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Survival of Rights Under The Nuclear Non-Proliferation Treaty: Withdrawal and the Continuing Right of International Atomic Energy Agency Safeguards

ANTONIO F. PEREZ*

On February 25, 1993, the Board of Governors of the International Atomic Energy Agency1 (IAEA or Agency) adopted a resolution calling upon the Democratic People's Republic of Korea (DPRK or North Korea) to cooperate with the IAEA and accept its request to inspect two sites at Yongbyon.2 The Agency's Secre-

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1. The IAEA was established by international agreement for the purpose of advancing peaceful cooperation in the international development of nuclear energy. Statute of the International Atomic Energy Agency, opened for signature Oct. 26, 1956, 8 U.S.T. 1093, 276 U.N.T.S. 3 (entered into force July 29, 1957) [hereinafter IAEA Statute]. The Board of Governors, which meets several times a year and may also meet on an urgent basis, is the principal policy-making organ of the IAEA for most management issues. See David Fischer & Paul C. Szasz, Safeguarding the Atom: A Critical Appraisal 11-12 (1985).

tariat suspected, and the Board of Governors agreed, that North Korea had concealed at those sites nuclear material subject to IAEA safeguards, and that perhaps North Korea had engaged covertly in the separation of significant quantities of weapons-grade plutonium. On March 12, 1993, the DPRK, pursuant to article X(1) of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT or Treaty), gave notice to the United Nations Security Council of its intent to withdraw from the Treaty effective three months later. On April 1, after the DPRK refused to comply with the Agency's request for a special inspection within the time frame set by its February 25 resolution, the Board of Governors determined that it was unable to verify whether North Korea had diverted nuclear material subject to safeguards from peaceful purposes. Thus, it found the DPRK in noncompliance with obligations under its agreement with the Agency for the application of safe-


The NPT establishes a global regime dividing states into two categories: nuclear-weapon states (NWS), which may possess nuclear weapons; and nonnuclear-weapon states (NNWS), which undertake not to manufacture or acquire nuclear weapons. See NPT, supra, arts. I, II, 21 U.S.T. at 487, 729 U.N.T.S. at 171. Under the Treaty, a state may adhere as a NWS only if it has detonated a nuclear explosive device before January 1, 1967. Id. art. XI, 21 U.S.T. at 494, 729 U.N.T.S. at 175.


Article X(1) of the NPT provides:

[e]ach 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.

NPT, supra note 4, art. X, para. 1, 21 U.S.T. at 493, 729 U.N.T.S. at 175.
guards in North Korea pursuant to the NPT.\

Thereafter, on May 1 the Depositaries to the NPT—the United States, the United Kingdom, and the Russian Federation—called on the DPRK to "retract" its withdrawal, followed on May 11 by the Security Council's unanimous call for the DPRK to "reconsider" its decision to withdraw from the NPT. On June 11, after intense negotiations with the United States, the DPRK purported to "suspend" its withdrawal from the NPT and to modify unilaterally its obligation pursuant to the NPT to accept safeguards on all its nuclear material.\

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6. February 1993 Director General's Report, supra note 3, at 2; see also infra note 45 and accompanying text. For a discussion of the relevant provisions of NPT safeguards agreements, see infra notes 22-25.


9. Report Dated 16 September 1993 by the Director General on the Implementation of the Agreement 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 [hereinafter September 1993 Director General's Report], in Note by the Secretary General, U.N. SCOR, 48th Sess., Appendix, para. 25, U.N. Doc. S/26456 (Sept. 17, 1993) [hereinafter September 1993 Note by the Secretary General]; also reprinted in Text of U.S.-North Korean Declaration of June 11, 1993, Arms Control Today, July-Aug. 1993, at 19. The NPT explicitly provides for withdrawal. NPT, supra note 4, art. X, para. 1, 21 U.S.T. at 493, 729 U.N.T.S. at 175. It does not expressly provide that a notice of withdrawal can be revoked or suspended. Nonetheless, the Vienna Convention on the Law of Treaties expressly permits only the "revocation" of a notice of withdrawal, although it does not expressly prohibit suspension of a notice of withdrawal. Vienna Convention on the Law of Treaties, concluded May 23, 1969, art. 68, 1155 U.N.T.S. 331, 348 [hereinafter Vienna Convention]. The United States is not a party to the Vienna Convention, although it considers it to reflect customary international law. See generally Richard D. Kearney & Robert E. Dalton, The Treaty on Treaties, 64 Am. J. Int'l L. 495 (1970). Because the DPRK suspended its notice of withdrawal only a day before it would have become irrevocable, there remains the somewhat theoretical question whether, if the DPRK were to revoke its suspension of its notice of withdrawal, that action would result in its withdrawal on the very next day or instead function as a new notice of withdrawal effective only after the expiration of the three month period provided for in article X(1). The question might be of practical significance to this Article's proposition that the duty to comply with a special inspection requested while a state is a party to the NPT survives that state's withdrawal from the NPT; provided that, after revocation of the DPRK's suspension of its notice of withdrawal, the IAEA were to request, after expiration of the period remaining on the original notice of withdrawal but before the expiration of a new three-month notice period, a special inspection exceeding the scope of its initial request. Such a request might also trigger a duty of compliance that would survive withdrawal from the NPT.
This nearly-consummated attempt to withdraw from the NPT, virtually on the eve of the conference of parties that will meet in April 1995 to decide the fate of the Treaty after the expiration of its initial twenty-five year term, requires a critical re-examination of the effect of withdrawal from the NPT on the safeguards obligations established through the Treaty. It appears to be the DPRK’s position that withdrawal from the NPT would effectively terminate the legal basis for international efforts to determine whether the DPRK, while an NPT party, had engaged in unsafeguarded nuclear-weapons related activities. It is the thesis of this Article that there are principled grounds for maintaining that, on the contrary, the IAEA’s right to safeguards pursuant to a special inspection requested before withdrawal from the NPT takes effect survives withdrawal from the Treaty. If correct, this proposal would imply that the dispute between the parties to both the NPT and the IAEA and North Korea would still be framed as a legal dispute amenable to principled, legal solutions, even after withdrawal. The DPRK would owe a continuing obligation to the international community, and this obligation would provide a legal foundation in support of the political rationale justifying Security Council action, under chapter VII of the United Nations Charter, for international sanctions against North Korea.

Moreover, by interpreting article X(1) of the NPT as preserving, rather than extinguishing, special inspection rights established prior to withdrawal, North Korea may have less of an incentive to withdraw from the Treaty. Although the strengthening of the NPT under this interpretation may make adherence more costly for sig-

10. Article X(2) of the NPT provides: “Twenty-five years after the entry into force of the Treaty, a conference shall be convened to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods. This decision shall be taken by a majority of the Parties to the Treaty.” NPT, supra note 4, art. X, para. 2, 21 U.S.T. at 494, 729 U.N.T.S. at 175. A conference is scheduled to convene in New York in April 1995. Interview: Thomas Graham: Preparing for the 1995 NPT Conference, Arms Control Today, July/Aug. 1994, at 10.

11. See infra notes 51-53.

12. Under the United Nations Charter, chapter VII, and articles 25 and 48, the Security Council may require DPRK compliance with its legal obligations only if it finds the situation to constitute a “threat to the peace, breach of the peace, or act of aggression.” U.N. Charter art. 39.

13. In the case of Iraq, for example, the fact that Iraq breached its NPT obligations appears to have substantially strengthened the case for imposing a special regime prohibiting Iraq from engaging in a broad range of nuclear activities. See S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. at 6, paras. 12-13, U.N. Doc S/RES/687 (1991) [hereinafter S.C. Resolution 687].
nantory states, the confidence-building functions served by the NPT can be enhanced by weeding out those states whose adherence would be deterred by the proposal advanced in this Article.

In developing its thesis, this Article will review the history and purpose of IAEA safeguards and their relation to the NPT, and then show that special inspections in the DPRK represent a transitional moment for the IAEA safeguards system. This Article will then consider two different arguments in favor of a continuing right to inspections even against a state exercising its right to withdraw from the NPT to escape its safeguards obligations: the first identifies circumstances under which a state would not have the right to withdraw from the NPT; and the second asserts that the effects of withdrawal from the NPT do not include the extinction of the safeguards obligations, or at least certain critical safeguards duties established through NPT adherence. The Article demonstrates that it is impossible to identify any meaningful and principled limitation to a NPT party’s right to withdraw. It then argues that, although the IAEA’s right to apply safeguards with respect to the nuclear activities of the withdrawing state terminates with withdrawal, a right to conduct any special inspection requested before withdrawal relating to suspect activities that occurred while the state was still a party to the NPT should survive withdrawal. This argument is framed in terms not only of general principles of treaty law articulated in the Vienna Convention of the Law of Treaties, which, for the most part, represents a codification of customary international law, but also in terms of the object and purpose of the NPT and safeguards agreements entered into by states to fulfill their NPT safeguards obligations. Finally, this Article recommends that an interpretation to this effect be reflected in the final documents of the conference to be held by the parties to the NPT in 1995 for the review and extension of the Treaty.

I. The IAEA Safeguards Regime and the NPT in Historical Context

North Korea’s frontal attack on the NPT, and the possibility that it may lead to the unravelling of the international nonproliferation regime, poses challenges for President Clinton similar to those that confronted President Kennedy. Indeed, John Kennedy voiced his fear, perhaps even resignation, that nuclear proliferation was man-
kind's tragic destiny. In the years prior to the negotiation of the NPT, widespread acquisition of nuclear weapons seemed inevitable to statesmen and strategists alike. Abram Chayes, Legal Adviser to President Kennedy's Secretary of State Dean Rusk, recently recalled the pessimism shared by academics in the early 1960's when he recounted that members of a Harvard-Massachusetts Institute of Technology study group on arms control, including himself, placed bets in sealed envelopes on how many nuclear powers would exist at the close of the decade. When Harvard Professor Albert Carnasale opened these envelopes a quarter century later, he discovered that not a single expert had projected fewer than twenty nuclear powers by 1970.

History, however, at least in the short term, did not turn out the way President Kennedy and the experts feared. After the five permanent members of the United Nations Security Council crossed the nuclear threshold, only a handful of other states realized their nuclear dreams; President Kennedy's nuclear nightmare. These states—Israel, India, Pakistan, and South Africa—developed nuclear weapons programs covertly but never illegally. None adhered to the NPT or a comparable international legal obligation while pursuing an active weapons program. Indeed, with the exception of South Africa, which publicized its nuclear program after adhering to the NPT and reversing its nuclear weapons capability, none of these states has been prepared to declare publicly

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that it has ever possessed nuclear weapons. Thus, for nearly the entire twenty-five years of the NPT's initial term, no state did any real damage to the emerging expectation that broader adherence to the NPT would strengthen, rather than undercut, international security.

How did this surprising set of circumstances transpire? One critical factor was the role of IAEA safeguards. For the life of the NPT, safeguards have served as the principal tangible expression of the Treaty. Both the NPT and the safeguards trace their origins to a policy adopted by President Eisenhower, which he called "Atoms for Peace." This policy discouraged nuclear weapons proliferation by establishing a framework for non-nuclear states to receive the benefits of the peaceful uses of the atom without needing to develop independent nuclear programs. Similarly, article IV(2) of the NPT establishes a duty of nuclear cooperation, subject only to the specific obligation stated in article III(2) not to export "source or special fissionable material" or "equipment or material especially designed or prepared for the processing, use, or production of special fissionable material" to any nonnuclear-weapon state (NNWS) party, unless such items are subject to safeguards. Article III(1) of the NPT requires NNWS parties to accept these


20. Article IV(2) provides that: [a]ll parties to the Treaty undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy. Parties to the Treaty in the position to do so shall also co-operate in contributing alone or together with other States or international organizations to the further development of the applications of nuclear energy for peaceful purposes, especially in the territories of non-nuclear-weapon States Party to the Treaty, with due consideration for the needs of the developing areas of the world.


21. The terms "source material" and "special fissionable material" were drawn from the IAEA Statute. IAEA Statute, supra note 1, art. XX, paras. 1, 3, 8 U.S.T. at 112, 276 U.N.T.S. at 38. In general terms, source (or so-called "indirect use") material is material capable of being used to produce special material, and special (or so-called "direct use") material is material readily usable for nuclear explosive purposes. See Scheinman, The International Atomic Energy Agency, supra note 19, at 166 (Table 5-3). The IAEA definitions list the specific materials the Agency has concluded meet these implicit criteria and authorize the Board of Governors (although the Board has never exercised this authority) to revise the list from time to time.
safeguards on all their peaceful nuclear activities. Accordingly, the objective of IAEA safeguards, as stated in article III(1) of the NPT, is "verification [of NNWS's obligation] with a view to preventing diversion" of nuclear material to nuclear explosive purposes.\footnote{22}

\footnote{22. Article III(1) provides:

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 safeguards 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.}

\footnote{23. NPT, supra note 4, art. III, para. 1, 21 U.S.T. at 487-88, 729 U.N.T.S. at 172. Indeed, article III(4) requires NNWS parties to discharge this obligation by commencing the negotiation of an agreement to this effect with the IAEA within 180 days of their adherence to the NPT, and to complete such negotiations within 180 days after their commencement. The term "principal nuclear facility" is defined in paragraph 78 of The Agency's Safeguards System (1965, as provisionally extended in 1966 and 1968), IAEA Doc. INFCIRC/66/Rev. 2 (1968) [hereinafter INFCIRC/66].}

\footnote{23. NPT, supra note 4, art. III, para. 1, 21 U.S.T. at 487-88, 729 U.N.T.S. at 172. In its own explanation of the safeguards system, the IAEA has construed this formulation to include providing assurance of nondisversion, warning to the international community when it is unable to verify that there has been no diversion, deterrence of diversion by the risk of its early detection, and the imposition of sanctions. See IAEA Safeguards: Aims, Limitations, Achievements, supra note 3, at 21-24; see also D.M. Edwards, International Legal Aspect of Safeguards and the Non-Proliferation of Nuclear Weapons, 33 Int'l & Comp. L. Q. 1, 11-14 (1984) (former Director of the IAEA Legal Division, 1977-79). In particular, the IAEA has drawn attention to the language of paragraphs 2, 19, and 28 of the standard agreement for safeguards pursuant to article III of the NPT approved by the IAEA Board of Governors, which was first published in the form of negotiating instructions to the IAEA's Secretariat as The Structure and Content of Agreements Between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, IAEA Doc. INFCIRC/153 (June 1972) [hereinafter INFCIRC/153] and later published as The Standard Text of Safeguards Agreements in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, Annex A, IAEA Doc. GOV/INF/276 (1974) [hereinafter INFCIRC/276]. Located in Part I of INFCIRC/153, which comprises the framework of the agreement, paragraph 2 establishes the IAEA's "right and obligation" to apply safeguards "for the exclusive purpose of verifying" that nuclear material is not "diverted to nuclear weapons or other explosive purposes." Located in Part II, which details the safeguards concept developed by the IAEA specifically for the purposes of satisfying the requirement of the NPT, paragraph 28 provides that the "objective of safeguards procedures . . . is the timely detection of diversion of significant quantities of nuclear material from peaceful nuclear activities to the manufacture of nuclear weapons or other nuclear explosive devices or for purposes
The IAEA "safeguards" system essentially consists of (i) the provision of information by the safeguarded state, particularly the state's own declaration of the quantity and location of safeguardable nuclear material, coupled with (ii) on-site inspections by the IAEA. While each safeguards agreement between the IAEA

unknown, and deterrence of such diversion by the risk of early detection." INFCIRC/153, supra, para. 28. Paragraph 19 provides that, in a case in which the IAEA is unable to verify that there has not been a diversion of nuclear material, the Director General of the IAEA must so report to the Board of Governors and the Board, in turn, may impose any of the sanctions and make any of the reports to the Security Council and General Assembly contemplated by article XIC of the IAEA Statute, if it has found that a state has not complied with its obligations under a safeguards agreement. Id. para. 19. The sanctions contemplated, however, involve at most suspension of the privileges of membership in the IAEA. See also IAEA Statute, supra note 1, art. XIX, 8 U.S.T. at 1111, 276 U.N.T.S. at 36, 38. Ultimately, the IAEA imposed this sanction on the DPRK, with the DPRK responding tit-for-tat by withdrawing from the IAEA. See R. Jeffrey Smith & T.R. Reid, North Korea Quits U.N. Nuclear Body: Move May Add Urgency to Sanctions Plan, Wash. Post, June 14, 1994, at A1.

24. Paragraph 29 of INFCIRC/153 provides that "material accountancy shall be used as a safeguards measure of fundamental importance, with containment and surveillance as important complementary features." INFCIRC/153, supra note 23. Safeguards, roughly put then, are a bean-counting exercise involving the provision of information by the safeguarded state and on-site inspection by the IAEA to verify the location of nuclear material. The "accountancy" component of safeguards refers to the obligation of the safeguarded state to keep accurate and complete records of nuclear material subject to safeguards. Paragraphs 59-69 of INFCIRC/153 provide for detailed reports by the safeguarded state to the IAEA; notably including, pursuant to paragraph 62, an initial report, or "declaration," which establishes a baseline for material accounting. Based on these reports "and the results of its verification activities," the IAEA maintains an inventory of safeguarded nuclear material. Id. para. 41. Verification activities specified in the agreement include routine, ad hoc, and special inspections. Id. paras. 71-73. "Routine" inspections are limited to access to "strategic points" negotiated in the subsidiary arrangements between the safeguarded state and the IAEA for implementation of the agreement. Id. para. 76(c). Ad hoc inspections, which are primarily conducted to verify the initial report, id. paras. 71(a) and (b), authorize access in such cases, "and until such time as the strategic points have been specified in the Subsidiary Arrangements, . . . to any location where the initial report or any inspections carried out in connection with it indicate that nuclear material is present," id. para. 76(a). When, pursuant to paragraph 73(b), the IAEA "considers that the information made available" to it "is not adequate for the Agency to fulfill its responsibilities under" the agreement, it may "obtain access, in agreement with . . . [the safeguarded state], to information or locations in addition to those specified" for routine or ad hoc inspections. Id. para. 77(b). The scope of inspections includes, among other things, "containment," which allows for the application of locks and seals on nuclear storage areas to prevent movement of nuclear material, and "surveillance," which involves human and remote observation of specified activities at nuclear facilities. Id. para. 74(d); Edwards, International Legal Aspects of Safeguards, supra note 23, at 6.

The core idea of the safeguards system is to maintain "the continuity of safeguards" on each atom of nuclear material subject to safeguards under the safeguards agreement, even as it undergoes transformation into different chemical forms upon irradiation, until it is in a chemical or physical form not amenable to weapons-related applications. See Scheinman,
and the relevant state, pursuant to article III of the NPT, confers upon the IAEA the power to request a special inspection of locations in addition to those agreed to by the safeguarded state for other normal inspections. Historically the IAEA has never sought to exercise this right to search for undeclared nuclear material. Thus, the balance between assurance provided by the safeguarded state and verification conducted by the IAEA had, in the implementation of IAEA safeguards, tilted so far toward assurance that safeguards could not reasonably be said to provide a meaningful measure of verification.

25. INFCIRC/153, supra note 23, paras. 18, 73, & 77. The IAEA is not a party to the NPT and, thus, is not legally bound to negotiate agreements with NPT parties along the lines set forth in article II of the NPT. Nonetheless, there is a substantial overlap in membership between the NPT and IAEA, and the IAEA responded promptly to the requirements of the NPT by convening a special committee, chaired by Kurt Waldheim, to negotiate a new model safeguards agreement that would satisfy the requirements of the NPT. See Edwards, supra note 24, at 11; Paul C. Szasz, The Law and Practices of the International Atomic Energy Agency 1970-1980, at 289-92 (Legal Series No. 7, Supp. 1, 1993) [hereinafter Law and Practices of the IAEA].

26. Lawrence Scheinman, Lessons from Post-War Iraq for the Full-Scope Safeguards Regime, Arms Control Today, Apr. 1993 at 3; North Korea at the Crossroads: Nuclear Renegade or Regional Partner?, Arms Control Today, May 1993, at 3 (news conference with nonproliferation specialists) (Spurgeon M. Keeny, Jr.).

27. The distinction between “assurance” and “verification” regimes is drawn by Kenneth Abbott in terms of whether a state provides information or a third party itself gathers the information. Kenneth Abbott, “Trust But Verify”: The Production of Information in Arms Control Treaties and Other International Agreements, 26 Cornell Int'l L.J. 1, 4 (1993). Both techniques seek to make available information on the theory that greater transparency will reduce the risk of suboptimal decision-making by players in the classical Prisoner's Dilemma or similar strategic games, which bear some similarities to inter-state conflicts. In such games, lack of information concerning other players' intentions results in perceived payoffs inducing players to "defect"—that is to say, breach—rather than "cooperate" or perform their obligations. Incentives to defect, however, can take two forms: first, an "offensive" form in which defection gives a player his best outcome and gives the other player his worst; or, second, a "defensive" form in which defection merely avoids the worst outcome. Id. at 8. Abbott argues that assurance techniques will ordinarily be used when defensive incentives predominate and verification techniques will be required where offensive incentives are significant. Id. at 17, 23. In the arms control context, Abbott postulates that the risk of offensive defection suggests that assurance techniques of information production, functioning as confidence-building measures, will be inadequate, and that instead verification techniques will predominate. Id. at 32. Accordingly, he locates the IAEA squarely in the verification camp. Id. at 34.
can be found in the tension implicit in the safeguards regime between reliance on information voluntarily provided by the safeguarded state and intrusive international verification. In short, between deference to national sovereignty and the requirements of world order.

Thus, almost as if historically inevitable, in the last several years revelations concerning the implementation of the NPT have lent new credibility to President Kennedy’s nightmarish vision of widespread nuclear weapons. For example, following the Gulf War in 1990-1991, it became clear that Iraq had come perilously close to acquiring nuclear weapons during the late 1980’s, even though it was a party to the NPT.28 Oddly enough, and perhaps contrary to popular understanding, the fact that Iraq violated the NPT and its NPT-safeguards agreement with the IAEA29 did not necessarily imply that IAEA safeguards in Iraq had failed to meet expected standards of performance.30 Indeed, the U.S. government appears to have taken the position that no nuclear material subject to safeguards in Iraq was diverted to Iraq’s nuclear weapons program.31 In other words, once nuclear material was captured by the IAEA’s safeguards system, it remained subject to international inspection and supervision. The problem in Iraq, however, was that nuclear material was present in an entirely parallel but covert nuclear pro-


29. Iraq’s breaches of nuclear-related international obligations arguably included the “manufacture” of a nuclear explosive device in violation of article I of the NPT; the failure to make “all its peaceful nuclear activities subject to safeguards” in violation of article III of the NPT; and the violation of the safeguards treaty with the IAEA through which Iraq’s safeguards obligations under the NPT were to be fulfilled. See S.C. Resolution 687, supra note 13, at 3.


gram completely shielded from the international inspection regime.\textsuperscript{32}

\section*{II. IAEA Safeguards in Transition}

In 1992, in response to the perceived failure of its safeguards system in Iraq, the Agency sought to increase confidence that clandestine nuclear activities would not escape its attention. First, the Agency paid additional attention to intelligence collection, particularly by collaborating with IAEA member states possessing information suggesting that a state may have developed elements of a nuclear program outside of safeguards.\textsuperscript{33} Second, when possessed of such information, the Agency would consider exercising its hitherto untapped power to demand access to a facility not previously admitted by the state to contain nuclear material.\textsuperscript{34} Opinion on whether the IAEA’s assertion of these powers is fully sustainable varies,\textsuperscript{35} although no state seems to have stated that it would not

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\item See Chayes, supra note 15, at 525 (describing how IAEA inspectors visited the nuclear facility at Al Tarmiya, where a declared research reactor was surrounded only 300 yards away by undeclared calutrons producing weapons usable uranium, “but neither to the right nor the left”).
\item See 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. 162, 180 (1992) (citing IAEA Summary of the Director General’s Press Conference (Feb. 27, 1992) (on file with author)). The right was asserted publicly by a former IAEA Legal Adviser and authoritative commentator on the legal authorities of the IAEA at least as early as 1979. See Paul C. Szasz, Sanctions and International Nuclear Controls, 10 Conn. L. Rev. 545, 559 (1979) (discussing the use of information from “intelligence services or other states or from individuals in the state itself”).
\item Monahan, supra note 33, at 180. The proposal for access to locations or “areas not normally subject to controls” publicly emerged early in the history of NPT safeguards agreements. See generally Paul C. Szasz, The Adequacy of International Nuclear Safeguards, 10 J. Int’l L. & Econ. 423, 433 (1975).
\item Compare, e.g., Chayes, supra note 15, at 525 (noting the Chairman and the Board of Governors’ opinion “that the IAEA really does have this authority . . . . [T]he legal work that has been done to analyze the safeguards agreements and their legislative history and to come to the conclusion that the IAEA does have this special inspection authority has been very thorough and very good.”) and Monahan, supra note 33, at 182 (arguing for a broad right to special inspections “of undeclared facilities used in potential violation of the NPT”) with Chauviestre, supra note 30, at 26 (asserting that both the use of information provided by governments and special inspections of undeclared facilities would require amendment of the applicable safeguards agreements).
\item Given the bias of international organizations and career civil servants not to assert expansive interpretations of their authorities so as to limit national sovereignty, it is not surprising that the research supported by the United Nations Institute for Disarmament Research would take a cautious view of the IAEA’s authorities under INFCIRC/153. Nonetheless, because this “legislative history” is in the form of documents restricted to government access (including the IAEA’s legal opinion), it must be acknowledged that a
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consider itself bound by the construction advanced by the IAEA. However, because the precise contours of these powers have not been exhaustively addressed publicly by the IAEA, it is difficult to know whether states have registered objections in confidential communications. In any event, it is clear that the IAEA’s recent interpretation of the powers available to it represents a substantial shift in its view of safeguards, transforming IAEA-NPT safeguards into a more intrusive regime compatible with modern standards of arms control verification.

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definitive conclusion as to this issue would seem premature. But see Chayes, supra note 15, at 30.

36. Chauvistré, supra note 30, at 25. It should also be noted that the fourth NPT review conference in its draft final statement expressly urged the IAEA “not to hesitate to take full advantage of its rights, including the use of special inspections as outlined in paragraphs 73 and 77 of INFCIRC/153.” Fourth Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, para. 28, U.N. Doc NPT/CONF.IV/DC/1/Add. 3(A) (Sept. 13, 1990), reprinted in Chauvistré, supra note 30, at 47, 51.

37. IAEA Director General Hans Blix has, however, described the scope of the IAEA’s special inspections rights as follows:

[We] have the right to go to a sight where we think that there are reasons to believe that some nuclear material or installations which have not been declared, which should have been declared, are located. And we had a discussion of this in the Board of Governors of the IAEA and a conclusion by the chairman that we do have the right to perform what you term rightly, special inspections.

North Korea Nuclear Program: Testimony of Dr. Hans Blix Before the Subcommittee on Asian and Pacific Affairs of the House Foreign Affairs Committee, at 4, July 22, 1992, Federal News Service. He added that special inspections needed to be distinguished from so-called challenge inspections permitted under other proposed arms control regimes: “[B]y challenge inspections, one usually means in [the] arms control context, the right of another state or organization to go a site, regardless of whether there are any suspicions. Such a right does not exist in our safeguards agreement . . . .” Id. at 7. Thus, Blix’s account suggests that the IAEA may inspect when it “has suspicions” of the presence of undeclared nuclear “material or installations.”

Remaining questions about operationalizing special inspections include: the evidentiary standard for determining whether the IAEA properly has “suspicions” which trigger the right to inspect; and, perhaps more important, whether the right to inspect “locations in addition” to those previously declared, see INFCIRC/153, supra note 23, para. 77, means “any” additional locations. One must imagine that the IAEA’s duty to develop “suspicions” before invoking its right to conduct special inspections must be discharged in good faith. See the Vienna Convention, supra note 9, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”) Whether the IAEA’s duties in this regard must also be discharged in accordance with some objective standard of reasonableness remains unclear. Also, one would think that the failure to provide for exceptions implies an unlimited range, particularly since the drafters of INFCIRC 153 did know how to provide for exceptions in other contexts. See id. para. 14; for a discussion of the conditions for invoking this exception, see infra note 43.

38. See Abbott, supra note 27, at 36-38 (discussing the expansion of intrusive verification techniques in recent arms control agreements). In game theory terms, additional verification provides a player with information concerning another player’s behavior that will allow the player to cooperate rather than defect. Id. at 12-16. Another
A. The North Korean Challenge to Special Inspections

A year after advancing its new interpretation of the safeguards system, the Agency made its first attempt to demand a special inspection at an undeclared site. However, the Agency met with resistance, indeed defiance, from North Korea. The DPRK sought to exercise its right to withdraw from the NPT, evidently on the presumption that IAEA inspection rights would thereby fully terminate. The DPRK formally identified two distinct grounds for its withdrawal: (i) the resumption of the joint U.S.-South Korea military exercise, “Team Spirit,” which the DPRK characterized as a “nuclear war exercise,” and (ii) the February possibility is that information will also alter perceived payoffs from cooperation or defection, thus transforming a Prisoner’s Dilemma into a game more likely to induce cooperative behavior, such as “Chicken,” where mutual defection leads to a worse outcome for each player than performance in the face of the other player’s breach. Arguably, proliferation—like the typical road warrior’s game—is a glorified game of “Chicken,” in which acquisition of nuclear weapons by both players is an inferior outcome, leading to an ever-increasing spiral of arms competition drawing resources from more socially productive uses. William Poundstone, Prisoners’ Dilemma: John von Neuman, Game Theory, and the Puzzle of the Bomb 197-201, 215-222 (1992) (discussing the effects of varying perceived payoffs in changing the nature of the game). If so, proliferation may be a game that induces greater cooperation than does the classic Prisoners’ Dilemma. Cf. id. at 201.


40. While there is no doubt North Korea discharged its obligation to notify the Security Council through its letter of March 12 to the Security Council’s president, it probably cannot be verified, without canvassing the parties to the Treaty, whether and when it discharged its additional obligation under article X(1) to notify each other party to the Treaty individually (and not simply through an indirect notification to the Security Council or General Assembly). The problem is compounded by the fact that the NPT is a triple-depositary treaty and, given conflicting depositary practice, there may be no single authoritative list of parties to the NPT. See NPT, supra note 4, art. IX, 21 U.S.T. at 492-93, 729 U.N.T.S. at 174-75. Nonetheless, no state seems to have contested North Korea’s performance of its obligation to notify all state parties, although it would appear this issue was never really joined given North Korea’s decision on June 11, 1993 “unilaterally to suspend, as long as it considers necessary, the effectuation of its withdrawal” from the NPT. September 1993 Director General’s Report, in September 1993 Note by the Secretary General, supra note 9, Appendix, para. 25.


42. Arguably, Team Spirit’s resumption on March 9 may have reflected a U.S.-DPRK misunderstanding about whether the 1992 suspension was a permanent concession. See North Korea at the Crossroads, supra note 26, at 5 (Interview with Michael Mazarr, who
25. 1993 IAEA Board of Governors resolution, which the DPRK alleged was instigated by certain unnamed "member States," demanding access to "military sites not relevant to safeguards." North Korea asserted also that its adherence to the NPT had been

noted that while the suspension "was always planned as a one-year postponement, it is unclear whether Pyongyang understood that."); see also Bruce Cummings, Time to End the 40 Year War, North Korean Bomb Scare, 257 Nation 206 (Aug. 23, 1993). This misunderstanding may have been exacerbated by ambiguity about the nuclear capabilities of U.S. forces stationed on the Korean peninsula. See Michael J. Mazarr, Lessons of the North Korean Crisis, Arms Control Today, July/August 1993, at 9 (arguing that resumption of Team Spirit seems to have been calculated to provoke a North Korean response and that Washington and Seoul had never permitted verification of the removal of U.S. tactical nuclear weapons from South Korea). Following President Bush's October 1991 decision to remove all U.S. land-based tactical nuclear weapons worldwide, the United States continued to follow its global policy of refusing to confirm or deny the presence of U.S. nuclear weapons, even with respect to forces deployed in South Korea. South Korea, however, did publicly confirm that no U.S. nuclear weapons remained on their soil. Id. at 8. Thus, because North Korea long believed that resolution of its disputes with South Korea could be achieved only by negotiating with the United States—ostensibly as guarantor of its "puppet" South Korea's conduct—it may also be that both (i) President Bush's unilateral decision in September 1991 to withdraw all tactical nuclear weapons from forward deployment (presumably including any tactical nuclear weapons that may have been deployed by the United States on the Korean Peninsula), and (ii) the U.S.-South Korean decision to suspend their 1992 joint military exercise known as "Team Spirit" played a role in inducing the DPRK to honor its article 111(4) obligation. The U.S. failure to fulfill at least some elements of North Korea's expectations concerning Team Spirit, may have played a part in the timing of DPRK's decision to withdraw from the NPT. Id.

43. Mazarr, Lessons of the North Korean Crisis, supra note 42, at 8. It should be noted that, even if North Korea's claim that military facilities are exempt from safeguards (including safeguards pursuant to the right of special inspections) were plausible, the DPRK would need to comply with any applicable procedures set forth in the safeguards agreement. For example, INFCIRC/153 permits the withdrawal from safeguards of nuclear material for certain nonproscribed military uses of nuclear material. This exemption from the normal peaceful use condition of non-NPT safeguards agreements is included in NPT safeguards agreements because the NPT prohibits only the nuclear explosive weapons applications of nuclear material, not non-explosive military applications such a nuclear propulsion of military vehicles. INFCIRC/153, supra note 23, para. 14. However, reliance on the exemption requires compliance with certain procedures, including the submission of reports to the IAEA. Id. In other words, where there has been no exemption, it is unclear how any argument can be constructed that a military site containing such exempted nuclear material should be immune from routine inspections, much less special inspections. It should be noted that in its request for a special inspection, the Agency has been sensitive to the DPRK's putative concern that the suspect sites are military in character, and has expressed the willingness to discuss how these concerns can be met in practice without compromising the effectiveness of safeguards. See Addendum Dated 11 October 1993 to the Report by the Director General on the Implementation of the Agreement Between 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, in Note by the Secretary General, U.N. SCOR, 48th Sess., Appendix, para. 10, U.N. Doc S/26456/Add.1 (Oct. 13, 1993) [hereinafter Addendum to the September 1993 Director General's Report].
based on the "premise that the depository States [the United States, United Kingdom, and Russian Federation] of the NPT should neither deploy their nuclear weapons on the Korean peninsula nor pose any nuclear threat against the DPRK," and that the resumption of Team Spirit in 1993 after its suspension in 1992 renewed the threat of the use of nuclear weapons by the United States against the DPRK.\footnote{44.

North Korea's reluctance to comply with the IAEA's request for special inspection, however, appears to have come on the heels of years of noncompliance with safeguards obligations under the NPT. For example, the DPRK became a party to the NPT in December 1985, but breached its article III(4) obligation by failing to conclude its required safeguards agreement with the IAEA until early 1992.\footnote{45.

In addition, North and South Korea, under a Joint Declaration on Denuclearization of the Korean Peninsula (the North/South Declaration), have agreed (i) not to test, manufacture, produce, accept, possess, stockpile, deploy, or use nuclear weapons; (ii) not to possess nuclear enrichment or reprocessing facilities; and (iii) to develop a system of bilateral inspections to verify the denuclearization of the Korean peninsula.\footnote{46.
Joint Declaration on Denuclearization of the Korean Peninsula, Jan. 20, 1992 (entered into force, Feb. 19, 1992). For an unofficial English translation of this agreement, see IAEA Doc. GOV/INF 660, reprinted in 33 I.L.M. 569 (1994) [hereinafter North/South Declaration]. This bilateral inspection regime, if implemented, would supplement IAEA inspections on the basic commitment not to divert safeguarded nuclear material to nuclear weapons-related purposes, particularly in view of diminished international confidence in the efficacy of IAEA inspections after the Iraqi case. More importantly, however, it would provide assurance as to the additional nonproliferation obligations undertaken by both North and South Korea through the North/South Declaration. For example, nothing in the NPT or under IAEA safeguards requires states not to accept for deployment on their national territory weapons under the control of another state. See NPT, supra note 4, art. I, 21 U.S.T. at 487, 729 U.N.T.S. at 171 (NNWS parties merely undertake not to "receive" or "control" nuclear weapons from a transferor); Jonathan Schwartz, Controlling Nuclear Proliferation: Legal Strategies of the United States, 20 Law & Pol'y Int'l Bus. 1, 18 (stating that U.S. deployment of nuclear weapons in Europe pursuant to a NATO commitment does not involve a U.S. violation of its article I obligation not to transfer nuclear weapons, or a violation of a NNWS party such as the Republic of Germany of its obligation not to receive nuclear weapons); Willrich, Non-Proliferation Treaty, supra note 17, at 71-87 (addressing the NPT's intent not to preclude deployment of nuclear weapons so long as control is maintained by the NWS).} Nonetheless, the DPRK appears not to have considered this agreement fully bind-
ing, as it subsequently suggested that it needed to engage in reprocessing in order to manage the spent fuel produced at existing reactors.\footnote{47}

Continuing this pattern of noncompliance, the DPRK now has asserted that its "suspension" of its withdrawal from the NPT has resulted in a "unique status" for the DPRK as a NNWS party.\footnote{48} Under this interpretation, North Korea's safeguards obligations under the NPT require it to accept only such inspections as are necessary to assure the "continuity of safeguards" on the material it previously declared to be in its possession.\footnote{49} Accordingly, North Korea denies any duty to comply with the IAEA's demand for special inspections.\footnote{50}

It is somewhat less clear whether both the North and South agreed to forgo enrichment and reprocessing on the peninsula. They have only agreed not to possess enrichment or reprocessing "facilities." Admittedly, the precise scope of this term could be resolved in such a way to permit small-scale laboratories, sometimes referred to as "hot cells," for the separation of de minimis quantities of plutonium for experimental purposes. It would be counterintuitive, however, to interpret the North/South Declaration to leave open the possibility of reprocessing plutonium in quantities sufficient to manufacture nuclear explosive devices.

\footnote{47}{Testimony of Ambassador-at-Large Robert Gallucci Before the East Asian and Pacific Sub-Committee of the Senate Foreign Relations Committee on the U.S.-North Korea Nuclear Agreement, Federal News Service (Dec. 1, 1994) (observing that fuel cladding for the graphite plutonium production reactor used in North Korea degrades quickly, and that the DPRK planned to address the environmental concerns thus posed through reprocessing).}

\footnote{48}{See Memorandum of DPRK Foreign Ministry (Apr. 20, 1994) in IAEA Doc. INFCIRC/442, at 1 (May 9, 1994) [hereinafter DPRK Memorandum].}


\footnote{50}{DPRK Memorandum, supra note 48, at 2. As construed by the DPRK, its special status has allowed it to renegotiate the precise terms of "routine inspections" and, in effect, to permit degradation of IAEA remote surveillance in ways that have led the Director General of the IAEA to question whether the "continuity of safeguards" has in fact been assured. See Jon B. Wolfsthal, U.S. Considers New Policy Options As North Korea Standoff Continues, Arms Control Today, Dec. 21, 1993, at 21 (IAEA Director General Blix "told the UN General Assembly on November 1, 1993 that the continuity of safeguards had already been damaged," but "stopped short of determining . . . [they] had been broken"); see also September 1993 Director General's Report, reprinted in
The DPRK position appears to be based on three separate legal theories: first, that suspension of withdrawal from the NPT has the effect of suspending the safeguards agreement; second, that the United States and IAEA in negotiations leading to the DPRK's suspension of its withdrawal and subsequent negotiations relating to the resumption of IAEA inspections have "recognized" that further inspections would be limited to assuring the continuity of safeguards on material declared by the DPRK; and, third, that the

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51. DPRK Memorandum, supra note 48, at 1. As to the first theory, the precise effect of the DPRK's "suspension" of its withdrawal appears to be ill-defined. Nothing in the safeguards agreement suggests that the agreement can be modified through suspension of withdrawal from the NPT. Rather, article 26 simply provides that the agreement shall remain in force "as long as [the DPRK] is party to [the NPT]." See DPRK/IAEA Safeguards Agreement, supra note 45, art. 26. Moreover, it is not even clear that the DPRK's suspension can be construed as anything but a full revocation of its withdrawal notice. While the Vienna Convention appears to contemplate the "revocation" of a withdrawal from a treaty, it does not explicitly contemplate the lesser step of suspension. See Vienna Convention, supra note 9, art. 68, 1155 U.N.T.S. at 348. Presumably, it can be argued that the lesser step is impliedly permitted. However, interpreting a "suspension of withdrawal" to modify unilaterally the obligations originally undertaken by the withdrawing state could conflict with the requirements for consent to a modification set forth in article 41. Also, it could conflict with article 44(1) of the Vienna Convention, which permits exercise of a withdrawal right provided for in a treaty only "with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree." Vienna Convention, supra note 9, art. 44, para. 1, 1155 U.N.T.S. at 343. The IAEA has consistently taken the position that, as long as the withdrawal has not taken effect, the DPRK is bound by all the provisions of the safeguards agreement. See, e.g., Communication Dated 12 March 1993 from the Director General of the International Atomic Energy Agency addressed to the Minister for Foreign Affairs of the Democratic People's Republic of Korea, in Letter Dated 19 March 1993 from the Secretary-General addressed to the President of the Security Council, U.N. SCOR, 48th Sess., Annex VI, at 15, U.N. Doc. S/25445 (1993) [hereinafter U.N. Doc. S/25445]; September 1993 Director General's Report, in September 1993 Note by the Secretary General, supra note 9, Appendix, para. 25; Addendum to the September 1993 Director General's Report, supra note 43, para. 2; IAEA Board of Governors Resolution on North Korea, reprinted in Arms Control Today, Apr. 1994, at 19 (referring particularly to paragraph 5 of the Resolution of March 21, 1994, which calls upon the DPRK to comply fully with its safeguards agreements).

52. DPRK Memorandum, supra note 48, at 2. The second argument, that the IAEA or United States accepted a special status for the DPRK under the safeguards agreement, either under a theory of modification or interpretation, also founders on the shoals of reality. The agreements cited by the DPRK on terms for conducting the inspections necessary to assure continuity of safeguards appear to relate to precise procedures for implementing routine and ad hoc inspections of declared material. See U.S. Moving Towards Sanctions as North Korea Blocks Inspections, Arms Control Today, Apr. 1994, at 27. The IAEA thus cannot have implicitly waived its right to conduct special inspections designed to uncover undeclared material; and, in the absence of explicit Board of
IAEA has materially breached the safeguards agreement by seeking a special inspection based, at least in part, on information provided by the United States, thus giving the DPRK the right to suspend the treaty.\textsuperscript{53}

Governors approval for a subsidiary agreement between the IAEA and DPRK terminating or suspending the right to conduct special inspections, it may be questioned whether the DPRK would be in a position to assert such a theory in view of the potential invalidity of an agreement derogating from special inspection rights without Board of Governors approval under article 46(2) of the Vienna Convention, which permits an international organization to invoke "violation of the rules of an organization" as a ground for invalidity when the violation is "manifest and concerns a rule of fundamental importance." Vienna Convention, supra note 9, art. 46, para. 2, 1155 U.N.T.S. at 343. Even if the DPRK claims that the principle it agreed to with the United States in U.S.-DPRK Joint Declaration of June 11, 1993, for "impartial application of full-scope safeguards, mutual respect for each other's sovereignty, and non-interference in each other's internal affairs" represents an acknowledgment that use of U.S. intelligence information by the IAEA and special inspections requested on that basis constitute disrespect for DPRK sovereignty, interference in DPRK internal affairs, or partial application of full scope safeguards, it would be hard to see how U.S. recognition of these propositions would be binding on the IAEA. See text of U.S.-North Korean Joint Declaration of June 11, 1993, reprinted in Arms Control Today, July-Aug. 1993, at 19 [hereinafter Joint Declaration].

\textsuperscript{53} See DPRK Memorandum, supra note 48, at 3 (citing article 60(1) of the Vienna Convention). The notion that the IAEA has materially breached its safeguards obligations seems to be founded on the IAEA's reliance on U.S. satellite intelligence to request special inspection of suspect locations. The DPRK asserted that:

[n]one of the provisions in the IAEA statute and the safeguards agreement stipulates usability of a third country's intelligence information to the agency's inspection activities. However, some officials of the IAEA Secretariat have breached the IAEA statute and the safeguards agreement by systematically using the falsified intelligence information from a third country for their inspections at the DPRK's nuclear facilities.

Id. at 7; see also Communication Dated 16 March 1993 from the Minister of Atomic Energy of the Democratic People's Republic of Korea addressed to the Director General of the International Atomic Energy Agency, in U.N. Doc. S/25445, supra note 51, Annex VII., at 16 (alleging in effect that the IAEA had breached safeguards confidentiality requirements through information sharing with IAEA member states). Thus, the DPRK's legal theory could be framed in at least two ways: first, that the IAEA's own behavior was unlawful; or second, that IAEA members, presumably the United States, engaged in conduct attributable to the Agency that functioned as an independent breach.

Yet, the Agency's assertion of a right to receive information from third parties, and its right to conduct special inspections on that basis, cannot be described by the DPRK as an unforeseen development. Use of so-called National Technical Means (NTMs)—intelligence gathering through satellite surveillance—appears to be a widely recognized verification tool in arms control agreements that is not inconsistent with customary international law. See Abbott, supra note 27, at 32-35; see also Study On the Role of the United Nations In the Field of Verification, U.N. GAOR, 45th Sess., at 70, U.N.Doc. A/45/372 (1991) (implicitly relying on international acceptability in principle of satellite verification in fashioning a proposal for the development of a United Nations satellite network for arms limitation and disarmament verification); but see Chauviestré, supra note 30, at 25 (concluding that the existing IAEA regime would not be authorized to use NTMs). Even if the United States breached obligations owed to the DPRK under customary international law not to
None of these arguments seems persuasive, however, especially in view of the fact that, at its February 1992 meeting, the IAEA Board of Governors affirmed the IAEA's right to special inspections and to additional information.\textsuperscript{54} IAEA Director General Hans Blix expressly stated that the IAEA's mandate included the right to seek information from governments,\textsuperscript{55} and that these interpretations of the safeguards agreement predated the final ratification of the agreement by the DPRK and its entry into force on conduct such surveillance, it would appear strained to treat such a violation as a separate breach of the IAEA Statute or of the safeguards agreement by the United States. Nothing in the IAEA Statute or the safeguards agreement expressly provides for obligations of this kind for members of the IAEA. Indeed, there seems to be no general consensus that obligations based on such agreements may be generally inferred from the constitutive instruments of such organizations. To the contrary, the International Law Commission (ILC) rejected a proposed provision of the Vienna Convention on International Organizations to this effect. Report of the Commission to the General Assembly on the Work of the 34th Session, 2 Y.B. Int'l L. Comm'n 45, U.N. Doc. A/CN.4/SER.A/1982 (discussing the defects of proposed article 36 and concluding that it is not possible to declare a general rule since the question will always turn on the precise legal relationship created under the constitutive instrument). Neither would it seem plausible to impute responsibility to the IAEA itself because it used information unlawfully acquired by the United States; it appears the DPRK asserts as a remedial principle the functional equivalent of the U.S. Supreme Court's exclusionary rule under the Fourth Amendment. See generally Mapp v. Ohio, 367 U.S. 643 (1961). This strains credulity.

Finally, North Korea's claim that in response to breach it can subvert the whole safeguards system, defining for itself the scope not only of special, but also of routine and \textit{ad hoc}, inspections seems to be inconsistent with article 44(2) and (3) of the Vienna Convention. See Vienna Convention, supra note 9, art. 44, paras. 2, 3, 1155 U.N.T.S. at 343. Under paragraph 2, a ground for suspension under article 60 of the Vienna Convention may ordinarily be invoked "only with respect to the whole treaty." The DPRK appears to assert that it can suspend parts of the safeguards agreements. To do so, the DPRK would need to rely on the exception stated in paragraph 3, which permits suspension

\begin{quote}
[i]f the ground relates solely to particular clauses, [but] only with respect to those clauses where: (a) the said clauses are separable from the remainder of the treaty with regard to their application; (b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and (c) continued performance of the remainder of the treaty would not be unjust.
\end{quote}

Id. art. 60, para. 3, 1155 U.N.T.S. at 346. Thus, the DPRK would need to establish that (i) special inspections are separable in their performance from routine and \textit{ad hoc} inspections, (ii) a right to potential special inspections was not essential to the IAEA's consent to be bound, and (iii) it would not be unjust to require the IAEA to apply safeguards without a special inspection, when routine and \textit{ad hoc} inspections establish inconsistencies, and at the same time preclude the IAEA from making the finding of non-diversion intended under the safeguards regime. And even if the DPRK were to carry such a virtually impossible burden of persuasion, article 44(3) of the Vienna Convention would still bar the DPRK from suspending its duty to permit routine and \textit{ad hoc} inspections.

\textsuperscript{54} See supra note 33.

\textsuperscript{55} See supra note 30 and accompanying text.
Arguably, the DPRK’s implicit acceptance of the safeguards agreement on these terms places it in a weak position to assert that the IAEA’s use of third-party information constitutes material breach of the safeguards agreement. The DPRK’s pattern of noncompliance thus seems substantial. Nevertheless, North Korea’s near-withdrawal from the NPT in 1993, at least on its face, may not have been motivated by a decision to conceal an ongoing nuclear weapons program. That North Korea was entitled to engage in reprocessing before the entry into force of the Joint Declaration is beyond question, but the DPRK may have engaged in more reprocessing while it was an NPT party than it had revealed in its initial negotiations with the IAEA Secretariat over the declaration submitted by the DPRK. Thus, some

56. See IAEA Doc. INFCIRC/419, para. 5 (Apr. 8, 1993) (report pursuant to paragraphs 4 and 5 of the Board of Governors Resolution of April 1, 1993, which, inter alia, found the DPRK in noncompliance with its safeguards obligations) [hereinafter INFCIRC/419].

57. See Vienna Convention, supra note 9, art. 60, para. 3(b), 1155 U.N.T.S. at 346 (“violation of a provision essential to the accomplishment of the object and purpose” of the safeguards agreement) and art. 60, para. 1 (“material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operations in whole or in part”).

58. Neither the NPT nor safeguards agreements bar facilities for nuclear enrichment or reprocessing. Either of these technologies may be used to produce weaponsusable nuclear material and, accordingly, are considered “sensitive” for export purposes under the international regime for multilateral control of nuclear-related equipment or material. See Notification to the Agency of Exports and Imports of Nuclear Material, IAEA Doc. INFCIRC/209/Rev.1 (1990) (NPT Treaty Exporters’ Committee or “Zangger Committee,” in honor of its first chairman, guidelines for identifying “equipment or material especially designed or prepared for the processing, use or production of special fissionable material” which may not be exported unless subject to safeguards pursuant to art. III(2) of the NPT include equipment for enrichment or reprocessing) [hereinafter INFCIRC/209/Rev.1]. These activities, though relevant for weapons purposes, are also basic to nuclear fuel cycles for peaceful purposes. For example, uranium enrichment (i.e., the separation of uranium isotopes in order to increase the percentage of U235 slightly above its naturally occurring rate of .7 percent in uranium ore) is critical to production of fuel for the most commonly used reactor type for energy production. Mohamed I. Shaker, 1 The Nuclear Nonproliferation Treaty 283 (1980). Such peaceful programs have not been considered violations of the NPT when they are subject to safeguards. See generally Shaker, supra, at 279-92.

59. One possible scenario is that the DPRK engaged in unsafeguarded, and thus unlawful, reprocessing of spent reactor fuel in 1989 or thereafter when it removed, as it has admitted, small quantities of reactor fuel from a damaged reactor fuel rod. See North
analysts have considered the possibility that the DPRK has sought to conceal not an ongoing nuclear weapons program, but merely past reprocessing campaigns related to a subsequently terminated nuclear-weapons program.60

B. Implications

Regardless of whether North Korea sought to withdraw from the NPT, and then unilaterally reinterpreted its safeguards obligations in order to conceal a present or past nuclear weapons program, its behavior seems to have been predicated on two assumptions: first, that its withdrawal from the NPT was legally effective; and, second, that withdrawal under article X(1) of the NPT would fully terminate all international rights of inspection.

However, even if the DPRK's withdrawal from the NPT were legally effective, the IAEA would still retain certain inspection rights pursuant to a preexisting non-NPT safeguards agreement between the IAEA and the DPRK, not subject to unilateral termi-
nation. Such rights, moreover, would be of unlimited duration. But the critical question which arises when a state withdraws from the NPT concerns the scope of any revived non-NPT safeguards obligations, particularly, the circumstances under which undeclared facilities could be inspected. The special inspection rights based on non-NPT safeguards agreements do not authorize the IAEA to conduct an inspection unless the Agency has reason to believe that specific material subject to safeguards under that agreement is at a specific location. In other words, non-NPT safeguards agree-

61. INFCIRC/153 agreements contain a clause which suspends, as long as that agreement is in force, the operation of any other safeguards agreements. INFCIRC/153, supra note 23, para. 23. For example, the DPRK/IAEA Safeguards Agreement states:

The application of Agency safeguards in the [DPRK] under other safeguards agreements with the Agency shall be suspended while this Agreement is in force. If the [DPRK] has received assistance from the Agency for a project, the [DPRK's] undertaking in the Project Agreement not to use items which are subject thereto in such a way as to further any military purpose shall continue to apply.

DPRK/IAEA Safeguards Agreement, supra note 45, art. 23. Accordingly, when the INFCIRC/153 agreement is no longer in force, any other agreements automatically revive. The DPRK in 1977 entered into such an agreement with the IAEA for the application of safeguards on a Soviet-supplied research reactor. See The Text of the Agreement of 20 July 1977 between the Agency and the Democratic People's Republic of Korea for the Application of Safeguards in Respect of a Research Reactor Facility, IAEA Doc. INFCIRC/252 (Nov. 14, 1977) [hereinafter INFCIRC/252].

62. Non-NPT agreements are negotiated by the IAEA in accordance with principles set forth in INFCIRC/66, supra note 22, at 5-7. Under this type of agreement, safeguards are applied in perpetuity on any material or equipment ever made subject to safeguards. This perpetuity principle for the negotiation of INFCIRC/66 agreements, a conscious departure from prior IAEA policy, was established by a memorandum of the IAEA Director General, The Formulation of Certain Provisions in Agreements under the Agency's Safeguards System (1965, as provisionally extended in 1966 and 1968), IAEA Doc. GOV/1621 (1973) [hereinafter GOV/1621]. Paragraph 2 of the Annex of this memorandum states that, in the event of termination of the agreement, "the rights and obligations of the parties, as provided for in the Agreement, would continue to apply in connection with any supplied material or items and with any special fissionable material produced, processed or used in connection with any supplied material or items which had been included in the inventory, until such material or items had been removed from the inventory." GOV/1621, supra, para. 2. Section 24 of INFCIRC/252, for example, provides that "the agreement shall remain in force until, in accordance with its provisions, safeguards have been terminated." INFCIRC/252, supra note 61, § 24. Section 12, concerning termination, incorporates by reference "paragraphs 26(a), (c) and (d) or 27" of INFCIRC/66, which provide for termination of safeguards on nuclear material only upon certain judgments by the IAEA primarily relating to whether the material has been returned or is no longer usable. With respect to facilities, section 12 provides that safeguards will be terminated when the IAEA determines that the facility is "no longer usable for any nuclear activity relevant from the point of view of safeguards." Id. § 12.

63. Despite their perpetual effect, the safeguards rights found in INFCIRC/66 agreements do not include a broad right of special inspections in INFCIRC/153. They provide, however, for one limited type of "special inspection." See INFCIRC/66, supra
ments do not provide a foundation for inspections designed to ferret out covert nuclear programs at undeclared facilities.

As a result, the efficacy of safeguards could depend on whether the special inspection right under the NPT safeguards agreement survives withdrawal from the NPT. The public perception appears to be that safeguards rights terminate completely upon withdrawal. Academic commentary, however, has not exhaustively examined this question, at least not with respect to the IAEA right to inspect to determine whether a state has unlawfully engaged in nuclear weapons activities before its withdrawal.

In addition to its effect on the crisis on North Korea, the answer to this question has far-reaching implications for the NPT. First, if the DPRK is correct, once a state has withdrawn, parties to the NPT would be unable to verify the existence or nonexistence of a nuclear weapons program in that state during any previous period

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note 22, para. 53 (providing for special inspections if “the study of a report indicates that such inspection is desirable” or if “[a]ny unforeseen circumstances requires immediate action”). It appears this limited right was indirectly incorporated in INFCIRC/252, supra note 61, as well. Section 14 of INFCIRC/252, relating to “Safeguards Procedures,” specifies that the “safeguards procedures to be applied by the agency under this Agreement are those specified in the Safeguards Document,” which is in turn defined as INFCIRC/66. The special inspections right in paragraph 53 of INFCIRC/66 is located under the chapter “Safeguards Procedures.”

The term “special inspection” under INFCIRC/66, however, is not defined, as it is in paragraph 73 of INFCIRC/153, supra note 23, to include a right to access “information or locations in addition to the access specified” for routine or ad hoc inspections. It is implicitly defined in terms of the normal domain of INFCIRC/66 safeguards, the specific facilities and material listed in the inventory and those locations where that material or equipment may be found. Perhaps paragraph 29 of INFCIRC/66, which provides that “safeguards procedures . . . shall be followed, as far as relevant, with respect to safeguarded nuclear materials, whether they are being produced, processed or used in any principal nuclear facility or are outside any such facility,” can be interpreted to permit application of safeguards and thus special inspections wherever such material is found. The availability of such a right in a concrete case, however, would depend on a critical question of fact: could the IAEA have reason to believe the precise material subject to safeguards is at a particular location? The IAEA would need to meet a difficult, and probably impossible, burden of proof to form a reasonable belief that the nuclear material inventoried in a non-NPT safeguards agreement is now at a particular location. By contrast, under the NPT INFCIRC/153 regime, the safeguards obligation extends to all nuclear material regardless of how it came into a state’s possession. As a result, to request a special inspection of a specific site, the IAEA would only need to believe that any nuclear material subject to safeguards may be located there.

64. The Washington Post appears to have summarily concluded that all international inspection rights would terminate were North Korea to withdraw from the NPT. See Thomas W. Lippman, Perry Offers Dire Picture of Failure to Block North Korean Nuclear Weapons, Wash. Post, May 4, 1994, at A29 (For example, “North Korea announced last year that it intended to withdraw from the nuclear Non-Proliferation Treaty, ending the International Atomic Energy Agency’s right to inspect North Korea’s nuclear facilities.”).
in which the state had been legally bound by the NPT not to engage in such a program. Second, if withdrawal were known to have this effect, it might undermine efforts at the upcoming 1995 conference to extend the NPT indefinitely. Furthermore, the absence of any significant costs in legal terms associated with withdrawal (and the implications for the utility of the NPT itself as a security and confidence building device) will no doubt affect the willingness of states to forgo their nuclear weapons options for a meaningful period of time. As a result, if the IAEA were to adopt the position that its special inspection rights survive withdrawal from the NPT, this would change states' perceptions of the consequences of safeguards termination following either unilateral withdrawal from or termination of the NPT. These changed perceptions, building on the IAEA's recent interpretations of its rights to use information collected from third-party governments and to conduct special inspections, could buttress the use of political pressure to induce stricter adherence to NPT obligations.

Before turning to the core problem of whether any safeguards rights survive withdrawal, this Article will address the preliminary question of whether a state can exercise its right to withdraw from the NPT and avert the IAEA's assertion of its right to a special inspection. Would, for example, an assertion of the right to withdraw be invalid if made to conceal a past violation of the NPT? Specifically, how should the statement by the three states depositaries for the NPT, “questioning” North Korea's statement of the

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65. It should be noted that article I of the NPT does not prohibit NNWS's from "attempts" to acquire nuclear weapons, but only from the actual "manufacture" of a nuclear weapons. NPT, supra note 4, art. I, 21 U.S.T. at 487, 729 U.N.T.S. at 171. The precise contours of the prohibition against "manufacture" have not been authoritatively determined. But see Shaker, supra note 58, at 249. Nonetheless, it can be inferred that any significant activities bearing on the production or separation of nuclear material for use in a nuclear explosive device outside of safeguards, if not technically constituting the proscribed "manufacture" of a weapon, would still constitute a separate breach of the article III safeguards obligation the principal function of which is to facilitate enforcement of NNWS obligations under article I.

66. In effect, the durational extension of safeguards proposed in this Article would increase the pool of information available to other players in the security regime constituted by the NPT and the IAEA system of safeguards. Additional information could permit greater cooperation by facilitating a better appreciation of other players' perceived payoffs in the same way that special inspections of undeclared locations and information from third-party governments do. See supra note 27 (discussing game theory analysis by Kenneth Abbott).
III. The Scope of the Right to Withdraw from the NPT

This section will examine whether article X(1) of the NPT can be interpreted to limit the right of a state to withdraw from the Treaty. It analyzes the relevant materials in accordance with the interpretive principles set forth in the Vienna Convention on the Law of Treaties (the Vienna Convention).69 Under the Vienna Convention and customary international law, the scope of the NPT right to withdraw must be defined, first, in terms of the ordinary meaning of the text in context and in light of the NPT's object and purpose.70 The relevant context for interpreting article X(1) arguably includes the assurances given by the NWS parties as an inducement for NNWS parties to adhere to the NPT, as confirmed by Security Council Resolution 255 recognizing those assurances.71 Article X(1)'s relation to the object and purpose of the NPT can best be understood by considering how it differs from ordinary grounds for withdrawal, which it is meant to supplement, and by relevant sub-

67. See Depositaries' Statement, supra note 7, at 2 ("We question whether the DPRK's stated reasons for withdrawing from the Treaty constitute extraordinary events relating to the subject-matter of the Treaty.").
68. The Depositaries' Statement did not assert that the DPRK's announcement was invalid; it simply urged the DPRK "to retract its announcement" of its intention to withdraw. Id. Moreover, S.C. Resolution 825 of May 11, 1993, noted the NPT depositaries' question, but called upon the DPRK to "reconsider the announcement" of its intent to withdraw. S.C. Resolution 825, supra note 8, at 2. Thus, both the Depositaries' Statement and Resolution 825 could reasonably be construed to acknowledge the legal efficacy of the withdrawal, but the question is not free from doubt.
69. See discussion supra notes 9 and 51.
70. Vienna Convention, supra note 9, art. 31, para. 1, 1155 U.N.T.S. at 340 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.").
71. Article 31(2)(b) of the Vienna Convention admits reference to "any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." Vienna Convention, supra note 9, art. 31, para. 2(b), 1155 U.N.T.S. at 340. Though not technically presented as part of the agreed package of documents constituting the NPT, nor exchanged or proffered at the time of the Treaty's conclusion, the so-called positive security assurances were extended by the United States, United Kingdom, and Russian Federation for the express purpose of inducing non-nuclear weapon states to adhere to the NPT. See U.S. Arms Control and Disarmament Agency, Pub. No. 48, International Negotiations on the Treaty on the Nonproliferation of Nuclear Weapons, 112-14, 127-28, (1969) [hereinafter International Negotiations]. Accordingly, to interpret the withdrawal clause, it would not be unreasonable to look to the security assurances, and, specifically, the role they contemplate for Security Council action pursuant to chapter VII of the U.N. Charter.
sequent practice under the treaty, which arguably include safeguards agreements entered into to fulfill NPT safeguards obligations. Negotiating history of the NPT reflected in both the negotiations leading to the NPT text and in deliberations on ratification is an important supplementary source for both resolving remaining doubts about the meaning of article X(1) and confirming interpretations derived from the use of primary materials. Briefly, it would seem none of the available sources provides a sound basis for identifying limits on a state’s right to withdraw from the NPT. On the contrary, because only the most theoretical and strained interpretation seems to provide any hope for limiting the right to withdraw, the stronger position appears to be that the right to withdraw is, for all practical purposes, absolute.

A. Text of Article X(1)

Although interpretation must begin with the precise words at issue, legal drafters do not write on a blank slate, but rather in the context of the “relevant rules of international law applicable in the relations between the parties.” Accordingly, this section will ana-

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72. See the Vienna Convention, supra note 9, art. 31, para. 2(a), 1155 U.N.T.S. at 340 (stating that the context also includes “any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty”). Similarly, article 31(3)(a) requires consideration, in relation to the context of the treaty, of “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.” Id. art. 31, para. 3(a), 1155 U.N.T.S. at 340. The INFCIRC/153 agreement, negotiated at the IAEA with the participation of the major nuclear supplier state parties to the NPT, was accepted by NNWS parties as the basis for their compliance with their article III(4) obligation to conclude a safeguards agreement with the IAEA assuring the application of safeguards on all their peaceful nuclear activities as required under article III(2) of the Treaty. Arguably, INFCIRC/153 constitutes such a “subsequent agreement” for purposes of article 31.

73. Vienna Convention, supra note 9, art. 32, 1155 U.N.T.S at 340. Under article 32, recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

Id. art. 32, 1155 U.N.T.S at 340.

74. Vienna Convention, supra note 9, art. 31, para. 3(c), 1155 U.N.T.S. at 340 ("There shall be taken into account, together with context ... any relevant rules of international law applicable in the relations between the parties."). Nonetheless, the Vienna Convention approach to interpretation focuses on the “ordinary meaning” of the precise words agreed to by the parties to the treaty. See Territorial Dispute (Libyan Arab Jamahiriya/Chad) 1994 I.C.J. 6, at 21-22 (Feb. 3), reprinted in 33 I.L.M. 571 (1994) (“Interpretation must be based above all on the text of the treaty.”). In the Libya/Chad Territorial Dispute Case, a contemporary example of its jurisprudence on this subject, the
lyze the text of article X(1) in light of the general principles of law its drafters may have referred to in giving expression to their purposes. At first blush, it appears undeniable that article X(1) utilizes a formulation which expressly confers upon each state the right to withdraw when "it decides," in the exercise of its sovereignty, to make certain statements. This kind of clause implies acceptance by the parties of self-interpretation as the applicable standard for measuring performance of the rights and obligations subject to the clause.

Upon closer inspection, however, article X(1) may be ambiguous to the extent that it calls for a compound judgment relating to three elements: first, that "extraordinary events" have occurred; second, that those extraordinary events "relate to the subject matter" of the Treaty; and, third, that there is a threat to a state's

International Court of Justice (ICJ) rejected the suggestion that the 1955 Treaty between Libya and France did not intend to fix boundaries not already set by prior agreements, stating it had "no difficulty either in ascertaining the natural and ordinary meaning of the relevant terms of the 1955 Treaty, or in giving effect to them." Id.; see also Restatement (Third) of the Foreign Relations Law of the United States, 325 cmt. g and reporter's note 4 (1986) [hereinafter Restatement (Third) Foreign Relations]; see also David J. Bederman, Revivalist Canons and Treaty Interpretation, 41 U.C.L.A. L. Rev. 953, 973 (1994); Maria Frankowska, The Vienna Convention on the Law of Treaties Before United States Courts, 28 Va. J. Int'l L. 281,328 (1988). But see Ian Sinclair, The Vienna Convention on the Law of Treaties 69-76 (1973) (demonstrating that, while it considers textualism the primary approach, the Vienna Convention gives due deference to teleological and intentionalist methods of interpretation). For a recent confirmation of Sinclair's view, see the very same Libya/Chad Territorial Dispute Case, in which the ICJ, despite a pellucid text, as described above, invoked the 1955 Treaty's object and purpose, id. at 51-52, and context, id. at 53-54, and found it appropriate to "confirm" its interpretation by a review of the travaux, id. at 55-56. One cannot help but see hints of the modern U.S. approach that no text is lacking in ambiguity. See, e.g., Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F. 2d 969 (2d Cir. 1974) (barring an arbitral award of damages for "loss of production" could be interpreted to permit an award of damages for "loss of production").

75. NPT, supra note 4, art. X, para. 1, 21 U.S.T. at 493-94, 729 U.N.T.S. at 175. Article X(1) states: "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." Id. (emphasis added). The subjective character of the determination is emphasized in this provision's third sentence, which states that the notice the withdrawing state is required to give "shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests." Id. (emphasis added).

76. According to Schweb, the term was first coined by Leo Gross in an essay honoring Hans Kelsen. See Egon Schweb, The Nuclear Test Ban Treaty and International Law, 58 Am. J. Int'l L. 642, 663 n.64 (1964). Auto-interpretation, in Schweb's view, involves the exercise of a right to make a judgement stipulated in a treaty, without second-guessing by a tribunal. Id. at 662-63 & n.65 (citing article IV of the Limited Test Ban Treaty, which was the precursor of article X(1) of the NPT, as an example of auto-interpretation "expressly stipulated").
“supreme national interests.” One might argue, for example, that only the first two elements could be considered legally “self-judging.” If the clause, moreover, were considered entirely self-judging, the withdrawal right could so undercut any NPT obligation that the treaty would effectively constitute a legal nullity. Ordinarily, the International Court of Justice would seek to find a basis for avoiding this stark result and sever the clause from the treaty or, alternatively, avoid the question entirely where the injured party refused to forgo its own right of auto-interpretation. Thus, it might be suggested that limiting the self-judging effect to the question of whether there was an “extraordinary event” would preserve the legal validity of the clause as a whole.

On the other hand, such a parsimonious interpretation of the self-judging language in article X(1) would be unnecessary to sustain its legal validity. If fully self-judging, the clause does not render the whole agreement a nullity, because other legal value is exchanged. Article X(1) contains a three-month notice period before withdrawal becomes effective. During the three-month period, all NPT and safeguards rights would continue. Indeed, the IAEA might be entitled to call for a special inspection to ascertain whether the state had sought to exercise its right to withdraw

77. In this connection, the NPT Depositaries’ Statement purported to question only whether the DPRK’s “stated reasons for withdrawing . . . constitute extraordinary events relating to the subject-matter of the Treaty.” Depositaries’ Statement, supra note 7, at 2. It did not also question whether the asserted events also “jeopardized the supreme interests” of the DPRK. Id.

78. See Interhandel Case (Switz. v. U.S.), 1959 I.C.J. 101, 116-19 (Mar. 21) (dissenting opinion of Judge Hersh Lauterpacht) (arguing that such a self-judging reservation is inconsistent with good faith and would involve a nullity, since the instrument of acceptance as a whole would be nonseverable and thus invalid).

79. Id. at 76-78, 93-94 (dissenting opinion of Pres. Klaestad & Judge Armand-Ugon) (arguing the obligations were severable and thus the acceptance of jurisdiction would continue to be valid). See generally D.W. Bowett, Reservations to Non-Restricted Multilateral Treaties, 48 Brit. Y.B. Int’l L. 67 (1977) (stating impermissible reservation renders the reservation alone a nullity if severable or entire acceptance of treaty invalid if not severable).

80. See Certain Norwegian Loans (Fr. v. Nor.) 1957 I.C.J. 9 (July 6). The Court avoided the question of the validity of a self-judging reservation on the ground that neither party questioned its validity, but suggested that under article 36(6) of the Statute of the Court, the ICI is the ultimate arbiter of its own jurisdiction. This theory of judicial review would not apply, however, to self-judging, non-jurisdictional provisions.

81. NPT, supra note 4, art. X, para. 1, 21 U.S.T. at 493-94, 729 U.N.T.S. at 175 (requiring the withdrawing state to “give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance.”).

82. The IAEA has explicitly affirmed this proposition in its dispute with the DPRK. See supra note 51.
in good faith rather than to conceal a breach of the safeguards obligations. Under these circumstances, one would hesitate to claim that the self-judging character of the withdrawal clause, even if deemed self-judging with respect to each judgment the clause requires a state to make before it may give the required notice of withdrawal, renders the NPT devoid of legal obligation. Accordingly, the plain meaning of article X(1) ought to control, and a state's right to withdraw should be given the maximum deference possible consistent with the requirement of good faith performance of a treaty.

Does good faith exercise of a withdrawal right require more than mere notification to the Security Council and to the parties to the NPT? Article 65 of the Vienna Convention provides: first, "[a] party which, under the provisions of the present Convention, invokes . . . a ground for . . . withdrawing from it or suspending its operation, must notify the other parties of its claim"; second, the state may not implement its withdrawal, "except in cases of special urgency, . . . less than three months after the receipt of the notification"; and, third, if any state objects, the withdrawing state must "seek a solution through the means indicated in article 33 of the Charter of the United Nations." The latter prescribes "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice" and Security Council intervention. Compliance with these procedures could thus imply a duty to suspend any attempt to exercise the right to withdraw until the dispute resolution procedures specified in article 33 of the Charter are exhausted.

83. See, e.g., Fisheries Jurisdiction (Ice. v. U.K.), 1973 I.C.J. 18 (Feb. 2), reprinted in 12 I.L.M. 290 (1973) (suggesting that arguments derived from common law doctrine of consideration may be applicable to international agreements). Accordingly, the proverbial "peppercorn" involving the identification of any quantum of consideration, even if a major portion of the agreed exchange fails, would be sufficient to validate an agreement. Any period of notice of termination, regardless of its duration, would be sufficient to sustain the agreement. Cf. E. Allan Farnsworth, Farnsworth on Contracts § 2.14 (1990); see also infra note 194 for a discussion of the Fisheries Jurisdiction Case.

84. Vienna Convention, supra note 9, art. 26, 1155 U.N.T.S. at 339 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."). As a result, even self-judging withdrawal clauses are subject to the requirement of good faith. Schwelb, supra note 76, at 663.

85. Vienna Convention, supra note 9, art. 65, para. 1, 1155 U.N.T.S. at 347.

86. Id. art. 65, para. 2, 1155 U.N.T.S. at 347.

87. Id. art. 65, para. 3, 1155 U.N.T.S. at 347.

88. U.N. Charter art. 33.
However, even assuming all these intricate requirements apply to article X(1) withdrawals (which is doubtful), the NPT right to withdraw may be regarded as a specific regime (a lex specialis) not subject to article 65 of the Vienna Convention. Moreover, the Vienna Convention specifically permits a state to exercise its right of withdrawal "in answer to another party claiming performance of the treaty or alleging its violation." Thus, absent any procedural barrier establishing objective grounds for challenging the legality of the exercise of the right to withdraw, it seems the validity of withdrawal should be viewed solely under the framework of the general principle of good faith.

Yet the precise content of good faith in the law of treaties relating to a self-judging decision may not be ascertainable. It may even be tautological: the commentary to article 26 of the Vienna Convention treats "good faith" as an integral part of the pacta sunt

89. For example, invoking "extraordinary events" under article X(1) of the NPT is arguably not a ground "under the provisions of the present Convention" for purposes of article 65(1) of the Vienna Convention. Vienna Convention, supra note 9, art. 65, para. 1, 1155 U.N.T.S. at 347. Moreover, applying article 67, which describes the form instruments of withdrawal must take expressly treats withdrawal pursuant to the provisions of the treaty as a category separate from a withdrawal pursuant to article 65: "[a]ny act . . . withdrawing from . . . a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65." Id. art. 67, para. 2, 1155 U.N.T.S. at 348 (emphasis added). Accordingly, it would be strained to construe the term withdrawal "under the provisions of the present Convention" pursuant to article 65(1) to include withdrawal under treaties expressly providing for withdrawal. The domain of article 65 must then be those treaties which are silent on the subject and for which the procedural mechanisms set forth in article 65 would facilitate the resolution of disputes over unilateral termination. Finally, it would be hard to question a withdrawal from the NPT under the exception in article 65(2) of the Vienna Convention for special urgency, even if the rule in article 65(2) were applicable.

90. Vienna Convention, supra note 9, art. 65, paras. 1, 4, 1155 U.N.T.S. at 347, 348. Article 65(4) states that "[n]othing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes." Id.; see infra note 99 and accompanying text. This clause functions in tandem with the limitation of the domain of article 65(1) to withdrawal "under the provisions of the present Convention." See supra note 89.

91. Id. art. 65, para. 5, 1155 U.N.T.S. at 348 ("[T]he fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.").

92. One scholar reviewing the negotiating history of article 65 of the Vienna Convention has concluded that the ILC reached an impasse on the question of whether a state could take unilateral action after it had unsuccessfully pursued the dispute resolution procedures contemplated under the Convention. Arie E. David, The Strategy of Treaty Termination 167 (1975) (quoting Special Rapporteur to the ILC, Sir Humphrey Waldock, who commented on draft article 65 that "[i]f after [seeking pacific settlement under U.N. auspices] the parties should reach a deadlock, it would be for each Government to appreciate the situation and to act as good faith demands.") (emphasis omitted).
servanda rule itself, raising the proverbial dilemma of the chicken and the egg.\textsuperscript{93} Theories that have been advanced for divining the meaning of good faith seem too indeterminate to be of much use in constructing objective criteria that could facilitate resolution of concrete cases.\textsuperscript{94} And even if a self-judging withdrawal right has been exercised in bad faith, it might still be that, rather than invali-

\textsuperscript{93} See David, supra note 92, at 170. David has persuasively argued that unilateral termination pursuant to article 65 of the Vienna Convention depends on circular reasoning: whether a withdrawal is lawful depends on whether it is undertaken in good faith; and whether withdrawal is in good faith depends on whether the party has the right to withdraw.

\textsuperscript{94} One could develop a method based on evaluating the process of interpretation. David postulates, for example, that the best solution is to treat good faith in this context as a duty not to abuse legal rights by an over-literal interpretation of a treaty. Id. at 171; accord J.F. O'Connor, Good Faith in International Law 122 (1991). O'Connor notes, however, that whether an "abuse of rights" is a breach of a legal obligation, rather than merely an act bringing upon its author political and moral consequences, is a matter on which there has been serious disagreement. O'Connor, supra, at 83. O'Connor contrasts Judges Alvarez and Azevedo's concurring opinions in Conditions of Admission of a State to Membership in the United Nations, 1948 I.C.J. 57 (May 28), in which both considered votes to deny admission to the United Nations based on political, rather than legal, criteria to be an abuse of rights. Although Judge Alvarez did not consider this a legal question, Judge Azevedo did. O'Connor, supra, at 71, 81.

Alternatively, one could measure the good faith of an interpretation by whether it falls within a range of substantive outcomes. Ian Johnstone, for example, has argued that an interpretation which does not fall within the range of permissible constructions, as reflected in community judgments, is as much abrogation of a treaty as withdrawal pursuant to an express right. See Ian Johnstone, Treaty Interpretation: The Authority of Interpretive Communities, 12 Mich. J. Int'l L. 371, 384-85 (1991). While Johnstone notes that the explicit, self-judging withdrawal clause in the Limited Test Ban Treaty upon which article X of the NPT was modeled would, as a practical matter, be "subject to indirect community judgment," he does not appear to advance the more radical proposition that community judgment in this context is relevant to the legal validity of the exercise of the right of withdrawal. Id. at 384 n.50, 388 n.60. For an explication of the idea that the international legal order is a primitive legal system, in the sense that term is used by H.L.A. Hart, because it relies uniquely on community judgments (particularly those of international lawyers) for authoritative decision, see Terry Nardin, Law, Morality and the Relations of States 166-186 (1983). However, significant barriers prevent the use of the relevant interpretive community for assessing the meaning of a clause, such as the NPT withdrawal clause, so close to the sources of state sovereignty and thus survival; chiefly, one would counsel caution in relying on opinions of private actors formed without the benefit of all the information, including that acquired covertly, available to the government of the withdrawing state. Surely questions about the legitimacy of objective evaluation of such decisions would suggest a need for a precautionary principle governing international lawyers' claims that a state's withdrawal from the NPT was not legally defensible. Cf. Oscar Schachter, United Nations Law, 88 Am. J. Int'l L. 1, 9 (1994) (recognizing the need for "more empirical inquiry" as to "whether a specialized 'interpretive community', particularly international lawyers, "influences state responses to the controversial issues raised in U.N. bodies"). For a potentially persuasive case that the United States breached its article VII obligations under the NPT by refusing to pursue comprehensive test ban negotiations during the 1980's, see David A. Koplow, Parsing Good Faith: Has the United
date withdrawal, the bad faith exercise of the right is a separate breach of the duty of good faith.\textsuperscript{95} The remedy for breach of the duty of good faith may not be the invalidation of the withdrawal.\textsuperscript{96} Thus, it is difficult to argue that a withdrawing state would be required by the treaty termination provisions of the law of treaties, or the general principle of good faith performance of a treaty, to suspend its attempt to withdraw. In the absence of such a procedural mechanism, it is hard to see how the principle of good faith could be given enough weight to override a sovereign right to withdraw so explicitly recognized in the NPT.

One possible counterargument remains, however. Perhaps the fact that the NPT refers the issue of withdrawal to the Security Council implicitly invokes the general pacific settlement procedures under chapter VI of the U.N. Charter. Yet, if anything, the requirement of notice to the Security Council suggests that the NPT recognizes that the fundamental question posed by withdrawal can be addressed only through political, not legal, means. The Council, of course, particularly through its binding decisions, is the international system's preeminent political venue for evaluating the "supreme national interest" of states in protecting themselves from nuclear attack or any other "threat to the peace, breach of the peace, or act of aggression."\textsuperscript{97} If withdrawal itself were a legal question, the parties to the NPT would also have included a provision for dispute settlement by the legal organ of the United Nations, the International Court of Justice.\textsuperscript{98}

\begin{footnotes}
\item[95] See Conditions of Admission of a State to Membership in the United Nations, 1948 I.C.J. at 79-80 (dissenting opinion of Judge Azevedo).
\item[96] Reparations may be the alternative remedy. See Elisabeth Zoller, Peacetime Unilateral Remedies: An Analysis of Countermeasures 64-65 (1984). Alternatively, states may wish to seek to invoke a bad faith withdrawal of a party from the NPT as a ground for their own suspension or withdrawal from the Treaty, particularly if they are specially affected. See Vienna Convention, supra note 9, art. 60, para. 2(c), 1155 U.N.T.S at 346.
\item[97] U.N. Charter art. 39 (authorizing the Security Council to adopt measures binding, pursuant to articles 25 and 48(2), on all members and, through them, international organizations when the Council fulfills it obligation to "determine the existence of any threat to the peace, breach of the peace, or act of aggression.").
\item[98] This is not intended to question the competence of either the ICJ or the Security Council to address the legal or political elements of a dispute, even though the matter might simultaneously be before both bodies. See, e.g., Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 433-435 (Nov. 26). Thus, the understanding of the parties concerning whether withdrawal is a legal or a political issue might be inferred from their decision to include political, but not legal, dispute resolution mechanisms.
\end{footnotes}
tion of the three-month notice period is thus to provide a time during which political means may be found, particularly through the intervention of the U.N. Security Council, to resolve the underlying concerns giving rise to a state’s decision to withdraw from the Treaty.\textsuperscript{99}

On the other hand, it might be argued that, by referring the matter to the Security Council, the Treaty implicitly incorporates the Charter obligation to seek a peaceful resolution of the dispute under the provisions of chapter VI,\textsuperscript{100} even where (as argued above) article 65 of the Vienna Convention referring to chapter VI of the U.N. Charter is inapposite. The withdrawing party would then be barred from completing withdrawal from the NPT and thus creating an actual, rather than potential, threat to the peace—in a sense, moving the situation from chapter VI to chapter VII—\textsuperscript{101} until it had exhausted chapter VI procedures. Yet it is doubtful

\textsuperscript{99} Shaker, supra note 58, at 895-96 (noting the Soviet representative’s assertion that “observance [of the NPT] and its effectiveness are bound to be related to the powers of the Security Council”) (quotation in original). Shaker himself adds that [s]ince the decision to withdraw might most probably be based on security considerations, as can be implied from the text of article X and its negotiating history, the Security Council would be a suitable forum for meeting the security preoccupations of the withdrawing Party. Moreover, the possibility that withdrawal might imply or indicate an imminent acquisition of nuclear weapons by the withdrawing State, may bring into play the Security Council resolution 255 on security guarantees . . . . The entire situation might thereafter be characterised as a “threat to the peace” under Article 39, justifying the application of appropriate sanctions.

Id.; see also Mason Willrich, The Treaty on Non-Proliferation of Nuclear Weapons: Nuclear Technology Confronts World Politics, 77 Yale L. J. 1447, 1511 n.151 (1968) (noting that the negotiating history indicates the defeat of the Rumanian objection to requiring notification to the Security Council because “the right of withdrawal was within the exclusive competence of every state and no other state or international organization was qualified to discuss it”). Willrich goes on to assert that, “[t]he Security Council would probably become involved, in any event, if a state sought to withdraw form the Treaty, if not to assist the party considering withdrawal, then to consider sanctioning it for creating a situation endangering the peace.” Id.

\textsuperscript{100} See U.N. Charter art. 33(1) (“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution . . . . by peaceful means of their own choice.”); see also id. art. 2(3) (“All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”).

\textsuperscript{101} The argument that a party withdrawing from the NPT must seek first to exhaust the dispute resolution procedures set forth in article 33 of the U.N. Charter is not free from doubt, however. As noted above, supra notes 85-88 and accompanying text, in the related context of withdrawal from a treaty not under the specific rules set forth by that treaty, article 65 of the Vienna Convention specifically requires exhaustion of the dispute resolution procedures set forth in article 33 of the Charter. It is silent, however, on the dispute resolution procedures that would govern withdrawal pursuant to the terms of the
that under the current views of states, withdrawal would be barred as a countermeasure under the Charter or, more generally, under international law.\textsuperscript{102}

Neither is it certain that notice to the Security Council implies that a situation triggering application of chapter VI has arisen. Even if article 33 could be interpreted to bar completion of withdrawal prior to exhaustion of chapter VI procedures, the critical question would then be whether withdrawal would "likely . . . endanger the maintenance of international peace and security."\textsuperscript{103}

The example of the North Korean situation illustrates that negotiations over the delicate subject of withdrawal are likely to induce statements by the Security Council that tend to minimize the gravity of the situation. In Resolution 825 (1993), the Security Council merely noted the "crucial contribution which progress in non-proliferation can make to the maintenance of international peace and security," and asked the DPRK to "reconsider" its notice of withdrawal.\textsuperscript{104} It should be noted, however, that the Resolution failed to go as far as the NPT Depositaries' Statement, which expressly declared that "withdrawal from the NPT would constitute a serious threat to regional and international stability."\textsuperscript{105}

Although the Depositaries' Statement does not use the precise

\textsuperscript{102} See Schachter, Dispute Settlement and Countermeasures in the International Law Commission, supra note 101, at 475.

\textsuperscript{103} U.N. Charter art. 33.

\textsuperscript{104} Resolution 825, supra note 8, pmbl. paras. 1, 3.

\textsuperscript{105} Depositaries' Statement, supra note 7, at 2.
words of article 33, much less make the finding required for mandatory chapter VII action, its intent seems clear. Thus, the Security Council failed to endorse the Depositaries' conclusions or draw any specific inferences as to the implications of withdrawal from the NPT when it declared to use the language required to trigger application of chapter VI of the Charter. Certainly the DPRK would be able then to argue that the Council did not, within the three-month time frame contemplated by the NPT, take the position that the DPRK was legally required to defer withdrawal pending exhaustion of dispute resolution procedures.

Finally, that article X(1) requires notification of the Security Council suggests that the parties never saw withdrawal as a legal issue. This follows from both the political nature of the Security Council's functions and the fact that the Security Council need not review the legality of a state's withdrawal before taking action. If, for example, a state withdrew in order to commence a nuclear weapons program after withdrawal, there would be no question of its legality since customary international law does not prohibit the acquisition of nuclear weapons.106 This is not to say that the Security Council or its members are precluded from making judgments about the legality of a state's conduct that could help to establish a political basis for Security Council enforcement action.107 That said, it is equally clear that, under the law of the Charter, withdrawal *per se* could present a basis in appropriate circumstances for a Security Council finding in favor of chapter VII measures; the breach of a legal obligation is not a prerequisite, but the facts

106. Szasz, Sanctions and International Nuclear Control, supra note 33, at 552 n.21 (suggesting that in establishing a basis for sanctions "it cannot be asserted that any state which has not entered into a specific treaty, such as N.P.T. or Tlatelolco, is prohibited by international law from manufacturing nuclear weapons or even from deploying and using them"). But see S.C. Res. 418, U.N. SCOR, 33d Sess., 2046 mtg. at 1, U.N. Doc. S/RES/418 (1977) (imposing an arms embargo against South Africa because, among other things, the Council feared that "South Africa is at the threshold of producing nuclear weapons") (preambular para. 5).

107. The Security Council, in Resolution 687, based on its concerns over "reports in the hands of Member States that Iraq has attempted to acquire materials for a nuclear-weapons programme contrary to its obligations" under the NPT, S.C. Resolution 687, supra note 13, at 3, decided to impose strict limitations on Iraq's nuclear activities exceeding those imposed by the NPT, id. at 6, para. 12; see Chauvistré, supra note 30, at 6-7 (characterizing the preambular clause as an "unusually broad interpretation of the NPT" to prohibit merely the acquisition of nuclear material). Schachter has noted that, "[i]n practice" the Security Council has imposed sanctions "against a state that has not complied with a Charter requirement or significant legal obligation." Schachter, United Nations Law, supra note 94, at 12.
underlying it may be relevant to the Council's determination called for in article 39.108

In sum, the article X(1) notice period establishes an important legal obligation serving the fundamental interests of all parties to the Treaty. The right to withdraw is subject, of course, to the requirement of good faith; yet, none of the procedural mechanisms under the Vienna Convention, customary international law, or the U.N. Charter would appear to bar withdrawal even if disputed by other parties to the NPT or members of the United Nations. Furthermore, the text of the NPT calls upon the Security Council only to perform the political functions contemplated by the Charter.

B. Context

The security assurances issued by the three original 109 nuclear weapon state parties to the NPT, and Security Council Resolution 255,110 also provide a context for interpreting article X(1) and

108. Schachter, United Nations Law, supra note 94, at 12 (observing that chapter VII "was not meant to provide sanctions for enforcing international legal obligations as such" and the Security Council may impose sanctions against "a state that has not violated international law if the Council decides that sanctions are necessary to give effect to its decisions in the interest of maintaining peace and security"); see also E. Szegilongi, Unilateral Revisions of International Nuclear Supply Arrangements, 12 Int'l Law. 857, 862 (1978) (citing examples of lawful activity that could support such a finding). This is not to argue that there is no theoretical limit to the Security Council's power to make a determination that a situation constitutes a threat to international peace and security. See, e.g., David D. Caron, The Legitimacy of the Collective Authority of the Security Council, 87 Am. J. Int'l L. 552 (1993) (critiquing the so-called "reverse veto" exercised by the permanent members of the Security Council to prevent the revocation of authorization given in chapter VII resolutions for unilateral action by states, especially the permanent members, and offering proposals for reform).


110. Resolution 255, as adopted, tracked the tripartite proposal submitted by the United States, the United Kingdom, and the Soviet Union at the Eighteen Nation Disarmament Committee (ENDC). The resolution "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
determining whether the legal efficacy of withdrawal from the Treaty can be challenged. This is because the Eighteen Nation Dis-
armament Committee (ENDC) approved the draft treaty intro-
duced by the United States and the former Soviet Union and recessed on March 14, 1968, only after the United Kingdom, the United States, and the former Soviet Union introduced a proposal for security assurances on March 7.\footnote{International Negotiations, supra note 71, at 112-14.} In sum, the assurances,\footnote{See Edwin B. Firmage, The Treaty on the Non-Proliferation of Nuclear Weapons, supra note 71, at 167.}
taken together, express a judgment that the use of nuclear weapons against a non-nuclear weapons state would, by definition, satisfy the legal standard set forth in article 39 of the Charter for enforcement action. However, they do not contemplate or discuss the underlying legality of such a "use" of nuclear weapons.113 Because withdrawal, regardless of its legality, could permit the inference that the withdrawing state is on the path towards developing nuclear weapons,114 it might create an incentive for a preemptive use of force by another state to dismantle the withdrawing state's nuclear infrastructure.115 Because neither the security assurances nor Resolution 255 turns on the legality of the possession or the use of nuclear weapons, and withdrawal could itself pose the threat of use of nuclear weapons regardless of its legality, arguably the security assurances and Resolution 255 provide additional support for the inference that the Security Council would not need to evaluate the legality of withdrawal pursuant to article X(1).

C. Object and Purpose

The object and purpose of article X(1) also tend to support a construction of the article as fully self-judging. One plausible way to evaluate the object and purpose of the withdrawal clause is to consider how the right of withdrawal under the Treaty differs from the right of withdrawal states would otherwise have in the absence of such a clause.116 Setting aside defects in formation invalidating the agreement, a state may withdraw from a treaty of a permanent character under two circumstances: first, in the event of any mate-

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113. The ICJ may soon consider this question. See Applications of the World Health Organization for an Advisory Opinion Concerning the Legality of the Use of Nuclear Weapons, 1993 I.C.J. 93 (Sept. 13).

114. See Shaker, supra note 58, at 896.


116. But see Cindy A. Cohn, Note, Interpreting the Withdrawal Clause in Arms Control Treaties, 10 Mich. J. Int'l L. 849, 855, 858-64 (1989) (arguing that criteria for establishing rebus sic stantibus may also provide guidance for determining when withdrawal clauses may be invoked in arms control treaties.).
rial breach by another party; and, second, under the doctrine of *rebus sic stantibus*, or fundamental change of circumstances.\(^\text{118}\)

Under material breach analysis, a distinction must be drawn in terms of the character of the treaty. In a bilateral treaty, the right of termination in the event of material breach is rather straightforward.\(^\text{119}\) In a multilateral treaty, a party must show that the breach by a defaulting state “radically changes the position of every party with respect to the further performance of its obligations under the treaty.”\(^\text{120}\) Because the NPT is a multilateral treaty, the strenuous conditions imposed by the Vienna Convention on termination or suspension of obligations in response to breach provide a clear rationale for a self-judging withdrawal clause.\(^\text{121}\)

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117. See Vienna Convention, supra note 9, art. 60, 1155 U.N.T.S. at 346.

118. See id. art. 62, 1155 U.N.T.S. at 347. For purposes of analysis, this Article will treat the NPT as though it were a treaty of unlimited duration because, though its initial term is only 25 years, the Treaty could be extended indefinitely. Also, the NPT duration clause does not provide that the Treaty will terminate if the parties fail to take action at the Extension Conference. Treaties of unlimited duration present the strongest case for applying the rule of *rebus sic stantibus*. But see Shaker, supra note 58, at 898 (stating that “the invocation of a fundamental change of circumstances does not arise in the case of the NPT, since the Treaty already contains a clause permitting a Party to withdraw,” and quoting the observation of the ILC in its commentary on article 59 of the draft version of the Vienna Convention that the “fundamental change rule would for obvious reasons . . . seldom or never have relevance for treaties of limited duration or which are terminable upon notice”) (internal quotations omitted).

119. Article 60(1) of the Vienna Convention, supra note 9, 1155 U.N.T.S. at 346, expressly provides that “[a] material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.”

120. Id. art. 60, para. 2(e), 1155 U.N.T.S. at 346.

121. To be more precise, article 60(2) of the Vienna Convention provides different rules for three separate cases. Id. art. 60, para. 2, 1155 U.N.T.S. at 346. Paragraph 60(2)(a) permits the other parties to terminate the agreement by unanimous consent. Because a nuclear weapons program by one state party would not necessarily have the same effect on all state parties, it is rather doubtful that unanimous consent could ever be secured for the termination of the non-acquisition obligations of the NPT.

Paragraph 60(2)(b), however, permits “[a] party specially affected by the breach” to suspend the operation of the treaty between “itself and the defaulting State.” Id. art. 60, para. 2(b), 1155 U.N.T.S. at 346. Yet the right of suspension as between a state and the defaulting state would not in itself relieve the non-defaulting state of its obligations vis-a-vis other parties to the NPT. Schwelb has considered this point in connection with Secretary Rusk’s assertion at Senate hearings on the Limited Test Ban Treaty (LTBT) that, in the event of a material breach by a party of the LTBT, the United States would be entitled to resume nuclear testing without delay and without regard to the period of withdrawal specified in article IV of the LTBT. See Schwelb, supra note 76, at 663. Schwelb concluded, relying principally on the preparatory materials to what later became article 60 of the Vienna Convention, that Secretary Rusk’s claim could be grounded on the essentially bilateral character of the undertakings by the United States and the former Soviet Union not to test nuclear devices in the atmosphere, even if it could not be...
Rebus sic stantibus, by contrast, in either a bilateral or multilateral instrument, permits withdrawal under stringent conditions relating to the occurrence of unforeseen events undercutting the essential basis for the party’s consent and radically transforming the party’s executory obligations. Notably, the Vienna Convention demonstrated that the United States would be “specially affected” by the Soviet Union’s material breach. Id. at 663, 667-69. Under these circumstances, the rules governing withdrawal in the event of material breach would be more properly drawn from the regime of bilateral treaties.

Finally, paragraph 60(2)(c) gives “any party other than the defaulting state” the right to suspend “the operation of the treaty... with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.” Given the existence of other nuclear weapons states outside the treaty even at its inception, namely France and the PRC, it is equally questionable whether a single state’s breach of its obligations under the NPT could reasonably be said to “change the position of every party with respect to the further performance of its obligations.” Vienna Convention, supra note 9, art. 60, 1155 U.N.T.S. at 346.

Thus, taking the case of North Korea, given the presence of a nuclear weapon state in the region, it might be questionable that even the DPRK’s neighbors would be “specially affected” or that the breach would “radically change[ ] the position of every other party” for purposes of the Vienna Convention. Vienna Convention, supra note 9, art. 60, 1155 U.N.T.S. at 346. Yet, it is questionable whether the NPT could be seen as a bilateral agreement, as argued by Schwelb with respect to the LTBT. Moreover, Schwelb’s analysis is problematic even as applied to the LTBT alone. Accordingly, the need for a special withdrawal clause would appear to be overwhelming.

122. Article 62 of the Vienna Convention provides:

A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

Vienna Convention, supra note 9, art. 62, 1155 U.N.T.S. at 347. The narrowness of the doctrine is emphasized by the fact that the rule is stated in negative terms; in other words, rebus sic stantibus is unavailable unless stringent conditions are met. See Heribert F. Koeck, The “Changed Circumstances” Clause After the United Nations Conference on the Law of Treaties (1968-69), 4 Ga. J. Int’l & Comp. L. 93, 103 (1974).

A state might plausibly argue that the acquisition of nuclear weapons by its neighbor, assuming the neighbor lacked nuclear weapons when it signed the NPT, is also an “essential basis” for the state’s consent, thus meeting the condition set forth in paragraph 62(1)(a) of the Vienna Convention. Vienna Convention, supra note 9, art. 62, para. 1(a), 1155 U.N.T.S. at 347. On the other hand, it is somewhat more difficult to maintain that the possibility of a state’s developing nuclear weapons, either within the treaty or outside the treaty, is “not foreseen” within the meaning of article 62(1). (Breach is not relevant to rebus sic stantibus; it is addressed, instead, under the principles governing withdrawal in response to material breach.) It is difficult, moreover, to argue that the non-acquisition obligation for NNWS parties could be “radically transformed” within the meaning of article 62(1)(b). Indeed, the obligation is invariant with respect to whether neighboring states, or any other states, possess nuclear weapons or the technical capability to produce nuclear
tion has been interpreted to impose an objective standard on the assertion of *rebus sic stantibus*,\(^{123}\) and to exclude application of the doctrine in cases where the fundamental change of circumstances results from a state seeking termination of the treaty.\(^{124}\)

It might then be inferred that the NPT withdrawal clause should be construed to dispense with the restrictive conditions of the Vienna Convention approach to unilateral termination on the basis of a fundamental change of circumstances. In effect, the parties must have doubted that either material breach or *rebus sic stantibus* would have given them sufficient security to escape from their obligations in appropriate circumstances.\(^{125}\) Article X(1) must, at a minimum, permit withdrawal in some cases where these doctrines would have not permitted withdrawal. Accordingly, it would appear to be unreasonable to attempt to limit the right of withdrawal to those cases where a state is predicing its withdrawal on concerns regarding another state’s compliance or a change of circumstances contemplated by article 60 of the Vienna Convention.

Does this analysis compel the conclusion that no objective criteria are available to assess a withdrawal under article X(1)? Perhaps not, but it would still reframe the question posed by article X(1) as one more daunting than even the one posed by a withdrawal based on *rebus sic stantibus*. Could one develop objective criteria to delimit a category of “extraordinary events” less momentous than those justifying withdrawal under material breach or *rebus sic stantibus*, yet sufficiently “extraordinary” to justify withdrawal from the NPT? Such a construction of the withdrawal clause would seem to be unnecessary when the Vienna Convention’s reformulation of *rebus sic stantibus* into an objective doctrine can reasonably be seen to have driven the parties to the NPT to an entirely subjective formulation of the right to withdraw.

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\(^{123}\) See Koeck, supra note 122, at 115; cf. Kelvin Widdows, The Unilateral Denunciation of Treaties Containing No Denunciation Clause, 53 Brit. Y.B. Int’l L. 83, 86-93 (1982) (discussing the ILC’s adoption of the position that the “character” of certain treaties, such as treaties establishing a permanent regime or treaties of alliance, make escape based on *rebus sic stantibus* less permissible).

\(^{124}\) Id. at 109 (citing article 62(2)(b) of the Vienna Convention).

\(^{125}\) See Richard B. Bilder, Managing the Risks of International Agreement 52-55 (1981) (describing the Supreme National Interests Clause as a risk-reduction technique, controlling the risk that other possible bases for withdrawal will be unavailable).
D. Subsequent Practice

Subsequent agreements related to the NPT, such as the NPT safeguards agreements, also suggest that a dispute over withdrawal before the Security Council would not be amenable to resolution as a legal dispute. Normally, disputes between the safeguarded state and the IAEA concerning the implementation of an NPT safeguards agreement, including a finding by the Board of Governors that a special inspection is "essential and urgent,"126 are subject to compulsory dispute resolution.127 However, when the IAEA Board of Governors finds that it "is unable to verify" whether nuclear materials subject to safeguards have been diverted from peaceful purposes, it may then make the reports to the Security Council and General Assembly that it would be required to make under article XII.A.6 of the IAEA Statute in the case of non-compliance.128 In that circumstance, the matter would not be sub-

126. INFCIRC/153, supra note 23, para. 18.
127. See id. para. 22; see also IAEA Statute, supra note 1, art. XVII, 8 U.S.T. at 1110, 276 U.N.T.S. at 34.
128. Article XII.C of the IAEA Statute provides: “The Board shall report the non-compliance to all members and to the Security Council and General Assembly of the United Nations.” IAEA Statute, supra note 1, art. XII.C, 8 U.S.T. at 1107, 276 U.N.T.S. at 30. In some instances (particularly where even compliance with safeguards obligations would not permit the Agency to assert that it believed all nuclear material in the state in question was indeed subject to safeguards), paragraph 73 of INFCIRC/153 contemplates the possibility of requesting “special inspections” under which the agency may have the right to inspect “locations in addition to the access specified... for ad hoc or routine inspections, or both.” INFCIRC/153, supra note 23, para. 73.

Once the Board of Governors of the IAEA makes the finding set forth in paragraph 18 of INFCIRC/153—that the Agency cannot assure the international community that the state in question has complied with its NPT obligations not to divert nuclear material for weapons related purposes—it may call upon the state to permit the special inspection. Id. para. 18.

A technical argument could be made that the Board’s right to make a finding of noncompliance, and request a special inspection pursuant to paragraph 19 of INFCIRC/153, does not in every instance amount to a finding of noncompliance with, or breach of, the safeguards agreement. This view is supported by the formulation in paragraph 19 of INFCIRC/153 in which the Board is authorized, in the event of noncompliance with the request for special inspections, to make the report that it would be permitted to make pursuant to the provisions of the Statute, which itself may be grounded explicitly on a finding of noncompliance with a state’s obligations under the Statute. See id. para. 19. Accordingly, it might be argued that the simple refusal to comply with a request for a special inspection is not necessarily a breach of a legal obligation, in terms of the INFCIRC/153 safeguards agreement or the Statute of the IAEA. Thus, the “noncompliance” of a state reported to the Security Council by the Board of Governors pursuant to paragraph 19 of the safeguards agreement would not amount to a report of a breach of a legal obligation. Under this construction of the legal meaning of a paragraph 19 report, it might plausibly be inferred that the parties to the NPT accepted the proposition that even a failure to comply with a request for a special inspection, where
ject to dispute resolution. Thus, compulsory dispute resolution is excluded by the NPT safeguards agreement even for disputes in which the IAEA is not prepared to find a state to have breached, or be in "noncompliance" with, its obligations under the safeguards agreement. This decision to foreclose use of a legal forum for the resolution of disputes further suggests that the reference to the Security Council, pursuant to article X(1) of the NPT, is not a legal issue.

E. Treaty History

The language found in article X(1) was drawn from a comparable provision in the Limited Test Ban Treaty (LTBT). The only real difference is the addition in the NPT of the procedural requirement of notice to the Security Council and the other parties to the treaty. Similar language has been included in virtually all subsequent arms control agreements concluded by the United States. It should be noted at the outset that the clause represented such failure did not amount to a breach of a legal obligation, could still raise a question of a potential threat to international peace and security that would be squarely within the competence of the Security Council.

129. INFCIRC/153, supra note 23, para. 19. That said, there is at least the theoretical possibility that precluding dispute resolution of claims arising under the safeguards agreement would not foreclose a claim that a special inspection request by the Board of Governors violates a state's rights under the IAEA Statute, apart from the safeguards agreement, which could be subject to the separate dispute resolution obligation found in article XVII of the IAEA Statute.

130. In the case of North Korea, given the strong evidence of concealment of nuclear material, the IAEA actually found the DPRK to be in "noncompliance" for refusing to comply with the request for a special inspection. See DPRK/IAEA Safeguards Agreement, supra note 45, arts. 23, 33. It is not clear, however, that the Board would be in a position to make a finding of noncompliance whenever there is a disagreement about a special inspection. The argument here is based on the fact that the minimal assumption for referral to the Security Council, and exclusion of judicial dispute settlement under INFCIRC/153, is that the IAEA is unable to conclude that there has not been a diversion of nuclear material. If anything, this lower burden of proof for making the dispute nonjusticiable strengthens the case for treating the whole issue as a political, rather than a legal, dispute.

131. Secretary Rusk reported to the President that:

Article X provides a right of withdrawal upon three months notice if a party finds that extraordinary events related to the subject matter of the treaty have jeopardized its supreme interests. This provision is the same as the withdrawal provision in the Nuclear Test Ban Treaty [the "LTBT"] except that it requires notice of such withdrawal to be given to the United Nations Security Council as well as to the other treaty parties and requires the notice to include a statement of the extraordinary events involved.

Report by Secretary of State Rusk to President Johnson on the Nonproliferation Treaty, S. Ex. H, 90th Cong., 2d Sess. vi-xii, 6 (1968), reprinted in International Negotiations, supra note 71, at 179.
a failure of the United States and Great Britain to secure in the LTBT a withdrawal clause explicitly providing for quasi-adjudicative, third-party review. It reflected an attempt to provide explicitly in the LTBT a right the former Soviet Union asserted it had on the basis of sovereignty: the right to withdraw solely at its own discretion.

How the United States, as one of the lead drafters of the clause, publicly characterized article X(1)'s meaning is an important reference point in determining the intent of the parties. In representing article X(1) to the Senate in hearings on U.S. ratification of the NPT, Secretary of State Rogers appears to have advanced internally contradictory views. On the one hand, Senator Javits and the Secretary seemed to agree that the U.S. exercise of its right to withdraw could not be questioned by any other state; on the other


133. Secretary Rusk explained before the Senate that the Soviet Union considered a withdrawal clause superfluous because states had a right to withdraw from any treaty as a function of sovereignty. Nuclear Test Ban Treaty: Hearings Before the Senate Subcommittee on Foreign Relations, 88th Cong., 1st Sess. 50 (1963) [hereinafter LTBT Hearings]. Rusk added that the United States and its western allies believed that the Soviet view evidenced too little respect for international law and that it was necessary, therefore, to insert a clause which would be flexible, and very flexible, [but] would make it quite clear that the purposes of the treaty, the subject matter of the treaty, and the jeopardy to the supreme interests of the country, would have to be involved to permit withdrawal from the treaty, and that a country could not withdraw for simply frivolous or unrelated matters as matter of whim and still pretend that it is legal within the treaty to do so.

Id. But see Cohn, supra note 116, at 850-51 (relying on this language to argue that the clause, in effect, is not entirely subjective in its application). On the other hand, when pressed, Rusk refused to articulate criteria for determining when something could be considered "related to the subject matter of this treaty," saying "flexibility was something which we wanted and which the other side also wanted. So I would hope we wouldn't try to find the exact boundaries on these extraordinary events related to the subject matter. It is a very flexible clause." LTBT Hearings, supra, at 51.

Schwelb points out that this view of the Soviet doctrine of international law seems at odds with the typical Soviet position which emphasizes the strict observance of treaty obligations. See Schwelb, supra note 76, at 661. It appears, however, that the Soviets have articulated this view, at least with respect to international organizations, and particularly in the context of the Charter to the United Nations (which contains no withdrawal clause but which, based on a clear understanding at the San Francisco conference, is thought to permit withdrawal). See Widdows, supra note 123, at 99 & n.39. The Arms Control and Disarmament Agency General Counsel George Bunn reports that he was told by Chief U.S. Negotiator Adrian Fisher that Soviet Foreign Minister Gromyko took the position that, because a state could always withdraw, a special withdrawal clause was unnecessary. George Bunn, Arms Control by Committee: Managing the Negotiations with the Russians 38 (1992).
hand, they seemed to suggest the United States could hold others to a “standard” of performance. While not a commanding performance—amenable, perhaps, to the construction that U.S. rights are self-judging while Soviet rights are not—Secretary Rogers, on

134. The colloquy is quoted at length to illustrate the subtlety of the exchange:

Senator Javits. [Article X(1)] says each party shall, exercising its national sovereignty, have the right to withdraw from the treaty if it decides that extraordinary interests related to the subject matter of this treaty have jeopardized the supreme interests of its country. That is a completely unilateral decision, is it not?

Secretary Rogers. That is right.

Senator Javits. And not subject to contest?

Secretary Rogers. That is right.

Nonproliferation Treaty: Hearings Before the Senate Committee on Foreign Relations, 91st Cong., 1st Sess., pt. 2, 367-68 (1969) [hereinafter NPT Hearings]. However, seconds later, Secretary Rogers appeared to reverse course when he was asked to consider the case of Soviet withdrawal based on a position that the United States might regard as frivolous:

Senator Javits. Nothing could stop them?

Secretary Rogers. That is true.

Id. Javits pressed the point:

Senator Javits. Do we feel the same way? Will we, if we decide unilaterally we ought to pull out, pull out—without getting all tangled up in legal justifications and self-inhibiting restrictions?

Secretary Rogers. Well, Senator, you ask, will we feel the same way. I don’t think the Soviet Union would feel that way to begin with. So I wouldn’t want to say we would feel the same way. I think we would consider the provisions of article X, and we would take them very seriously, and we would not think of withdrawing unless the language of the treaty applied.

In other words, I think it would have to be a situation where extraordinary events related to the subject matter of this treaty jeopardized the supreme interests of their country.

In other words, I wouldn’t want to leave the impression that we were just taking this treaty lightly and any time we could pull out in 3 months. I think the language is pretty clear, and we take the language very seriously.

Senator Javits. And we would endeavor to hold the Soviet Union to the same standard?

Secretary Rogers. Well, we would—

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

Secretary Rogers. Yes. We would think that, we would hope that they had the same general attitude about this treaty that we have, but certainly, Senator, it is in their interests, I think, as it is in our interests, to ratify this treaty and in their interests to continue the treaty. So I don’t believe it is a matter of enforcement. It is just a matter of judgment.

Id. (emphasis added).
closer inspection, carefully articulated a fine line between legal and political obligation. When he described U.S. and Soviet legal rights, he categorically agreed with Senator Javits that "nothing" can impair the right to withdraw. But, when asked how the United States would, or the Soviet Union should, exercise their rights to withdraw, he explained how the United States would, not "must," interpret the treaty, invoking the language of good faith. However, his language in this context was merely precatory. Nowhere did he withdraw his earlier categorical assertions about the scope of U.S. and Soviet withdrawal rights. At a minimum, then, at least with respect to its representations to the Congress, the Executive Branch did not argue that there were legal limits on a state's right to withdraw from the NPT. Surely, if the United States had believed that article X(1) gave state parties the right to challenge the legal validity of this ostensibly self-judging clause, the Secretary of State would have said so.

135. The United States would "take the language very seriously," and an interpretation "should really be honestly something ... with some color of plausibility." Id. at 368; cf. U.C.C. § 1-201(19) (1977) ("honesty in fact") and § 2-103(1)(b) ("honesty in fact" and "observance of reasonable ... standards") (standards of United States commercial law no doubt familiar to Secretary Rogers, a former Attorney General in the Eisenhower Administration).

136. The argument advanced here is merely that the Secretary's testimony bears on the subsequent interpretation of article X by one of its principal drafters. This Article does not explore the precise legal status of Secretaries Rusk or Rogers' representations vis à vis the U.S. position. For a discussion of Executive Branch representations and treaty interpretation, see, e.g., David A. Koplow, Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties, 137 U. Pa. L. Rev. 1353, 1434 (1989) (denying the existence of any general Executive Branch power to reinterpret treaties, but noting that "Executive Branch testimony should be treated as particularly compelling evidence of what was integral to creating an enduring legislative understanding"). It seems clear that any recent attempt by the Executive Branch to interpret article X could be characterized as a "reinterpretation" at odds with one of the many strands of the ratification record. Such a reinterpretation would raise difficult constitutional issues.

But such disputes may be inevitable in this context. For example, it appears that the Supreme National Interests withdrawal clause in the LTBT ultimately was sought by the Kennedy Administration, not to preserve rights against the Soviet Union, but rather to ensure Senate approval. See Bunn, supra note 133, at 33. Also, it may well be that the Clinton Administration's earlier proposal for a clause permitting withdrawal, without cause after ten years, from the proposed Comprehensive Test Ban Treaty, see R. Jeffrey Smith, Total Nuclear Test Ban Favored: Clinton Overrule Pentagon Objections to Win Backing on Treaties, Wash. Post, Jan. 31, 1995, at A10, was driven by the Executive Branch's desire to establish a right of withdrawal vis à vis Congress' broader right of withdrawal Secretary Rogers articulated before the Senate Foreign Relations Committee concerning how the United States would implement the Supreme National Interests withdrawal clause in the NPT.
The U.S. view seems to be sustained by the positions of other participants to the ENDC, where two efforts to vary the U.S. draft language—one seeking to delete the requirement for a statement of reasons, the other seeking to provide criteria to facilitate assessment of the legality of withdrawal—were rejected. Indeed, in view of the negotiators' failure to agree on criteria for the exercise of the right of withdrawal, it was widely understood that any withdrawal would be a "highly controversial issue."\footnote{137. The Rumanian representative at the ENDC appeared twice to have sought to delete from article X(1) the requirement for an explanation of reasons for withdrawal. At one point, Ambassador Escobesco argued that the content of a notice of withdrawal was "within the exclusive competence" of withdrawing states. See International Negotiations, supra note 71, at 90 (citing ENDC/PV.348, at 9). Later he argued that "the right to withdraw was within the exclusive competence of every state and that no other state or international organization was qualified to discuss it." Id. at 111 (citing ENDC/PV.376, at 10; ENDC/PV.376, at 5). The Nigerian representative also suggested that withdrawal should be permitted "if treaty aims were being frustrated or security was being jeopardized by the failure of a state or states to adhere to the treaty." Id. at 91 (citing Documents on Disarmament 558 (1967)).

The Canadian representative opposed the Rumanian amendment on the ground that withdrawal would be seen as indicating an intention to develop nuclear weapons and, thus, "could lead to a chain reaction which might completely upset the treaty." Id. (citing ENDC/PV.345, at 13). He also rejected limiting withdrawal to conform with treaty "aims," because he "doubted that it would help the stability of the treaty to include the provision on treaty aims, which would be open to 'variable interpretations,'" and he believed that the problem of states outside the treaty regime could be addressed by a state withholding ratification if "it saw a threat to its security through the nonadherence of others." Id. (citing ENDC/PV.346, at 6). The Brazilian representative sought to remove the term "extraordinary events" and replace a report to the Security Council with a report to the depositaries. Id. at 111 (citing ENDC/PV.201, rev. 2). The Nigerian representative noted that the terms "extraordinary events" and "supreme interests" were unclear, but averred that "there should be no implication that the sovereign rights of states would be 'fettered' by the treaty." Id. (citing ENDC/PV.371, at 9-10).

In this context, the U.S. representative stated that "each party would have the sovereign right to make its own decision and to frame its statement in its own way. He did not see why there should be any difficulty in meeting the [explanatory statement] requirement. In his view, it was important to have a situation affecting intentional peace and security discussed in the Security Council." Id. (citing ENDC/PV.368, at 10). In sum, however, the Swedish representative wisely noted that "there was no authoritative interpretation of the grounds for withdrawal and that there was uncertainty about the relationship between the provisions on the review conference and those on withdrawal." Id. (citing ENDC/PV.373, at 10).

\footnote{138. See Shaker, supra note 58, at 893. But see K. Narayana Rao, Editorial Comment, The Draft Treaty on Non-Proliferation of Nuclear Weapons: A Critical Appraisal, 8 Indian J. Int'l L. 223, 233 (1968) (advancing—presumably as a rationale for Indian nonadherence—the strained argument that, because it is not clear that the "subject matter" of the NPT includes nuclear attacks, it is therefore not clear that a state has the right to withdraw in the event of a nuclear attack).}
IV. SURVIVAL OF SAFEGUARDS RIGHTS AFTER NPT WITHDRAWAL

Assuming a state withdraws from the NPT, one critical consequence of its withdrawal is that the NPT safeguards agreement, by its own terms, also terminates. Accordingly, if the exercise of the right of withdrawal under the NPT is not subject to any principled legal standards (including cases of withdrawal motivated by the desire to conceal past violations of the NPT), states might be encouraged to adhere to the NPT solely to reap the benefits of nuclear cooperation but thereafter rid themselves of its burdens by withdrawing with impunity. And, even assuming a party originally adhered in good faith, if the international community has reason to suspect a breach of the NPT or the safeguards agreement, the prospect of fully terminating safeguards obligations through withdrawal, particularly the lapse of any special inspection request, may encourage a state to seek to withdraw when it otherwise might not do so.

A critical review of this issue, however, yields the conclusion that some, though not all, safeguards rights should survive NPT withdrawal. In support of this proposal, this Article will first discuss the underpinnings and evolution of the survival doctrine in treaty law and analyze its relevance to IAEA safeguards pursuant to the NPT. It will then turn to interpretive materials relating specifically to NPT safeguards agreements; in the absence of any provision addressing perpetuity in the NPT safeguards agreement, it examines the relevant context and object and purpose of the agreement (particularly from the standpoint of evaluating the relevance of legal rights of nuclear suppliers party to the NPT). Finally, it suggests that the NPT itself would appear to confer upon the parties to the Treaty the same rights as the IAEA would have under NPT safeguards agreements, either as continuing rights or, in an appropriate case, as a remedy for breach of the Treaty.

139. INFCIRC/153, supra note 23, para. 26; see also DPRK/IAEA Safeguards Agreement, supra note 45, art. 26 (specifically providing that "[t]his Agreement shall remain in force as long as the Democratic People's Republic of Korea is a party to the Treaty").

140. NPT, supra note 4, art. 4, 21 U.S.T. at 489-90, 729 U.N.T.S. 172-73 (discussing efforts to facilitate nuclear cooperation under the treaty); see also Fred Charles Iklé, After Detection—What?, 39 Foreign Aff. 208, 216 (1961).
A. The Principle of Survival of Rights

The modern formulation of the idea that treaty obligations can survive the termination of a treaty is found in article 70 of the Vienna Convention, which provides:

Unless a treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
(a) Releases the parties from any obligation further to perform the treaty; [but]
(b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.\textsuperscript{141}

Application of these principles does not turn on whether the treaty is bilateral or multilateral,\textsuperscript{142} or on whether its parties include an international organization.\textsuperscript{143} Accordingly, the rule is stated as one of general applicability in section 338 of the Restatement (Third) of

\textsuperscript{141} Vienna Convention, supra note 9, art. 70, para. 1, 1155 U.N.T.S. at 349. A similar distinction may be found in U.S. commercial law under Section 2-106(3) of the Uniform Commercial Code, which provides that: "Termination" occurs when either party pursuant to a power created by agreement puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives. This formulation thus distinguishes between claims based on breach and those based on performance, unlike article 70, which address only the case of rights derived from performance, thus leaving the question of breach to the law of state responsibility. See infra notes 175-176.

\textsuperscript{142} Article 70(2) of the Vienna Convention provides that: "If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect." Id. art. 70, para. 2, 1155 U.N.T.S. at 349. Thus, the parties' right, individually or collectively, to the NPT safeguards provided for in article III(1) might survive North Korea's withdrawal from the NPT under the principles found in article 70(2). For convenience, this Article will henceforth analyze the forgoing questions as though article 70(1) of the Vienna Convention were directly applicable.

\textsuperscript{143} Because the IAEA-DPRK Safeguards Agreement, supra note 45, is not technically an agreement between "states," within the meaning of articles 1 and 2(1)(a) of the Vienna Convention, article 70 of the Vienna Convention is not directly applicable to its interpretation. Nonetheless, reliance on the principles stated in article 70 does not turn on this fact. Identical concepts are found in article 70 of the Vienna Convention on International Organizations. See discussion supra note 49. Therefore, these concepts can be considered generally applicable to international agreements, including those involving international organizations, as a matter of customary international law of treaty interpretation. Thus, the IAEA's right to safeguards might survive the termination of the IAEA-DPRK Safeguards Agreement under principles articulated in article 70(1) of the Vienna Convention. See Vienna Convention, supra note 9, art. 70, para. 1, 1155 U.N.T.S. at 349.
the Foreign Relations Law of the United States, although neither the comment nor the reporter’s notes to that section discuss its meaning or cite any illustrative cases.

The principle of survival of rights has been described as “self-evident.” However, there does not appear to have been a consistently accepted theoretical foundation for its application, as evidenced in judicial decisions and the various efforts to formulate it as a rule of treaty law discussed below. Courts and commentators, both international and municipal, have often addressed the question of survival of rights most often in the context of the survival of personal rights acquired under municipal law but protected by treaty. In doing so, they have developed a special jurisprudence making clear, among other things, that more than mere expectations are to be protected under the doctrine of “vested rights.”

Though invoked primarily in respect of transfers of property interests, it appears the principle has been deemed applicable to a variety of legal rights, including sale, status, debt and, by at

144. Restatement (Third) Foreign Relations § 338(3) (“(a) no party as to which the agreement is terminated is obligated to perform further acts under the agreement”; but “(b) rights and duties of the parties as of the date of termination are not affected.”).


146. See, e.g., Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), 1926 P.C.IJ. (Ser. A) No. 7, at 22, 42 (May 25). It may be noted, however, that even in cases considering whether property interests had vested for purposes of the application of a treaty that was in force at the time, the vesting could have consequences as to whether ancillary rights established under the treaty would also be recognized. See Arnold D. McNair, The General Principles of Law Recognized by Civilized Nations, 1957 Brit. Y.B. Int’l L. 1, 16-18.

147. See, e.g., Oscar Chinn Case, 1934 P.C.IJ. (ser. A/B) No. 63, at 65, 88 (Dec. 12) (establishment of de facto monopoly in Congo shipbuilding and transport by Belgian Government in favor of Belgian firm through tariff concessions did not deprive British national of “vested right”).

148. But see 1 D.P. O’Connell, State Succession in Municipal and International Law 257 (1967) (observing, in the context of state succession, that “the presumption that [a successor state] intends to maintain existing titles is apparently restricted to tangible property, or at least minimized in the case of rights arising . . . out of contract”).

149. Chirac v. Chirac, 15 U.S. (2 Wheat) 259, 276 (1817) (Marshall, C.J.) (holding that a French national who had inherited property by descent in the United States, at a time when a treaty ratified in 1778 was in effect between the United States and France, was entitled to exercise his right under a subsequent convention between the United States and France to sell or dispose of such property following the repeal of both the treaty and the convention).

150. See Case No. 210 (Court of Appeals of Berlin) 8 Ann. Dig. 443 (Ger.) in 8 I.L.R. 443 (1936) (holding that the Luxembourg divorce decree of two German nationals, issued while both Germany and Luxembourg were parties to the Hague Convention on Divorce, was binding on the parties even after Germany had withdrawn from the Convention).
least one commentator, as potentially applicable in the state succession context to international delicts.\textsuperscript{152}

The International Court of Justice (ICJ) has failed, however, to differentiate explicitly the doctrine of vested rights from the more general question addressed in article 70 of the Vienna Convention. In the \textit{Northern Cameroons Case},\textsuperscript{153} the ICJ declined to consider Cameroon's claims that the United Kingdom had breached its Trusteeship Agreement with the United Nations with respect to the Northern Cameroons, because in the Court's judgment a decision would have no practical effect. The rights and duties of the United Kingdom under the Trusteeship Agreement had been terminated with the United Nations' acceptance of the plebiscite, conducted by the United Kingdom, leading to the division of the Northern Cameroons between Nigeria and Cameroon.\textsuperscript{154} The ICJ contrasted this conclusion with the caveat that "property rights which might have been obtained in accordance with certain articles of the Trusteeship Agreement and which might have vested before the termination of the Agreement, would not have been divested by the termination."\textsuperscript{155} Yet this contrast was a case of apples and oranges. Generally, the question of whether the General Assembly's termination of a mandate extinguishes a claim that the procedures for termination of the mandate are unlawful has nothing to do with the municipal rights in property established during a mandate. The ICJ's suggestion to the contrary might be misinterpreted to suggest that the consequences of termination of treaty rights created under that treaty should be analyzed under the jurisprudence of vested rights.

151. See Caisse Sociale de La Region de Constantine (CASOREC) v. Enterprise Sourdive and Others (Court of Cassation) (France) (Social Chamber) in 73 I.L.R. 31 (1973) (holding that an Algerian organization responsible for social security was entitled to a preferential claim under French law in a bankruptcy proceeding involving a French debtor and "payments" which had "fallen due" before Algerian independence).

152. See, e.g., Michael J. Volkovitsch, Note, Righting Wrongs: Towards a New Theory of State Succession to Responsibility for Intentional Delicts, 92 Colum. L. Rev. 2162, 2163, 2203-05, 2214 (1992) (arguing that international torts, particularly those involving liability for environmental damage in the newly independent states of central and eastern Europe, should be deemed to have vested before state succession and thus be considered binding on the successor states by operation of law).


154. Id. at 34.

155. Id. This aspect of the ICJ’s opinion has been cited in a leading treatise on international law without adequate attention to the misleading nature of its reference to "vested rights." See 1 Oppenheim's International Law 1311 n.2 (Sir Robert Jennings & Sir Arthur Watts eds., 1992).
In some cases, use of the "vested rights" formulation has been avoided. Instead, the legal consequences of termination of a treaty have been determined based on reasoning drawing from the survival principle found in article 70(1)(b) of the Vienna Convention. In the *Ambatielos Case*, the ICJ concluded that a declaration attached to an agreement was an integral part of the agreement. It thus reached the tortured result that claims arising under the Anglo-Greek Commercial Treaty of 1886 referred to in the Declaration attached to the Anglo-Greek Commercial Treaty of 1926 were subject to the arbitration provisions of 1926 agreement. The Court avoided the question whether entry into force of the 1926 Treaty, which terminated the 1886 Treaty, also extinguished the rights created under the 1886 Treaty. But Lord McNair, in his dissent, disagreed with the ICJ's tortured construction of the Anglo-Greek Commercial Treaty of 1926. He concluded that claims arising under the 1886 Treaty survived its termination.

Foreshadowing the Vienna Convention's approach, McNair eschewed "vested" or "acquired" rights vocabulary and, instead, focused on the "independent existence" of rights created under a treaty even after the treaty terminates.

More recently, the Iran-U.S. Claims Tribunal avoided "vested rights" vocabulary in addressing the survival of treaty obligations. The Tribunal concluded it could apply the U.S.-Iran Treaty of Amity, Economic Relations and Consular Rights (Treaty of Amity), as well as principles of customary international law, to expropriation cases which "arose" while the Treaty of Amity was in force. However, the Tribunal's conclusion may well have rested,

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156. Ambatielos Case (Greece v. U.K.), 1952 I.C.J. 28 (July 1).
157. See id. at 44-45.
158. Lord McNair observed:
   I do not see how the provisions of the Treaty of 1926 could prejudice claims 'based' on the Treaty of 1886 because, in my opinion, such claims acquire an existence independent of the treaty whose breach gave rise to them. Neither the expiry of the Treaty of 1886, nor the entry into force of the Treaty of 1926, could affect the survival and validity of claims 'based' on a breach of the Treaty of 1886 which had already occurred.
   Id. at 63.
160. Sedco, Inc. v. NIOC Co., 10 Iran-U.S. Cl. Trib. Rep. 180, 184 (1986). There the Tribunal reaffirmed its conclusion in Phelps Dodge Corp. v. Islamic Republic of Iran, 10 Iran-U.S. Cl. Trib. Rep. 121, 131-32 (1986) (the Treaty was "clearly applicable to [the investment at issue in that Case] at the time the claim arose and that whether or not the Treaty is still in force today, it is a relevant source of law on which the Tribunal is justified in drawing in reaching its decision") (internal quotation omitted).
as Judge Brower argued, on the surer alternative ground that the Treaty of Amity was still in force at the time of suit.\(^{161}\) Nonetheless, Judge Brower concurred with the Tribunal's alternative holding and specifically relied on article 70(1) of the Vienna Convention.\(^{162}\)

Indeed, confusion with the survival of personal rights under municipal law complicated the task of formulating the survival principle as a rule of treaty law. For example, an early attempt to codify this concept in treaty law, the Harvard Research Draft Convention (Harvard Draft), failed to make this crucial distinction.\(^{163}\) That said, the Harvard Draft provides an important reference point for the U.N. International Law Commission's (ILC) efforts to formulate an intelligible rule. The Harvard Draft suggested that: "[t]he termination of a treaty puts an end to all executory obligations stipulated in the treaty; it does not affect the validity of rights acquired in the consequence of the performance of obligations stipulated in the treaty."\(^{164}\) Lord McNair, expanding upon his contribution on this subject in the Ambatielos Case, suggested that the Harvard Research formulation should be amended to include "the validity of rights acquired through the exercise of powers conferred by the treaty."\(^{165}\) The negotiating history of the Vienna Convention appears to suggest that the substance of McNair's reasoning became the conceptual core of the article produced by the ILC and adopted by the states present at the Vienna Conference.\(^{166}\)

A draft article on the consequences of terminating a treaty in what ultimately became the Vienna Convention was submitted by Special Rapporteur Sir Humphrey Waldock in 1963.\(^{167}\) However

\(^{161}\) Id. at 189-90 (separate opinion of Judge Brower) (stating that "a fuller conclusion as to [the Treaty's] applicability is in order," because its termination had not been affected by the government of Iran in accordance with the terms of the treaty).

\(^{162}\) Id. at 191 n.9.


\(^{164}\) Id.


\(^{166}\) See infra notes 167 to 196 and accompanying text; see also infra note 193 (comments of Mr. de Luna).

self-evident the principle, it soon became apparent to the participants that in its application the principle was infinitely variable. For example, Waldock, in his commentary on the draft provision, recognized that the rule was subject to variation by the parties. As an example of variation, he alluded to the Convention on the Liability of Operators of Nuclear Ships (Nuclear Ships Convention), which "expressly provides" for liability after termination of the agreement for a nuclear incident "with respect to ships the operation of which was licensed during the currency of the Convention." Yet, when the draft article was reformulated to address the case of termination or withdrawal from a multilateral treaty, the commentary again cited the Nuclear Ships Convention, but this time it was not clear whether it was cited as an illustration of variation from the principle or as an example of the express inclusion of the principle in a multilateral agreement, ex abundanti cautela.

The ILC's deliberations then turned even murkier. First, the ambiguity of Waldock's 1963 draft was accentuated by its expansion to include the "validity of any situation resulting from the

validity of any act performed or of any right acquired under the provisions of the treaty prior to its termination") [hereinafter Second Report on the Law of Treaties].

168. Id.

169. Summary Records of the 714th Meeting, 1 Y.B. Int'l L. Comm'n 282, U.N. Doc. A/CN.4/SER.A (1963) (Waldock reported that the Drafting Committee had revised the draft article. In pertinent part, the revision provided that: "The legality of any act done in conformity with the provisions of the treaty prior to the denunciation or withdrawal and the validity of any situation resulting from the application of the treaty shall not be affected.").

170. Second Report of the Special Rapporteur to the Commission, U.N. GAOR, 17th Sess., at 13, U.N.Doc. A/CN.4/L.102/Add.9 (1963) The provision merely adopts the provisions [with respect to bilateral treaties] to the case of withdrawal of an individual State from a multilateral treaty. It also takes account of the fact that some multilateral treaties do contain express provisions regarding the legal consequences of withdrawal from the treaty. Article XIX of the Convention on the Liability of Operators of Nuclear Ships, for example, expressly provides that even after the termination of the Convention liability for a nuclear incident is to continue for a certain period with respect to ships the operation of which was licensed during the currency of the Convention.

Id. (emphasis added); see also Commentary to the Draft Articles of the International Law Commission, 3 Official Records of the United Nations Conference on the Law of Treaties 85 (1968), U.N. Doc. A/CONF.39/11 v.3 (1968) [hereinafter Draft Articles Commentary]. Possibly, viewed as an illustration of the principle of vested rights, the limitation of liability "for a certain period" may be a negotiated limitation on the normal application of vested rights doctrine in the case of nuclear liability to require liability with respect to all ships licensed for operation without a temporal limit. The potential breadth of such a result would certainly lead the parties to the Nuclear Ships Convention to provide expressly, as it appears they did, for some durational limit.
application of the treaty,"\(^{171}\) perhaps suggesting that additional sources or categories of surviving rights were needed to give the article its intended ambit. Second, in 1966, the Special Rapporteur submitted an entirely new proposed text to the ILC,\(^{172}\) which provided that termination would leave intact not only "the legality of any act done in conformity with the treaty or that of any situation resulting from the application of the treaty," but also "any rights accrued or any obligation incurred prior to such termination, including any rights or obligations arising from a breach of the treaty."\(^{173}\) The introduction of "accrued rights and incurred obligations" was roundly criticized by Jiménez de Aréchaga, who appears to have seen the formulations as surrogates for "vested rights" concepts protecting foreign investors. Accordingly, he considered these concepts controversial in municipal and international law.\(^{174}\) Erroneously believing that the question of accrued rights and obligations was solely a question of breach,\(^{175}\) he appears to have suggested that the survival of rights derived from breach should not be covered by the article under discussion.\(^{176}\) Nonetheless, Jiménez

\(^{171}\) Draft Articles Commentary, supra note 170.


\(^{173}\) Id.

\(^{174}\) Id. paras. 63-65. As to accrued rights, Mr. Jiménez de Aréchaga noted that: "nothing would be gained by mentioning it in the article, as it might be interpreted to refer to rights acquired by nationals or individuals." Evidently, his objection was not to the principle itself, but rather to its application to protect rights of foreign nationals acquired under municipal law, possibly against expropriation, under which the rights of such nationals could be espoused on a theory of denial of justice by the states of which they were nationals. Jiménez de Aréchaga added that "the notion of incurred obligations was even less acceptable and its meaning was not clear."

\(^{175}\) Waldock had earlier noted that if his proposal for a separate clause dealing with "accrued rights and obligations" were accepted, "the case of termination in response to a breach can conveniently be covered by specifying in that clause that accrued rights and obligations include [but are not limited to] those arising from the breach of the treaty." Sir Humphrey Waldock, Sixth Report on the Law of Treaties, U.N. Doc A/CN.4/186 & Add. 1-7 (1966), reprinted in 2 Y.B. Int’l L. Comm’n 51, para. 6, U.N. Doc. A/CN.4/SER.A (1966) vol. 2. There, Waldock at least had in mind something more than cases where a breach had occurred while the treaty was in force and a remedy for breach was sought after the termination of the treaty. However, the failure immediately to perform a duty does not automatically constitute a breach. The passage of time may be necessary to transform the nonperformance into a breach. Thus, under Waldock’s theory, obligations may be established even though nonperformance may not have constituted a breach before the termination of a treaty.

\(^{176}\) Although Jiménez de Aréchaga went on to endorse McNair’s reasoning in the Ambatielos Case, he considered the only issue to be one involving the breach of a treaty. The record of the ILC debate notes:
de Aréchaga did not object to the basic proposition that obligations due to be performed while a treaty was still in effect should survive its termination under the principle stated in the draft article.\textsuperscript{177}

Similarly, Reuter, going to the heart of the matter, noted that the difficulty of reaching an acceptable formulation was a result of the tension between the two "complementary, but contradictory," ideas.\textsuperscript{178} He observed that the Special Rapporteur's approach to "fix the difficult boundary between retroactive effects and future effects had been to use such terms as 'act', 'situation' and 'rights accrued or obligations incurred prior to such termination'. While that wording could perhaps be improved, it certainly could not be radically changed."\textsuperscript{179} Thus, Reuter too endorsed Waldock's basic premises, though not his specific wording.

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He presumed that what was meant by obligations incurred were those which had to be performed, but had not been performed in time, and would engage the State's international responsibility: that question did not belong in a codification of the law of treaties. When a State became responsible for failure to perform treaty obligations, the fact that the treaty terminated after such a violation did not extinguish the resulting international responsibility; on that point some cogent observations had been made by Lord McNair in his dissenting opinion in the Ambatielos Case, where he had said "I do not see how the provisions of the Treaty of 1926 could prejudice claims 'based' on the Treaty of 1886 because, in my opinion, such claims acquire an existence independent of the treaty whose breach gave rise to them."
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Summary Records of the 846th Meeting, supra note 172, at 16. In a related context, Paredes made a similar objection when he:

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considered it impossible to maintain, as the Commission did ... that the rights and obligations created while the treaty was in force could subsist, while at the same time affirming [in article 69(2)(a) (preserving legal effect of acts performed in good faith reliance on an invalid treaty)] ... a sort of right to restitution in integrum for those who had suffered from the consequences of the invalidity of a treaty. There was a duality if not an actual opposition, contrary to all legal thinking, between the two points of view: on the one hand full restitution, and on the other hand the thesis that rights and obligations had been created in a valid manner and produced legal effects.
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Id. at 155, para. 102. This comment, however, appears to have focused only on the case where treaty rights subsist despite the termination of the treaty under \textit{jus cogens}, and thus does not constitute a general attack on the principle set forth in article 70 of the Vienna Convention.

\textsuperscript{177} He stated: "So far, the draft has been restricted to obligations performed, or still to be performed, under the treaty, and those two categories were sufficiently covered" in the existing draft. Id.

\textsuperscript{178} Id. at 17, para. 71.

\textsuperscript{179} Id. para. 72. Reuter added:

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It was mainly the use of the word "situation" that would call for some modification of the text of the draft articles. It would be necessary to distinguish between the creation and effects of a situation and probably also between situations having immediate effects and situations having successive effects. It
Subsequent debate appears to have focused on the task of resolving the remaining ambiguity Reuter recognized. For example, de Luna noted that the term "legal situation" was not clear and "could be unduly broad." He explained:

According to the traditional concepts accepted by continental lawyers, a treaty could give rise to rights, obligations, faculties, and powers. By virtue of the rule *pacta sunt servanda*, it created rights, in that it enabled a party to demand a certain conduct from another party; that other party was correspondingly under an obligation so to conduct itself. A treaty conferred a legal faculty when it conferred the possibility of obtaining a legally prescribed result by performing a particular act. A treaty conferred powers when it enabled a party to take some action to which certain results were attached.

De Luna's reference to the civil law vocabulary of "rights, faculties, and powers" arising from a treaty suggests that a reformulation of the concept of "legal situation" to encompass those concepts would not have been "unduly broad."
In sum, the eventual deletion of "accrued rights" and "incurred obligations" from the ILC draft language did not signify an intention to undercut the legal principle Waldock intended to articulate. As Judge Lachs emphasized, the idea embodied in the Special Rapporteur's paragraph including these additional concepts was correct, but it did not define the problem clearly enough. For two types of rights and obligations were at stake: first, rights established and obligations entered into at the time when the treaty was concluded — they were 'vested under the treaty', to use the words of Chief Justice Marshall — and secondly, rights and obligations created during the operation of the treaty. It was necessary to make clear which of the two were meant. He thought it should be the latter group only.\(^{183}\)

Lachs' views bore fruit in the final formulation recommended by the ILC and accepted by states at the Vienna Conference as article 70, which asks whether rights under a treaty already exist "through execution of the treaty," and not whether rights of individuals have vested.\(^{184}\)

The negotiating history of the Vienna Convention thus reveals that "a right, obligation or legal situation" covered by the provision encompasses what lawyers from civil law systems refer to as "rights, faculties, and powers."\(^{185}\) Also, the concept "created through the execution" was clearly intended to implement Lachs' distinction between rights "under the treaty" and obligations "created during the operation of the treaty."\(^{186}\) As Jiménez de Aréchaga noted, the formulation preserves "obligations still to be performed," although when they amounted to rights to a remedy for breach such obligations would not be within the scope of article

\(^{183}\) Summary Records of the 847th Meeting, supra note 180, at 20, para. 34. Lachs' views appeared not to have been challenged, although Tunkin (while endorsing Lachs' inclusion of rights "created during the operation of" the treaty) continued to express concern about the dangers of including "acquired rights." Id. at 21-22, paras. 51-52. But see McNair, Law of Treaties, supra note 165, at 532 n.4 (interpreting Fitzmaurice's formulation to include both types of rights Lachs articulated for treaty termination).

\(^{184}\) Vienna Convention, supra note 9, art. 70, 1155 U.N.T.S. at 349. The final commentary on the draft articles makes clear that article 70 of the Vienna Convention "related only to the right, obligation or legal situation of the States parties to the treaties created through the execution, and is not in any way concerned with the question of the 'vested interests' of individuals." Draft Articles Commentary, supra note 170, at 85.

\(^{185}\) Summary of Records of the 847th Meeting, supra note 180, at 19.

\(^{186}\) Id. at 20, para. 34.
Finally, as de Luna suggested, article 70 might be understood to preserve "faculties" and "powers," as those terms are understood by the civilians, in addition to "rights." But when are "powers" and "faculties" "created through execution" of a treaty for purposes of article 70? One might argue that some "performance" in consequence of the exercise of a power is still required to "create" an obligation "through execution" of a treaty. Inviolability of executed obligations is a core theme underlying a broad range of treaty law concepts reflecting undifferentiated concerns about the diplomatic and political costs of reversing the status quo. The Harvard Draft, for example, distinguished between "executory" and "non-executory" obligations. It purported to extinguish all executory obligations (that is to say, duties of performance which remain to be performed), but to preserve rights acquired "in consequence of the performance of obligations stipulated in the treaty." The commentary to the Harvard Draft added: "It may happen, however, that some or all of the obligations on one or both sides still remain to be executed at the time of the termination of the treaty; in that case the duty to execute the parts which remain unexecuted ceases with the termination of the treaty."

This approach appears to be inconsistent with the ILC's understanding of article 70 of the Vienna Convention, particularly with Jiménez de Aréchaga's recognition that the survival of "obligations still to be performed" might be called into question. The ILC debate on article 70 appears to have recognized that rights derived from executed performances are merely a subcategory of rights

187. See comments by Jiménez de Aréchaga, supra notes 176-177.
188. See comments by de Luna, supra note 182.
189. See David, supra note 92, at 13-16 (relating to rebus sic stantibus) and 208-10 (relating to procedures for notification of withdrawal).
190. See Harvard Draft, supra note 163, at 1171.
191. Id. The comment also notes that where obligations "are continuous, the duty of performances never ceases as long as the treaty is in force and occasion for performance arises; in this case, the obligation of further performance ends with their termination." Id. at 1172. However, the comment does not suggest criteria for determining whether a treaty falls into the category involving continuous performances; nor does it consider the case where the treaty includes duties of continuous performance together with distinct obligations triggered by specific events. Arguably, IAEA safeguards agreements, which call for regular reports and inspections, but also include the right to extraordinary requests for special inspections, may be seen as composites of the two categories of treaties suggested by the Harvard Draft.
192. See Summary Records of the 846th Meeting, supra note 172, para. 86.
that would survive termination of a treaty.\textsuperscript{193} In sum, if the Harvard Draft has the meaning advanced above, the Vienna Convention should be interpreted instead to permit the survival of rights the Harvard Draft would extinguish. Such rights, although created through execution of a power, might well exceed performance of duties under an agreement or the separate duty to perform created by the exercise of a power.\textsuperscript{194} Indeed, giving effect to this broader understanding in the Vienna Convention of the scope of

\begin{quote}
193. Summary Records of the 847th Meeting, supra note 180, para. 86. De Luna expressed support for the idea behind the “accrued rights” formulation along the lines proposed by Lachs and others:

- obligations deriving, not from the treaty itself, but also from its application, as Mr. Ago had rightly observed, must be respected and were not affected by the fact that the treaty terminated. It was also understood that it was impossible to go back on what had already been executed in accordance with the treaty, since that was no longer part of what subsisted at the time the treaty was extinguished. Id. (emphasis added). The compound formulation thus appears to recognize the distinction between “obligations deriving from application” of the treaty, which subsist, and obligations deriving from “what had already been executed,” which do not subsist but are merely “impossible to back on.”

194. On the other hand, it may also be that the Vienna Convention approach would not protect some rights derived from execution or performance of obligations that might be retrievable under a theory that focused, as does the Harvard Draft, on actual performance. Article 70’s focus on “execution” does not suggest that every execution of a treaty gives rise to rights preserved after termination or withdrawal. Indeed, the ILC Draft Articles Commentary noted that the provision “raised the question of equitable adjustment in the case of a treaty which has been partially executed by one party only.” Draft Articles Commentary, supra note 170, para. 4. In view of this concern, Lord McNair had argued against recognizing a right of unilateral termination. McNair, Law of Treaties, supra note 165, at 494 (“If one party has already benefitted under the treaty, for instance, by acquiring territory ceded to it, there is a strong presumption that the party would not be allowed to free itself from any obligations still remaining executory by denouncing the treaty.”). Correlatively, McNair took the view that, though ordinarily material breach of one treaty did not give the injured party a right to suspend or terminate a separate treaty inter se, in some cases “it [is] possible to show that of two separate treaties each was consideration for the other and that they were intended to be interdependent.” Id. at 571; see also David, supra note 92, at 228.

Moreover, the Vienna Convention and its negotiating history do not appear to rule out common law approaches to treaty interpretation under which an agreement can be divided into corresponding pairs of performances. Accordingly, part performance by a party of the whole agreement could establish its right, under article 70 principles, to a corresponding performance by the party that seeks to avoid its own duty of performance by terminating the agreement. See, e.g., Farnsworth on Contracts, supra note 83, § 8.13; see also McNair, Law of Treaties, supra note 165, 474-84.

Finally, the ICI seems also to have approved this reasoning, though only after the negotiation of the Vienna Convention, in the Fisheries Jurisdiction Case [Ice. v. U.K], 1973 I.C.J. 18. There, the Court observed: “in the case of a treaty which is in part executed and in part executory, in which one of the parties has already benefitted from the executed provisions of the treaty, it would be particularly inadmissible to allow that party to put an end to obligations which were accepted under the treaty by way of \textit{quid pro quo} for the provisions which the other party has already executed.” Id.
\end{quote}
surviving rights would also be consistent with the Vienna Convention's rejection of the "vested rights" jurisprudence which seems to have undergirded the Harvard Draft.

On the other hand, the Harvard Draft and the Vienna Convention may yet be understood to be consistent under a revised understanding of the Harvard Draft. An "executory" obligation can be defined not simply as an obligation that remains to be performed, but as an obligation whose performance depends upon a future performance or event. If the Harvard Draft's exclusion of "executory obligations" is understood to extinguish only duties of performance which are unexecuted because they have not yet been performed.

On the other hand, this ICJ dictum is of doubtful significance, for the argument rejected by the Court was based on a flawed understanding of the common law doctrine of consideration. Iceland contested jurisdiction on the ground, among others, that the change in international law following the conclusion of the Anglo-Icelandic Agreement, containing a jurisdictional clause conferring the same right to Iceland by custom that the United Kingdom had granted through the treaty, extinguished the consideration given by the U.K. in return for its right to dispute resolution. Id.; see also D.W. Greig, International Law 507 (1976). Under common law, the validity of consideration is measured at the time the agreement is concluded. See Restatement (Second) of Contracts §§ 71, 73 (1981). Here, Iceland advanced an ex post facto argument of dubious merit, even assuming common law concepts of consideration were applicable.

Moreover, the ILC in its final assessment of article 70 concluded that "equitable adjustment demanded by each case would necessarily depend on its particular circumstances" and that "the matter should be left to the application of the principle of good faith in the application of the treaties demanded of the parties by the rule pacta sunt servanda." Draft Articles Commentary, supra note 170, para. 4. Thus, while the ILC did not rule out considering a party's performance under article 70, it does not appear to have conceived the survival of rights to constitute a special case of equitable adjustment.

In the context of safeguards agreements and the NPT, if it can be determined that performance by the IAEA of its duty to evaluate safeguards information, which led it to request special inspection of DPRK facilities, is the agreed equivalent of the DPRK's duty to accept such an inspection, then it may reasonably be argued that the IAEA's "right" to conduct the special inspection requested before termination of the safeguards agreement was "acquired" before the date of termination. A similar analysis might support a claim by the NPT parties to be entitled to the information relating to the DPRK's nuclear activities safeguards would have generated prior to termination of the agreement. It would follow that neither the IAEA nor the parties to the NPT would be entitled to information concerning the DPRK's post-withdrawal nuclear activities.

However, it is questionable whether this approach can be taken this far. First, it seems to run afoul of the Vienna Convention's explicit rejection of principles of equitable adjustment under article 70 in cases where only one party has performed and a treaty terminates. Second, it derives from the common law doctrine of consideration, whose applicability is doubtful given that it is not even included among the requirements for formation of treaties under the Vienna Convention. Accordingly, it might not meet the standard of general acceptance required under article 38(1)(d) of the Statute of the International Court of Justice. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. 993.

become due, then duties to performance that have become fully
due through the occurrence of all requisite conditions of perform-
ance might well survive.196 These duties would not then be consid-
ered "executory" within the meaning of the Harvard Draft and
thus would survive a state's withdrawal from a treaty. On this
reading, the Harvard Draft would be seen as a precursor of the
Vienna Convention formulation, and "powers" and "faculties"
under the Vienna Convention would survive under article 70 when
all conditions on their exercise had been satisfied. For example, if
properly exercised while a treaty was in effect, a power would
establish obligations that acquire an existence outside the agree-
ment and thus survive its termination.

As applied to IAEA safeguards, the text and travaux
preparatoire of the Vienna Convention thus suggest that a distinc-
tion needs to be drawn between, on one hand, the general and con-
tinuing duty of the safeguarded state to provide reports and permit
routine inspections (including ongoing measures of containment
and surveillance) and, on the other, a state's duty to comply with a
request for a special inspection made by the Agency while the
agreement is still in force. The latter is arguably analogous to the
exercise of a "power" conferred under the safeguards agreement.
Once such a right is exercised, it is arguably "created," within the
meaning of article 70(1)(b) of the Vienna Convention and custom-
ary international law, "through the execution" of the safeguards
agreement, and the safeguarded state's duty of performance thus
survives until that duty is discharged or excused.

B. Survival of Rights Under the IAEA Safeguards Agreement

If a special inspection could be sought after withdrawal based on
an IAEA request while the NPT and its related safeguards agree-
ment were still in force for the safeguarded state, it could be
abused to replicate the rights terminated or extinguished by with-
drawal from the treaty unless limits were placed on its purpose and
scope. The IAEA safeguards system in practice provides informa-
tion about both past and present uses of nuclear material; thus,
safeguard inspections after termination of a safeguards agreement
could in theory provide information about either the pre- or post-
termination use of nuclear material that had been subject to safe-

196. See Restatement (Second) of the Law of Contracts § 225(1) (1986) ("Performance
of a duty subject to a condition cannot become due unless the condition occurs or its non-
ocurrence is excused.").
guards or material subject to safeguards. As suggested below, while there seems to be little support for permitting post-termination inspections for the purpose of obtaining information about a state's post-termination nuclear activities, strong arguments can be made to support inspections designed to reconstruct the pre-termination history of the state's use of nuclear materials subject to safeguards.

V. SAFEGUARDS ON CURRENT USES

Those who have considered the possibility of the termination of NPT safeguards agreements—in other words thought the unthinkable—appear to have concluded that the general right to apply safeguards on nuclear material while such an agreement is in force expires with the termination of the safeguards agreement.197 No one seems to have analyzed this question, however, in terms of the background interpretive rules found in article 70 of the Vienna Convention. Rather, their conclusions have been based on the intent of NPT safeguards agreements—deduced from a comparison with non-NPT safeguards agreements, which expressly provide for perpetual application of safeguards under the IAEA's policy articulated in GOV/1621.198 This failure to provide expressly for perpetuity in the NPT safeguards agreement, when the IAEA had

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197. See Schwartz, supra note 46, at 15 ("[the] effect of withdrawal is that a nonnuclear-weapon state may free itself of its . . . NPT obligation to accept international safeguards, even on material transferred while it remained a party. In the absence of other commitments, the materials could be used in contravention of the NPT's most fundamental principles."); Scheinman, The International Atomic Energy Agency, supra note 19, at 138 (in IAEA safeguards agreements, non-NPT states are "under more stringent requirements than NPT states insofar as the later are bound only for the duration of the treaty . . . and also have the right to withdraw"); see also Szasz & Fischer, Safeguarding the Atom, supra note 1, at 85 (Fischer states: "NPT safeguards would cease to apply if . . . the NNWS withdrew from the NPT."); Willrich, International Safeguards, supra note 58, at 89 (upon withdrawal, "[i]nsofar as other safeguards agreements are automatically revived, the country then holds its nuclear material free of any restrictions or controls").

198. This reflects IAEA policy with regard to perpetuity flowing from the recommendations made by the IAEA Director General in a memorandum, GOV/1621, supra note 62. Paragraph 2 of the Annex to the Director General's Memorandum states: The primary effect of termination of the agreement, either by act of the parties or affluxion of time, would be that no further supplied nuclear material, equipment, facilities or non-nuclear material could be added to the inventory. On the other hand, the rights and obligations of the parties, as provided for in the agreement, would continue to apply in connection with any supplied material or items and with any special fissionable material produced, processed or used in or in connection with any supplied material or items which had been included in the inventory, until such material or items had been removed from the inventory. GOV/1621, supra note 62, para. 2.
done so in other contexts, arguably tends to establish that the IAEA forswore perpetuity in the NPT safeguards agreements.\textsuperscript{199} It has been suggested that this places non-NPT parties in the awkward position of having more onerous safeguards obligations than NPT parties.\textsuperscript{200} This may be explained as the bargain struck in the negotiation of the NPT safeguards model agreement in which supplier states party to the NPT accepted framing the right to safeguards in terms of the duration of the NPT rather than in terms of the nuclear-end use of supplied material, facilities or equipment, in return for which NNWS parties to the NPT accepted so-called full-scope safeguards on all their peaceful nuclear activities.

This inference appears to be corroborated by the example of the IAEA's subsequent practice as expressed in its recent safeguards agreement with the government of Albania (the Albanian Safeguards Agreement).\textsuperscript{201} In this one case, the IAEA secured a full-scope safeguards commitment from a state bound by neither the NPT nor any other international legal regime requiring the application of safeguards on all peaceful nuclear activities.\textsuperscript{202} The duration clause provided for a fixed initial term of twenty-five years with the possibility of additional periods.\textsuperscript{203} The NPT duration clause similarly provides for an initial twenty-five year term,
although that could become perpetual or could terminate shortly after the expiration of twenty-five years (depending on what the parties decide at the 1995 Extension Conference).\textsuperscript{204} Unlike the NPT, however, the Albanian Safeguards Agreement provides for the continuing application of safeguards on the nuclear material and equipment safeguarded on the date of termination.\textsuperscript{205} Thus, from the Agency's express inclusion of such a right to safeguards in perpetuity in a non-NPT fullscope safeguards agreement it could be inferred that, in deciding to leave out such provisions in an NPT fullscope safeguards agreement, the IAEA has relinquished the rights it might, or even should, secure under the NPT to apply safeguards after termination of the applicable agreement.

On the other hand, the inference drawn from these comparisons could be challenged on various grounds. First, NPT parties and IAEA members are not identical. Therefore, the practice of the IAEA in fulfilling the expectations of its membership in voluntary material and facility-specific agreements based on the principles of non-NPT safeguards agreements, and under the IAEA Statute, may not be relevant to understanding what the NPT parties and the IAEA Board of Governors agreed to in the model for safeguards agreements that would satisfy NNWS obligations under the NPT. Second, the IAEA negotiating policy requiring express reservation of the right to apply safeguards in perpetuity on material or equipment that had been subject to the safeguards obligation during the life of non-NPT safeguards agreements was finalized only after the NPT safeguards negotiating model was issued.\textsuperscript{206} On balance, however, these questions do not seem significant enough to rebut the inference of non-perpetuity permitted by the absence of an express provision for the subsistence of safeguards after the termination of an NPT safeguards agreement.

\textsuperscript{204} See infra notes 244-245 and accompanying text.
\textsuperscript{205} INFCIRC/359, supra note 201, para. 25(b), states:

If this Agreement is terminated for any reason: (i) safeguards shall continue to apply with respect to nuclear material and facilities . . . which are subject to safeguards on the date of termination and any nuclear material produced, processed or used in or in connection with such nuclear material or facility after the termination of this Agreement, including subsequent generations of produced nuclear material . . . .

\textsuperscript{206} GOV/1621, supra note 62 (issued in 1973). Meanwhile, INFCIRC/153, supra note 23, was issued in final form in 1972. As Scheinman notes, the basic safeguards arrangements called for by the NPT were agreed on in 1971. Scheinman, The International Atomic Energy Agency, supra note 19, at 173.
VI. SAFEGUARDS FOR HISTORICAL INFORMATION

In contrast, it does not appear that serious attention has been given to the more limited claim that safeguards rights might survive termination to allow parties to ascertain how material subject to safeguards was used before the agreement was terminated. The relationship between this question and supplier interests in the status of nuclear material as of the date of withdrawal was foreseen shortly after the NPT entered into force, when a U.S. expert observed that: "All the Agency can do in such an event is to notify the world community of the types, forms, and amounts of nuclear material released from restraint."\textsuperscript{207} Although this comment does not explicitly state that the IAEA is legally required to do all that it can under these circumstances, it does seem predicated on the assumption that the Agency will be able to take some steps in this direction. In short, even where it is understood that the general right to safeguards terminates upon withdrawal from the NPT, the residual interest of the international community in learning the status of the material and equipment supplied to the withdrawing state might yet be acknowledged. Arguably, the most fertile ground for advancing such a claim would be a case like the one posed by North Korea's near withdrawal from the NPT to avoid compliance with the IAEA's request for a special inspection.

That, in a sense, is the heart of the issue. If inspections are required for the Agency to make the reports that the international community, particularly nuclear supplier states, expects it to make, does the IAEA then have a duty to seek such inspections? And, if so, how can it not have the rights necessary to collect the requisite information? How, then, can one establish that suppliers' expectations support an interpretation of the NPT safeguards agreements that would authorize the IAEA to seek a post-termination accounting?

A. Perpetuity Under NPT Safeguards Agreements

Viewing the matter from the standpoint of nuclear suppliers, the survival of some safeguards rights for this narrow purpose would

\textsuperscript{207} Willrich, supra note 58, at 89. Szasz has suggested that "the information gathered while controls were still being exercised should make it possible to give an estimate of the dimensions of the threat, based on the quantity of nuclear materials readily available for conversion into weapons." Paul C. Szasz, The Adequacy of International Safeguards, 10 J. Int'l L. & Econ. 423, 434 (1975). Where, as in North Korea's case, the quantity of nuclear materials available for such conversion is unknown, this conclusion may not be valid.
facilitate implementation of the balance struck between suppliers' commitment under article IV to assure nuclear supply and their obligations under article III(2) not to export without safeguards. U.S. nuclear nonproliferation policy, beginning with Atoms for Peace and continuing through the present era, has consistently represented the leading edge and, over the course of time, the paradigmatic expression of supplier concerns. Under Atoms for Peace, the United States encouraged the development of peaceful applications of nuclear energy through agreements under which the United States would supply cooperating parties with nuclear material and equipment. As a condition of this supply, the United States secured assurances from states receiving U.S. exports that they would not use the transferred item for non-peaceful purposes and would accept U.S. inspections for the purpose of verifying compliance with this peaceful use commitment. After the establishment of the IAEA, the United States concluded trilateral safeguards transfer agreements, under which the IAEA undertook to apply the safeguards provided for in the agreements for cooperation while the United States retained the right to apply "fallback" safeguards on the cooperating party if the IAEA could not, or would not, apply its safeguards.

Subsequently, the IAEA itself also saw the need for gradually enhancing the confidence building effects of safeguards agreements. It developed its own models for agreements, applying safeguards on specific materials or facilities and progressively expanding its safeguards rights to meet the demands of suppliers for reasonable assurance that their supply would not be converted to weapons use. First, the Agency expanded its safeguards to include the right of safeguards "pursuit" (that is, the right to apply safeguards not only on specific material or material used at a safeguarded facility but also to successively produced generations of nuclear material). Second, as noted above, the Agency expressly provided in its non-fullscope safeguards agreements that its rights

208. See President's Address Before the General Assembly of the United Nations on Peaceful Uses of Atomic Energy, supra note 19.
210. Id. at 31-34.
212. Id. at 128 (noting the progression from INFCIRC/26 (1961) for small reactors to INFCIRC/26 Add.1 (1964) for large reactors).
to apply safeguards would subsist as long as the nuclear material, facilities, or equipment were in use.\textsuperscript{213}

Multilateral supplier controls also moved on a parallel track of U.S.-led restraint.\textsuperscript{214} The NPT Treaty Exporters' Committee identified a "trigger list" of material or equipment especially designed or prepared for the production, processing or use of nuclear material, which NPT parties could not, under article III(2) of the Treaty, export unless safeguards were applied.\textsuperscript{215} At the same time, a comparable group was formed to accommodate nuclear suppliers, such as France, which at the time were not NPT parties. This so-called Nuclear Suppliers Group (NSG), or London Club, formulated similar but broader guidelines, which, unlike the Zangger Committee guidelines, applied also to nuclear technology transfer.\textsuperscript{216} Later, the Gulf War demonstrated the threat posed by the export of dual-use items (which, while important for a nuclear weapons program, do not rise to the level of significance necessary to warrant the application of safeguards). The NSG guidelines were revised to include licensing criteria, but not safeguards requirements, for dual-use exports.\textsuperscript{217} In addition, the NSG at a meeting in Warsaw

\textsuperscript{213} Scheinman, The International Atomic Energy Agency, supra note 19, at 138.

\textsuperscript{214} U.S. controls on nuclear exports grew in scope and detail after the Atomic Energy Act of 1954 revoked the earlier ban on the export of nuclear material under the McMahon Act of 1946, ch. 724, 60 Stat. 755-75 (codified as amended at 42 U.S.C. §§ 2011-2296 \textsuperscript{218} (1982)), particularly through amendments to the Act by the Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95-242, 92 Stat. 120-152 (1978), 22 U.S.C. §§ 3201-82 and 42 U.S.C. §§ 2011-2160(a)(1982) [hereinafter Non-Proliferation Act]. Over time these included, in descending order of complexity and rigor, controls over the export of nuclear reactors and fuel, see Non-Proliferation Act §§ 123, 126-128, minor reactor components and moderator material, see id. § 109, and dual use commodities, see id. § 309, as well as, the Export Administration Act. Pub. L. No. 96-72, 93 Stat. 503 (1979) (codified as amended at 50 U.S.C. §§ 2401-20). Sensitive nuclear technology, defined in section 4(a)(6) of the Non-Proliferation Act as relating to enrichment, reprocessing, or heavy water production, is under especially rigorous controls exceeding perhaps even those governing nuclear fuel and reactor exports. All other types of nuclear technology are subject to procedures more comparable to the licensing requirements for dual-use items. See Atomic Energy Act § 57(b). Several U.S. agencies, to a greater or lesser degree, are involved in the conclusion of agreements and issuance of licenses and authorizations for export pursuant to these authorities. See generally Schwartz, supra note 46, at 23-50 (outlining substantive export requirements and procedures for nuclear reactors and fuel).

\textsuperscript{215} See Communications Received From Members Regarding the Export of Nuclear Material and of Certain Categories of Equipment and Other Material, IAEA Doc. INFCIRC/209 (Sept. 3, 1974), revised by the IAEA and reprinted in IAEA Doc. INFCIRC/209/Rev.1, at 2 (Nov. 1990) (containing memoranda of the so-called Zangger Committee setting forth guidelines for common nuclear export policies) [hereinafter INFCIRC/209].

\textsuperscript{216} IAEA Doc. INFCIRC/254 (1978).

on March 31 through April 3, 1992 adopted a policy statement going beyond the requirements of article III(2) of the NPT for safeguards on items to be exported. Instead, contracts for supply of NSG trigger list items or technology would require the application of fullscope safeguards. The adoption of fullscope safeguards as a condition of supply for new contracts is the near-realization of the longstanding U.S. policy objective since 1978 of persuading other suppliers to adopt fullscope safeguards as a condition of all nuclear supply.

U.S. practice provides a precedent for safeguards in perpetuity even where it has not been explicitly provided for in the applicable agreement. In at least one instance, the United States has taken the position that certain of its rights as a nuclear supplier under its agreements for peaceful nuclear cooperation survive the termination of the U.S. agreement. The dispute involved the U.S. right to consent, under the U.S.-India Agreement for Cooperation Concerning Civil Use of Atomic Energy (the U.S.-India Agreement), to the reprocessing of U.S.-origin nuclear fuel supplied while the Agreement was still in force, material which was thereafter irradiated at the Indian reactor at Tarapur so as to produce a weapons-usable stock of plutonium. No specific provision in the agreement controlled this question. An argument based on article 70 of the Vienna Convention appears to have been advanced by the United States. Additionally, it has been argued that the Indian interpretation of the Agreement "obviously destroys rights that the agreement meant to confer." This argument was framed

222. See Schwartz, supra note 46, at 34 & n.136 (relying on article 70(1)(b) of the Vienna Convention in relation to the Tarapur supply issue).
223. Milhollin, supra note 220, at 601. According to Milhollin, the consequence of India's position would be that the United States would have an effective reprocessing consent right only with respect to nuclear material exported to India during the first part of the supply period. With respect to material supplied toward the end of the supply period, for which the United States in theory acquired a reprocessing consent right pursuant to the Agreement, the question of reprocessing would in practice arise only after the expiration of the Agreement. However, it would be divested of any practical possibility of disapproving reprocessing. Id. at 601-02.
in terms of the probable intent of the parties, particularly that India was aware of U.S. plutonium use policy and therefore could not have believed that the United States would export uranium to India without perpetual safeguards and reprocessing consent rights.\textsuperscript{224}

On the other hand, the United States appears to have been unable to persuade India to accept the U.S. position, whatever its theoretical merit. Concern over the possibility of disputes with other U.S. export recipients led the United States to begin to incorporate such provisions in its agreements for nuclear cooperation.\textsuperscript{225} It might thus be argued that subsequent practice by the United States, rather than reflecting merely excessive caution in drafting, manifests U.S. recognition that perpetuity must be expressly included in its agreements for cooperation.\textsuperscript{226} But even assuming this inference is correct, and that the U.S.-India agreement did not create perpetual rights, the agreement reflects a difference of opinion between the United States (a state party to the NPT) and India (a state not party to the NPT), and it is therefore questionable whether it controls questions of perpetuity when the dispute involves only states party to the NPT. In any event, neither party

\begin{itemize}
\item \textsuperscript{224} Id. However, even accepting this argument's premise, one does not need to agree with its conclusion. To sustain Milhollin's argument that the United States should be entitled to its full reprocessing consent right, regardless of when it supplied the material from which plutonium could be reprocessed, it would be necessary to conclude only that the agreement gives the United States a reprocessing consent right that extends for the full period of the agreement. In other words, the reprocessing consent right would attach for exported material on the date it was exported and extend thirty years thereafter.
\item \textsuperscript{225} See Schwartz, supra note 46, at 34 n.139 (noting that recent U.S. agreements for cooperation expressly provide for perpetuity on all controls, in order to resolve doubts expressed by India in the Tarapur case).
\item \textsuperscript{226} Id. at 34 n.138 (noting that, under U.S. law, perpetuity is required only for safeguards).
\end{itemize}
appears to have pressed its legal arguments.\textsuperscript{227} They have sought, instead, to resolve their dispute through negotiation.\textsuperscript{228}

It is noteworthy, however, that the United States based its position in the Tarapur question on an agreement for cooperation con-
cluded at a time when IAEA safeguards agreements did not explicitly provide for the perpetual application of safeguards. Thus, if the U.S. position on perpetuity with respect to its agreements for cooperation is sustainable, then it might suggest that pre-GOV/1621 safeguards agreements might also be amenable to the construction that they too establish rights in perpetuity, despite their failure to do so expressly.

Admittedly, post-GOV/1621, non-NPT safeguards agreements secured perpetual application of safeguards on nuclear material transferred to a recipient through the duration clause. But this does not mean that the same or comparable results could not have been achieved through different legal techniques. For example, non-NPT safeguards agreements could have included a clause defining the residual safeguards to be applied after termination on the Albania model. Or, as has been suggested with respect to the U.S. position on Tarapur, safeguards on material supplied while an agreement was in effect might have been maintainable on the basis of the probable intent of the parties. Finally, such a conclusion might have been based on general principles of treaty law articulated in article 70 of the Vienna Convention.

On this view, the modification of non-NPT safeguards agreements to provide expressly for perpetuity through a perpetual duration clause could be viewed as drafting *ex abundanti cautela*, belying the ancient maxim that an excess of caution can do no harm. Moreover, if indefinite duration clauses were included in non-NPT safeguards agreements solely to confirm a result that would flow from interpretation, it may well be that the failure to include a similar duration concept in NPT safeguards agreements does not mean that NPT safeguards agreements should be construed not to provide for perpetuity. And the express method of doing so, providing for an indefinite duration, might have seemed anomalous in an NPT safeguards agreement (given that the *raison d'ètre* of NPT safeguards is the NPT, and thus the normal and natural duration of such safeguards agreements is the duration of the NPT). By parity of reasoning, the inclusion of an explicit provision for perpetuity in the Albania Safeguards Agreement could also be seen as over-cautious drafting by the IAEA, motivated in part

229. See supra note 198.
230. See discussion supra notes 200-201.
231. See discussion supra notes 221-227.
232. See discussion supra notes 163-184.
233. See discussion supra notes 201-202.
by India's reluctance to accept the U.S. claim that its rights under the U.S.-India Agreement would survive the termination of the agreement. Accordingly, the IAEA's failure to provide expressly for perpetuity might not have been seen as a waiver of rights it might have pursuant to article 70 of the Vienna Convention and customary international law.

One does not, however, need to draw all the possible inferences from the U.S. theory of perpetual rights under its agreements for peaceful nuclear cooperation to recognize that suppliers are motivated, not only by the legal requirements of the NPT, but also by the nonproliferation policies and concerns which led to IAEA safeguards and the NPT in the first place, to seek complete information on whether the material and equipment they have supplied have been, or could be, used for nuclear weapons. Indeed, the United States appears never to have asserted that its legal position vis-a-vis Tarapur is mandated by article III(2) of the NPT. Yet supplier interests in assuring that safeguards are in fact applied, as required by article III(2), cannot be irrelevant to the interpretation of the IAEA safeguards system established to fulfill the requirements of articles III(1) and (IV) of the NPT. Hence, the safeguards established by the IAEA to fulfill safeguards requirements under the NPT should be interpreted in such a manner as to allow supplier state parties to the NPT to ensure that their NPT obligations are fulfilled. Would, for example, the Russian Federation, on the assumption that it succeeded to the obligation of the former Soviet Union as supplier to the DPRK, be comfortable with never being able to verify whether the DPRK misused Soviet-supplied

nuclear material to launch a nuclear weapons program? Thus, while it would seem too much a stretch to argue that supplier states are third-party beneficiaries of the safeguards agreements between the IAEA and NPT parties, it would seem plausible, in light of the U.S. position and the concerns of other suppliers, that third-party interests must inform the interpretation of the safeguards agreements. Recognition of this supplier interest does not, however, compel the conclusion that the NPT safeguards agreements must be construed to require full perpetuity, since only the production of information through inspections sufficient to vindicate the good faith performance by the supplier of its obligation not to export in the absence of safeguards would be necessary to achieve that end. Thus, a more limited claim of perpetuity that would permit determination by international inspectors that evasion of safeguards, if any, was the responsibility of the recipient state would serve the interests of the supplier in determining how better to comply with its NPT export obligations without unknowingly facilitating nuclear proliferation. Would fullscope safeguards in perpetuity be necessary to accomplish this end? Probably not, if special inspections necessary to resolve any significant loose ends would do the job.

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235. Would other NPT parties have an interest in knowing whether evidence in the safeguarded state reveals that the exporter knew or should have known of unsafeguarded use of the material exported, and may itself have breached article III(2), and perhaps article I, of the NPT?

236. Article 36 of the Vienna Convention provides that:

A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

Vienna Convention, supra note 9, art. 36, 1155 U.N.T.S. at 341; see also supra note 49 (application of this rule as a matter of customary international law, including with respect to agreements involving an international organization).

237. For example, in terms of the relationship between the IAEA and the safeguarded state, would the safeguarded state be free to waive the IAEA's duty to perform its safeguards obligations? Could the safeguarded state thus defeat its duty to comply with a request for a special inspection by waiving its rights to the verification of its activities? Such an analysis would ignore the fundamental interests of supplier states in verification pursuant to the terms of the safeguards agreement of the recipient, nuclear activities, so long as the treaty for safeguards remains in force, and thus defeat the object and purpose of the safeguards agreement. See Vienna Convention, supra note 9, art. 31, para. 1, 1155 U.N.T.S. at 340 (interpretation must be "in light of" the agreement's "object and purpose").

238. This Article asserts that rights to special inspections, if legitimately sought before a state seeks to exercise its right to withdraw, survive the effective date of withdrawal. See infra notes 59-63 and accompanying text. If correct, then the question is posed whether
B. Perpetuity Under the NPT

While the safeguards agreement implements the NPT, the NPT itself is also an independent source of rights and duties vis-a-vis the safeguarded state. If the IAEA is unable or unwilling to assert that its right to a special inspection under the terms of the safeguards agreement survives a state’s withdrawal from the NPT, it may still be the case that the parties to the NPT, individually or collectively, may be entitled to exercise safeguards rights after withdrawal based on the same rationale that would support post-withdrawal rights under the NPT safeguards agreement, either as third-party beneficiaries of the IAEA’s rights under the safeguards agreement or directly under the NPT.

Although the precise contours of such a right would need to be elaborated, it arguably could be understood as the functional equivalent of a special inspection to which the IAEA might be entitled if it asserted a right under article 70 of the Vienna Convention and customary international law. That is, the parties would be entitled to the information which led the IAEA to request a special inspection. The parties could then formulate their own positions on the types of inspections necessary to ascertain whether a state had complied with its article III obligations under the NPT, obligations which prevent a state from diverting nuclear material from peaceful purposes. But if the IAEA Board of Governors has not requested a special inspection, and if the IAEA Director General has not pursued a path leading to a request for such authorization from the Board of Governors, there would not appear to be a basis for further demands by the parties.

The right to all special inspections so requested survives. A reasonable factual inference might be drawn that an attempt to withdraw following a request for a special inspection is designed to conceal evidence which an inspection might uncover. However, a contrary inference might be drawn when a state seeks to withdraw and only then the IAEA seeks a special inspection. Such an inspection might be part of an effort to intrude in legitimate sovereign affairs, such as activities related to national self-defense taken after the effective date of withdrawal to respond to the security threat that motivated a state’s initial decision to withdraw. Ultimately, the temporal center of gravity for a request for a special inspection would need to be located on one side of the divide established when a state gives notice of its intent to withdraw.

239. See Vienna Convention, supra note 9, art. 36, 1155 U.N.T.S. at 341.

240. The article III(1) duty under the NPT to apply safeguards on all peaceful nuclear activities begs the question of what are safeguards. INFCIRC/153, supra note 23, gives a straightforward answer to this question, and treats special inspections as a unique part of NPT safeguards.
C. Safeguards as a Remedy for Breach

It may also be that, if rights to inspections under the NPT safeguards agreement and the NPT—even for the limited purpose advanced above—do not survive withdrawal from the NPT, post-withdrawal inspections would serve as the appropriate remedy for the breach of noncompliance with the Agency’s special inspection request. The difficulty with this suggestion is that special inspections may be necessary to establish the fact of a material breach. Perhaps if the failure to comply is only with the special inspection request itself, then the IAEA or the parties to the NPT would be entitled to an appropriate remedy. Yet, although international law generally requires restoration of the status quo ante as the remedy for breach, reliance on the vagaries of a remedial rule in so sensitive an area as NPT safeguards may well be the proverbial “weak reed.”

VII. Summary and Recommendations

This Article has considered three possible approaches for assessing the availability of a legal claim under the NPT in favor of continuing rights to international inspection in the event a state seeks to exercise its right to withdraw from the NPT. Under one approach, the right to withdraw is not plenary and, therefore, may not permit a withdrawal intended to terminate inspection rights that would otherwise yield evidence concerning whether a state had breached its NPT or NPT-safeguards related obligations. Under another equally extreme approach, a state may withdraw from the NPT under virtually any circumstances, but its withdrawal would not have the effect of terminating the right to apply safeguards on any material that had been subject to safeguards by virtue of the operation of the NPT. An intermediate position, the one advanced here as the most plausible in terms of the NPT and its safeguards instruments, would accept that withdrawal is not subject to meaningful third-party review, except through the political judgments and instruments available to the U.N. Security Council. While as a general proposition the safeguards rights generated under the NPT through the IAEA safeguards agreement would terminate upon the effective date of withdrawal, the right to a special inspection requested while the withdrawing state was still a

party to the NPT, in order to verify whether nuclear material subject to safeguards was diverted from peaceful use would survive.

The fate of the NPT now hangs in the balance. The 1995 Extension Conference will allow a majority of the parties the opportunity to select among three legally permissible options: (1) indefinite extension; (2) extension for a fixed period (presumably amounting to a termination of the treaty as of a date certain); and (3) extension for a series of fixed periods (presumably, including some procedural mechanism for allowing a majority of the parties to effect a decision to move into a new period). This suggests that the parties to the NPT may well be under some pressure to make a decision about the fate of the Treaty when critical questions raised by the North Korean situation remain unanswered. Such questions could undermine the willingness of the parties to extend the Treaty indefinitely.

Conceivably, a solution to this conundrum can be found by extending the Treaty for an indefinite duration by advancing a non-restrictive interpretation of the Treaty language permitting extension for "fixed periods." In 1989, then General Counsel to the U.S. Arms Control and Disarmament Agency (ACDA), Thomas Graham, argued that article X excludes the possibility of extending the Treaty subject to new substantive conditions, such as requirements for a comprehensive test ban or legally binding security assurances, since this would amount to de facto amendment of the Treaty. Indeed, such a substantive condition, in effect amending the NPT, would conflict with the express requirement of article VII(2) that entry into force of an amendment for each state shall be subject to its own consent, the approval of a majority of the parties, and the unanimous approval of the NWS's of the NPT and the IAEA Board of Governors. Graham has also recently argued that the procedural mechanism for moving from one successive period to the next such period cannot amount to a de novo extension conference in which the parties are authorized to make each of the three choices permitted in the one extension conference contemplated.

243. Id. at 667.
by the Treaty. This view has been criticized, however, as unnecessarily inflexible and not required by the text of the NPT.

The imminence of the conference also accentuates the need to resolve the legal issues involved in the North Korean situation, given that states will be reticent to develop or finalize their positions concerning long-term extension of the NPT when fundamental questions concerning its durability or efficacy have been so plainly exposed. In addition, states may also be concerned with the instability created by the potential acquisition by certain states of nuclear weapons or nuclear material from the former Soviet Union.


while there does exist some ambiguity as to what would constitute an acceptable transition mechanism, even here it is possible to determine the parameters of what would conform with the treaty negotiators' intent. Renewal absent a decision by a majority of the parties to terminate would conform. Convening another extension conference which would offer a range of extension options would not.

Id.

245. William Epstein & Paul C. Szasz, Extension of the Nuclear Non-Proliferation Treaty: A Means of Strengthening the Treaty, 33 Va. J. Int'l L. 735, 756 (1993) (suggesting that "a majority [of the parties] could also provide for a single extension at the end of which the parties would again be able to select one of the options set forth in article X(2)"). However, it does seem clear from the Epstein/Szasz formulation that any option which confers upon an individual state a unilateral right to withdraw is foreclosed. Such a mechanism would conflict with the precise standard set forth in article X(1) for the circumstances under which to exercise the unilateral right to withdraw. Furthermore, it would conflict with the express rejection of an Italian proposal to amend the original U.S.-Soviet draft of article X, which provided that the treaty "shall be automatically extended for terms equal to its initial duration for those governments which, subject to six months' notice, shall have made known their intention to withdraw." Graham, supra note 242, at 671 (citing Shaker, supra note 58, at 860 (citing U.N. Doc. ENDC/PV.350 (1967), para. 9)); see also Mary Elizabeth Hoinkes, Correspondence, Epstein and Szasz Do the NPT No Favor, 34 Va. J. Int'l L. 247 (1993) (Statement by the Acting General Counsel, U.S. Arms Control and Disarmament Agency; asserting that the third option in article X(2) is unambiguous and that the extension permitted by the Epstein and Szasz approach would require parliamentary recommendation for many NPT parties); see George Bunn, Extending the Non-Proliferation Treaty: Legal Questions Faced by the Parties in 1995, 2 Issue Papers on World Conferences (American Society of International Law) 44-53 (1994). But see William Epstein & Paul C. Szasz, Correspondence, Hoinkes Could Jeopardize the Future of the NPT, 34 Va. J. Int'l L. 471 (1994) (criticizing Hoinkes for finding, where none can be found, a plain meaning in article X(2)).
Yet, a failure by the majority of the parties to record a choice on the fate of the NPT would not terminate the Treaty.246 Indeed, it will be theoretically possible for the Conference to remain open, in other words to convene but not adjourn sine die, so that the period of decision could be extended.247 Accordingly, any substantial questions concerning the stability of the NPT regime that are weighty enough to cause a majority of state parties to defer a final decision on the terms of extension would not immediately have the legal effect of terminating the NPT.

Moreover, to the extent the North Korean case highlights an inadequacy in the NPT safeguards regime, article VIII of the Treaty provides an amendment process for addressing such a problem. Nothing precludes the parties to the NPT from calling for a conference for the amendment of the NPT or even holding such a conference as a dual extension/amendment conference. But the technical difficulty of securing practical amendments without allowing the process to snowball into a virtually new drafting session suggests that amendments should not be sought.

Yet, clearly, legal questions concerning the legitimacy of IAEA special inspections or use of government information to conduct such inspection, or the survival of international rights to inspect the suspect sites in the DPRK even after its withdrawal from the NPT, would be legitimate subjects for a statement by the conference of the Parties to the NPT. Such a statement would yield an authoritative interpretation of the Treaty and the safeguards agreement it requires that would not conflict with the provisions for amendments pursuant to article VIII(2).

However postured procedurally, interpreting article X of the NPT and the related safeguards agreement to permit the survival of a limited right to inspect, for the purpose of ascertaining whether the withdrawing state had breached its obligations under the safeguards agreement or the NPT, would serve the fundamental purposes of the NPT-safeguards regime by reducing the incentive to withdraw as a means for concealing noncompliance. It may well be that the withdrawal is motivated to conceal past violations of safeguards which would be politically embarrassing to the withdrawing state, withdrawal or could be motivated by some other

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246. Graham, supra note 242, at 668.
247. But see Graham Statement, supra note 244, at 3 (stating, but without citing any authority or identifying a precise temporal constraint, that the extension conference would "not be authorized to adjourn itself for a lengthy period of time in lieu of taking a decision on extension, as this would amount to a circumvention of Article X.2").
reason that would not necessarily imply a final decision by a state to develop a nuclear weapons capability.\textsuperscript{248} If, however, withdrawal from the NPT means that a state has embarked on the path of developing nuclear weapons, it might be argued that whether the state complied with its safeguards obligations while the treaty was in force would be essentially moot. Yet, even if a state is withdrawing from the NPT in order to pursue a nuclear weapons program, it would be relevant to the international community’s understanding of the threat to international peace and security posed by that withdrawal to know the degree to which the withdrawing state had succeeded in developing a covert nuclear program. It would be equally important to NPT parties to assess the effectiveness of safeguards to determine the scope of unsafeguarded activities in withdrawing states and the means by which safeguards had been circumvented.\textsuperscript{249}

A clear statement by the NPT parties might also facilitate the survival of a legal framework around which to conduct a debate concerning the legitimacy of a state’s withdrawal on a principled basis. This would avoid the premature escalation of a conflict into a raw contest of political power. Finally, in the event that international sanctions become necessary under the authority of chapter VII of the U.N. Charter, securing international support for a finding that there exist a threat to the peace by reason of a state’s withdrawal from the NPT would be garnered more easily if grounded on the specific facts concerning a possible breach of the NPT (or its related safeguards obligations), rather than a withdrawal for the purpose of developing a nuclear weapons capability. Thus framed, the case for sanctions would be more persuasive to NPT parties concerned about presenting their own right to withdraw in the event their “supreme national interests” so require.

\textsuperscript{248} See, e.g., supra note 90.

\textsuperscript{249} Iraq violations, for example, played a critical role in initiating new proposals for improvements in the safeguards system, i.e., special inspections, improved intelligence cooperation, early reporting on design, reporting on imports and exports of nuclear material, and efforts among suppliers to supplement the NPT system by enhancing international cooperation in export control beyond those mandated by the NPT. See Chauvistré, supra note 30, at 23-24. Perhaps the most constructive result has been the expansion of the Nuclear Supplier Group Guidelines to include dual use export control, see INFCIRC/254 (pt. II); IAEA Doc. INFCIRC/254/Rev. 1/Part 2 (July 1992), supra note 217, and the supplier statement of adoption of fullscope safeguards as a condition of major, new nuclear supply, see Statement on Full-Scope Safeguards Adopted by the Adherents to the Nuclear Suppliers Guidelines, IAEA Doc. INFCIRC/405 (May 1992), supra note 218.
At the NPT Review and Extension Conference, the parties could seize the opportunity presented by the final conference statement to shed some clarifying light on these and other questions. The dilemma, of course, is reconciling the competing agendas of securing the extension of the NPT and ensuring an extended NPT is secure. Flexibility in assessing the possible legal options for the duration of an extended NPT, and for establishing a time frame for making the decision on extension (in other words, the duration of the Extension Conference), would obviate treating the conference as a sword of Damocles hanging over the heads of the NPT parties as they seek to resolve the North Korean imbroglio. But ignoring that need to reexamine the question of the survival of safeguards after withdrawal from the NPT would ensure that North Korea's withdrawal will serve as an invitation for others to follow suit. Prudence might counsel the path of least resistance, thus avoiding a confrontation that could rock the foundations of the NPT. Indeed, pursuing a course that avoids these mines could lead to the Treaty's indefinite extension. But would such an emasculated treaty serve any real purpose?

250. A Task Force of the Council on Foreign Relations has in fact recommended, among other things, that "the IAEA should, within the context of existing safeguards agreements, expand the envelope of its activities at undeclared locations, including greater use of special inspections (so that they become more 'normal' than 'special') . . ." and [c]onsistent with a more expansive view of IAEA activities, the IAEA should propose to undertake 'challenge inspections' that could be initiated, at IAEA discretion, upon a complaint from an aggrieved state . . ." Nuclear Proliferation: Confronting the New Challenges, 25 (Report of an Independent Task Force on Nuclear Proliferation) (1995).