

Decennial Déjà Vu: Reassessing a Nuclear North Korea on the 1995 Supply Agreement's Ten-Year Anniversary

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Ten years ago, North Korea, in exchange for promises of security and economic aid, agreed to remain a party to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and suspend its nuclear weapons program. Today, North Korea has withdrawn from the NPT, has removed International Atomic Energy Agency inspectors, and is flaunting its development of a nuclear arsenal.

Although the political grounds are clear, the United States has failed to provide a coherent legal rationale for its decision not to perform its obligations under the 1995 Supply Agreement, the compromise that defused the 1994 crisis.

Part II of this Article summarizes the history and politics behind the current stalemate. Part III surveys and assesses several legal justifications for the United States' refusal to proceed with the Supply Agreement. Ultimately, I advocate for the Supply Agreement's "discontinued performance." This approach would accommodate the need for flexible policy-making without sacrificing fundamental tenets of international law.

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I. INTRODUCTION

On March 12, 1993, North Korean dictator Kim Jong Il announced that his country intended to withdraw from the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and recommence its nuclear program.¹ This action triggered the greatest crisis on the Korean Peninsula since the Korean War. One year later, when it seemed that the prospect for a peaceful resolution had all but vanished, the United States brokered a deal: in exchange for Western promises of security and economic aid, North Korea would remain a party to the NPT and suspend its nuclear weapons program. It was a dramatic Hollywood ending. But like so many Hollywood blockbusters, its sequel has been a disappointment.

Just ten years removed from those remarkable events, North Korea has again withdrawn from the NPT, removed International Atomic Energy Agency (IAEA) inspectors from the country, and, for the first time, openly claimed a nascent nuclear arsenal.² Indeed, the question in 2006 is not *when* will North Korea attain nuclear weapons, but *how many* weapons do they already have.³

Although the political rationale is clear, the United States has failed to provide a coherent legal rationale for its decision not to perform its

1. LARRY A. NIKSCH, CONG. RESEARCH SERV., NORTH KOREA'S NUCLEAR WEAPONS PROGRAM CRS-12 (2005), <http://www.fas.org/sgp/crs/nuke/IB91141.pdf>.

2. *Id.* at CRS-4.

3. *Id.* at 3, CRS-4.

obligations under the 1995 Supply Agreement, the compromise that defused the 1994 crisis. This Article attempts to fill that gap by analyzing possible legal responses to North Korea's violations of the 1995 Agreement. It is divided into two main Parts, each consisting of several Subparts.

Part II, which surveys the history and politics of the current crisis, has seven Subparts. First, it provides a brief overview of the Korean Peninsula's twentieth-century history. Second, Part II discusses the personality and leadership style of North Korea's dictator, Kim Jong Il. Third, it explores the Bush Administration's perceptions of Kim Jong Il. Fourth, it describes the development of nuclear power in North Korea, with particular attention paid to its pursuit of nuclear weapons. Fifth, Part II explores the causes of the 1994 nuclear crisis and describes the history and terms of the agreements that brought about its temporary resolution. Sixth, it describes the gradual erosion of bilateral accord and the weakening of those agreements upon which that accord was based. Finally, Part II highlights the primary policy approaches now being offered as replacements for the one espoused a decade ago.

This Article does not, however, sponsor one particular policy approach over another. Rather, my aim is to highlight concomitant issues of international law in hopes of improving, not replacing, the policy debate. Accordingly, this analysis is guided by a simple supposition: to the extent that some policy approaches better cohere to the pertinent norms of international law, it is likely that these approaches will find greater legitimacy within the community of nations, international institutions, and the North Korean government itself.

Part III attempts to illuminate the contours of the policy debate by surveying and assessing several legal justifications for the United States' refusal to proceed with the Supply Agreement. In broad terms, Part III of this Article addresses the following question: What is the status of the Korean Peninsula Energy Development Organization's and, ultimately, the U.S. legal obligations to North Korea under the 1995 Supply Agreement? This question impliedly recognizes that a nation's international legal obligations are not always as easily restructured as its foreign policy.

Part III consists of four Subparts. First, it briefly frames the legal issue and its implications. Second, Part III contrasts treaty termination with treaty suspension. Third, it discusses the possibility of treaty suspension in more detail and argues that the most important potential basis for suspending the Supply Agreement is material breach. This Subpart addresses other possible grounds for suspension as well:

internal provisions of the Agreement, the impossibility of performance, changed circumstances, and the doctrine of state responsibility. Fourth, Part III assesses options available outside of the rigid formulations of the Vienna Convention. Ultimately, the best legal justification for the U.S. refusal to proceed with the Supply Agreement is “discontinued performance.” This approach allows for a necessary degree of flexible policy-making without dismissing fundamental tenets of international law.

Importantly, the relevance of this legal analysis extends beyond problems peculiar to North Korea. Many of the political, historical, and legal questions of this problem are rooted in larger issues of treaty drafting and negotiation. A thorough evaluation of the possible escape hatches embedded in the 1995 Supply Agreement, particularly in light of the unexpected political developments that ensued, has the potential to provide much-needed insights to those who will draft similar agreements in the future.

II. THE HISTORICAL AND POLITICAL CONTEXT OF THE NORTH KOREAN NUCLEAR CRISIS

A. “*The Hermit Kingdom*”

Korea’s historical efforts to remain isolated from other peoples and cultures account for the Peninsula’s best known moniker: “The Hermit Kingdom.”⁴ The history of Korea’s foreign relations, however, is too intricate for such a simplistic characterization. Korea has traditionally tried to avoid foreign contact, but its ill-fated location—nestled tightly between China, Russia, and Japan—historically has made it susceptible to the ambitions of larger states.⁵ Not surprisingly, Korea’s cultural and political history has been tumultuous. This was never more true, perhaps, than during the twentieth century.

On February 8, 1904, the Japanese, fearful that Russia was aiming to become Asia’s preeminent power, launched a surprise attack on Russian naval vessels stationed at Port Arthur, China.⁶ Eighteen months later, when Japan emerged victorious, control of Korea was one of the

4. Joel Levin, *UNESCO Program Offers Cross-Cultural Experience*, KOREA HERALD, Dec. 10, 2002.

5. The Mongols, Chinese, and Japanese are among those to have invaded Korea over the centuries. See BUREAU OF E. ASIAN & PAC. AFFAIRS, U.S. DEP’T OF STATE, BACKGROUND NOTE: NORTH KOREA (2004), <http://www.state.gov/r/pa/ei/bgn/2792.htm> [hereinafter BACKGROUND NOTE: NORTH KOREA].

6. Russo-Japanese War Research Soc’y, *Torpedo Attack, Port Arthur* (2002), <http://www.russojapanesewar.com/torp-attk-pa.html>.

main issues addressed by the Treaty of Portsmouth:⁷ “The Imperial Russian Government, acknowledging that Japan possesses in Korea paramount political, military and economical interests, engages neither to obstruct nor interfere with measures for guidance, protection and control which the Imperial Government of Japan may find necessary to take in Korea.”⁸

Japan began a brutal occupation of Korea that lasted through the end of World War II. The Japanese engaged in a massive land reform project that effectively expropriated land from the Korean people; they also banished teaching of the Korean language and stifled dissent through the formation of “thought” courts.⁹

In the wake of World War II, Korea—though liberated from Japanese occupation—was not free from foreign influence. Instead, the Korean peninsula became an important ideological battleground for the competing political philosophies of the Allied Forces. The Soviet Union set up a regime, led by Kim Il Sung, in the city of Pyongyang.¹⁰ The United States, in turn, supported a democratic regime in the South. Like Germany, Korea was divided in two, and the 38th Parallel, a convenient, if arbitrary divide, was established as the official border by the United Nations in 1948.¹¹

The border’s security was short-lived. On June 25, 1950, North Korea invaded the South.¹² Kim Il Sung, on the day of the invasion, described his objective in benign, even familial, terms:

Dear brothers and sisters! Great danger threatens our motherland and its people! What is needed to liquidate this menace? Under the banner of the Korean People’s Democratic Republic, we must complete the unification of the motherland and create a single, independent, democratic state! The war which we are forced to wage is a just war for the unification and independence of the motherland and for freedom and democracy.¹³

7. The Treaty of Portsmouth was signed in Portsmouth, New Hampshire, on September 5, 1905. PETER E. RANDALL, *THERE ARE NO VICTORS HERE!: A LOCAL PERSPECTIVE ON THE TREATY OF PORTSMOUTH 95-100* (1985) (quoting SYDNEY TYLER, *THE JAPAN-RUSSIA WAR 564-68* (1905)).

8. *Id.* at 95 (quoting TYLER, *supra* note 7, at 564).

9. Korea.net, *Colonial Period*, http://www.korea.net/korea/kor_loca.asp?code=A0308 (last visited Jan. 20, 2006).

10. BURTON I. KAUFMAN, *THE KOREAN WAR 6-16* (1986).

11. *See* BACKGROUND NOTE: NORTH KOREA, *supra* note 5.

12. *Id.*

13. True Parents Org., *Korean War Starts*, <http://www.tparents.org/Library/Religion/Cta/Korea-J/eyewit17.htm> (last visited Jan. 20, 2006)

Caught off-guard, the invasion forced South Korean troops to flee southward, and Kim Il Sung's People's Army easily captured Seoul. Within one month, North Korea controlled most of the Peninsula.¹⁴

A few days after the invasion began, General MacArthur gave President Truman his assessment: "The only assurance of holding the present line, and the ability to regain later lost ground, is through the introduction of U.S. ground forces into the Korean battle area."¹⁵ President Truman ordered ground forces into South Korea the same day.¹⁶ By the end of September, U.N. troops had regained control of Seoul and were preparing to cross the 38th Parallel.¹⁷ As a result of this early success, General MacArthur predicted that American troops would be home by Christmas.¹⁸

An easy victory, however, was not to be. By November, Chinese troops had crossed the border into North Korea and were fighting alongside their communist comrades.¹⁹ They soon pushed U.S. forces back across the 38th Parallel and out of Seoul.²⁰ Although the South regained control of the capital just a few months later, the war lasted another three years.²¹ By the time an armistice was struck on July 27, 1953, two million Koreans, four hundred thousand Chinese, and forty thousand U.S. soldiers had been killed in the conflict.²² The border has remained in a state of watchful tension ever since.

Following the close of the Korean War, Kim Il Sung devoted increased attention to the development of his personality cult.²³ In the mold of Stalin, Kim Il Sung spurred his self-sponsored apotheosis with political purges, command economics, and the replacement of religious devotion with ideological fervor.²⁴ Much like Stalin, he was not without success.²⁵

14. KAUFMAN, *supra* note 10, at 30.

15. True Parents Org., *supra* note 13.

16. *Outbreak of the Korean War: Week of Decision Documents*, Truman Presidential Museum & Library, http://www.trumanlibrary.org/whistlestop/study_collections/Korea/large/koreaweek1docs.htm (last visited Jan. 5, 2006).

17. KAUFMAN, *supra* note 10, at 78.

18. *Id.*

19. *Id.* at 107.

20. *Id.* at 108 (mapping the extent of the Chinese-led offensive).

21. *Id.*

22. *North Korea Revealed* (History Channel on Demand television broadcast, Mar. 23, 2004).

23. See DON OBERDORFER, *THE TWO KOREAS: A CONTEMPORARY HISTORY* 10-23 (1997).

24. *Id.* at 18-22.

25. *Id.* at 20-21 (observing that during the 1960s, every home displayed a photograph of Kim Il Sung and every North Korean wore a badge bearing Kim's image).

It did not take long, however, for instability to set in. Like others, North Korea's instability has been marked by a consistent disregard for international norms. This disregard has manifested itself in at least three ways: state-sponsored terrorism, disregard for basic human rights, and a failure to respond to the fundamental needs of its people.

First, North Korea has sponsored terrorism, particularly against South Korea. Three of these terrorist attacks merit some description. In 1974, an attempt was made on the life of then-President of South Korea, Park Chung-Hee.²⁶ Although North Korea failed in the assassination attempt, Park Chung-Hee's wife was killed in the attack.²⁷ North Korea has long denied culpability, but when the daughter of Park Chung-Hee, an opposition member in South Korea's National Assembly, visited Pyongyang in 2002, it was reported that Kim Jong Il apologized for the death of her mother.²⁸

In October 1983, North Koreans attempted to assassinate South Korean President Chun Doo Hwan during his trip to Rangoon, Burma.²⁹ Because the President's car was delayed in traffic, he was not killed when the bomb detonated at his planned destination.³⁰ The South Korean deputy prime minister, foreign minister, and commerce minister were not so fortunate; they were among the eighteen South Korean officials killed in the blast.³¹

Finally, on November 29, 1987, two North Korean intelligence agents planted a liquid explosive onboard Korean Airlines Flight 858 during a stopover in Abu Dhabi. The plane exploded over the Indian Ocean, killing 115 people.³² Although both agents swallowed cyanide when apprehended, one of them survived to tell how Kim Jong Il had ordered the attack³³ in hopes of destabilizing South Korea in advance of presidential elections and the 1988 Summer Olympics in Seoul.³⁴ Since

26. *Kim Jong Il Apologises for 1974 Attempt on S. Korean Leader's Life*, ABC NEWS ONLINE, Sept. 13, 2002, <http://www.abc.net.au/news/newsitems/200209/s676037.htm>.

27. *See id.*

28. *See id.*

29. Russell Skelton, *Heir to the Hermit Kingdom*, THE AGE (Melbourne), Oct. 11, 1997, at 17.

30. *See id.*

31. *Id.*

32. *Id.*

33. Though Kim Jong Il had not yet taken power, he became involved in various government pursuits well before 1994. *See* Peter Maass, *The Last Emperor*, N.Y. TIMES, Oct. 19, 2003 (Magazine), at 38.

34. Skelton, *supra* note 29.

that year, the United States State Department has included North Korea on its list of state sponsors of terrorism.³⁵

Second, North Korea continues to disregard human rights norms. Although North Korea is closed to foreigners, enough intelligence has been collected to show that an extensive network of prison camps has existed in North Korea for some time, and enough prison camp survivors have escaped North Korea to catalogue the human rights abuses employed at the camps.³⁶ In short, torture, rape, hard labor, and starvation are commonplace.³⁷

Third, North Korea has failed to respond properly to the basic needs of its people. In the 1990s, Kim Jong Il stirred up a caterwaul of international protest by allowing millions of his citizens to starve to death.³⁸ In 1995, heavy flooding caused crops to fail.³⁹ The resulting food, energy, and healthcare shortages were so severe that even the relative affluence of Pyongyang was stymied.⁴⁰ Reports of cannibalism were not uncommon.⁴¹ Although many North Koreans fled to China, by 1999, approximately three million people—about fifteen percent of the population—died because of the shortages.⁴²

These events, along with its consistently bad manners at the international table, highlighted by occasional threats of war and continuing efforts to develop nuclear weapons, explain why even China—North Korea's strongest ally—has become wary of North Korea.⁴³

Despite the government's failings, North Korea's leaders seem to maintain the earnest support of the North Korean people. After Kim Il Sung's death in 1994, few doubted the sincerity of North Korea's mourning.⁴⁴ There was doubt, however, about the country's future. Kim Jong Il, Kim Il Sung's son and heir to the dictatorship, was not well-known by the people.⁴⁵ Moreover, his reputation abroad was that of an

35. COUNTERTERRORISM OFFICE, U.S. DEP'T OF STATE, STATE SPONSORS OF TERRORISM, <http://www.state.gov/s/ct/c14151.htm> (last visited Jan. 20, 2006).

36. *North Korea Revealed*, *supra* note 22.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *See* Niksch, *supra* note 1, at CRS-3 to -4.

44. *See* OBERDORFER, *supra* note 23, at 342.

45. *Id.* at 347.

eccentric playboy, more interested in cinema and women than in political power.⁴⁶ His only credential, it seemed, was lineage.

B. “Greetings, Earthlings”

The June 17, 2000, issue of *The Economist* showed a photograph of Kim Jong Il, North Korea’s inscrutable monarch, hair slicked back, wearing his signature one-piece coveralls and oversized sunglasses, and bending his arm in a half-salute. Editors completed the caricature by ascribing to Kim Jong Il the accompanying caption: “Greetings, Earthlings.”⁴⁷

This portrayal captures some notable popular perceptions about Kim Jong Il. The first is that he is strange, alien-like, and perhaps even mentally unstable. It also represents the perception that Kim Jong Il is nearly impossible to read. While assessments of Kim Jong Il’s emotional state are difficult to confirm, it is hard to dispute that Kim Jong Il is a mysterious figure. He is a recluse, who rarely leaves his country⁴⁸ and has never granted an interview to a Western reporter. His public appearances are rare, and when he does appear, he almost never speaks.⁴⁹ This style has caused some observers to speculate that Kim Jong Il is paranoid, sheltered, and deluded.⁵⁰

On the other hand, some assert that Kim Jong Il is neither batty nor dim-witted. After the 1994 death of his father, many experts predicted that Kim Jong Il would prove incapable of maintaining effective control

46. See *id.* at 348.

47. THE ECONOMIST, June 17, 2000, cover, available at http://www.koreapowered.com/gallery/data/500/123Kim_Jong_Il_economist-med.jpg.

48. Just as strange as Kim Jong Il’s proclivity not to travel is his chosen means of travel on the rare occasions when he does. In the summer of 2001, Kim Jong Il made a multiweek trek from Pyongyang to Moscow via the Trans-Siberian Railroad. See Maass, *supra* note 33, at 38. Perhaps the events of April 22, 2004—when two trains carrying oil and liquefied petroleum gas exploded at the Ryongchon, North Korea, train station just hours after Kim Jong Il passed through that station on his return from Beijing—will persuade him of the virtues of air travel. See James Brooke, *Reports of Massive Blasts Emerge from Secretive North Korea*, N.Y. TIMES, Apr. 22, 2004, available at <http://www.nytimes.com/2004/04/22/international/asia/22CND-KORE.html?hp>.

49. See Maass, *supra* note 33, at 38.

50. See, e.g., Frank Langfitt, *S. Korea Looks Warily at North’s Overtures: Divided Families Yearn for Unification; Others Fear Economic Drain*, BALTIMORE SUN, June 11, 2000, at A24 (“North Korea’s international image has been one of a paranoid, rogue state teetering on the brink of self-destruction, a sort of doomsday cult as nation-state.”); Anthony Daniels, *Leaders Dear and Great*, SUNDAY TELEGRAPH (London), Feb. 22, 2004, at 12 (“The regime is so secretive, and its leaders so reclusive, that it is difficult to distinguish between genuine information about North Korea and myth and speculation.”); Jimmy Carter, *U.S.-North Korea War Seems “Strong Possibility”*, USA TODAY, Sept. 2, 2003, at A11 (“North Korea is an isolated country, poverty stricken, paranoid, apparently self-sacrificial and amazingly persistent in international confrontations.”).

of North Korea. Some even predicted imminent political collapse.⁵¹ He has surprised observers, however, with his ability to skillfully tame North Korea's political and military factions. A recent *New York Times Magazine* article⁵² contends that Kim Jong Il is more politically and culturally adroit than Westerners generally believe.⁵³ For example, during Secretary of State Madeleine Albright's visit to Pyongyang in 2000, Kim Jong Il caused a stir among the American delegation when he asked for Ms. Albright's e-mail address.⁵⁴ Although North Koreans are barred from doing so, he regularly watches television news from Japan, South Korea, and the United States.⁵⁵ Most importantly, at times he has shown glimmers of profound sanity. For example, when asked about the possibility of war at a dinner with South Koreans in the summer of 2000, Kim Jong Il replied:

The missiles cannot reach the United States, and if I launch them, the U.S. would fire back thousands of missiles, and we would not survive. I know that very well. But I have to let them know I have missiles. I am making them because only then will the United States talk to me.⁵⁶

C. "I Loathe Kim Jong Il"

Whatever popular perceptions of him are, the Bush Administration's perceptions of Kim Jong Il are the primary force behind the U.S. policy toward North Korea. In 2000, just before her appointment as President Bush's National Security Advisor, Condoleezza Rice denounced Kim Jong Il as presumptively evil: "The regime of Kim Jong Il is so opaque that it is difficult to know its motivations, other than that they are malign."⁵⁷ President Bush's rhetoric has been even harsher. On August 20, 2002, he succinctly stated his thoughts on the North Korean dictator: "I loathe Kim Jong Il I've got a visceral reaction to this guy"⁵⁸ And, of course, in his 2002 State of the Union Address, President Bush

51. OBERDORFER, *supra* note 23, at 343 (noting the prediction of Chung Chong Uk, the South Korean president's national security assistant, to his U.S. counterpart that North Korea would collapse within six to twenty-four months).

52. See Maass, *supra* note 33, at 38.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. Condoleezza Rice, *Promoting the National Interest*, FOREIGN AFF., Jan.-Feb. 2000, at 45.

58. BOB WOODWARD, BUSH AT WAR 340 (2002) (quoting United States President George W. Bush).

named North Korea, along with Iraq and Iran, as a member of the “Axis of Evil.”⁵⁹

In July 2003, the State Department’s then highest ranking nonproliferation official, John Bolton, angered North Korean officials when he said that life in North Korea is “a hellish nightmare,” and described Kim Jong Il as a “tyrannical rogue.”⁶⁰ Within a month, Secretary of State Colin Powell wrote that Mr. Bolton’s remarks “did not really break new ground with regard to our disdain for the North Korean leadership and, as such, [were] official.”⁶¹ North Korea’s foreign ministry, which clearly shares Mr. Bolton’s disregard for diplomatic finesse, announced that it would no longer recognize Bolton as an official representative of the United States, describing him as “human scum . . . a beastly man bereft of reason,” and a “bloodsucker.”⁶²

Stark rhetoric notwithstanding, the Bush Administration’s policy toward North Korea is anything but clear. This is particularly apparent when contrasting U.S. and South Korean policy on North Korea. South Korean President Roh Moo Hyun and his predecessor, Kim Dae Jung, have found wide domestic support for their “Sunshine Policy” of North Korean engagement.⁶³ This policy calls for continuing aid and foreign exchanges with North Korea despite North Korean efforts to obtain nuclear weapons.⁶⁴ In June 2000, Kim Dae Jung visited Kim Jong Il in Pyongyang, marking the first-ever summit between leaders of the broken Peninsula.⁶⁵ The announcement revitalized Kim Dae Jung’s party just in time for that year’s parliamentary elections. In the fall of 2002, in an election that was largely viewed as a referendum on North Korean engagement, Roh Moo Hyun⁶⁶ rode his endorsement of the “Sunshine

59. See George W. Bush, U.S. President, *President Delivers State of the Union Address* (Jan. 29, 2002), <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>.

60. Glenn Kessler, *N. Korea Seeks To Exclude U.S. Official from Talks*, WASH. POST, Aug. 4, 2003, at A10.

61. Associated Press, *Powell Defends Aide’s N. Korea Speech*, WASH. POST, Aug. 27, 2003, at A26.

62. Kessler, *supra* note 60, at A10.

63. See MARK E. MANYIN, CONG. RESEARCH SERV., SOUTH KOREAN POLITICS AND RISING “ANTI-AMERICANISM”: IMPLICATIONS FOR U.S. POLICY TOWARD NORTH KOREA, CRS-1 to -2, <http://www.nautilus.org/DPRKBriefingBook/southkorea/CRS-RL31906ROKAntiAmericanism.pdf>.

64. Fed’n of Am. Scientists, *The Government of the People’s Sunshine Policy Toward North Korea and Plans for Implementation*, Apr. 12, 1999, <http://www.fas.org/news/skorea/1999/990412-sunshine.htm>.

65. Sonni Efron & Mark Magnier, *Korean Leaders Pledge Steps to Reunification*, L.A. TIMES, June 15, 2000, at A1.

66. Although Roh Moo Hyun was victorious in the election, subsequent scandals in his cabinet led to his parliamentary impeachment. South Korea’s constitutional court overturned the

Policy” to a narrow victory over his hard-line opponent Lee Hoi Chang, the conservative candidate favored by President Bush.⁶⁷

Although U.S. policy toward North Korea is less clear than South Korea’s, it is fair to say that President Bush views South Korea’s “Sunshine Policy” as naïve.⁶⁸ Engagement has not been entirely dismissed, but Bush argues that the United States, South Korea, and Japan have given North Korea too much for too little in return.⁶⁹ President Bush maintains that any cooperation with Kim Jong Il should be conditioned on North Korea’s complete abandonment of its nuclear weapons program.⁷⁰ In essence, the Bush Administration believes that Kim Jong Il outmaneuvered President Clinton in the mid-1990s. Indeed, the argument goes, Kim Jong Il has successfully used the nuclear threat to bolster national security, gain economic concessions, and stoke national pride.⁷¹

D. “A Sea of Fire”

The Soviet Union was North Korea’s original nuclear benefactor, facilitating its arrival on the nuclear stage in the mid-1950s, shortly after the Korean War.⁷² Since that time, its nuclear development has consisted of a series of fits and starts. Less than a decade after Kim Il Sung was lifted to power in Pyongyang by the Soviet regime, North Korea formed two agreements on “cooperation in nuclear research” with the Soviet Union.⁷³ By the end of the 1950s, North Korea had established a nuclear

impeachment on May 14, 2004, returning Roh to power. *Profile: Roh Moo-Hyun*, B.B.C. NEWS, May 14, 2004, <http://news.bbc.co.uk/1/hi/world/asia-pacific/2535143.stm>.

67. Interestingly, the other issue dominating the 2002 South Korean election was coterminous with the first: South Korea-United States relations. *See id.*; MANYIN, *supra* note 63.

68. Although President Bush has expressed some support for South Korea’s “Sunshine Policy,” he simultaneously has implied that the policy is not working. Robert Marquand, *Bush Refines View of N. Korea*, CHRISTIAN SCI. MONITOR, Feb. 21, 2002, available at <http://www.csmonitor.com/2002/0221/p06s01-woap.html>.

69. *See* Kim Tae Woo, *Twilight Time for the Sunshine Policy*, TIME, Nov. 4, 2002, available at <http://www.time.com/time/asia/covers/1101021104/view.html> (noting the Administration’s irritation with South Korea “for using too much carrot and not enough stick in its dealings with Pyongyang”).

70. *See* Tony Karon, *Why the U.S. Changed Its North Korea Stance*, TIME, Jan. 7, 2003, available at <http://www.time.com/time/world/article/0,8599,405876,00.html>. Following a visit to South Korea, President Bush announced that the United States would engage in talks with North Korea, but “would offer no quid-pro-quo for Pyongyang complying with its nuclear obligations.” *Id.*

71. *See id.*

72. *See North Korea Nuclear Chronology: 1941-1989*, NUCLEAR THREAT INITIATIVE (2003), http://www.nti.org/e_research/profiles/NK/Nuclear/46_89.html.

73. OBERDORFER, *supra* note 23, at 252.

research institute in Yongbyon,⁷⁴ and in 1965, North Korea imported the IRT-2000—its first research nuclear reactor—from the Soviet Union.⁷⁵ By the early 1980s, the United States was aware that North Korea was in the process of building its own nuclear reactor at Yongbyon.⁷⁶

Previously, however, North Korea had showed signs of restraint by joining the IAEA in 1974.⁷⁷ This act was more than symbolic because it made North Korea's nuclear program subject to regular international inspection.⁷⁸ Still, by the late 1980s, when North Korea had created a plutonium reprocessing facility in Yongbyon, it was clear that North Korea's nuclear status had become a question mark.⁷⁹

In December 1985, under Soviet pressure, North Korea again showed signs of accommodation by signing the NPT.⁸⁰ In 1993, however, the international community discovered that North Korea had been violating its international obligations by reprocessing spent fuel from its reactor in Yongbyon, in violation of IAEA obligations.⁸¹ Because of North Korea's obfuscation, the IAEA could not determine exactly how much plutonium had been produced through this process.⁸² This was the first real sign of the diplomatic turmoil to come.

On September 27, 1991, the United States, optimistic in the wake of its Cold War victory, announced its intention to remove nuclear weapons fully from the Korean Peninsula.⁸³ In December, North Korea reciprocated by promising "not to 'test, manufacture, produce, receive, possess, store, deploy or use nuclear weapons.'"⁸⁴ These acts of goodwill brought promising results in subsequent months. In January 1992, North Korea signed a safeguards agreement with the IAEA.⁸⁵ The international community hoped that this would allow the IAEA to determine what had happened to the fuel reprocessed in 1989.⁸⁶ In January 1992, North

74. See *North Korea Nuclear Chronology: 1941-1989*, *supra* note 72.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. OBERDORFER, *supra* note 23, at 253-55.

81. Hans Blix, IAEA Director General, *Report of the International Atomic Energy Agency: Compliance with Arms Limitation and Disarmament Agreements*, U.N. Doc. A/48/133 (Apr. 12, 1993).

82. *Id.*

83. OBERDORFER, *supra* note 23, at 259.

84. *Id.* at 264.

85. Steven E. Weisman, *North Korea Signs Accord on Atom-Plant Inspections*, N.Y. TIMES, Jan. 31, 1992, at A2.

86. *Id.*

Korea and South Korea agreed to completely denuclearize the Korean Peninsula.⁸⁷

Unfortunately, these high expectations were never met. Over the course of the next year, the North Korean government denied IAEA inspectors access to the most sensitive facilities and rejected ad hoc inspection requests as illegal violations of its national sovereignty.⁸⁸ In turn, the IAEA reported to the international community that there were inconsistencies between the results of its inspections and what North Korea had initially reported and that it was impossible to determine what had actually happened to the reprocessed fuel because North Korea's government was unwilling to allow reasonable access for inspections.⁸⁹

North Korea's response to the IAEA's request for special inspections triggered a full-fledged crisis: On March 12, 1993, North Korea announced its intention to withdraw from the NPT because of the IAEA's "undisguised strong arm act designed to disarm [North Korea] and strangle [its] socialist system."⁹⁰ On April 6, 1993, the U.N. Security Council convened an emergency assembly to discuss North Korea.⁹¹ The result, however, was unremarkable. The Council ultimately adopted only a platitudinous statement on the importance of nonproliferation and the continued monitoring of North Korean nuclear conduct, rather than outlining specific consequences for North Korea's noncompliance.⁹²

Meanwhile, North Korea pressured the United States to engage in bilateral talks. In April 1993, the United States agreed, and talks began a few months later.⁹³ On June 11, 1993, one day before North Korea's withdrawal from the NPT was to take effect,⁹⁴ North Korea agreed not to withdraw from the NPT in exchange for assurances of security from the United States.⁹⁵

87. ROK-DPRK Joint Declaration of the Denuclearization of the Korean Peninsula, Jan. 20, 1992, available at <http://www.nti.org/db/china/engdocs/snkdenuc.htm>.

88. See Blix, *supra* note 81, at 5-6.

89. *Id.*; OBERDORFER, *supra* note 23, at 276.

90. OBERDORFER, *supra* note 23, at 279-80.

91. See Hans Blix, IAEA Director General, *Statement of the IAEA Director General Regarding DPRK at Informal Briefing of U.N. Security Council* (Apr. 6, 1993), available at <http://www.fas.org/news/un/dprk/dgsp1993n10.html>.

92. See U.S. GEN. ACCOUNTING OFFICE, *NUCLEAR NONPROLIFERATION: IMPLICATIONS OF THE U.S./NORTH KOREAN AGREEMENT ON NUCLEAR ISSUES*, LETTER REPORT, GAO/RCED/NSIAD-97-8 (Oct. 1, 1996), available at <http://www.fas.org/spp/starwars/gao/nsi97008.htm> (describing the United Nation's April 8, 1993, statement to the press, in which it welcomed all efforts to resolve the North Korea-IAEA impasse, and encouraged the IAEA to work toward settlement).

93. OBERDORFER, *supra* note 23, at 283-85.

94. *Id.* at 286-87.

95. *Id.* at 285-86.

The second round of talks, coming just one month later, was shaken by controversy before it even began. Just before talks resumed, during a visit to the demilitarized zone at the 38th Parallel, President Clinton announced, “[I]t is pointless for [North Korea] to try to develop nuclear weapons because if they ever use them it would be the end of their country.”⁹⁶ Despite this rather undiplomatic prelude, North Korea came forth with a proposal that would make up the core of the eventual settlement: in exchange for the United States providing light-water nuclear reactors⁹⁷ and guaranteeing security, North Korea would end its nuclear program.⁹⁸ The U.S. delegation thought that this proposal was a promising step toward resolving the crisis, and in the wake of this success, the IAEA resumed its inspections.⁹⁹

High hopes again fell flat, however, when North Korea refused to permit the IAEA to conduct full inspections of sensitive sites.¹⁰⁰ The IAEA subsequently reported to the United Nations that it was impossible to determine whether North Korea was complying with the NPT due to the government restrictions placed on its inspectors.¹⁰¹ As a result, the third round of talks, scheduled for September 1993, was postponed indefinitely.¹⁰²

At this point, the United States adopted a more rigid stance toward North Korea. United States Defense Secretary Les Aspin announced on *Meet the Press* in December of 1993 that there was a possibility that North Korea *already* had at least one nuclear device.¹⁰³ In January of 1994, the *New York Times* publicized the U.S. government’s plans for a military buildup on the Peninsula, including the installation of Patriot missiles.¹⁰⁴ As the situation continued to deteriorate, in March of 1994, the IAEA once again publicly held North Korea responsible for the Agency’s inability to assess compliance.¹⁰⁵

By the spring of 1994, the United States had determined that the best course of action with regard to North Korea was the threat of

96. *Id.* at 288.

97. Mark P. Barry, *North Korea and the United States: Promise or Peril?*, in *KOREA: A WORLD IN CHANGE* 142 (Kenneth W. Thompson ed., 1996).

98. MITCHELL REISS, *BRIDLED AMBITIONS: WHY COUNTRIES CONSTRAIN THEIR NUCLEAR CAPABILITIES* 254-55 (1995).

99. *Id.*

100. See OBERDORFER, *supra* note 23, at 292.

101. See *id.* at 294; Blix, *supra* note 81.

102. OBERDORFER, *supra* note 23, at 292-93.

103. Eric Schmitt, *A Nuclear Weapon for North Korea?*, *N.Y. TIMES*, Dec. 13, 1993, at A3.

104. See OBERDORFER, *supra* note 23, at 300.

105. REISS, *supra* note 98, at 266.

sanctions, or alternatively, the threat of a preemptive military strike.¹⁰⁶ According to North Korean leaders, however, economic sanctions alone would be considered a declaration of war.¹⁰⁷ On March 19, a North Korean diplomat threatened to turn Seoul into a “sea of fire” should war break out.¹⁰⁸ In April 1994, the United States shipped its first round of Patriot missiles to South Korea.¹⁰⁹ In late May 1994, the Pentagon presented President Clinton with a plan for war.¹¹⁰

North Korea, however, did not budge. Indeed, North Korea alarmed the international community by removing spent fuel from its reactor, an act that would prevent the IAEA from determining how much, if any, processed fuel had been diverted.¹¹¹ Although the IAEA was not provided with the information necessary to determine how much spent fuel was reprocessed, some experts estimated that it was sufficient for the manufacture of up to five more nuclear bombs.¹¹² In addition, on June 5, North Korea reiterated its earlier threat that “sanctions mean war, and there is no mercy in war.”¹¹³ Soon, even China’s support of North Korea began to waver, and economic sanctions or military action from the United Nations seemed unavoidable.¹¹⁴

E. “An International Consortium”

In the summer of 1994, former United States President Jimmy Carter had not yet won the Nobel Peace Prize,¹¹⁵ but he was certainly bolstering his credentials. As the showdown with North Korea continued to escalate, Carter secured the hesitant permission of President Clinton to visit Pyongyang in June 1994 as a private citizen of the United States.¹¹⁶ The risk paid off. Carter and Kim Il Sung, both of whom had come out of retirement to help deal with the crisis, reached an agreement: North

106. See Anthony Lake & Robert Gallucci, *Negotiating with Nuclear North Korea*, WASH. POST, Nov. 6, 2002, at A21.

107. See OBERDORFER, *supra* note 23, at 307.

108. *Id.* at 304.

109. *Id.* at 312-13. Along with the missiles came tanks, radar systems, aircraft parts, and additional U.S. troops. *Id.*

110. *Id.* at 317.

111. *Id.* at 309-11.

112. *Id.* at 308.

113. *Id.* at 311.

114. See *id.* at 320-21.

115. This distinction came in 2002. Nobelpeace.org, *The Nobel Peace Prize—Laureates*, <http://nobelprize.org/peace/laureates>.

116. Carter, *supra* note 50.

Korea would temporarily freeze its reactors and return to negotiations in Geneva.¹¹⁷

The United States and North Korea resumed negotiations in August 1994, and on August 12, the parties issued an Agreed Statement.¹¹⁸ The Statement had four main prongs: (1) North Korea would agree to replace its graphite-based nuclear reactors with light-water reactors (LWRs); (2) North Korea would remain a party to the NPT; (3) the parties would work toward eventual diplomatic representation in their respective capitals; and (4) the United States would give some form of security assurance to North Korea.¹¹⁹ The governments of North Korea and the United States reconvened in Geneva from September 23 to October 17 to pound out the details of this agreement.¹²⁰

On October 21, 1994, the United States and North Korea signed the Agreed Framework between the United States of America and the Democratic People's Republic of Korea (Agreed Framework).¹²¹ The Agreed Framework provided that North Korea would remain a party to the NPT and fulfill its attendant obligations, immediately freeze its graphite-moderated reactors and plutonium reprocessing facilities, prevent future reprocessing of spent fuel, and come into full compliance with its NPT safeguards agreement.¹²² In return, the United States agreed to form an international consortium to provide North Korea with two LWR nuclear power plants and heavy fuel oil until the completion of the first LWR.¹²³

On March 9, 1995, the governments of Japan, the Republic of Korea, and the United States formed the Korean Peninsula Energy Development Organization (KEDO)¹²⁴ "to coordinate cooperation among interested parties and to facilitate the financing and execution of projects

117. OBERDORFER, *supra* note 23, at 326-29. Kim Il Sung died of a heart attack just weeks after meeting with President Carter. Interview by Frontline with Jimmy Carter, Former U.S. President (Mar. 21, 2003), *available at* <http://www.pbs.org/wgbh/pages/frontline/shows/kim/interviews/carter.html> [hereinafter Jimmy Carter Interview].

118. RICHARD P. CRONIN & VIOLET JIE MOORE, CONG. RESEARCH SERV., NORTH KOREA: U.S. POLICY AND NEGOTIATIONS TO HALT ITS NUCLEAR WEAPONS PROGRAM; AN ANNOTATED CHRONOLOGY AND ANALYSIS I (1994), <http://fas.org/spp/starwars/crs/94-905f.htm>.

119. *Id.* at 12-13.

120. *Id.* at 1.

121. Agreed Framework Between the United States of America and the Democratic People's Republic of Korea, U.S.-N. Korea, Oct. 21, 1994, 34 I.L.M. 603 [hereinafter Agreed Framework].

122. *Id.* arts. I(3), IV(1)-(3).

123. *Id.* art. I(1)-(2).

124. Agreement on the Establishment of the Korean Peninsula Energy Development Organization, U.S.-Japan-N. Korea, Mar. 9, 1995, 34 I.L.M. 608.

needed to implement the Agreed Framework.”¹²⁵ Signed approximately one year after the establishment of KEDO, the Protocol between KEDO and North Korea on the Juridical Status, Privileges and Immunities, and Consular Protection of KEDO in North Korea (Protocol) recognized KEDO’s independent juridical status in North Korea and extended privileges and immunities to KEDO personnel and contractors.¹²⁶

On December 15, 1995, North Korea and KEDO signed the Agreement on Supply of a Light-Water Reactor Project (Supply Agreement or Agreement).¹²⁷ The Agreement stipulated that KEDO would provide two 1000 MW(e) LWR units.¹²⁸ It called for the development of a delivery schedule and named 2003 as the target completion date.¹²⁹ The Agreement’s preamble stated that North Korea would perform its obligations under the relevant provisions of the Agreed Framework.¹³⁰ Further, the Agreement stipulated that North Korea would remain a party to the NPT, continue to freeze its graphite-moderated reactors, refrain from constructing new reactors or related facilities, permit the IAEA to resume ad hoc and routine inspections of facilities not subject to the freeze, and—upon significant completion of the first LWR, but before delivery of key nuclear components—come into full compliance with IAEA safeguards.¹³¹ KEDO’s supply of the LWRs and North Korea’s compliance with these conditions were made “mutually conditional.”¹³²

F. Reprocessed Fuel, Reprocessed Fear

The Agreed Framework and Supply Agreement provided renewed hope that North Korea had finally decided to set aside its nuclear ambitions. International monitors verified North Korea’s nuclear freeze, and on January 21, 1995, the United States delivered 50,000 metric tons

125. *Id.* pmb. para. 6.

126. Protocol Between the Korean Peninsula Energy Development Organization and the Government of the Democratic People’s Republic of Korea on the Juridical Status, Privileges and Immunities, and Consular Protection of the Korean Peninsula Energy Development Organization on the Democratic People’s Republic of Korea, July 11, 1996, KEDO-N. Korea, *available at* <http://www.kedo.org/pdfs/ProtocolPrivImmun.pdf>.

127. Agreement on Supply of a Light-Water Reactor Project to the Democratic People’s Republic of Korea Between the Korean Peninsula Energy Development Organization and the Government of the Democratic People’s Republic of Korea, KEDO-N. Korea, Dec. 15, 1995, <http://www.kedo.org/pdfs/SupplyAgreement.pdf> [hereinafter Supply Agreement].

128. *Id.* art. I, ¶ 1.

129. *Id.* art. III, ¶ 1.

130. *Id.* pmb., ¶ 2.

131. *Id.* annex 3, ¶¶ 1-3, 6-7.

132. *Id.* art. 3, ¶ 1.

of heavy fuel oil,¹³³ the first of the promised yearly 500,000 tons.¹³⁴ Despite early delays (the parties were never able to agree on a concrete delivery schedule), work on the LWRs eventually began,¹³⁵ and significant progress on their construction was made throughout the late 1990s.¹³⁶

Nevertheless, by 1998 it was clear that North Korea was not in full compliance with its obligations under the Supply Agreement.¹³⁷ That year, U.S. intelligence discovered a possible underground nuclear facility in Kumchang-ni.¹³⁸ Kim Jong Il added to the tension by test-launching a Taepo Dong-1 ballistic missile over Japan on August 31, 1998.¹³⁹ In 2000, suspicion about the site continued. Although inspectors found nothing during their visit of the questionable underground facilities in Kumchang-ni, North Korea had been given sufficient notice to easily remove any nuclear materials from the site.¹⁴⁰

Still, North Korea had not completely abandoned diplomacy. In July 2002, Secretary of State Colin Powell met with his North Korean counterpart, Paek Nam Sun.¹⁴¹ In the next four months, North Korea proposed high-level talks with the United States, South Korea, and Japan, removed mines from some parts of the demilitarized zone, and sent a delegation of athletes to the Asian Games in South Korea.¹⁴²

These unprecedented attempts to reach out to the international community, however, were oddly timed; they came just before North Korea's public acknowledgement of its highly enriched uranium (HEU)

133. KEDO was not formed until March of 1995. After KEDO's formation, it handled all subsequent fuel shipments. See OBERDORFER, *supra* note 23, at 363-64, 366.

134. Agreed Framework, *supra* note 121, art. I(2).

135. OBERDORFER, *supra* note 23, at 393.

136. See Charles L. Pritchard, U.S. Representative to KEDO, Remarks at the KEDO Concrete Pouring Ceremony (Aug. 7, 2002), available at <http://www.state.gov/p/eap/rls/rm/2002/12628.htm>.

137. HOLLY HIGGINS, SOLVING THE NORTH KOREAN NUCLEAR PUZZLE app. 5 (David Albright & Kevin O'Neill eds., 2000).

138. *Id.*

139. *Id.* In an announcement that was contested by U.S. Space Command, North Korea claimed that it had launched a small satellite into orbit. ARMS CONTROL ASS'N, CHRONOLOGY OF U.S.-NORTH KOREAN NUCLEAR AND MISSILE DIPLOMACY (2003), <http://www.armscontrol.org/factsheets/dprkchron.asp>.

140. North Korea agreed in March 1999 to allow the United States access to its nuclear facility in Kumchang-ni, but the inspection did not take place until May of that year. ARMS CONTROL ASS'N, *supra* note 139; see also HIGGINS, *supra* note 137.

141. ARMS CONTROL ASS'N, *supra* note 139.

142. James T. Laney & Jason T. Shaplen, *How To Deal with North Korea*, 82 FOREIGN AFF. 16, 16-17 (2003).

program in October 2002.¹⁴³ This disclosure was bold, but hardly shocking. By July 2002, United States intelligence had already conjectured that an HEU nuclear program existed in North Korea.¹⁴⁴ Indeed, some experts estimated that the program had been in place since as early as 1987.¹⁴⁵

The U.S. government essentially ignored Kim Jong Il's simultaneous offer to end this program in exchange for a nonaggression promise from the United States.¹⁴⁶ Instead, on October 4, 2002, the United States formally accused North Korea of violating the Agreed Framework and Supply Agreement.¹⁴⁷ KEDO simultaneously suspended its shipments of heavy fuel oil.¹⁴⁸ In contrast to the Clinton Administration's policy of constructive engagement with North Korea, the Bush Administration, on the theory of not rewarding bad behavior, ruled out the possibility of dialogue with North Korea until it came into full compliance with its obligations.¹⁴⁹

North Korea responded with its typical brinksmanship. Although North Korea stopped allowing IAEA inspections of facilities not subject to the freeze several years prior, it had continued to permit IAEA

143. Jean-Pierre Leng, *North Korea: The Reactor That Was Never Finished*, INT'L HERALD TRIB., Mar. 4, 2004, available at http://www.iht.com/articles/2004/03/04/edleng_ed3_.php.

144. The Central Intelligence Agency (CIA) concluded that by 2002 North Korea had "recently" begun constructing a facility to enrich uranium, and that this plant "could produce enough weapons-grade uranium for two or more weapons per year when fully operational, which could be as soon as mid-decade." Selig S. Harrison, *Did North Korea Cheat?*, 93 FOREIGN AFF. 99, 103-04 (2005).

However, some North Korea experts are skeptical that the evidence alluded to in the CIA report substantiates the report's conclusion. *Id.* Although North Korea's attempts at enriching uranium have been uncontroverted, there is disagreement among experts over whether North Korea was enriching weapons-grade uranium (in violation of the 1994 Agreed Framework) or engaging in lower levels of enrichment (technically forbidden by the Agreed Framework, but permitted by the NPT). *Id.* at 105-07.

145. Ctr. for Def. Info., *Fact Sheet: North Korea's Nuclear Weapons Program*, Jan. 23, 2003, <http://www.cdi.org/nuclear/nk-fact-sheet.cfm#19a>.

146. Laney & Shaplen, *supra* note 142, at 17. According to the *Washington Post*, "some [Bush Administration] officials privately admit they had plotted its [the Agreed Framework's] demise even before the uranium enrichment program was discovered." Glenn Kessler, *Both Sides Bend To Restart N. Korea Talks*, WASH. POST, July 14, 2005, at A20.

147. Harrison, *supra* note 144, at 99.

148. *See id.*

149. *See* Paul Kerr, *U.S. Sends Conflicting Signals on North Korea*, ARMS CONTROL TODAY, Sept. 2002, available at http://www.armscontrol.org/act/2002_09/nkorea_sept02.asp; *see also* Press Release, Arms Control Ass'n, Top Administration Official Comments on Bush's North Korea Policy; United States, North Korea Set To Meet Later This Month (Apr. 16, 2003), http://www.armscontrol.org/pressroom/2003/bolton_apr03.asp (quoting Undersecretary of State for Arms Control and International Security, John Bolton, as saying the Bush Administration expects "complete verified dismantlement of the North Korean nuclear weapons program" before bilateral talks can proceed).

monitoring of facilities expressly subject to the freeze under the Agreed Framework.¹⁵⁰ In December 2002, however, North Korea expelled all IAEA inspectors from the country and disabled surveillance cameras in facilities subject to the freeze.¹⁵¹ Simultaneously, Kim Jong Il decided to restart North Korea's plutonium-based operations at Yongbyon and now claims to have reprocessed spent fuel that was subject to the Agreed Framework freeze.¹⁵² In January 2003, only two months before the decennial of its 1993 withdrawal announcement, North Korea again proclaimed its intention to withdraw from the NPT.¹⁵³

After a year of discussion about how best to respond, KEDO ultimately decided to suspend construction of the LWRs for one year, beginning December 1, 2003.¹⁵⁴ Notably, at the time of this announcement KEDO emphasized the need to maintain the facilities to allow for renewal of construction.¹⁵⁵ In addition, KEDO has explicitly observed that "[s]uspension implies that KEDO and the DPRK will continue to observe the . . . agreements and protocols concluded between them."¹⁵⁶ On November 25, 2004, KEDO renewed its decision to suspend construction of the LWRs for an additional year.¹⁵⁷

On February 10, 2005, North Korea brought an abrupt halt to ongoing six-party talks by publicly proclaiming, for the first time, that

150. See Mohamed El Baradei, IAEA Director General, *Status of Safeguards Agreement with the Democratic People's Republic of Korea* (Sept. 2002), http://www.iaea.org/NewsCenter/Focus/iaeaDprk/dg_on_dprk.shtml.

151. Paul Eckert, *South Korea Says Sanctions on North Korea Won't Work*, GLOBAL POLICY FORUM, Dec. 30, 2002, <http://www.globalpolicy.org/security/sanction/nkorea/2003/1230san.htm>; see also Letter from Yi Che-son, Dir. of the N. Korean Gen. Dep't of Atomic Energy, to Mohamed el Baradei, IAEA Director General (Dec. 27, 2002), available at http://news.bbc.co.uk/1/hi/not_in_website/syndication/monitoring/media_reports/2609515.stm.

152. See Harrison, *supra* note 144, at 109; see also KEDO, *About Us: Our History*, http://www.kedo.org/au_history.asp (last visited Jan. 21, 2006).

153. This time, North Korea argued that its withdrawal was effective within one day since it had stopped short of formal withdrawal in 1993, just one day shy of the three-month deadline. Although it has become a moot point with the passing of an additional three months, it remains an interesting question of treaty interpretation. Jean du Preez & William Potter, *North Korea's Withdrawal from the NPT: A Reality Check*, CTR. FOR NONPROLIFERATION STUD., Apr. 9, 2003, <http://cns.miis.edu/pubs/week/030409.htm>.

154. KOREAN PENINSULA ENERGY DEV. ORG., ANNUAL REPORT 2003, at 6, available at http://www.kedo.org/pdfs/KEDO_AR_2003.pdf [hereinafter KEDO 2003 ANNUAL REPORT].

155. Because the LWR construction site is located near Korea's often-turbulent sea, the elements ensure this is no easy task. See KOREAN PENINSULA ENERGY DEV. ORG., ANNUAL REPORT 2004, at 7, http://www.kedo.org/pdfs/KEDO_AR_2004.pdf [hereinafter KEDO 2004 ANNUAL REPORT].

156. KEDO 2003 ANNUAL REPORT, *supra* note 154, at 5. In March 2004, KEDO and North Korea signed a Memorandum of Understanding, which reiterated the continuing nature of the underlying agreements. KEDO 2004 ANNUAL REPORT, *supra* note 155, at 5.

157. KEDO 2004 ANNUAL REPORT, *supra* note 155, at 1, 5.

North Korea had manufactured “nukes for self-defense.”¹⁵⁸ Although there is continued debate as to whether North Korea actually possesses a nuclear arsenal, there appears to be no doubt that North Korea has been developing the components and resources necessary to create a nuclear weapon, and further, that it already possesses the missiles necessary to launch a nuclear device.¹⁵⁹

Despite these developments, North Korea blames the United States for undermining the Supply Agreement.¹⁶⁰ Article III of the Supply Agreement states:

The schedule of relevant steps to be performed by the DPRK [North Korea] under the U.S.-DPRK Agreed Framework, as specified in Annex 3 to the Agreement, shall be integrated with the delivery schedule for the LWR project with the aim of achieving the performance of such steps by 2003 and the smooth implementation of the LWR project.¹⁶¹

Although 2003 was adopted as the goal for completion, the project, delayed from its inception, has never been on schedule to finish by that time.¹⁶²

North Korea argues that KEDO's failure to follow this guideline makes KEDO the party most responsible for the project's failure.¹⁶³ North Korea contends that KEDO's delays in LWR construction forced

158. Press Release, Democratic People's Republic of Korea Ministry of Foreign Affairs, N. Korea's Statement on Its Nuclear Program (Feb. 10, 2005), *available at* <http://www.washingtonpost.com/wp-dyn/articles/A13987-2005Feb10.html>. North Korea's statement was made not long after Secretary of State Rice named North Korea an “outpost of tyranny” during her confirmation proceedings—a statement that Rice refuses to retract. Glenn Kessler, *N. Korea Agrees To Rejoin Talks; Nuclear Arsenal on the Table After Year-Long Boycott*, WASH. POST, July 10, 2005, at A01.

159. Erich Marquardt, *North Korea's Case for Nuclear Weapons*, ASIA TIMES, Aug. 22, 2003, *available at* <http://www.atimes.com/atimes/Korea/EH22Dg02.html>.

Various North Korean officials have implied that this is the case. James Kelly, Assistant Secretary of State for East Asian and Pacific Affairs in 2002, claims that First Deputy Foreign Minister Kang Sok Ju acknowledged the existence of North Korea's HEU project. Kang subsequently denied this, and claims to have stated only that North Korea is “entitled” to have such a program. Harrison, *supra* note 144, at 101. However, many doubt North Korea's operational capacity. One North Korean expert reported that a ranking general told him in April 2004 that Kim Jong Il wanted to keep the world guessing about North Korea's capabilities because it “strengthens our deterrent posture.” *Id.* at 109. General James Clapper, director of the Defense Intelligence Agency during the 1994 crisis, has similarly stated that “personally . . . I was skeptical that they ever had a bomb.” *Id.* at 110.

160. CTR. FOR NONPROLIFERATION STUDIES, US-DPRK AGREED FRAMEWORK (Sept. 10, 2003), *available at* <http://cns.miis.edu/pubs/inven/pdfs/agframe.pdf> [hereinafter US-DPRK AGREED FRAMEWORK].

161. Supply Agreement, *supra* note 127, art. III, ¶ 1.

162. *Compare id.*, with US-DPRK AGREED FRAMEWORK, *supra* note 160, at AF-2.

163. US-DPRK AGREED FRAMEWORK, *supra* note 160, at AF-2.

the energy-starved country to seek alternative means of power.¹⁶⁴ At the February 2004 session of the six-party talks, North Korea called upon KEDO to resume immediately its obligations under the Supply Agreement—namely, completed delivery of the LWRs—as the first step to a peaceful resolution.¹⁶⁵ Not surprisingly, KEDO has no such plans.¹⁶⁶

Although North Korea has agreed to return to six-party talks,¹⁶⁷ it is difficult to see this as a sign of real progress. Just days after this development, Rice told Japanese reporters:

These talks have had an unfortunate pattern, which is that we meet for a couple of days, they break up, really nothing has been achieved, and we wait three months or six months or in this case another year until the talks resume, and during that period of time North Korea is improving its nuclear capability.¹⁶⁸

Indeed, some experts estimate that North Korea's stockpile of weapons-grade plutonium has quadrupled in size since the six-party talks first broke up in June 2004.¹⁶⁹

G. "Necessary but Not Sufficient"

With these developments, the Agreed Framework and the Supply Agreement have come under unprecedented attack. In 1999, Richard Armitage, now the Deputy Secretary of State, summed up U.S. disappointment: "Since the Agreed Framework was signed by the United States and North Korea on October 21, 1994, the security situation on the Korean peninsula and in Northeast Asia has changed qualitatively for the

164. *Id.*

165. Philip P. Pan, *North Korea Retreats from Offer on Nuclear Plans: Officials Scuttle Hopes for Freeze, Declaring Intent To Keep Up Civilian Energy Industry*, WASH. POST, Feb. 29, 2004, at A16.

166. In August 2003, KEDO's Executive Board met at its New York City headquarters to discuss the extent, if any, to which KEDO should continue to maintain the partially constructed LWRs. KEDO is left with two primary possibilities. First, KEDO could simply shut down all operations without making an effort to preserve the work that has been done to this point. This would likely kill any future hope of renewing the Supply Agreement in its current form since, based on the state of construction at that time, any significant delay would force future construction crews to start from scratch. Second, KEDO could expend resources to pour concrete and build protective structures. This would prepare existing structures for long-term exposure and neglect and allow construction to continue without significant delay in the event that the construction project was renewed in the future. KEDO has clearly embarked on the latter course. See Press Release, Korean Peninsula Energy Dev. Org., KEDO Executive Board Meeting (Nov. 21, 2003), available at http://www.kedo.org/news_detail.asp?NewsID=25.

167. Kessler, *supra* note 158.

168. Kessler, *supra* note 146.

169. Kessler, *supra* note 158.

worse.”¹⁷⁰ Kim Jong Il, the argument goes, has used the past ten years to gain handouts from the West while continuing an underground nuclear program, and the United States has received nothing in exchange.¹⁷¹ Thus, our message to North Korea has been, “Brinksmanship works!”¹⁷² In sum, Armitage put it this way: “Arguably, the Agreed Framework was necessary but not sufficient to the multiple security challenges posed by North Korea.”¹⁷³

This view, however, does not fully recognize the gravity of the situation in 1994. Although the Supply Agreement clearly has not brought long-term resolution to the North Korean nuclear threat, it has served the valuable, if temporary, purpose of avoiding military conflict. At the time of the Agreed Framework’s signing, both sides were threatening war.¹⁷⁴ Moreover, in 1994, Russia and China did not support a hard-line approach to North Korea.¹⁷⁵ Still, one need not be critical of the Agreed Framework and Supply Agreement to recognize the current need for a change in policy.

Any sound policy for the future must recognize the existence of these earlier treaties. Indeed, at a time when the United States is attempting to shed its unilateralist image among the international community,¹⁷⁶ recognizing the existence of international commitments is particularly important. The debate over a new North Korea policy is as complex as it is vibrant. Indeed, at this point there are more clear questions than clear answers. Condoleezza Rice emphasized the unpredictability of Kim Jong Il: “[S]ooner or later Pyongyang will threaten to test a missile one too many times, and the United States will not respond with further benefits. Then what will Kim Jong Il do? The possibility for miscalculation is very high.”¹⁷⁷ In addition, with recent intelligence failures in Iraq fresh on the American mind, one wonders

170. 145 CONG. REC. E 341 (Report on N. Korea, Mar. 4, 1999) (statement of Rep. Gilman (quoting Richard L. Armitage, *A Comprehensive Approach to North Korea*, 159 STRATEGIC FORUM I (1999))).

171. *See id.*

172. *Id.*

173. *Id.*

174. Jimmy Carter has stated that the United States was on the verge of war in 1994. In a conversation with Kim Il Sung’s top advisors, Carter asked explicitly whether North Korea had been making plans to go to war and received an affirmative response. Jimmy Carter Interview, *supra* note 117.

175. *See* Laney & Shaplen, *supra* note 142, at 19, 27.

176. *See* Elisabeth Bumiller, *Bush Seeks To Begin a Thaw in a Europe Still Cool to Him*, N.Y. TIMES, Feb. 20, 2005, § 1, at 1. Following his reelection, U.S. President Bush actively sought to repair relations with European countries that opposed him on Iraq. *Id.*

177. Rice, *supra* note 57, at 45.

about the reliability of U.S. intelligence in North Korea.¹⁷⁸ Certainly, assessments about North Korea's intentions and current capabilities vary.¹⁷⁹ Another obstacle in settling on a North Korea policy is the fact that U.S. priorities and perceptions do not perfectly correspond with those of other nations. For example, South Korea still prefers a more conciliatory approach toward its Northern neighbor.¹⁸⁰ Perhaps the biggest question is a threshold one: should the United States negotiate at all before North Korea has convincingly stopped its nuclear program?

Though complicated, this time of transition affords the United States and KEDO the chance to restructure its North Korea policy to fit the current circumstances. Most experts agree that policy changes are necessary, but there is wide disagreement as to what form those changes should take. The hard-line approach dictates that the United States and KEDO should not reengage North Korea at any level until after North Korea has ceased its nuclear program. Simply put, we should not grant any rewards for misbehavior. Critics of this approach point out that North Korea's chief request is that the United States renew its nonaggression pledge. Arguably, this is not a significant concession when weighed against the prospect of military conflict, and to stand on principle in this context would be foolish obstinacy. Most policy proposals, however, strike a balance between these two positions. For example, Laney and Shaplen propose an intermediate, step-by-step approach toward North Korea:

The proper approach, therefore, is to now re-engage with North Korea without rewarding it for bad behavior. Working together, the major external interested parties (China, Japan, Russia, and the United States) should jointly and officially guarantee the security of the entire Korean Peninsula. But the outside powers should also insist that Pyongyang abandon its nuclear weapons program before offering it any enticements. Only when security has been established (and verified by intrusive, regular inspections)¹⁸¹ should a prearranged comprehensive deal be implemented

.....

178. At least one expert has drawn parallels between the available nuclear intelligence about North Korea and Iraq. Selig Harrison, Chairman of the Task Force on U.S. Korea Policy at the Center for International Policy, has accused the Bush Administration of distorting intelligence data about North Korea's nuclear capability, noting similar pre-war misrepresentations of Iraq's capabilities. Harrison, *supra* note 144, at 99.

179. See *supra* note 159 and accompanying text.

180. This is not surprising. Aside from their ethnic and geographic bond with North Korea, it is South Korean technology and manpower at work in the construction of the light-water reactors. OBERDORFER, *supra* note 23, at 365.

181. Laney & Shaplen, *supra* note 142, at 19.

In their haste to reformulate policy, however, most proposals have paid little attention to the legal obligations already established—and never formally disposed of—by the 1995 Supply Agreement. Although it is possible to form new policy without regard for international norms, it is a challenging road full of practical and ethical obstacles. Even advocates of the hard-line approach recognize the importance of establishing international legitimacy—if not as a nod to the rule of international law, then as a tool for the effective exercise of power. In short, whatever one's theoretical orientation toward international relations, to fashion effective policy it is important to recognize the role of legal norms. Part II of this Article attempts to fill in this gap by addressing those legal questions.

III. LEGAL ANALYSIS

A. *Legal Overview*

The 1995 Supply Agreement forms the basis for the legal obligations between the United States and North Korea.¹⁸² Although the Agreement is not a treaty according to U.S. municipal law,¹⁸³ it clearly qualifies as such under the strictures of international law.¹⁸⁴ Accordingly, the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (Vienna Convention) will guide much of this analysis.

Invoking the Vienna Convention requires two important clarifications. First, it is important to recognize the distinction between

182. Although many experts have focused attention on the terms of the Agreed Framework, in legal matters, that document is of secondary importance to the Supply Agreement. While the Agreed Framework was the foundational document that spelled out the basic elements of the resolution to the 1994 crisis, it is understood by both parties to have no binding effect under international law. Instead, it is the blueprint of purportedly shared hopes. The Supply Agreement, in contrast, speaks clearly about the parties' obligations. Therefore, the Supply Agreement is the proper centerpiece of any legal analysis.

183. Unlike international law, U.S. law reserves use of the term "treaty" for those agreements having passed through a specific constitutional process. Most notably, for an agreement to become a "treaty" under U.S. municipal law, it must be signed by the President and ratified by the Senate. Because the Supply Agreement is therefore not technically a treaty, it is not a law binding upon the U.S. government. Despite this, it is still an important element in creating foreign policy, however, because it will be viewed by other states in the international regime as binding upon the United States.

184. See Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, art. 2(1)(a), U.N. Doc. A/CONF/129/15 (Mar. 21, 1986) [hereinafter Vienna Convention]. Article 2 of the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations defines a treaty more broadly as "an international agreement governed by international law and concluded in written form."

this Convention and its better-known progenitor, the Vienna Convention on the Law of Treaties.¹⁸⁵ Although the text is virtually identical in both documents, the Vienna Convention on the Law of Treaties deals with treaties between states. Since the Supply Agreement was struck between North Korea and KEDO, a multinational organization, the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations is the appropriate analytical lens.

Second, although neither document has been ratified by the United States Senate, the U.S. government has expressly recognized the terms of the Vienna Convention on the Law of Treaties as valid customary international law. The *Third Restatement on the Foreign Relations Law of the United States*, which itself “accepts the Vienna Convention as, in general, constituting a codification of the customary international law governing international agreements,”¹⁸⁶ makes this point: “While the Convention has not yet been ratified by the United States, in its Letter of Submittal to the President the Department of State said that ‘[a]lthough not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice.’”¹⁸⁷ The *Restatement* goes on to list several U.S. court decisions that affirm the authority of the Vienna Convention on the Law of Treaties.¹⁸⁸

Because the Vienna Convention is a distinct agreement, one might argue that it is improper to assume that the United States has similar sentiments about both Conventions. However, given the nearly identical text of the Conventions and the United States’ general acceptance of international organizations as legitimate international actors, it seems not too great a leap.

Since the Bush Administration is determined to transition from one North Korea policy to another, a single question of international law is paramount: What are KEDO’s legal grounds for halting its obligations under the Supply Agreement? KEDO’s legal options for ending the Supply Agreement’s operation fall into three primary categories: (1) suspension, (2) termination, and (3) discontinuance of performance. Although these categories exist on something of a continuum, they are fundamentally distinguishable. Ultimately, discontinuance of

185. So as to avoid confusion, when referring to the Vienna Convention on the Law of Treaties, its full name will always be used. Compare *id.*, with Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 332.

186. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, introductory note (1987).

187. *Id.* at 145 n.1 (quoting S. Exec. Doc. L., 92d Cong., 1st sess. (1971)).

188. *Id.* at 145 n.2.

performance is the most pragmatic legal posture for KEDO and the United States to adopt as they work to settle on a revised North Korea policy.

B. Suspension vs. Termination

Under the Vienna Convention, the grounds for suspension of a treaty are the same as those for termination.¹⁸⁹ Each, however, has unique consequences. First, while treaties may be suspended either “in whole or in part,” a treaty can be terminated only “with respect to the whole treaty.”¹⁹⁰ Second, suspension of a treaty emphasizes the possibility of renewal of a treaty or its suspended provisions. In contrast, a terminated treaty is only restored by means of an entirely new agreement. KEDO should consider the legal and practical implications of each approach in determining whether to suspend or terminate its Supply Agreement with North Korea.¹⁹¹

1. Suspension in Part

a. Material Breach

KEDO can suspend the Supply Agreement on the ground of material breach according to article 60 of the Vienna Convention, which states: “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.”¹⁹² In other words, a nonbreaching party to a treaty has three options under the Vienna

189. See Vienna Convention, *supra* note 184, arts. 42, 44, 54, 56-57, 60-62.

190. *Id.* art. 60.

191. As noted above, KEDO has already suspended both its shipments of heavy fuel oil (in 2002) and the construction of the two LWRs (in 2003). See KEDO, *supra* note 152. KEDO's use of the term “suspension” in this context, however, is not the equivalent of “suspension” under the Vienna Convention. In the context of international law, suspension is a term of art that places its invocation within the parameters of settled norms. Namely, the Vienna Convention sets forth specific steps for suspending an agreement. These steps include: notification by the invoking party of the proposed measures to suspend the treaty; a three-month period of time in which the other party may object to the suspension; in the case of an objection, a resolution according to the means stated in article 33 of the U.N. Charter; and, if no solution is reached within one year, a request to the U.N. Secretary General to implement the conciliation procedure specified in the Vienna Convention's Annex. See Vienna Convention, *supra* note 184, arts. 65(1)-(3), 66(4).

In this instance, these procedures have clearly not been followed. Moreover, KEDO has crafted its language regarding the discontinuance of LWR construction carefully so as to reconcile its stance with its repeated statement that the signed agreements underlying the LWR project continue to remain in force. In sum, it is unclear what legal muscle is being flexed by KEDO in announcing the “suspension” of certain operations in North Korea.

192. Vienna Convention, *supra* note 184, art. 60(1).

Convention in response to a material breach: (1) terminate the treaty, (2) suspend the treaty in whole, or (3) suspend the treaty in part.

b. Grounds Other than Material Breach

It is unlikely, however, that KEDO can suspend the Supply Agreement “in part” on any ground other than material breach. For instance, the Supply Agreement cannot be suspended “in part” based on the Agreement’s own provisions. Article 44(1) provides: “[a] right of a party, provided for in a treaty . . . to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.”¹⁹³

Although it might be argued that the Supply Agreement’s provisions implicitly allow for its suspension, it certainly does not do so with any degree of specificity regarding partial suspension. Thus, assuming that the Agreement can be suspended based on its own provisions; it “may be exercised only with respect to the whole treaty.”¹⁹⁴

In addition, it is unlikely that KEDO can suspend the Supply Agreement “in part” on grounds identified in the Vienna Convention other than material breach. According to article 44(3), partial suspension for grounds other than material breach is plausible only under a more narrow set of circumstances:

If the ground relates solely to particular clauses, it may be invoked 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.¹⁹⁵

Even if all of the other conditions were satisfied, it cannot be said that the obligations KEDO wishes to suspend were not an essential basis of North Korea’s consent to the agreement. Indeed, North Korea’s consent fully hinged on KEDO’s willingness to supply and fund the LWR project. In sum, while all of the grounds provide for suspension “in whole,”

193. *Id.* art. 44(1).

194. *Id.*

195. *Id.* art. 44(3).

material breach provides the strongest basis for suspending the Supply Agreement “in part.”¹⁹⁶

2. Treaty Renewal

When a treaty is terminated, the parties are permanently released from their mutual obligations because the obligations no longer exist. When a treaty is suspended, however, obligations are simply rendered temporarily inoperative. Suspension “releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension.”¹⁹⁷ Indeed, the Vienna Convention requires that parties, during the period of suspension, “refrain from acts tending to obstruct the resumption of the operation of the treaty.”¹⁹⁸ The article dealing with treaty termination, in contrast, contains no prohibition against frustrating the purposes of the treaty because there is no presumption of the treaty’s ultimate restoration.¹⁹⁹

Although KEDO and North Korea could renew the provisions of the Supply Agreement after its termination by creating a new agreement, maintaining the current framework simplifies the process. If KEDO believes that its collaboration with North Korea in the construction of the LWR project will be renewed at some point in the future, KEDO should favor suspension over termination.

This Article focuses more on possible grounds for the Supply Agreement’s suspension—as opposed to termination—because this option allows for the possibility of *partial* suspension and future renewal. It should be noted, however, that the analysis for a treaty’s suspension, with one exception, is identical to the analysis for termination.²⁰⁰

C. Treaty Suspension

Treaties between states and international organizations can be legally suspended in accordance with the treaty’s own provisions, the requirements of the Vienna Convention, or in agreement with other precepts of international law. In assessing the possibility of the Supply Agreement’s suspension, the following grounds merit consideration: material breach, the provisions of the Supply Agreement, impossibility,

196. *Id.*

197. *Id.* art. 72(1)(a).

198. *Id.* art. 72(2).

199. *See id.* art. 70.

200. Temporary impossibilities, unlike permanent impossibilities, provide grounds only for suspension. *Id.* art. 61(1).

changed circumstances, the doctrine of state responsibility, and discontinuance of the Supply Agreement's operation without formal suspension.

1. Material Breach

If North Korea has materially breached the Supply Agreement, KEDO is entitled to unilaterally suspend the Agreement.²⁰¹ Article 60(1) of the Vienna Convention explains: "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."

A party that breaches a treaty, thereby causing the breach of the other party, however, cannot invoke this ground to suspend a treaty. In the *Gabčíkovo-Nagymaros Project* case, Hungary sought to suspend its 1977 Agreement with the Slovak Republic concerning the erection of a system of locks on the Danube River.²⁰² Hungary invoked several grounds for the treaty's termination, including the Slovak Republic's material breach, impossibility of performance, and changed circumstances.²⁰³ The International Court of Justice (ICJ) held that the agreement could not be terminated on the ground of the Slovak Republic's alleged material breach of the Treaty because Hungary, "by suspending the works at Nagymaros and Dunakiliti, contributed to the creation of a situation" which had caused the Slovak Republic's breach.²⁰⁴ Essentially, the court held that a party whose conduct causes, or even contributes to, another party's breach may not terminate the treaty on grounds of material breach.²⁰⁵

Still, it is unlikely that KEDO's conduct caused North Korea's breach. KEDO did not prevent North Korea from remaining a party to the NPT, from allowing IAEA ad hoc and routine inspections, or from continuing the freeze on other nuclear development. Although North Korea claims that delayed LWR construction contributed to a situation in which North Korea had to violate the Supply Agreement to secure energy resources for its people, KEDO's role in the delays does not violate any "provision essential to the accomplishment of the object or purpose of

201. *Id.* art. 60(1).

202. *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 3 (Feb. 5).

203. *Id.* at 7.

204. *Id.* at 63.

205. *Id.* at 64.

the treaty.”²⁰⁶ Indeed, as pointed out earlier, the parties never formally agreed upon a delivery schedule. Therefore, assuming that North Korea can be shown to have materially breached the Supply Agreement, KEDO is not precluded from invoking this ground.

2. Grounds Other than Material Breach

a. Provisions of the Supply Agreement

KEDO has the right to suspend the operation of the Supply Agreement if the Agreement itself provides for suspension. Article 57 of the Vienna Convention states: “The operation of a treaty in regard to all the parties or to a particular party may be suspended: (a) in conformity with the provisions of the treaty.”²⁰⁷ The Supply Agreement, however, does not deal expressly with its own suspension. Moreover, unlike some treaties, the Supply Agreement does not specify a particular date of termination, nor does it provide an option to withdraw after a designated minimum period of operation or list explicit criteria that would automatically trigger the suspension of the Agreement. Arguably, the absence of such characteristics in the Agreement signals that the Agreement itself does not contemplate suspension.

On the other hand, the text, nature, and primary objective of the Supply Agreement might indicate that suspension of the Agreement is contemplated by the provisions of the treaty itself. Although the Supply Agreement contains no provisions that expressly deal with its suspension, the language of the Supply Agreement might contemplate suspension by making KEDO’s obligations “mutually conditional” upon North Korea’s obligations to remain a party to the NPT, freeze its graphite-moderated reactors, refrain from the construction of new reactors, and permit the resumption of IAEA ad hoc and routine safeguard inspections.²⁰⁸ Thus, to the extent that North Korea has breached these obligations, KEDO might argue that the Supply

206. Vienna Convention, *supra* note 184, art. 60(3)(b). Although some scholars note that until the Bush Administration stopped oil shipments in December 2002, North Korea had “scrupulously” observed the provisions of the Agreement relating to freezing its plutonium program, there is fairly broad consensus that its pursuit of uranium enrichment equipment violated the Agreed Framework, which reaffirmed a 1991 agreement between North and South Korea that banned “uranium enrichment facilities.” See Harrison, *supra* note 144, at 107.

207. Vienna Convention, *supra* note 184, art. 57. Article 42(2) of the Vienna Convention also codifies the right of treaty suspension in accordance with the treaty’s own provisions. Article 54(a) of the Vienna Convention provides the right to terminate a treaty based on its own provisions.

208. See Supply Agreement, *supra* note 127, art. III, ¶ 1.

Agreement can be suspended “in conformity with” the Supply Agreement’s own provisions.²⁰⁹

i. Text of the Supply Agreement

First, the language of the Supply Agreement itself supports the argument that the operation of the Agreement is conditional upon DPRK compliance. Article III of the Supply Agreement states: “As specified in the U.S.-DPRK Agreed Framework, the provision of the LWR project and the performance of the steps specified in Annex 3 to the Agreement are mutually conditional.”²¹⁰ This language makes KEDO’s obligation to deliver materials necessary to LWR construction “mutually conditional” on North Korea’s performance of obligations listed in Annex 3.²¹¹ These obligations include the following:

1. The DPRK will remain a party to the Treaty on the Non-Proliferation of Nuclear Weapons and will allow implementation of its safeguards agreement under the Treaty, as specified in the U.S.-DPRK Agreed Framework.
2. The DPRK will continue the freeze on its graphite-moderated reactors and related facilities and provide full cooperation to the IAEA in its monitoring of the freeze.
3. The DPRK will refrain from construction of new graphite-moderated reactors and related facilities.
-
6. Upon the signing of the Agreement, the DPRK will permit resumption of *ad hoc* and routine inspections under North Korea’s safeguards agreement with the IAEA with respect to facilities not subject to the freeze.²¹²

To the extent that North Korea has failed to fulfill its obligations under Annex 3, in effect committing a material breach,²¹³ KEDO is not legally bound to continue to perform its obligations under the Supply Agreement. In this respect, the provisions of the Supply Agreement itself can be understood to allow for the Agreement’s suspension.

209. See Vienna Convention, *supra* note 184, art. 57(a).

210. Supply Agreement, *supra* note 127, art. III, ¶ 1.

211. See *id.*

212. *Id.* annex 3.

213. Although the ground for this suspension is essentially material breach (as with all other grounds discussed herein), this type of suspension does not require reliance on the relevant provisions of the Vienna Convention.

ii. Nature and Subject Matter of Supply Agreement

Second, the nature and subject matter of the Supply Agreement might also imply the right to suspend the Agreement.²¹⁴ The subject matter of the Supply Agreement is such that it was likely not intended to remain in force indefinitely. The Supply Agreement concerns a cooperative project with reciprocal obligations between the parties. The Agreement is unlike treaties whose operation is indefinite or subject to possible extension. For example, the Chemical Weapons Convention of 1993 (CWC) indicates that the treaty “shall be of unlimited duration.”²¹⁵ The Supply Agreement, by contrast, is clearly provisory. Unlike the CWC, the Supply Agreement was concluded to answer a discrete problem with a discrete solution over a discrete period of time. It identifies a concrete purpose and metes out specific guidelines. It calls for a supply schedule and establishes specific terms of repayment. The narrow focus of the Supply Agreement sets it apart from many familiar treaties. For example, the Vienna Convention’s lengthy preamble invokes “international law at a universal level” to establish a framework for all international agreements.²¹⁶ In contrast, the Supply Agreement’s preamble cites a narrow purpose: “to finance and supply a light-water reactor project.”²¹⁷

On the other hand, the Supply Agreement’s limited scope does not necessarily imbue the treaty with an implied provision for suspension. The drafters easily could have included a provision expressly providing for the Agreement’s suspension. Moreover, even if the Supply Agreement was not intended to last forever, this does not necessarily indicate that the Agreement itself implies the right of suspension before the completion of the Agreement’s purpose. Indeed, some treaties are intended to go on until the achievement of a particular occurrence and contain no stipulation for suspension or termination prior to the

214. See Vienna Convention, *supra* note 184, art. 56. Article 56(1) states:

A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

- (a) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or
- (b) A right of denunciation or withdrawal may be implied by nature of the treaty.

Although article 56 does not address the issue of suspension explicitly, article 44 implies that article 56 is intended to govern suspension. See *id.* art. 44(1).

215. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, art. 16, para. 1, Jan. 13, 1993, 32 I.L.M. 800.

216. Vienna Convention, *supra* note 184, pmb1.

217. Supply Agreement, *supra* note 127, pmb1.

realization of that result. For example, “[t]he Agreement between Egypt and the United Nations on the Status of the UN Emergency Force 1957 [UNEF] provided for it to remain in force until the departure of UNEF from Egypt, the date to be defined by the Secretary-General and the Government of Egypt.”²¹⁸ In short, the language and nature of the Agreement arguably grant an implicit right of suspension; because the Supply Agreement is silent about the matter, however, there is no clear metric by which to analyze the possibility of self-governed suspension.

b. Impossibility

KEDO may suspend the Supply Agreement on grounds of impossibility if the performance of the Agreement has been rendered physically impossible. Article 61, paragraph 1 of the Vienna Convention explains “impossibility of performance”:

A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.²¹⁹

North Korea’s withdrawal from the NPT, its dismissal of IAEA monitors from North Korea, and its resumption of an unauthorized nuclear program arguably make it temporarily “impossible” for KEDO to perform its obligations. The “impossibility” referenced in the Vienna Convention, however, refers to physical impossibilities.²²⁰ Although it may be politically problematic, completion of the Supply Agreement is not physically impossible. Therefore, it is unlikely that KEDO can suspend the Supply Agreement on this ground.

This interpretation is buttressed by the following examples of impossibility offered by the International Law Commission: “the submergence of an island . . . the drying up of a river . . . or the destruction of a dam.”²²¹ In *Gabčíkovo-Nagymaros*, Hungary contended

218. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 228 (2000).

219. Vienna Convention, *supra* note 184, art. 61(1).

220. *Id.*

221. AUST, *supra* note 218, at 239-40. Article 61 might be understood to differentiate between permanent and temporary impossibilities. Permanent impossibility is clearly addressed in the article’s first sentence: “the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty.” Vienna Convention, *supra* note 184, art. 61(1). The second sentence, in contrast, distinctly deals with temporary impossibility: “If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.” *Id.* The best synthesis of this seemingly inconsistent approach to impossibility is to understand article 61 to define temporary impossibility as

that its treaty had become impossible to perform because “the essential object of the Treaty—an economic joint investment”—had permanently disappeared.²²² Although the ICJ did not make a general determination as to “whether the term ‘object’ in Article 61 can also be understood to embrace a legal regime” such as a joint investment, the court did hold that performance of the Treaty was not “impossible” because the parties were not physically precluded from negotiating necessary adjustments.²²³

As in *Gabčíkovo-Nagymaros*, KEDO and North Korea are not physically precluded from performing the Agreement—there has not been destruction of a physical object, only a change in political climate.²²⁴ Although the Supply Agreement may be temporarily “impossible” to perform for legal or practical reasons, it is not physically impossible to perform. Therefore, KEDO must pursue other grounds for suspending the Supply Agreement.

c. Changed Circumstances

KEDO is only entitled to invoke a fundamental change of circumstances as a ground for suspending the Supply Agreement if certain conditions are met.

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:

interchangeable with permanent impossibility, with the understanding that the “disappearance or destruction of an object indispensable for the execution of the treaty,” may be temporary as opposed to permanent. *See id.* Certainly, the history of article 61 favors this view. An earlier draft of article 61 suggests the interchangeability of permanent and temporary impossibility within the context of “disappearance or destruction”:

If the total disappearance or destruction of the subject-matter of the rights and obligations contained in a treaty renders its performance *temporarily* impossible, such impossibility of performance may be invoked as a ground for suspending the operation of the treaty.

If it is clear that such impossibility of performance will be permanent, it may be invoked as a ground for terminating or withdrawing from the treaty.

Summary Records of the Second Part of the 17th Session, [1966] 1 Y.B. INT'L L. COMM'N 67 (emphasis added).

This version of article 61 simply switches the placement of temporary and permanent impossibility. This view is also strengthened by the 1966 statements of International Law Commission delegates, who thought that as between the two versions of the article, “the substance remained unchanged.” *Id.* at 68, ¶ 45; *see also id.* ¶¶ 33, 38, 55.

222. *See Gabčíkovo-Nagymaros Project (Hung. v. Slov.),* 1997 I.C.J. 3, 63-64 (Feb. 5).

223. *Id.*

224. *See id.*

- (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.²²⁵

Although there has been a fundamental change of essential circumstances with regard to the Supply Agreement, it is unlikely that the parties did not foresee the change of circumstances. Therefore, it is unlikely that KEDO legitimately can suspend the Supply Agreement on the basis of changed circumstances.

The political situation that necessitated the Agreement makes it difficult for KEDO to argue that it did not foresee the possibility of this political change. Just prior to the Supply Agreement's formation, North Korea had announced withdrawal from the NPT and was actively pursuing nuclear development. The purpose of the Supply Agreement was to prevent precisely the circumstances that have now developed. It would be disingenuous to argue that the parties did not foresee the possibility of the very change the Agreement was formed to avoid.

d. State Responsibility

The doctrine of state responsibility in international law calls for the "performance or restoration of normal standards of international conduct."²²⁶ The International Law Commission has codified this doctrine in its Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles).²²⁷ Draft article 12 states: "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."²²⁸ Any breach of the Supply Agreement is also a clear breach of state responsibility.²²⁹ Although KEDO might use the doctrine of state responsibility to condemn North Korea's breach as an "internationally wrongful act," the doctrine is probably not useful for suspending the Supply Agreement.

225. Vienna Convention, *supra* note 184, art. 62(1).

226. IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY, PART I, at 22 (1983).

227. *Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at Its Fifty-Third Session*, U.N. Doc. A/56/10 (Nov. 2001) [hereinafter *Draft Articles*].

228. *Id.* art. 12.

229. *See, e.g.*, Interhandel Case (Switz. v. U.S.) 1959 I.C.J. 6, 12-14, 28-29 (Mar. 21); Application of the Convention of 1902 Governing the Guardianship of Infants (Neth. v. Swed.) 1958 I.C.J. 55, 58, 61-62 (Nov. 28); Anglo-Iranian Oil Co. Case (U.K. v. Iran), 1952 I.C.J. 93, 95-96 (July 22).

Even if KEDO claims that breach of the Supply Agreement by North Korea constitutes an “internationally wrongful act,” the argument faces at least two potential complications.²³⁰ The implementation of remedies is the entitlement of an “injured State,” not that of an international organization. Draft article 42 proclaims: “A State is entitled as an injured State to invoke the responsibility of another State”²³¹ Although state responsibility exists under international law independent of a state’s invocation of the doctrine, KEDO, a multinational organization, cannot formally invoke a remedy based on this doctrine.

Second, the doctrine of state responsibility does not police the suspension of treaties. In *Gabčíkovo*, the International Court of Justice noted that it is “well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect.”²³² Accordingly, when a state breaches a treaty, its international responsibility is to recommence observance to the treaty. Indeed, Draft article 29 states that, by default, treaty obligations remain intact even in the case of breach: “The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached.”²³³ State responsibility does not deal with the right of suspension. Accordingly, the Draft Articles do not identify suspension of a treaty as a remedy for an “internationally wrongful act.”

Unlike the Vienna Convention, the Draft Articles do not refer to the option of treaty suspension. This does not mean that the doctrine of state

230. Under the doctrine of state responsibility, states must exhaust remedies in the courts of the defendant country before bringing a cause of action. It is unlikely, however, that this would apply to KEDO (even if international organizations could avail itself of this doctrine). Article 44(b) of the Draft Articles declares:

The responsibility of a State may not be invoked if:

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- (b) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Draft Articles, supra note 227, art. 44(b).

A state, however, is not required to use remedies that fail to provide a reasonable expectation of relief. KEDO is exempt from the requirement to “exhaust local remedies” because North Korea’s domestic legal system is incapable of providing “effective remedies.” The breach of the Supply Agreement is not the type of harm the local DPRK legal system would remedy. In other words, because there are no local remedies to exhaust, KEDO is not obliged to seek redress in North Korea.

231. *Id.* art. 42.

232. *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 3, 47 (Feb. 5).

233. *Draft Articles, supra* note 227, art. 29.

responsibility *rejects* the suspension of treaties, only that the doctrine does not *regulate* the suspension of treaties. KEDO might condemn North Korea on the basis of state responsibility, but it must look elsewhere for the right to suspend the Supply Agreement.

D. Options from Outside the Vienna Convention

There are at least three possible grounds for KEDO to discontinue the Supply Agreement from outside the formal structure of the Vienna Convention: informal suspension, the doctrine of state responsibility, and discontinuance of performance.

Ultimately, discontinuance of performance is not only the best extra-Vienna Convention option, but the best of all those available to KEDO and the United States as they reformulate their North Korea policy. Although not explicitly referenced in the Vienna Convention, the terms of the Supply Agreement itself imply discontinuance as a possible legal remedy for North Korea's noncompliance.

1. Informal Suspension

Unless a party formally suspends the Supply Agreement, the Agreement technically remains in force. A treaty is not properly suspended under international law unless an affected party has invoked a plausible ground for suspension and followed the prescribed procedure for the implementation of that suspension. Moreover, the Vienna Convention prescribes a specific procedure for the accomplishment of a treaty's suspension after the right has been invoked.

International law strongly favors the stability of treaties. As one United States representative to the International Law Commission has stated, the Vienna Convention provided that grounds for suspension "could be invoked by a party to terminate a treaty or suspend its operation but did not produce that effect in itself."²³⁴ For example, article 60 "entitles" an affected party to invoke suspension in cases of material breach, but does not automatically suspend all breached treaties.²³⁵ Article 61 states that "a party may invoke" impossibility as a ground for suspension, but is not required to do so.²³⁶ Article 62 even states the right of suspension negatively (it "may *not* be invoked . . . unless).²³⁷ In sum,

234. Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INTL. L. 495, 540 (1970).

235. Vienna Convention, *supra* note 184, art. 60.

236. *Id.* art. 61.

237. *Id.* art. 62 (emphasis added).

the Supply Agreement is not formally suspended until KEDO invokes a formal ground for its suspension.

2. Countermeasures

KEDO might be able to discontinue the operation of the Supply Agreement through the implementation of countermeasures without formally suspending the Agreement. Draft article 49(1) states: “An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations”²³⁸ Countermeasures, which fit under the doctrine of state responsibility, are different from the suspension of a treaty on the ground of material breach. One commentator notes:

Countermeasures are to be clearly distinguished from the termination or suspension of treaty relations on account of the material breach of a treaty by another State, as provided for in article 60 of the Vienna Convention on the Law of Treaties Countermeasures involve conduct taken in derogation from a subsisting treaty obligation but justified as a necessary and proportionate response to an internationally wrongful act of the State against which they are taken. They are essentially temporary measures, taken to achieve a specified end, whose justification terminates once the end is achieved.²³⁹

Countermeasures involving the temporary discontinuance of the operation of a treaty are similar to treaty suspension in that both respond to a party's deviant acts by permitting departure from initial obligations. They differ, however, in that countermeasures provide a legal rationalization for treaty deviation, rather than an outright suspension, from a treaty's terms. Therefore, KEDO might be able to suspend the operation of the Supply Agreement, not as a tool for suspending mutual obligations, but as a countermeasure directed toward renewing North Korea's compliance to the treaty.

a. Status of International Organizations

Even if KEDO can show that North Korea has committed an “internationally wrongful act” by not complying with the terms of the Supply Agreement, the fact that KEDO is an international organization, not a state, may bar KEDO's ability to implement countermeasures.

238. *Draft Articles*, *supra* note 227, art. 49(1).

239. JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 282 (2002).

Draft article 49 refers only to an “injured State.”²⁴⁰ The implementation of the doctrine of state responsibility is traditionally reserved for states, and there are no references to the ability of international organizations to implement countermeasures. Of course, it is possible to argue that in the emerging international community, international organizations are equally entitled to the use of countermeasures. This argument, however, is novel and untested.

b. Requirements and Conditions

Nevertheless, assuming that KEDO may implement countermeasures against North Korea despite its status as an international organization, KEDO must consider the requirements and conditions of implementation. The Draft Articles have standardized the implementation of countermeasures: countermeasures must be nonforcible, directed only at the responsible state, as temporary and reversible as possible, proportionate, and must not violate the basic tenets of international law.²⁴¹ KEDO’s suspension of the Supply Agreement’s operation would meet all of these requirements. It does not involve force, is directed only at North Korea, is temporary and reversible, is proportionate to North Korea’s noncompliance, and does not violate general tenets of international law.

The Draft Articles also catalog the required conditions for the implementation of countermeasures. Countermeasures cannot disrupt existing dispute resolution procedures or “impair diplomatic or consular inviolability.”²⁴² Countermeasures also must be “preceded by a demand” for cooperation and “accompanied by an offer to negotiate.”²⁴³

3. Discontinued Performance

Arguably, the Supply Agreement itself allows for a temporary discontinuance of obligations in the event of specified conditions. Both the preamble and article III of the Supply Agreement make certain KEDO obligations “mutually conditional” upon North Korea’s compliance with particular terms. To the extent that North Korea is not in compliance with these terms, KEDO can claim a right to a discontinuance of performance, whereby its obligations are temporarily

240. *Draft Articles*, *supra* note 227, art. 49(1).

241. See CRAWFORD, *supra* note 239, at 283 (discussing *Draft Articles*, *supra* note 227, arts. 49(1)-(3), 50(1)(a), 51, 53).

242. *Id.* (discussing *Draft Articles*, *supra* note 227, art. 50(2)(a)-(b)).

243. *Id.* (discussing *Draft Articles*, *supra* note 227, art. 52(3)).

discontinued in accordance with the terms of the Supply Agreement itself.

The Preamble to the Agreement “[r]eaffirm[s] that the DPRK shall perform its obligations under the relevant provisions of the U.S.-DPRK Agreed Framework.”²⁴⁴ In this way, the parties agree that compliance with the terms of the Agreed Framework is fundamental to the operation of the Supply Agreement. The Agreed Framework stipulates that North Korea “will remain a party to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and will allow implementation of its safeguards agreement under the Treaty.”²⁴⁵

As already noted, article III of the Supply Agreement makes KEDO’s supply obligations “mutually conditional” with North Korea’s obligations found in Annex 3 of the Agreement. In essence, Annex 3 requires that North Korea continue to comply with the terms of the Agreed Framework in order to bind KEDO to supply the LWRs.²⁴⁶ North Korea has announced its intention to withdraw from the NPT, has not allowed the IAEA to perform ad hoc and routine inspections of facilities not subject to the freeze, and has confessed to unauthorized nuclear development. North Korea’s noncompliance, by the provisions of the Supply Agreement itself, may discontinue KEDO’s obligation to supply the LWRs until North Korea again comes into full compliance with its obligations.

Although its effects are similar, discontinuance of performance is not the legal equivalent of formal suspension. Suspension must be based on grounds that are outlined in the Vienna Convention or outlined in the treaty itself. Discontinuance of performance, on the other hand, is a more mild remedy that can be implied by the terms of a treaty. The Supply Agreement does not expressly deal with formal suspension. It probably allows, however, for a temporary discontinuance of performance by making specified obligations of the parties “mutually conditional.”

KEDO’s argument for discontinued performance suffers from at least one potential weakness. Since the obligations are “mutually conditional,” just as KEDO does not have to perform its obligations if North Korea does not comply with the terms of Annex 3, North Korea does not have to comply with Annex 3 if KEDO does not supply the LWR project. In light of continued delays of the LWR project, North Korea might argue that it is KEDO, not North Korea, that must come into

244. Supply Agreement, *supra* note 127, pmbl.

245. Agreed Framework, *supra* note 121, art. IV(1).

246. See Supply Agreement, *supra* note 127, annex 3.

compliance in order to proceed with the remaining terms of the Supply Agreement. As noted above, however, this argument is unlikely to gain traction in the international community.²⁴⁷

In the final analysis, the most modest step on the continuum, discontinuance of operation, is the best approach. This course relies on language in the Supply Agreement that makes KEDO's obligations "mutually conditional" upon North Korea's compliance with enumerated requirements. By stopping short of a formal termination or suspension of the Supply Agreement, discontinuance of operation provides KEDO with maximum flexibility in its current and future relations with North Korea. Moreover, this approach allows KEDO to stop construction on the LWR project without being forced to show a material breach, follow the dispute resolution procedures found in the Vienna Convention, or demonstrate that KEDO did not contribute to a DPRK breach.

IV. CONCLUSION

In June 2004, six-party negotiations over North Korea's nuclear future were held. For several days, dark-suited diplomats from the United States, North Korea, South Korea, Japan, China, and Russia sat around a hexagonal table searching for the next step. By the conclusion of the first round of negotiations, however, there was little evidence of progress.²⁴⁸ North Korea quickly backed away from an earlier proposal to freeze its nuclear program, insisting instead that it would continue its "civilian nuclear energy industry."²⁴⁹ North Korea's deputy foreign minister and its chief delegate at the talks blamed the stalemate on the Bush Administration's refusal to compromise. The United States held to its demand that unless Pyongyang first dismantled its nuclear program, it would not discuss North Korea's requests for security assurances and economic aid.²⁵⁰ On the other hand, North Korea claimed to be ready to press forward. They used the negotiations to press the United States to resume KEDO's construction of the LWRs agreed upon in the Supply Agreement. Clearly this is unlikely to happen in the near future. Instead, North Korea's recent claim of already possessing nuclear weapons and its promise to boycott any multi-party talks has, at least temporarily, ended hopes of resolution.

247. See discussion *supra* Part III.C.1.

248. See *Six Party Talks on N. Korea End Without Breakthrough*, ASIA PULSE, June 28, 2004.

249. Pan, *supra* note 165.

250. *Id.*

Whatever the ultimate resolution, it is clear that the 1995 Supply Agreement is dead.²⁵¹ Still, because of the important diplomatic and political implications, it is significant what kind of funerary pomp surrounds its burial. To date, the Bush Administration has failed to provide a legal rationale for its North Korea policy. This is a mistake. While the present course is arguably defensible on policy grounds alone, proffering a sound legal rationale promises both to foster goodwill in the international community and buttress the policy itself. KEDO and the United States should embrace fundamental tenets of international law in justifying their decision not to perform their obligations under the 1995 Supply Agreement.

In particular, KEDO and the United States should rely on the least rigid step on the continuum of legal options—discontinuance of performance. Discontinuance of performance fits the terms of the 1995 Supply Agreement, which makes each party's obligations "mutually conditional" upon those of the other party and permits discontinuance without invoking the rigidity of the Vienna Convention.

Although the Vienna Convention technically allows for suspension of the Supply Agreement, it is doubtful that the procedures for implementing formal suspension would lead to a successful resolution of the conflict. Indeed, it would more likely serve to increase tensions as parties on both sides entrenched their positions in sanctimonious appeals to formal, but self-serving, interpretations of international law. A more prudent path is to adopt an intermediate approach, discontinuance of performance, which avoids rigid terms of art such as "suspension" or "termination." This course allows for maximum institutional flexibility as the political process moves forward by temporarily halting the efficacy of the Supply Agreement.

KEDO and the United States' failure to provide a coherent legal rationale for their political decision not to proceed with LWR delivery is due, at least in part, to the attendant burdens of exercising the stiff legal

251. On July 12, 2005, South Korea, calling it a "last chance," offered to provide North Korea electric power equal to the amount that the two completed LWRs would have produced. According to the *Washington Post*, South Korea's Minister of Unification, Chung Dong Young, stated that "the decade-old, \$5 billion project to build light-water reactors in North Korea was dead." The article goes on, "U.S. officials have welcomed that statement, on grounds that those facilities, if built, would still pose a proliferation risk. Clinton administration officials have privately said that they agreed to the plan in 1994 only because they thought the North Korean government would collapse before the project was completed." Glenn Kessler, *South Korea Offers To Supply Energy If North Gives Up Arms; Official in Seoul Calls Electricity Plan the "Last chance" for Nuclear Talks*, WASH. POST, July 13, 2005, at A16. Still, as noted above, KEDO continues to expend resources to preserve the unfinished LWRs in case future agreements involve their completion.

machinery of the Vienna Convention. The United States and KEDO are justified—even prudent—in avoiding the express terms of the Vienna Convention, but they are unwise to ignore legal issues altogether. Discontinuance of performance of the Supply Agreement, although it may not satisfy the most ardent international law formalists, is not only a valid and justifiable legal approach, it is also the most prudent.