi-war" exists and totality of circumstances permits DPRK withdrawal from Treaty).

209. See *supra* note 181 (reiterating DPRK Withdrawal Statement's position that NPT withdrawal clause permits North Korean withdrawal in these circumstances).

210. See *supra* notes 126-34 and accompanying text (reviewing Article 14 of North Korean-Agency Safeguards Agreement).

211. DPRK Withdrawal Statement, *supra* note 20, at 3. But see Leonard S. Spector, *Nuclear Proliferation in the 1990s: The Storm After the Lull*, in *NEW THREATS: RESPONDING TO THE PROLIFERATION OF NUCLEAR, CHEMICAL AND DELIVERY CAPABILITIES IN THE THIRD WORLD* 32, 38 (Aspen Strategy Group eds., 1990). Spector reiterates a common belief that Pyongyang deliberately delayed conducting any sort of safeguards agreement and misused its NPT membership for military prowess. *Id.*

212. INFCIRC/403, *supra* note 6, art. 14. During a series of talks between Agency Director General Blix and the DPRK's Minister of Atomic Energy Choi, Choi repeatedly objected to a Nyongbyon inspection and insisted that the Agency did not have the authority to demand inspections of North Korean military sites. INFCIRC/419, *supra* note 20, at 4; see also DPRK Withdrawal Statement, *supra* note 20, at 2 ("As for an inspection of the military installation in question, it has nothing to do at all with the inspections under the Safeguards Agreement, and it is a matter outside the competency of the IAEA.").

213. INFCIRC/403, *supra* note 6, art. 14(c).

extent possible,²¹⁴ the circumstances of military use. The DPRK is not obligated to report everything to the Agency, particularly anything that involves approval or classified knowledge of the military activity or that relates to the use of nuclear materials therein.²¹⁵ Thus, Pyongyang believes it has a right to withhold some information from the Agency where the Nyongbyon facility is concerned.²¹⁶ In keeping with this legal interpretation, Pyongyang points to the fact that Nyongbyon is a military institution²¹⁷ and that North Korea sought to make special safeguards arrangements with the Agency regarding Nyongbyon.²¹⁸ Furthermore, every time the Agency found an inconsistency, the DPRK cooperated with additional, though not complete, information.²¹⁹

Pyongyang also reads Article 14 of the North Korean-Agency Safeguards Agreement as a separate article that is as important as any other article in the Agreement. Thus, although Article 1 of the North Korean-Agency Safeguards Agreement claims the Agency has the right²²⁰ to implement safeguards anywhere in DPRK territory,²²¹ the DPRK interprets Article 14 as an exception to Article 1, rather than subordinate to it.²²² Accord-

214. *Id.* art. 14(b).

215. *Id.* art. 14(c).

216. *See, e.g.*, DPRK Withdrawal Statement, *supra* note 20, at 2 (claiming military inspections are outside competency of Agency).

217. INFCIRC/419, *supra* note 20, at 3-4.

218. *Id.* The Agency's own report noted that the Nyongbyon building always appeared to be under military control. *Id.*

219. *See, e.g., id.* at 3 (stating that after discrepancies could not be accounted for, IAEA inspectors were allowed to briefly visit Nyongbyon in September, 1992); *id.* (describing November 1992 meeting at IAEA headquarters, where DPRK agreed to sixth inspection); *id.* at 4 (describing January 1993 meeting in DPRK of senior Agency and DPRK officials); *id.* (stating that sixth inspection team allowed into DPRK but not Nyongbyon building).

Minister Choi also alleged that Director Blix breached an agreement with the DPRK to resolve inconsistencies through bilateral consultations. Choi March 16 Letter, *supra* note 183, at 1. Choi wrote that Blix needlessly internationalized the discrepancies by neglecting the DPRK's sincere efforts for clarification and placing an "unjust resolution" before the Agency's Board. *Id.* at 1-2.

220. INFCIRC/403, *supra* note 6, art. 1. Article 1 also explicitly states that this right stems from Article III(1) of the NPT. *Id.*; *see* NPT, art. III(I), *supra* note 2, 21 U.S.T. at 487, 729 U.N.T.S. at 172 (stating that each non-nuclear-weapon signatory agrees to accept safeguards as set forth in signatory's future bilateral agreement with Agency). For the complete text of the Article III of the NPT, *see supra* note 113.

221. *Id.*

222. *See, e.g.,* DPRK Withdrawal Statement, *supra* note 20, at 2 (claiming military inspections are outside competency of Agency).

ingly, the DPRK argues that it has complied with the North Korean-Agency Safeguards Agreement by choosing to meet the requirements of Article 14 instead of the requirements of Article 1.²²³ Hence, the DPRK asserts that it has rights under the North Korean-Agency Safeguards Agreement²²⁴ that allow it to exclude Agency inspectors from the Nyongbyon building.²²⁵ Thus, the North Korean Foreign Ministry has stated that an attempt to force Agency inspections of Nyongbyon is tantamount to an attempt to drive it out of the NPT Treaty.²²⁶

b. The Agency's Duty to Treat Its Members as Equally Sovereign States

The DPRK alleges that the Agency has breached its duty to treat all members of the Agency as equally sovereign²²⁷ by using third-party information against North Korea without similarly reacting to DPRK-furnished intelligence regarding other Agency members.²²⁸ No part of the IAEA Statute, the NPT, or the North Korean-Agency Safeguards Agreement explicitly permits use of third-party sources. Consequently, the DPRK points out that the Agency's use of third-party information asks the DPRK to legitimize espionage acts by the United States, a belligerent party *vis-à-vis* the DPRK.²²⁹ Pyongyang also claims that the United States²³⁰ fabricated²³¹ information designed to demand the opening of the DPRK's military sites,²³² thus lessening the DPRK's equally sovereign standing among Agency Member States. Furthermore, Pyongyang asserts that Agency officials have ignored North Korean demands for reciprocal inspections

223. See, e.g., *id.* at 2-3 (claiming that DPRK has met its safeguards obligations in good faith and that military obligations are outside Agency's competency).

224. INFCIRC/403, *supra* note 6, art. 14.

225. See DPRK Withdrawal Statement, *supra* note 20, at 2 ("As for an inspection of the military installation in question, it has nothing to do at all with the inspections under the Safeguards Agreement, and it is a matter outside the competency of the IAEA.").

226. Douglas Hamilton, *North Korea Links Nuclear Inspections to U.S. Talks*, Reuters, Feb. 21, 1994, available in LEXIS, Nexis Library, World News File.

227. IAEA Statute, *supra* note 2, art. IV(C), 8 U.S.T. at 1097, 276 U.N.T.S. at 10.

228. DPRK Withdrawal Statement, *supra* note 20, at 2.

229. *Id.* at 2.

230. See *supra* note 164 (discussing identity of Agency's third-party intelligence source).

231. DPRK Withdrawal Statement, *supra* note 20, at 2.

232. *Id.*

of military bases in South Korea and the United States.²³³ Similarly, the DPRK alleges that while the Agency has been pressing Pyongyang for access to Nyongbyon, the Agency has also been simultaneously approving Japanese and South Korean moves towards nuclear armaments.²³⁴

Next, the DPRK asserts that the Agency breached its duty to treat all Agency members equally²³⁵ by allowing other Agency Member States to threaten North Korea with nuclear attack in violation of the NPT's collective security pledges.²³⁶ The DPRK claims it acceded to the NPT with the understanding that, upon its accession, none of the NPT depository states²³⁷ would pose any nuclear threat against North Korea.²³⁸ However, Pyongyang views Team Spirit as a "nuclear war rehearsal" against the DPRK.²³⁹ Despite Pyongyang's post-ratification expectations that other NPT signatories would cease threatening the DPRK with nuclear weapons, the Agency did not request that the United States pull its nuclear weapons out of South Korea.²⁴⁰ In the face of these facts, especially when viewed with the Agency's decision to use U.S. intelligence against North Korea, the DPRK believes that it must react to what it sees as an Agency policy to favor the United States at the DPRK's expense by withdrawing

233. *Id.* at 3.

234. *Id.* at 3.

235. IAEA Statute, *supra* note 2, art. VI(C), 8 U.S.T. at 1097, 276 U.N.T.S. at 10.

236. DPRK Withdrawal Statement, *supra* note 20, at 2; *see supra* notes 73-83 and accompanying text (describing NPT's security provisions).

237. NPT, *supra* note 2, art. XI, ¶ 3, 21 U.N.T.S. at 494, 729 U.N.T.S. at 179. The United States, the United Kingdom, and the Soviet Union are the NPT depository states. *Id.*

238. DPRK Withdrawal Statement, *supra* note 20, at 1.

239. *Id.* However, the United States and South Korea claim "a complete withdrawal of tactical nuclear weapons" has been achieved in South Korea. 1992 U.N. DISARMAMENT Y.B 189. Nonetheless, the DPRK calls these statements trickery. DPRK Withdrawal Statement, *supra* note 20, at 1-2.

On February 15, 1994, the DPRK and the IAEA came to an initial agreement allowing the IAEA to inspect and place safeguards on some sites, but not Nyongbyon. *U.S. Welcomes North Korean Decision to Allow Inspections*, Agence Presse France, Feb. 16, 1994, available in LEXIS, Nexis Library, WORLD News File. To reach this agreement, the United States canceled Team Spirit as a concession to the DPRK. *Id.*

240. *See* DPRK Withdrawal Statement, *supra* note 20, at 1 ("It was on the premise that the depository States of the NPT should neither [sic] deploy their nuclear weapons against the DPRK that the DPRK signed the Safeguards Agreement with the IAEA and accepted IAEA inspections."); *id.* at 4 ("The DPRK's principled stand will remain unchanged until the United States stops its nuclear threats against the DPRK and the IAEA Secretariat returns to its principle of independence and impartiality.").

from the NPT.²⁴¹ Such alleged double-dealing by the Agency would be also a violation of the Agency's statute.²⁴²

c. Sovereignty and the NPT Withdrawal Clause

The DPRK ultimately argues that the alleged U.S. plots to manipulate the Agency for western intelligence purposes and to increase tactical South Korean nuclear threats are an interference with North Korea's internal affairs.²⁴³ Pyongyang asserts that such interferences with North Korea's internal affairs are hostile acts aimed at stifling the DPRK's socialism and thus violate the its sovereignty.²⁴⁴ The DPRK argues that it has no choice but to withdraw from the NPT as a measure to defend its supreme interests.²⁴⁵ First, the DPRK has the right of national sovereignty in customary international law.²⁴⁶ Under customary international law, a state does not have to relinquish its sovereignty to either a hostile state or an international organization that is successfully manipulated by that hostile state.²⁴⁷ Furthermore, under customary international law, hostilities that cumulate in war would legally permit the DPRK to immediately withdraw from the Treaty.²⁴⁸

Second, the NPT's and the IAEA Statute's unusually explicit emphasis on national sovereignty permits North Korea to argue that the DPRK is entitled to withdraw from the NPT and the

241. *See id.* at 2 ("It is on the basis of the 'intelligence information' fabricated by the United States, a belligerent party vis-a-vis the DPRK, that some officials of the IAEA Secretariat are trying to enforce inspection of our major military installations which are unrelated to nuclear activities.").

242. *See* IAEA Statute, *supra* note 2, art. III(B)(7), 8 U.S.T. at 1097, 276 U.N.T.S. at 10 (describing Agency's duty to treat all members as equally sovereign); *Implementation of the Agreement between the Agency and the Democratic People's Republic of Korea for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, IAEA Doc. GC(XXXVII)/Res/624, at 2 (1993) (resolving that Agency has been impartial).

243. DPRK Withdrawal Statement, *supra* note 20, at 1.

244. *Id.*

245. *Id.* at 4.

246. *See supra* note 13 (defining national sovereignty).

247. *See supra* note 7 (defining customary international law); JESSUP, *supra* note 13, at 41 (discussing states' right to withdraw from treaty obligations when confronted with acts of aggression).

248. *See* JESSUP, *supra* note 13, at 41 (discussing states' right to withdraw from treaty obligations when confronted with acts of aggression).

IAEA Statute.²⁴⁹ Although treaties rarely refer to national sovereignty,²⁵⁰ both the NPT and the IAEA Statute explicitly mention national sovereignty.²⁵¹ Thus, the DPRK asserts that this unusually explicit emphasis upon sovereignty allows Pyongyang to reject the Agency's "unjustified resolution forced by the United States upon [the Agency's Board]"²⁵² to protect North Korea's "supreme interests".²⁵³

2. The Agency's View: The DPRK Withdrawal Is Ineffective and the Agency Has the Right to Inspect Nyongbyon

Under the Agency's view, the DPRK is in violation of the NPT both by the terms of the Treaty itself and by the intent of the regime as a whole.²⁵⁴ The Agency argues that Article 14 must be read as part of the entire North Korean-Agency Safeguards Agreement as well as part of the whole nonproliferation regime.²⁵⁵ The Agency also argues that the use of third-party intelligence neither biases the Agency nor breaches its duty of impartiality.²⁵⁶ The Agency further asserts that each NPT signatory has agreed to relinquish some of its sovereignty to the Agency when the signatory ratifies the NPT.²⁵⁷ Finally, the

249. NPT, *supra* note 2, art. X, 21 U.S.T. at 483, 729 U.N.T.S. at 175; IAEA Statute, *supra* note 2, art. III(D), 8 U.S.T. at 1097, 276 U.N.T.S. at 8.

250. HENKIN, *supra* note 13, at 13.

251. See NPT, *supra* note 2, art. X, 21 U.S.T. at 493, 729 U.N.T.S. at 175. The NPT mentions sovereignty in its withdrawal clause. *Id.*; see *supra* note 20 (reiterating withdrawal clause text). The NPT withdrawal clause was derived in part from the 1965 Soviet Draft Treaty, which extols sovereignty. See *supra* notes 80-86 and accompanying text (discussing history of non-proliferation regime's draft treaties). The IAEA Statute promises the Agency shall always function with due observance of a member's sovereignty. IAEA Statute, *supra* note 2, art. III(D), 8 U.S.T. at 1097, 276 U.N.T.S. at 8; see *supra* notes 49-58 and accompanying text (discussing IAEA Statute's commitment to each Member State's sovereignty).

252. DPRK Withdrawal Statement, *supra* note 20, at 4.

253. Choi March 16 Letter, *supra* note 183, at 2.

254. See, e.g., INFCIRC/419, *supra* note 20, at 5-7 (incorporating portions of IAEA Statute, NPT, and North Korean-Agency Safeguards Agreement when defining DPRK's duties under nonproliferation regime).

255. See, e.g., Letter from Dr. Hans Blix, Director-General of the International Atomic Energy Agency, to Choi Hak Gun, DPRK Minister of Atomic Energy (March 19, 1993), available in INFCIRC/419, *supra* note 20, annex 11 [hereinafter Blix March 19 Letter] (stating that targeted inspection sites of military nature in no way immunizes such sites from Agency inspections).

256. See, e.g., *id.* (stating that Agency Secretariat endeavors to implement safeguards in DPRK objectively and impartially).

257. See IAEA Doc. GOV/2639, *supra* note 184, at 2 (confirming that North Ko-

Agency does not view a statement of intent to withdraw under the NPT as an effective NPT withdrawal if inspections cannot be conducted during the three month notice period.²⁵⁸

a. Reading Article 14 in Context

In the Agency's view, Article 14 must be read in light of the NPT and entire the North Korean-Agency Safeguards Agreement.²⁵⁹ The Agency argues that Article 14 must be read as one of many parts in the entire North Korean-Agency Safeguards Agreement.²⁶⁰ The Agency further argues that the entire North Korean-Agency Safeguards Agreement should be read in light of the NPT and the whole nuclear nonproliferation regime.²⁶¹

The Agency believes that the North Korean-Agency Safeguards Agreement should be read as a whole.²⁶² Article 1 of the North Korean-Agency Safeguards Agreement states that the DPRK agrees to let the Agency inspect any territory within its control.²⁶³ This general promise is derived from the NPT itself²⁶⁴ and is, in the Agency's view, an overriding commitment of the NPT regime. Article 14 promises the Agency the right to be kept informed of the total quantity and composition of unsafeguarded nuclear material used in military applications.²⁶⁵ The Agency believes that the North Korean-Agency Safeguards Agreement already provides that right, as well as the right to in-

rean-Agency Safeguards Agreement stays in force until withdrawal is effective and DPRK has duty to comply with verification).

258. *See, e.g., id.* (stating Agency view that urgent inspections must be conducted despite DPRK notice of intent to withdraw).

259. *See, e.g.,* INFCIRC/419, *supra* note 20, at 1-4 (beginning Agency's presentation of case with review of NPT's Article III(1)); *id.*, attachment (quoting the IAEA Statute's Article XII(C)).

260. *See id.* (citing other North Korean-Agency Safeguards Agreement provisions in support of Agency's position that Agency has right to conduct safeguards in military installations).

261. *See* INFCIRC/419, *supra* note 20, at 6 (stating that safeguards continue as long as DPRK is party to NPT).

262. *See* Blix March 19 Letter, *supra* note 255 (stating that targeted inspection sites of military nature in no way immunizes sites from IAEA inspections); INFCIRC/419, *supra* note 20, at 8 (reiterating duties of DPRK under Article 18 of the North-Korean Agency Safeguards Agreement).

263. INFCIRC/403, *supra* note 6, art. 1.

264. *See* NPT, *supra* note 2, art. III(1), 21 U.S.T. at 487-88, 729 U.N.T.S. at 172 (stating that each signatory agrees to accept safeguards anywhere in its territory).

265. INFCIRC/403, *supra* note 6, art. 14.

spect the entire Nyongbyon premises.²⁶⁶ For example, Article 28 of the North Korean-Agency Safeguards Agreement specifies that the objective of all safeguards is the timely detection of significant quantities of nuclear materials.²⁶⁷ In addition, Article 77 allows the Agency Board to decide urgent disputes regarding access to special inspections.²⁶⁸

The Agency also asserts that the North Korean-Agency Safeguards Agreement must be read within the context of the NPT.²⁶⁹ NPT Article III, paragraph 1 states that as long as the Agency is acting for the exclusive purpose of verification, it has the right to enter all of the signatory's territory.²⁷⁰ The Agency has repeatedly given the DPRK assurances that it would only enter Nyongbyon's second basement to ensure verification, and thus claims right of entry.²⁷¹ Even though Article 14 of the North Korean-Agency Safeguards Agreement permits the suspension of safeguards in military applications, the NPT Article III right of access supersedes Article 14.

b. The Agency's Duty to Be Impartial

The Agency denies that using third-party intelligence

266. See INFCIRC/419, *supra* note 20, at 8-10 (citing INFCIRC/403, *supra* note 6, art. 3 (pledge of co-operation); *id.* art. 18 (stating IAEA's Board of Governor's right to require inspections); *id.* art. 71 (stating Agency's right to make ad hoc inspections); *id.* art. 73 (stating Agency's right to make special inspections); *id.* art. 77 (reviewing Agency's right to make special inspections)); see also Blix March 19 Letter, *supra* note 255. In his March 19 letter, Blix said:

I am aware of your statements that the two additional sites which we wish to visit are military. While this in no way immunizes them from inspection, we are ready to discuss arrangements which might minimize security concerns, if such can be found that do not reduce the effectiveness of inspection, including sample taking.

Id.

267. INFCIRC/403, *supra* note 6, art. 28.

268. *Id.* art. 77.

269. See INFCIRC/419, *supra* note 20, at 6 (reiterating that DPRK's safeguards duties exist as long as DPRK is NPT signatory); NPT, *supra* note 2, art. III(1), 21 U.S.T. at 487-88, 729 U.N.T.S. at 172 (stating that non-nuclear-weapon signatories agree to accept safeguards); *supra* note 113 (reiterating text of Article III(1) of NPT).

270. NPT, *supra* note 2, art. III(1), 21 U.S.T. at 487-88, 729 U.N.T.S. at 172.

271. See, e.g., Letter from Dr. Hans Blix, Director General of the International Atomic Energy Agency, to Choi Hak Gun, DPRK Minister of Atomic Energy (Mar. 12, 1993), in INFCIRC/419, *supra* note 20, annex 8 [hereinafter Blix March 12 Letter] (stating that the sole objective of safeguards is to seek clarity about nuclear activities in DPRK); Blix March 19 Letter, *supra* note 255 (stating Agency willingness to discuss measures needed to ensure verification compliance).

sources biases the Agency.²⁷² The Agency points out that it has a duty created by the IAEA Statute to report any member's non-compliance to the Director General, and if necessary the Board, and finally the U.N. Security Council.²⁷³ After the Agency's failure to detect undeclared sites in Iraq, Director-General Blix declared that the Agency would need access to additional information, relevant locations, and the U.N. Security Council's sanction power²⁷⁴ to effectuate its verification duties in recalcitrant States.²⁷⁵ The Agency announced in its February 1992 Press Release²⁷⁶ that the Board of Governors now considered itself authorized to receive information from outside sources.²⁷⁷ Given the Agency's duty to report a lack of verification²⁷⁸ and the six-month-old unresolvable discrepancies of Pyongyang's Initial Report, the Agency argues that it could not ignore the third-party information.²⁷⁹

c. The Agency Response to the DPRK's Claim of Self-Defense and Collective Security

The Agency does not perceive that the DPRK is being threatened in such a way as to justify a claim of self-defense. The Agency has commented officially that the DPRK's claims of self-defense as a "state of semi-war"²⁸⁰ is insufficient justification for

272. Blix March 19 Letter, *supra* note 255 (finding Choi's assertion that Agency lacks impartiality and objectivity unfair).

273. See INFCIRC/419, *supra* note 20, attachment (quoting Article XII(C) of IAEA Statute and Article 19 of North Korean-Agency Safeguards Agreement).

274. U.N. CHARTER, art. 41. The U.N. Security Council has the power to impose sanctions that disrupt economic or diplomatic relations as needed to give effect to its decisions. *Id.*

275. Hans Blix, Statement to the 35th Session of the General Conference of Atomic Energy, at 7-9 (Sept. 16, 1991), *reprinted in* IAEA Doc. IAEA/PI/C.18E (1991). Blix also suggested the establishment of a small, two-person unit within the Director-General's office to evaluate the need for special inspections by reviewing any reports from Member States concerning the nuclear activities of the other NPT States, but this proposal was abandoned due to resistance from Member States as well as a lack of funds. M. Wise, *U.N. Agency Tightens Rules for Nuclear Inspection*, INDEPENDENT, Feb. 27, 1992, at 14.

276. IAEA Press Release, IAEA Doc. PR 92/12 (Feb. 26, 1992).

277. *Id.*

278. See IAEA Statute, *supra* note 2, art. III(B), 8 U.S.T at 1095, 276 U.N.T.S. at 8 (requiring Agency to submit reports, when appropriate, to U.N. Security Council); INFCIRC/403, *supra* note 6, arts. 18-19 (describing measures Agency may take to report its inability to verify NPT compliance).

279. INFCIRC/419, *supra* note 20, at 4.

280. Choi March 10 Letter, *supra* note 179.

refusal of an NPT inspection team.²⁸¹ Some Agency members, such as Japan and South Korea, have publicly criticized the DPRK's attempt to link the Team Spirit issue with obligations voluntarily assumed under international law.²⁸²

The Agency's Director-General, Hans Blix, recognizes two operative definitions of "aggression."²⁸³ Under Blix' first definition, aggression is whatever the majority deems in good conscience.²⁸⁴ Under this definition, the unanimous U.N. General Assembly vote constitutes proof that Team Spirit is not an aggressive act.²⁸⁵ According to Blix' second definition, a State commits an act of aggression if it does not, within a specified period of time, comply with the orders and take steps requested by international organizations.²⁸⁶ No international organization has demanded the cancellation of Team Spirit, although some Agency members have called it part of a breach of international law.²⁸⁷ Under this definition, the DPRK's refusal to allow an Agency inspection of Nyongbyon, despite unanimous U.N. resolutions²⁸⁸ requiring such inspections, is an act of aggression against the world.

Blix also argues that the world should recognize collective security²⁸⁹ laws on a par with the customary law²⁹⁰ of sovereignty.²⁹¹ Blix even interprets the U.N. Charter as promoting

281. Letter from Hans Blix to Minister Choi, Minister of Atomic Energy, DPRK, (March 10, 1993), in INFCIRC/419, *supra* note 20, annex 6, (quoting IAEA Board of Governors February 9 resolution that access to Nyongbyon is "essential and urgent"); see Blix March 19 Letter, *supra* note 255 (stating that denial of entry constitutes NPT non-compliance).

282. *N. Korean Inspections Going Smoothly Says IAEA*, Japan Economic Newswire, Dec. 4, 1992, available in LEXIS, Nexis Library, WIRES News File.

283. HANS BLIX, SOVEREIGNTY, AGGRESSION AND NEUTRALITY: THREE LECTURES BY HANS BLIX 36 (Almqvist & Wiksells, Stockholm, 1970) [hereinafter BLIX, SOVEREIGNTY].

284. *Id.* at 36.

285. G.A. Res. 48, *supra* note 193.

286. BLIX, SOVEREIGNTY, *supra* note 283, at 36. Blix recognizes this as a procedural definition. *Id.*

287. See, e.g., *China: Beijing Backs New Nuclear Export Rules at U.N.*, Interpress Service, Oct. 22, 1993, available in LEXIS, Nexis Library, WORLD News File (reiterating People's Republic of China official's statement of U.S. response to the crisis as that of "hegemonic, . . . self-styled world cop who tramples upon international law").

288. See, e.g., *supra* note 193 (describing 140 to 1 vote for U.N. General Assembly Resolution 48); *supra* note 7 (discussing customary international law and unanimous U.N. General Assembly resolutions as source thereof).

289. See *supra* note 1 (defining collective security).

290. See *supra* note 7 (defining customary international law).

291. BLIX, SOVEREIGNTY, *supra* note 283, at 12.

collective security before national sovereignty.²⁹² According to Blix, a state can make requests that another state cannot reject as an improper interference if the request concerns matters affected by some international obligation.²⁹³

d. National Sovereignty and the Withdrawal Clause

Under the Agency's view, a state's sovereignty is composed of many alienable sovereign rights.²⁹⁴ In other words, the Agency believes that a state that agrees to give away one sovereign right still retains many other sovereign rights and thus remains a sovereign state.²⁹⁵ Therefore, the Agency believes that its demands for enforcement of the North Korean-Agency Safeguards Agreement ask for no more of the DPRK's sovereignty than the DPRK voluntarily gave when ratifying its safeguards agreement with the Agency.

Blix defines national sovereignty as that state's freedom of action that is unaffected by any rules of customary or treaty law.²⁹⁶ Thus, the Agency stresses that the DPRK voluntarily ratified the NPT in 1985 as well as the 1992 North Korean-Agency Safeguards Agreement.²⁹⁷ Furthermore, in Blix' view, if ownership is described as a bundle of sticks, sovereignty is like a bundle of competencies.²⁹⁸ Under Blix' view, a state can give up a

292. *See id.* at 13. As a delegate to the 1967 U.N. Committee on Judicial Principles, Blix commented:

It would seem to my delegation that a second sphere in which a duty for States to co-operate may without hesitation be laid down in general terms relates to the preservation of the properties of the planet: [for example] an atmosphere free from dangerous radio-active fallout . . . States may legitimately be required to co-operate to ensure its proper administration.

Id. at 22.

293. *Id.*

294. *Id.* at 11-12.

295. *Id.* at 11.

296. *See id.* at 12 (discussing how sovereignty is untouched when other states that have an interest under customary or treaty law ask for that interest to be fulfilled).

297. Telephone interview with Marlene O'Dell, Press Officer, International Atomic Energy Agency (Sep. 15, 1994); *see* INFCIRC/419, *supra* note 20, at 1 (reiterating North Korean ratification of NPT and North Korean-Agency Safeguards Agreement).

298. *Id.* at 12 (citing as a comparison HENKIN H. Kelsen, *PRINCIPALS OF INTERNATIONAL LAW* 113 (1952) and A. ORS, *A TEXT-BOOK OF INTERNATIONAL LAW* 46-47 (1947)). Blix also notes that this rule might not apply if the proposed measures imply the abandonment or sharing of vital resources. Blix, *SOVEREIGNTY*, *supra* note 283, at 12.

sovereign right in a treaty without giving up sovereignty.²⁹⁹ Thus, according to the Agency's interpretation, just because Pyongyang chose to give away its sovereign right to expel Agency inspectors who seek verification does not mean that any other aspect of the DPRK's sovereignty has been damaged. In addition, because treaties are usually terminable, a state can always reclaim its plenary powers.³⁰⁰ Indeed, Blix feels that the voluntary assumption of treaty obligations is not a limitation but rather an expression of state sovereignty.³⁰¹ Under this view, the global community has every right to demand that the DPRK adhere to its voluntarily assumed treaty obligations, including the withdrawal clause, without feeling forcibly deprived of any national sovereignty.

Finally, the Agency claims that Pyongyang's interpretation of the withdrawal provision is ineffective.³⁰² First, the NPT withdrawal clause requires three months notice.³⁰³ Under the Agency's interpretation of the withdrawal clause, the notice period cannot toll until the DPRK has upheld its obligations under the North Korean-Agency Safeguards Agreement procedures for three months after the notice of intended withdrawal is tendered.³⁰⁴ Thus, the Agency does not see the DPRK's statement of intent to withdraw as effectively triggering the three month notice of withdrawal period because the DPRK will not allow required inspections to take place during that three-month period.³⁰⁵

299. *Id.* at 11. In other words, Blix believes that a state can give away one stick and still be left with a bunch of sovereignty. *Id.* at 12.

300. *Id.* at 12.

301. *Id.* (citing Case of the S.S. Wimbledon (U.K., Fr., It., Jap. v. Germ.), 1923 P.C.I.J. (ser. A) No. 1, at 25 (Aug. 17)).

302. Telephone Interview with Marlene O'Dell, Press Officer, International Atomic Energy Agency (Sept. 15, 1994).

303. See *supra* note 181 (reiterating NPT withdrawal clause's text).

304. Blix March 12 Letter, *supra* note 271. The day the DPRK's Withdrawal Statement was received, Dr. Blix felt

bound to point out that the Treaty and the [North Korea-Agency] Safeguards Agreement remain duly in force until any withdrawal takes effect, i.e., after three months advance notice to all other Parties and to the United Nations Security Council. It follows that a declaration of intention to withdraw from the NPT shall not impede the implementation of the [North Korea-Agency] Safeguards Agreement.

Id.

305. Telephone Interview with Marlene O'Dell, Press Officer, International Atomic Energy Agency (Sep. 15, 1994).

III. *THE NUCLEAR NONPROLIFERATION REGIME GIVES THE AGENCY THE RIGHT TO INSPECT NYONGBYON*

Although the North Korean interpretation points out legal weaknesses in the nuclear nonproliferation regime, the Agency verification of Nyongbyon's nuclear materials should be completed. First, progressive views of the rules of treaty interpretation, collective security, and national sovereignty all favor the completion of Agency's verification process. The United Nations must resolve the current DPRK-Agency dispute in the light of the entire nuclear nonproliferation regime and not just the North Korean-Agency Safeguards Agreement.³⁰⁶ Thus, Article 14 must be read in light of the entire North Korean-Agency Safeguards Agreement, the NPT, the IAEA Statute, and the nuclear nonproliferation regime. Second, although the Agency needs to develop laws that regulate incoming intelligence from third-party sources with guaranteed impartiality and reliability, the purpose of the regime nonetheless mandates that the DPRK respond to the third-party information. Third, the DPRK claim of being threatened is too weak to constitute a valid reason for Treaty withdrawal. Finally, the Agency's interpretation of the NPT withdrawal clause is the superior one, as the DPRK view conflicts with the terms of the Treaty as well as the overarching purposes of the entire nonproliferation regime.

A. Article 14 of the North Korean-Agency Agreement Is a Subordinate Clause

North Korea has violated the terms of Article 14 by failing to: (i) clearly inform the Agency that safeguards would be sus-

306. See Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31(2), 1155 U.N.T.S. 331, 340, 8 I.L.M. 679, 691 [hereinafter Vienna Convention] (stating that treaties shall be interpreted in light of other agreements relating to the treaty).

The Vienna Convention is largely a codification of existing customary international law and thus constitutes a useful depository of international legal rules. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 15 (1988); see *supra* note 7 (defining customary international law). The United States is not a party to the Vienna Convention, but the U.S. Department of State recognizes the treaty as the accepted guide to international treaty law and practice. JANIS, *supra*, at 15.

A basic tenant of international law reflected in the Vienna convention is *Pacta Sunt Servanda*. See Vienna Convention, *supra*, art. 26, 1155 U.N.T.S. at 339, 8 I.L.M. at 690. *Pacta Sunt Servanda* means that a signatory's treaty obligation must be performed in good faith. *Id.* If the signatory does not perform that obligation in good faith, the signatory has committed a material breach of the treaty. *Id.*

pending,³⁰⁷ and (ii) make arrangements that reinstitute safeguards for material used in military applications.³⁰⁸ Article 14 should also be read within the context of the entire North Korean-Agency Safeguards Agreement.³⁰⁹ Similarly, the North Korean-Agency Safeguards Agreement must be read as a part of the nonproliferation regime, with the IAEA Statute and the NPT as the regime's primary written representatives.³¹⁰ But interpreting the dispute in light of the written laws alone is nearly impossible because the statutes themselves value state sovereignty differently.³¹¹ Therefore, the nonproliferation regime must be interpreted not only in light of its written laws, but also with a view that includes a growing body of customary international law.

North Korea's argument that it has met the requirements of Article 14 in good faith is dubious.³¹² Because the North Korean-Agency Safeguards Agreement is the most recent written law in the regime, the DPRK is obligated to abide by its terms, *Pacta Sunt Servanda*.³¹³ Under Article 14 of the North Korean-Agency Safeguards Agreement, the DPRK has a duty to clearly inform the Agency that safeguards will be suspended and that the unsafeguarded material will not be used in proscribed activities.³¹⁴ However, the DPRK never informed the Agency that un-

307. See *supra* notes 126-34 and accompanying text (reviewing requirement in Article 14 of the North Korean-Agency Safeguards Agreement that DPRK clearly inform Agency that safeguards would be suspended because nuclear materials would be used in non-proscribed military applications).

308. See *supra* notes 126-34 and accompanying text (reviewing requirements in Article 14 of North Korean-Agency Safeguards Agreement, mandating that DPRK make arrangements with Agency to suspend safeguards).

309. See *supra* notes 259-68 and accompanying text (discussing Agency's view that Article 14 of the North Korean-Agency Safeguards Agreement should be read as subordinate clause).

310. See *supra* notes 269-71 and accompanying text (discussing Agency's entire regime view).

311. Compare *supra* notes 49-57 (reviewing Article III(D) of IAEA Statute, which requires that Agency function in due observance of member's sovereignty) with *supra* notes 105-10 (reiterating NPT's provision allowing withdrawal in expression of Member States' sovereignty and supreme interests) and *supra* notes 139-47 (reviewing Agency's right to enter DPRK territory when verification is "essential and urgent").

312. See *supra* notes 210-19 and accompanying text (discussing DPRK claims that it has met Article 14 terms in good faith).

313. Vienna Convention, *supra* note 306, art. 26, 1155 U.N.T.S. at 339, 8 I.L.M. at 690; see *supra* note 306 (discussing *Pacta Sunt Servanda*).

314. INFCIRC/403, *supra* note 6, art. 14.

safeguarded materials existed.³¹⁵ Furthermore, Article 14 clearly states that in any event and at all times, the Agency shall be kept informed of the total quality and composition of such unsafeguarded materials but shall not involve any approval or classified knowledge of the military activity therein.³¹⁶ The arrangement must also identify, to the extent possible, the period or circumstances during which safeguards shall not apply.³¹⁷ North Korea never sought to create such an arrangement before taking the nuclear material to Nyongbyon's secret second basement.³¹⁸ Also under Article 14, the DPRK must arrange with the Agency for immediate re-application of safeguards when the materials re-enter the peaceful nuclear process.³¹⁹ North Korea has yet to make such an arrangement.³²⁰

Article 14 must also be read in the context of the entire the North Korean-Agency Safeguards Agreement. For example, Article 1 of the North Korean-Agency Agreement states that the basic undertaking of the Safeguards Agreement is the DPRK's commitment to accept Agency safeguards anywhere in North Korean territory.³²¹ When read together, the agreement's basic undertaking and statement of Pyongyang's duty to make clear that the unsafeguarded materials are not being used for proscribed purposes force the DPRK to bear the burden of proof and convince the Agency that the third-party allegations are incorrect.³²² If the DPRK fails to convince the Director-General, it must either permit the inspectors access or demand arbitration from the Agency Board of Governors.³²³ This "entire agreement" inter-

315. See *supra* notes 151-63 and accompanying text (reviewing events before Agency received third-party intelligence).

316. INFCIRC/403, *supra* note 6, art. 14(b)-(c).

317. *Id.* art. 14(b).

318. See *supra* notes 151-57 and accompanying text (reviewing events before Agency received third-party intelligence).

319. INFCIRC/403, *supra* note 6, art. 14(b).

320. See *supra* notes 161-98 and accompanying text (discussing DPRK-Agency negotiations).

321. INFCIRC/403, *supra* note 6, art. 1; see *supra* note 121 and accompanying text (discussing North Korean obligation to accept safeguards anywhere in its territory pursuant to NPT).

322. Cf. *id.* art. 14(a)(i)-(ii) (obliging DPRK to make arrangements for alternative safeguards) with *id.* art. 18 (allowing Agency to make calls for "essential and urgent" actions by DPRK).

323. See *supra* notes 137-47 and accompanying text (discussing Agency-DPRK dispute resolution mechanisms).

pretation³²⁴ is consistent with the Agency's "total regime" view.³²⁵ Article 14 must be read as one small part of a large non-proliferation regime.³²⁶ The nonproliferation regime not only includes differing sources of treaty law, such as the North Korean-Agency Safeguards Agreement, the NPT, and the IAEA Statute,³²⁷ but also includes customary international law.³²⁸

Unlike the IAEA Statute, the NPT emphasizes that a signatory agrees to allow inspection of all its territories.³²⁹ However, the NPT also states that its safeguards are subject to the 1957 IAEA Statute,³³⁰ which seems to require the state's consent to inspect.³³¹ Furthermore, the Vienna Convention on Treaties promotes the view that a newer treaty is subject to an older one if the newer treaty so states.³³²

The IAEA Statute gives more consideration to a signatory's national sovereignty than does the NPT.³³³ But the IAEA Statute comes from a decade where Cold War considerations subsumed the legal philosophy of collective security.³³⁴ The global community shifted emphasis from national sovereignty to collective nuclear security before the Cold War ended.³³⁵ The negotiating history shows that the parties changed their collective minds as

324. See *supra* notes 262-68 and accompanying text (reviewing Agency's entire agreement view).

325. See *supra* notes 269-71 and accompanying text (discussing Agency's entire regime view).

326. See *supra* notes 269-71 and accompanying text (discussing Agency's entire regime view).

327. See *supra* notes 6-7 and accompanying text (describing sources of nuclear nonproliferation regime law).

328. See *supra* notes 6-7 and accompanying text (describing sources of nuclear nonproliferation regime law).

329. NPT, *supra* note 2, art. III(1), 21 U.S.T. at 487, 729 U.N.T.S. at 172.

330. *Id.*

331. IAEA Statute, *supra* note 2, art. III(A)(5), 8 U.S.T. at 11-15, 276 U.N.T.S. at 26-30.

332. Vienna Convention, *supra* note 306, art. 30(2), 1155 U.N.T.S. at 339-340, 8 I.L.M. at 691.

333. Compare *supra* note 57 and accompanying text (reviewing IAEA Statute's express provision to function in due observance of member's sovereignty) with *supra* notes 105-10 and accompanying text (discussing NPT's provision allowing signatories to withdraw to protect its "supreme interests").

334. Bobby Inman et al., *Lessons From the Gulf War*, 15 WASH. Q. 57, 64 (1992); see *supra* notes 25-86 and accompanying text (reviewing nuclear nonproliferation regime's negotiating history).

335. See *supra* notes 25-86 and accompanying text (reviewing nuclear nonproliferation regime's negotiating history).

world events hastened proliferation.³³⁶ Agency entry to non-nuclear-weapon signatories was eventually assumed³³⁷ and even nuclear weapon states voluntarily submitted to the verification regime.³³⁸

The conflicting emphasis between the IAEA Statute and the NPT should be resolved not by choosing one document over the other, but by reading them as parts of one nonproliferation regime that also includes sources of customary international law.³³⁹ To construe the entire regime otherwise would contradict the IAEA Statute's own purpose.³⁴⁰ Because the NPT and IAEA Statute are at odds over the sovereignty issue, customary international law should determine the regime's intent. The unanimous U.N. General Assembly resolutions during the negotiating process,³⁴¹ as well the current crisis,³⁴² illustrate that Agency inspections have become customary international law³⁴³ even when the host nation is resistant to inspections.³⁴⁴ Thus, any discrepancies between the IAEA Statute and the NPT are rectified by a review of the negotiating history and customary international law.³⁴⁵

336. *See supra* notes 25-86 and accompanying text (reviewing nuclear nonproliferation regime's negotiating history).

337. *Compare, e.g., supra* note 40 and accompanying text (discussing Baruch Plan's proposal to only monitor nuclear-capable states) *with supra* note 46 and accompanying text (reviewing Agency's purpose of accelerating and enlarging peaceful uses of nuclear material).

338. *Compare supra* note 113 and accompanying text (reviewing NPT safeguard requirements that only apply to non-nuclear-weapon states) *with Agreement between the United States of America and the International Atomic Energy Agency for the Application of Safeguards in the United States of America*, IAEA Doc. GOV/1800, 16 I.L.M. 22 (1976).

339. *See supra* note 7 and accompanying text (defining customary international law).

340. *See supra* notes 45-48 and accompanying text (discussing Agency's purposes under IAEA Statute).

341. *See supra* notes 72-86 and accompanying text (discussing negotiating history of NPT and U.N. General Assembly resolutions promulgated during that process); G.A. Res. 48, *supra* note 193 (urging unanimously that DPRK allow Agency's special inspections despite DPRK notice of intent to withdraw).

342. *See* G.A. Res. 48, *supra* note 193 (urging unanimously DPRK to allow Agency special inspections despite DPRK notice of intent to withdraw).

343. *See supra* note 7 (discussing unanimous U.N. General Assembly resolutions as source of customary international law).

344. *See* G.A. Res. 48, *supra* note 193 (urging unanimously DPRK to allow Agency special inspections despite DPRK notice of intent to withdraw).

345. *See supra* notes 72-86 and accompanying text (reviewing unanimous U.N. General Assembly resolutions during negotiation history calling for nuclear non-proliferation); *supra* note 193 and accompanying text (reviewing unanimous U.N. Gen-

B. *The Agency Duty to Treat Its Members as Equally
Sovereign Nations*

Although the Agency breached its safeguards agreement with North Korea by using third-party intelligence without Pyongyang's prior agreement, the overarching purposes of the regime mandate that North Korea address the data's allegation by permitting the Agency to inspect Nyongbyon. The Agency has no legal mechanisms that ensures it acts impartially and accurately when reviewing intelligence received from third parties. Without such regulation, the DPRK point out several persuasive arguments against Agency use of third-party sources.³⁴⁶ For example, without some regulation of the intelligence-gathering process, the Agency is demanding that signatories legitimate acts of espionage committed against them.³⁴⁷ The lack of regulation also allows the Agency to innocently or intentionally harass the intelligence's targets.³⁴⁸ For example, third-party sources could easily open up the Agency to manipulation by non-U.S. intelligence agencies.³⁴⁹ Indeed, this practice could transform the Agency into an expensive and incompetent international intelligence agency as it tries to weed out information from disinformation. The Agency could also become a tool of international political machinations by having states deliberately withhold or disseminate information according to national strategies.

The Agency also lacks legal mechanisms that ensure all intelligence that the Agency acquires from third parties will receive equal consideration.³⁵⁰ The Agency has given no reason

eral Assembly resolution urging DPRK to allow Agency special inspections despite DPRK notice of intent to withdraw).

346. *See supra* note 164 and accompanying text (reviewing Agency's use of third-party intelligence sources against DPRK).

347. *See, e.g., supra* note 181 and accompanying text (reviewing DPRK's assertion that Agency demands DPRK to legitimate hostile intelligence).

348. *See supra* note 181 and accompanying text (discussing accusation in DPRK Withdrawal Statement that Agency is being manipulated by U.S. intelligence).

349. *See, e.g., supra* note 181 and accompanying text (discussing accusation in DPRK Withdrawal Statement that Agency is being manipulated by U.S. intelligence).

350. INFCIRC 403, *supra* note 6, art. 24; *see, e.g., supra* note 125 (reviewing requirement in Article 24 of North Korean-Agency Safeguards Agreement that all amendments must be agreed upon); *supra* note 60 and accompanying text (describing Agency duty to treat all Member States as equally sovereign states); *supra* notes 227-42 and accompanying text (discussing lack of existing Agency regulation of third-party intelligence sources that are agreed upon by DPRK).

why it chose to react to allegedly American intelligence and yet failed to address the DPRK's claim that South Korea was creating nuclear weapons. Furthermore, the Agency has yet to name officially the source of the third-party data.³⁵¹ While no nation wants to jeopardize its intelligence operatives, the DPRK deserves an opportunity to confront its accusers, or at least their data, before allowing Agency entry into Nyongbyon. Allowing a signatory the opportunity to confront the data before entry is required is more consistent with the regime's spirit of enforcing safeguards as unobtrusively as possible.³⁵²

Clearly, the Agency needs to create a legal means of regulating intelligence from third-parties that ensures the Agency acts impartially when reviewing such intelligence. Member States like the DPRK are entitled to participate in the existing amendment process and to develop regulations coping with the issues above.³⁵³ An Agency press release, issued unilaterally, does not provide signatories with their rightful opportunity to participate in the amendment process.³⁵⁴ Furthermore, only one month before North Korea signed its safeguards agreement with the Agency, the Agency's Board rejected Blix' proposal to receive data from Member States regarding the nuclear affairs of other Member States because many Member States opposed Blix' suggestion.³⁵⁵ Such lack of participation is a clear breach of the North Korean-Agency Safeguards Agreement's provision stating

351. See *supra* note 164 (discussing Agency's lack of identification of third-party source).

352. IAEA Statute, *supra* note 2, art. XII(A), 8 U.S.T. at 11-15, 276 U.N.T.S. at 26-30; INFCIRC/403, *supra* note 6, art. 24; see *supra* notes 54-58 and accompanying text (reviewing Agency's duty under IAEA Statute to function in observance of a state's sovereignty); *supra* note 125 (discussing requirement in Article 24 of North Korean-Agency Safeguards Agreement that "[a]ll amendments shall require the agreement of the Democratic People's Republic of Korea and the Agency").

353. INFCIRC/403, *supra* note 6, art. 29; see, e.g., *supra* note 125 (reviewing North Korean-Agency Safeguards Agreement requirement that all amendments must be agreed upon); *supra* notes 227-42 and accompanying text (discussing Agency lack of existing regulation of third-party intelligence sources that are agreed upon by DPRK).

354. INFCIRC/403, *supra* note 6, art. 24(b); *id.*, art. 29; see *supra* note 125 (reviewing North Korean-Agency Safeguards Agreement requirement under Article 24(b) that all amendments must be agreed upon); *supra* notes 227-42 and accompanying text (discussing Agency lack of existing regulation of third-party intelligence sources that are agreed upon by DPRK).

355. Blix, Statement to the 35th Session of the General Conference of Atomic Energy, 7-16 (Sept. 16, 1991); see *supra* note 275 and accompanying text (reviewing Blix' initial proposal to allow Agency to use third-party sources).

that all amendments must be agreed upon.³⁵⁶

Although the question is a close one, the DPRK should nonetheless address the third-party information. The Agency's February 1992 press release³⁵⁷ gave the DPRK constructive notice that the Agency would make use of third-party sources and thus offered North Korea an opportunity to contest the Agency's decision before implementation.³⁵⁸ The DPRK also accepted the Board's authority to arbitrate emergency disputes when it signed the North Korean-Agency Safeguards Agreement.³⁵⁹ The Board's March 18, 1993³⁶⁰ resolution rejected the DPRK's assertion that using third-party information conveyed a hostile act³⁶¹ by declaring the Director-General's work to be impartial.³⁶² Most importantly, recent history³⁶³ clearly points to the Agency's need for better intelligence if it is to carry out its overarching mission under the entire regime: to safeguard and verify that nuclear weapons are not proliferating among non-nuclear signatory states.³⁶⁴ Finally, even if Nyongbyon undergoes inspection, requiring the Agency to ignore year-old data would cast aspersions upon any eventual Agency determination. The DPRK should therefore address the data's allegations.

C. *Pyongyang's Self-Defense Claim Is Unpersuasive*

Pyongyang's claim that it needs to withdraw from the NPT as an act of self-defense in the face of hostile military exercises³⁶⁵ is unpersuasive. The DPRK's claim of self-defense against Team

356. INFCIRC/403, *supra* note 6, art 29; *see supra* note 125 (reviewing requirement under Article 14 of North Korean-Agency Safeguards Agreement that amendments must be agreed upon by DPRK and Agency).

357. *See supra* note 157 and accompanying text (discussing Agency's announcement to use third-party intelligence sources).

358. IAEA Press Release, IAEA Doc. PR 92/12 (Feb. 26, 1992); INFCIRC/403, *supra* note 6, art. 19; *see supra* notes 156-57 and accompanying text (discussing Agency's February 1992 decision to use third party intelligence sources); *supra* note 138 (reviewing North Korean-Agency Safeguards Agreement dispute resolution mechanisms).

359. INFCIRC/403, *supra* note 6, art. 18; *see supra* notes 138-44 and accompanying text (discussing Article 18 of North Korean-Agency Safeguards Agreement).

360. IAEA Doc. GOV/2639, *supra* note 184.

361. DPRK Withdrawal Statement, *supra* note 20, at 1.

362. IAEA Doc. GOV/2639, *supra* note 184.

363. *See supra* notes 151-53 and accompanying text (discussing Agency failure to detect clandestine nuclear weapons program in NPT signatory Iraq).

364. *See, e.g., supra* notes 25-147 and accompanying text (discussing regime's negotiating history and primary purpose of ceasing proliferation of nuclear weapons).

365. *See supra* notes 177-78 and accompanying text (discussing the history of Team

Spirit's resumption lacks merit. The NPT drafters clearly envisioned the existence of global military alliances and exercises.³⁶⁶ The only argument debated then was whether these alliances could contain nuclear weapons without causing proliferation.³⁶⁷ The debate's relative, but not total, silence on conventional exercises shows the drafters intended such exercises to be permitted.³⁶⁸

Although a more evolved definition of a threat of force could, in the future, lend credence to the DPRK position, the North Korean view³⁶⁹ is erroneous. The United States and South Korea conducted these exercises for many years without the threat of a conventional first-strike invasion to Pyongyang.³⁷⁰ Team Spirit's resumption is not a threat. Rather, it is a diplomatic warning to the DPRK that shows a lack of trust. Similarly, the U.S. proposal to re-introduce tactical nuclear weapons to South Korea is not, in itself, a violation of the NPT.³⁷¹ The United States has made explicit threats to North Korea in clear violation of Article II(4).³⁷² But these threats seemingly have nothing to do with Team Spirit and Pyongyang has largely ignored them. This silence is further proof of the DPRK's willing-

Spirit); *supra* notes 180-82 and accompanying text (reviewing DPRK Withdrawal Statement).

366. NPT, *supra* note 2, art. VII, 21 U.S.T. at 491, 729 U.N.T.S. at 173.

367. See *supra* note 80 and accompanying text (reviewing NPT's negotiating history of definition of proliferation); *supra* notes 95-98 and accompanying text (reviewing final NPT definition of proliferation); *supra* note 101 and accompanying text (discussing NPT signatory's right to conclude regional defense agreements).

368. See *supra* note 80 and accompanying text (reviewing issue of "indirect access" during negotiating history); *supra* notes 99-104 and accompanying text (reviewing NPT's collective security provisions).

369. See *supra* notes 237-40 and accompanying text (discussing North Korean view that Team Spirit is threat of force against DPRK).

370. See *supra* notes 177-78 and accompanying text (discussing history of Team Spirit military exercises).

371. NPT, *supra* note 2, art. I, 21 U.S.T. at 487, 729 U.N.T.S. at 171; see *supra* notes 95-97 and accompanying text (reviewing NPT's definition of proliferation for nuclear weapons signatories). Nuclear powers are allowed to place nuclear weapons in the territory of non-nuclear-weapon States as long as that non-nuclear weapon State does not acquire direct or indirect control of those nuclear weapons. See NPT, *supra* note 2, art. I, 21 U.S.T. at 487, 729 U.N.T.S. at 171; *supra* notes 95-97 and accompanying text (reviewing NPT's definition of proliferation for nuclear weapons signatories).

372. See, e.g., *Chronology*, *supra* note 174 (stating that on July 10, 1992, President Clinton warned that if North Korea uses nuclear bomb, North Korea will cease to exist); *No North Korean Bomb?*, WASH. POST, Jan. 6, 1994, at A26 (stating that, on November 7, 1992, President Clinton said "North Korea cannot be allowed to develop a nuclear bomb").

ness to damage the legitimacy of the nonproliferation regime by putting its political ambitions on the negotiating table.

In addition, Pyongyang's linkage of the Team Spirit military issue to the nuclear nonproliferation legal conflict is a political stratagem that does not belong in the realm of international law. According to public record, the United States and South Korea never made formal concessions to North Korea in exchange for the DPRK's ratification of the North Korean-Agency Safeguards Agreement. In other words, the DPRK's safeguards agreement is with the Agency and no other entity. Without such formal obligations between the United States and North Korea, the DPRK has no right to demand U.S. concessions when North Korea's agreement lies with the Agency.³⁷³

Finally, the U.N. founding principles of collective security and rule of law must fill the void left by the Cold War's disappearing political divisions.³⁷⁴ The facts of nuclear nonproliferation make this a particularly appealing case for the rule of international law to assert itself over the realm of international politics. First, nuclear nonproliferation was never within the complete control of the superpowers either singly or jointly.³⁷⁵ Because the superpowers needed the agreement of nonaligned nations to achieve a global nuclear nonproliferation agreement,³⁷⁶ the nonproliferation consensus was never just a bipolar political contest but always a truly global regime. This universality gives the regime legitimacy in both the treaty³⁷⁷ and the customary sources of international law.³⁷⁸

Against the backdrop of these considerations, the Agency's progressive view of collective security³⁷⁹ must prevail over the increasingly archaic notion of indivisible sovereignty for the NPT

373. See generally INFCIRC/403, *supra* note 6; *supra* notes 115-47 and accompanying text (reviewing North Korean-Agency Safeguards Agreement).

374. Inman, *supra* note 334, at 64.

375. See *supra* notes 39-86 and accompanying text (reviewing superpower negotiations thorough history of nonproliferation agreement).

376. See *supra* notes 39-86 and accompanying text (reviewing superpower negotiations throughout history of nonproliferation agreement).

377. E.g., NPT, *supra* note 2, 21 U.S.T. 483, 729 U.N.T.S. 161.

378. See *supra* note 5 (defining customary law); *supra* note 7 and accompanying text (discussing regime's composition of customary international law); *supra* notes 25-114 and accompanying text (reviewing history of nonproliferation agreement negotiations, including unanimous U.N. General Assembly resolutions).

379. See *supra* notes 283-93 and accompanying text (discussing Agency's understanding of collective security and threat of force).

to have any real meaning. If the DPRK's view of sovereignty³⁸⁰ is sustained, any nation can pull out of the Treaty without consequence. The progressive view, however, treats sovereignty as "sticks" and encourages an international legal system that promotes global collective security to evolve.

Using the same analysis, however, the DPRK does not have to give the Agency complete access to Nyongbyon. Applying Director-General Blix' sticks of sovereignty analysis³⁸¹ here reveals that the DPRK has not handed over all of its "sticks." The IAEA Statute guarantees that all Agency functions shall be with a view to national sovereignty.³⁸² The NPT also mentions state sovereignty and supreme interests in its withdrawal clause.³⁸³ In light of these textual provisions and Blix' own theory, Article 14 should be read to give the material accountancy "stick" to the IAEA. In this light, the North Korean-Agency Safeguards Agreement states that the DPRK agreed that if it could not meet its burden of proof to make it clear no proscribed activities would occur in military facilities then the Agency could conduct material accountancy tests on those sites. Because military facilities are of vital interest, the Agency should forgo other "sticks" that are secondary safeguards, like surveillance and containment, as too intrusive in this sensitive area unless verification cannot be achieved without them.³⁸⁴ The Agency would bear the burden of proof in arbitration that any other "sticks" are so necessary that taking them away would constitute a violation of the IAEA Statute. Furthermore, this solution respects the IAEA Statute's requirement that all Agency activities be carried out in due observance of state sovereignty.³⁸⁵

380. *See supra* notes 243-53 and accompanying text (discussing DPRK definition of sovereignty under nonproliferation regime).

381. *See supra* notes 294-301 and accompanying text (discussing Blix' view of sovereignty).

382. IAEA Statute, *supra* note 2, art. III(D), 8 U.S.T. at 1095, 276 U.N.T.S. at 8; *see supra* note 57 (reiterating text of Article III(D) of IAEA Statute).

383. NPT, *supra* note 2, art. X(1), 21 U.S.T. at 493, 729 U.N.T.S. at 173; *see supra* note 87 and accompanying text (reviewing NPT withdrawal clause's text).

384. INFCIRC/403, *supra* note 6, art. 29; *see supra* notes 123-24 and accompanying text (reviewing prioritization of safeguards under North Korean-Agency Safeguards Agreement).

385. IAEA Statute, *supra* note 2, art. III(D), 8 U.S.T. at 1095, 276 U.N.T.S. at 8; *see supra* notes 56-58 and accompanying text (reviewing IAEA Statute requirement that Agency functions be carried out in due observance of signatory sovereignty).

D. Sovereignty and the Withdrawal Clause

The NPT's withdrawal clause reflects Director-General Blix' progressive view of sovereignty³⁸⁶ because it allows North Korea to retain its "supreme interests" while taking the DPRK's right to deny Agency inspections during the three-month notice period.³⁸⁷ The clause also envisions the nonproliferation regime set within a system of international laws.³⁸⁸ Furthermore, Pyongyang's argument that it can withdraw from the NPT because of its lack of formal diplomatic relations with the United States³⁸⁹ is unfounded. The DPRK's agreement is with the Agency, not the United States. The official status of U.S.-DPRK relations has no legal repercussions upon an agreement between the Agency and the DPRK.³⁹⁰ The DPRK's attempt to link its diplomatic status *vis-à-vis* the United States³⁹¹ to other NPT legal issues is, like Pyongyang's attempt to link Team Spirit to the legal debate, an attempt to replace international law with international political interests. Moreover, the Agency recognizes the DPRK as a state.³⁹² Furthermore, customary international law regards the DPRK as a state³⁹³ and thus places the customary responsibility of States to uphold its treaty obligations upon North Korea.

Similarly, Pyongyang's belief that withdrawal is instantly effective³⁹⁴ is clearly not supported by the NPT's text. The NPT withdrawal clause clearly calls for a three-month period where the signatory is still a party to the Treaty.³⁹⁵ This fits with the commonly accepted legal definition of the word "notice," where

386. See *supra* notes 294-301 and accompanying text (discussing Blix' view of sovereignty).

387. NPT, *supra* note 2, art X, 21 U.S.T. at 493, 729 U.N.T.S. at 175.

388. See, e.g., NPT, *supra* note 2, art. X, 21 U.S.T. at 493, 729 U.N.T.S. at 175.

389. See *supra* note 20 (discussing recent history of North Korean relations with United Nations and United States); *supra* note 181 (reviewing DPRK Withdrawal Statement's declaration that United States is "belligerent party vis-a-vis DPRK").

390. See *supra* notes 160-98 and accompanying text (reviewing DPRK negotiations with Agency regarding access to Nyongbyon).

391. See *supra* note 181 and accompanying text (reviewing DPRK claims that "specific conditions" vis-a-vis U.S. lack of recognition of DPRK statehood allows North Korea to withdraw from NPT and block special inspections).

392. See, e.g., 1993 U.N. DISARMAMENT Y.B. 19, *supra* note 7.

393. See RESTATEMENT (THIRD) OF FOREIGN LAW § 201, cmt. h (1986).

394. See *supra* notes 180-82 and accompanying text (discussing DPRK view that notice of intent to withdraw thus gives DPRK instant right to deny Agency special inspection).

395. NPT, *supra* note 2, art. X, 21 U.S.T. at 493, 729 U.N.T.S. at 175.

the party giving notice continues to have rights and obligations until the notice period tolls. To interpret the provision otherwise would make the words "three months notice" meaningless.

CONCLUSION

To maintain the NPT's force of law, the United Nations must strengthen the nuclear nonproliferation regime by reinforcing the regime's weakest point: the Agency's power to verify NPT compliance. The current crisis shows several areas of weakness in the Agency's ability to perform safeguards that need fortification. First, the Agency must have better access to and regulation of intelligence sources to achieve the verification and deterrence purposes of safeguards.³⁹⁶ Second and more important, the 1995 conference must clarify the limitations that safeguards agreements promulgated under the NPT impose on the national sovereignty of its members for the sake of global collective security.³⁹⁷ For example, language such as the North Korean-Agency Safeguards Agreement's Article 14 provision on military applications³⁹⁸ should be strengthened from permitting the Agency "to call upon"³⁹⁹ the signatory to take action immediately to stating that the signatory "agrees to" undertake the immediate action without the ability to appeal. Stronger agreement language, quicker enforcement processes, and better regulation of intelligence sources will allow the nuclear nonproliferation regime to function more effectively and with fewer legal conflicts in future confrontations.

396. See *supra* notes 151-65 (reviewing Agency's need for better intelligence, as demonstrated by Iraq and DPRK case histories).

397. NPT, *supra* note 2, pmb., 21 U.S.T. at 484-86, 729 U.N.T.S. at 162-63. The Treaty's preamble explicitly states that the NPT was created to promote international peace and security in accordance with the U.N. Charter's requirement that states refrain from threat or use of force. *Id.*

398. INFCIRC/403, *supra* note 6, art. 18; see *supra* notes 138-44 and accompanying text (discussing requirements under Article 18 of North Korean-Agency Safeguards Agreement).

399. See *supra* note 139 (reiterating text of Article 18 of North Korean-Agency Safeguards Agreement).