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CHARTING A PATH FORWARD: THE INTERNATIONAL LEGAL REGIME FOR NUCLEAR NONPROLIFERATION AND HOW THE BIDEN ADMINISTRATION SHOULD ADDRESS A NUCLEAR ARMED NORTH KOREA

Christian Fechter*

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Introduction

On March 18, 2021, the Democratic People's Republic of Korea (North Korea) launched two short-range ballistic missiles in its first missile test in a year and its first provocation of the Biden administration.¹ North Korea's missile test should not have come as a surprise to the experienced diplomats Biden is appointing to the State department, North Korea has a noted history of provoking incoming U.S. presidential administrations with weapons tests that increase tensions on the Korean peninsula and force the new administration to respond.² While the new administration has understandably been preoccupied with the faltering U.S. economy and its domestic response to the Covid-19 pandemic, North Korea's recent test serves as a reminder that nuclear North Korea is not a problem that can stay on the backburner for long. In response, President Biden rebuked the missile tests with a vague threat of 'responses' if North Korea continues to escalate tensions amid stalled negotiations.³ Such a progression is illustrative of the cycle of provocation that has plagued U.S.–North Korean diplomacy.⁴ As the cycle goes, North Korea provokes the international community to gain leverage, bring the parties to the table, and

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¹ Choe Sang-Hun, 'Power for Power': North Korea Returns to a Show of Force, N.Y. Times (Mar. 24, 2021), <https://www.nytimes.com/2021/03/25/world/asia/north-korea-ballistic-missiles.html>.

² Editorial Board, *Kim Jong Un likes to provoke new U.S. presidents. Biden's team should be prepared.* Wash. Post (Jan. 22, 2021), https://www.washingtonpost.com/opinions/global-opinions/biden-north-korea-policy-kim/2021/01/22/c3756e86-5c10-11eb-b8bd-ee36b1cd18bf_story.html.

³ Hyung-Jin Kim, *North Korea Confirms Missile Test as Biden Warns of a Response*, Time (Mar. 26, 2021), <https://time.com/5950249/north-korea-missile-tests-biden/>.

⁴ William J. Perry, *Proliferation on the Peninsula: Five North Korean Nuclear Crises*, 607 Annals Am. Acad. Pol. & Soc. Sci. 78-86 (2006) (pointing out that North Korea will manufacture nuclear crises to bring the international community to the negotiating table and extract concessions with promises to halt weapons testing while continuing on the path to a nuclear weapon).

extract concessions in exchange for briefly easing tensions or halting their nuclear programs, only to renege and begin the cycle again.⁵

Arriving at an effective approach to North Korea has been an intractable problem for the United States, as Secretary of State Antony Blinken explained in his confirmation hearing when he acknowledged that “North Korea is a hard problem that has plagued administration after administration, and it’s a problem that has not gotten better, in fact, it’s gotten worse.”⁶ Indeed, for over three decades, North Korea’s pursuit of a nuclear arsenal has posed a unique challenge to both the United States’ foreign policy objectives and the international regime for the nonproliferation of nuclear weapons. From Jimmy Carter to Donald Trump, while the United States has been able to hinder North Korea’s nuclear weapons program at various stages, no administration has been able to prevent North Korea’s steady march towards an expanded nuclear arsenal and modernized missile fleet.⁷ The North Korean regime has demonstrated the ability to endure the significant pressure of an intricate sanctions regime and a willingness to pass that economic suffering on to its people in order to maintain the nuclear arsenal that North Korean Supreme Leader Kim Jong-un views as essential to the regime’s survival.⁸

As of today, North Korea has between thirty to forty nuclear warheads, intercontinental ballistic missiles capable of carrying such warheads, a stockpile of chemical and biological weapons agents, and the ability to produce enough fissile material for six or seven more nuclear

⁵ *Id.*

⁶ *Nominations: Hearing on the Honorable Antony J Blinken of New York, to be Secretary of State Before the S. Comm. on Foreign Relations*, 117th Cong. (Jan. 19, 2021) (statement of Antony Blinken, nominee). <https://www.foreign.senate.gov/hearings/nominations-011921>.

⁷ See, e.g., Wendy Sherman & Evans Revere, *How to Stop Kim Jong-Un: Why we’ve fallen short and why that’s no longer an option*, TIME (Feb. 17, 2017) <https://time.com/north-korea-opinion/> (“Successive U.S. Administrations have tried various strategies to thwart the dangerous trajectory of the regime. Some have made progress, only to be set back by North Korean perfidy, by changes in policy direction and by cautious partners and allies in the region who wanted a different approach. We now know that for much of this time Pyongyang was working to preserve and expand its nuclear program.”).

⁸ Choe Sang-Hun, *Sanctions are Hurting North Korea. Can They Make Kim Give In?*, N.Y. Times (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/world/asia/north-korea-trump-sanctions-kim-jong-un.html>.

weapons each year.⁹ Coupled with Kim Jong-un's recent vow at a rare Workers' Party Congress to further strengthen North Korea's nuclear deterrence, and his declaration that North Korea is a responsible nuclear weapons state, it is likely that the Biden administration is inheriting a problem in which the complete denuclearization of North Korea is more of a necessary public stance rather than a realistic solution.¹⁰ However, just because the complete denuclearization of North Korea may be unrealistic as a short-term goal, it does not mean that diplomacy and engagement with North Korea are no longer worthwhile pursuits. As distinguished professor and North Korea expert Victor Cha aptly put it, "North Korea is the land of lousy options," but lousy options do not allow us to opt out, ignore the problem, and hope it simply goes away.¹¹ As the Biden administration nears the conclusion of its "full review of the U.S. approach to North Korea" and the nuclear threat it poses, the timing is apt to review the basis for nuclear nonproliferation in international law and address the steps the Biden administration should take in regard to North Korea.¹²

This paper will show that North Korea has slipped through the cracks of the international regime for the nonproliferation of nuclear weapons and argue that the Biden administration should (1) maintain a public posture of complete denuclearization of North Korea to sustain the nonproliferation regime in international law; (2) continue to pursue and enforce the economic

⁹ Choe Sang-Hun, *North Korea's Arsenal Has Grown Rapidly. Here's What's in It*, N.Y. Times (Mar. 26, 2021), <https://www.nytimes.com/2021/03/26/world/asia/north-korea-arsenal-nukes.html>.

¹⁰ Choe, Sang-Hun, *Kim Jong-un Uses Party Congress to Double Down on Nuclear Program*, N.Y. Times (Jan. 13, 2021), <https://www.nytimes.com/2021/01/13/world/asia/north-korea-kim-jong-un-nuclear.html?searchResultPosition=1>; See also, Anna Fifield, *North Korea is a nuclear state. But can the U.S. accept that?*, Wash. Post (Dec. 9, 2017), https://www.washingtonpost.com/world/asia_pacific/north-korea-is-a-nuclear-state-but-can-the-us-accept-that/2017/12/09/6fd76d7c-da79-11e7-8e5f-ccc94e22b133_story.html; For background on the Worker's Party of Korea and Kim Jong-un's regime see Eleanor Albert, *North Korea's Power Structure*, Council on Foreign Relations (June 17, 2020) <https://www.cfr.org/backgrounder/north-koreas-power-structure> (detailing the dynastic dictatorship of the Kim family, Kim Jong-un's authoritarian regime, and the history of the Worker's Party).

¹¹ Ami Bera and Victor Cha, *A Small Deal Within a Big Deal*, Center for Strategic & International Studies (Jul. 8, 2019), <https://www.csis.org/analysis/small-deal-within-big-deal-0>.

¹² Reuters Staff, *Blinken says U.S. plans full review of approach to North Korea*, Reuters (Jan. 19, 2021), <https://www.reuters.com/article/us-usa-biden-state-northkorea/blinken-says-u-s-plans-full-review-of-approach-to-north-korea-idUSKBN29O2QG>.

sanctions regime against North Korea; (3) reengage with Japan and South Korea and commit to trilateral defense and deterrence measures to contain a nuclear North Korea; and (4) convey a willingness to engage Kim Jong-un in high-level diplomacy and pursue proportional sanctions relief for verifiable steps towards denuclearization.¹³ Part I of this paper will discuss the foundations for nuclear nonproliferation and disarmament in international law. Part II will examine President Trump's approach to North Korea as a juxtaposition to the multilateral approaches of previous presidential administrations. And lastly, Part III will address how the Biden administration should move forward with regard to North Korea by maintaining a public posture of complete denuclearization, working with the United States' strategic partners in the region towards extended deterrence, and engaging North Korea if and when they display a readiness to make meaningful concessions in regard to their nuclear program and current nuclear arsenal.

I. The Foundations of Nuclear Nonproliferation in International Law

The legal basis for the nonproliferation of nuclear weapons in international law lies largely with the Treaty on the Nonproliferation of Nuclear Weapons (NPT) and economic sanctions levied through the United Nations Security Council (UNSC).¹⁴ The NPT imposes obligations on each of the signed parties and such obligations are enforced through sanctions from the UNSC.¹⁵ Section I.A explores the language and goals of the NPT, its alleged weaknesses, and North Korea's checkered relationship with the Treaty. Section I.B then evaluates the underpinnings of the United Nations sanctions regime and surveys the effectiveness of sanctions on North Korea.

¹³ China is an integral part of the conversation and any potential approach to addressing a nuclear North Korea, and this paper addresses China's role in regards to sanctions implementation in Section I.B and how China will affect the path forward for the Biden administration in Section III.

¹⁴ See Paul Lettow, *Strengthening the Nuclear Nonproliferation Regime* 6-8 (2010) (Explaining the international legal foundation for the nonproliferation of nuclear weapons and arguing that the current regime is falling short).

¹⁵ *Id.*

A. The Nuclear Nonproliferation Treaty

The NPT is widely regarded as the foundation of the international regime for the nonproliferation of nuclear weapons.¹⁶ Understanding that “the proliferation of nuclear weapons would seriously enhance the danger of nuclear war,” the NPT was drafted to prevent an unstable arms race from consuming the international order as ever increasing numbers of nations attempt to acquire nuclear forces.¹⁷ Opened for signature in 1968 and entered into force in 1970, a total of 191 States have joined the NPT.¹⁸ Article VIII of the NPT envisaged a review of the Treaty every five years, and at the review conference on May 11, 1995, the State parties decided to extend the NPT indefinitely.¹⁹

The NPT established a dual structure that is colloquially known as the Treaty’s ‘grand bargain,’ under which the Treaty differentiates between states already in possession of nuclear weapons (i.e., nuclear weapons states (NWS)), and those not in possession of such weapons (i.e., non-nuclear weapons states (NNWS)), and imposes distinct obligations dependent on a state’s classification.²⁰ The NPT defines NWS as the states that had manufactured and exploded a nuclear weapon or other nuclear device prior to January 1, 1967; a select group that encompasses the five permanent members of the UNSC in China, France, Russia, the United Kingdom, and

¹⁶ See Daniel H. Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (2009) (Analyzing the international nonproliferation regime and arguing that the current system is not sufficient in itself to address nuclear nonproliferation); *Nuclear Weapons: Strengthening the International Legal Regime* (Ida Caracciolo, et al. eds., 2012) (Scrutinizing the effectiveness and limits of the nonproliferation regime based on the NPT and raising potential future challenges to the nonproliferation regime); Gro Nystuen, Stuart Casey-Maslen & Annie Golden Bersagel, *Nuclear Weapons Under International Law* (2014) (Drawing upon various scholars and contributors to critically assess the NPT and the nonproliferation regime).

¹⁷ Treaty on the Non-Proliferation of Nuclear Weapons, Preamble, opened for signature July 1, 1968, 729 U.N.T.S. 161.; See also M.A. Kaplan, *The Nuclear Non-Proliferation Treaty: its rationale, prospects and possible impact on international law*, *Journal of Public Law* 18, 1-20, at 3 (1969).

¹⁸ United Nations, Treaty on the Non-Proliferation of Nuclear Weapons, <https://www.un.org/disarmament/wmd/nuclear/npt/> (last visited Apr. 3, 2021) (hereinafter “NPT”).

¹⁹ *Id.*

²⁰ See, e.g., Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* 9 (2009) (“This quid pro quo relationship of differential and reciprocal obligations between nuclear weapon states and non-nuclear weapon states, which the NPT came to codify, has become known as the “grand bargain” of the NPT”).

the United States.²¹ The ‘grand bargain’ was essential to the Treaty’s ratification in 1970, and the dichotomy between NWS and NNWS remains a fundamental aspect of the Treaty’s continued efficacy.²²

Five essential articles of the NPT lay out the framework of the ‘grand bargain’ and impose obligations on the member states. Article I of the NPT establishes the nonproliferation obligations of the NWS parties:

Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear weapon state to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.”²³

Article II obliges the NNWS parties:

not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.²⁴

Article III establishes the safeguards and monitoring system under the International Atomic Energy Agency (IAEA) of peaceful uses of nuclear technology.²⁵ Article III obliges the NNWS to “accept safeguards as set forth in accordance with the Statute of the International Atomic Energy Agency,” and allow the IAEA inspectors to verify that parties to the Treaty are not diverting nuclear energy from permissible peaceful uses to prohibited nuclear weapons.²⁶

²¹ See Nystuen, Casey-Maslen, & Bersagel, *Nuclear Weapons Under International Law* 376 (2014).

²² *Nuclear Weapons: Strengthening the International Legal Regime* 5 (Ida Caracciolo et al. eds. 2012).

²³ Treaty on the Non-Proliferation of Nuclear Weapons, Article 1, opened for signature July 1, 1968, 729 U.N.T.S. 161 (hereinafter “NPT”).

²⁴ NPT, Art. II.

²⁵ *Id.* Art. III.

²⁶ *Id.*

Article IV guarantees the right of NNWS parties to pursue peaceful uses of nuclear energy.²⁷

And lastly, Article VI addresses disarmament:

Each of the Parties to the Treaty undertake to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.²⁸

Together, the above articles establish the three pillars of the NPT; (1) NWS agree not to assist any NNWS in acquiring nuclear weapons and are obligated to pursue disarmament; (2) NNWS agree not to manufacture or acquire their own nuclear weapons; and (3) NNWS are free to pursue peaceful uses of nuclear technology under the watchful eye of the IAEA and the NWS will encourage international cooperation in furthering such goals.²⁹

1. Pros and Cons of the NPT Framework

More than five decades after its ratification, the NPT has largely received plaudits for creating an international norm against the proliferation of nuclear weapons, establishing a legal context for the reduction of existing nuclear weapons and the reduction of United States and Russian nuclear stockpiles in particular, and limiting the overall number of nuclear weapons states.³⁰ Today, only nine countries are currently in possession of nuclear weapons including the formally recognized NWS of the NPT and the “final four” nuclear weapons states that exist outside of the NPT’s framework: India, Israel, Pakistan and North Korea.³¹ India, Pakistan and

²⁷ *Id.*, Art. IV (“Nothing in this treaty shall be interpreted as affecting the inalienable right of all parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I and II of this Treaty”).

²⁸ *Id.*, Art. VI.

²⁹ See Rohan Mishra, Note, *Toward a Nuclear Recognition Threshold*, 120 Colum. L. Rev. 1035, (2020); Daniel H. Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* 9 (2009).

³⁰ See Michael O’Hanlon, Robert Einhorn, Steven Pifer & Frank A. Rose, *Experts assess the nuclear Non-Proliferation Treaty, 50 years after it went into effect*, Brookings (Mar. 3, 2020)

<https://www.brookings.edu/blog/order-from-chaos/2020/03/03/experts-assess-the-nuclear-non-proliferation-treaty-50-years-after-it-went-into-effect/>.

³¹ See David S. Jonas, *Variations on Non-Nuclear: May the “Final Four” Join the Nuclear Nonproliferation Treaty as Non-Nuclear Weapons State While Retaining Their Nuclear Weapons?*, 2005 Mich St. L. Rev. 417, at 418-419.

Israel never joined the NPT as state parties, while North Korea withdrew from the NPT in 2003.³² Viewed against the belief in the 1960s espoused by President John F. Kennedy, who foresaw the “possibility in the 1970s of the President of the United States having to face a world in which 15 or 20 or 25 nations may have these [nuclear] weapons,” the NPT has been a relative success.³³ International peace and security is not balancing on the knife’s edge feared by President Kennedy, where twenty-five states could instigate nuclear war with the press of a button, and the NPT is largely to thank for that reality.³⁴

However, the NPT is not without its faults. Part of the grand bargain rests on the Article VI agreement obliging all parties to the treaty, but really just the NWS, to move towards disarmament complete disarmament.³⁵ But while Article VI creates an obligation of disarmament, it does so in exceedingly vague terms, and only requires the state parties to “pursue negotiations in good faith” toward disarmament “at an early date.”³⁶ Article VI’s equivocal language offers no concrete terms to which NNWS can point in order to hold the NWS accountable in carrying out their end of the bargain. And while the U.S. and Russia have significantly reduced their nuclear arsenals, they pursued bilateral arms limitations and reductions “primarily because they believed such arms agreements would serve their own security interests, not because they were obliged to under the NPT.”³⁷ Indeed, nuclear weapons continue to be the basis of the NWS’s national security and deterrence policies and none of the

³² *Id.*

³³ *Text of President John F. Kennedy’s News Conference in Foreign and Domestic Affairs*, (Mar. 22, 1963) (quoted in E.B. Firmage, *The treaty on the non-proliferation of nuclear weapons*, *American Journal of International Law* 63, 711-46 (1969).

³⁴ *See* O’Hanlon, *supra* note 30.

³⁵ NPT, Art. VI.

³⁶ *Id.*

³⁷ O’Hanlon, *supra* note 30.

nine countries currently in possession of nuclear weapons have shown a willingness to give them up any time soon.³⁸

Harvard Kennedy School Director Steven E. Miller has identified several challenges to the NPT that arise out of the NPT's "Article VI stalemate."³⁹ Miller advances the idea that the Treaty's seemingly indefinite "bifurcation of the world into nuclear haves and have-nots" makes the long term viability of the grand bargain untenable.⁴⁰ Miller posits that the longer the NWS maintain their nuclear arsenals and "routinely proclaim that such weapons are essential to their defense postures, that they provide unique and crucial security benefits and that they must be retained indefinitely," the harder it will become for NWS to maintain that NNWS cannot pursue their own nuclear arsenals.⁴¹ Considering the centrality of the grand bargain to the continued viability of the Treaty and the concerns that arise out of the Article VI stalemate, critics of the NPT have argued that the Treaty should have addressed the nuclear disarmament process in more concrete terms.⁴²

2. *North Korea's Brief Stint as a State Party to the NPT*

North Korea began its nuclear program in the 1950s.⁴³ With significant technical assistance from the Soviet Union, North Korea established the Yongbyon Nuclear Research Center with a Soviet nuclear research reactor to produce radioisotopes and train personnel.⁴⁴ In the early 1970s, North Korea acquired plutonium reprocessing technology from the Soviet Union and established uranium processing facilities necessary to create the fissile material needed for a

³⁸ See Nuclear Threat Initiative, *Nuclear Disarmament Resource Collection*, (Dec. 15, 2020)

<https://www.nti.org/analysis/reports/nuclear-disarmament/>.

³⁹ Steven E. Miller, *Proliferation, Disarmament and the Future of the Non-Proliferation Treaty*, in *Nuclear Proliferation and International Security* at 64 (Morton Bremer Maerli et al. eds., 2007).

⁴⁰ *Id.*

⁴¹ *Id.*, at 65.

⁴² See Caracciolo, *supra* note 22, at 11.

⁴³ See *North Korea: Nuclear History*, NTI (Last updated Oct. 2018) <https://www.nti.org/learn/countries/north-korea/nuclear/>.

⁴⁴ *Id.*

nuclear weapon.⁴⁵ North Korea underwent a significant expansion of their nuclear program in the early 1980s and began construction on a 5MWe nuclear reactor.⁴⁶ North Korea told the IAEA that the Yongbyon reactor would be used solely for electricity generation, but experts were skeptical as the 5MWe reactor could easily be repurposed to produce the fissile material for a nuclear weapon.⁴⁷

In 1985, as North Korea neared completion of the 5MWe nuclear reactor in Yongbyon, it signed the NPT under international pressure.⁴⁸ However, North Korea did not sign a nuclear safeguards agreement with the IAEA as required by Article III of the NPT until 1992.⁴⁹ When IAEA inspectors finally gained access to North Korea's nuclear facilities, they detected discrepancies suggesting that North Korea had secretly produced enough fissile material for one or two nuclear weapons after they had assented to the NPT.⁵⁰ When IAEA inspectors requested further inspections, North Korea balked and threatened to withdraw from the NPT entirely and submitted notice of its withdrawal.⁵¹ Amid heightened tensions the U.S. and North Korea came to an agreement in 1994 known as the Agreed Framework, where the U.S. agreed to assist North Korea with fuel shipments and build two proliferation-resistant nuclear reactors in the county in return for North Korea coming back to full compliance with its obligations under the NPT and IAEA.⁵² At the time, the Agreed Framework was viewed as a relatively successful mechanism

⁴⁵ *Id.*

⁴⁶ *Yongbyon 5MWe Reactor*, NTI (Last updated Jul. 2018) <https://www.nti.org/learn/facilities/766/>.

⁴⁷ *Id.*

⁴⁸ See Daniel Wertz, *Issue Brief: The U.S., North Korea, and Nuclear Diplomacy*, The National Committee on North Korea, 6 (Oct. 2018) https://www.ncnk.org/sites/default/files/issue-briefs/US_DPRK_Relations.pdf (“In 1985, as North Korea neared completion of the 5MWe reactor, it signed the Non-Proliferation Treaty under Soviet (and indirectly, American) pressure”).

⁴⁹ See Frederic L. Kirgis, *North Korea's Withdrawal From the Nuclear Nonproliferation Treaty*, American Society of International Law, (Jan. 24, 2003) <https://www.asil.org/insights/volume/8/issue/2/north-koreas-withdrawal-nuclear-nonproliferation-treaty>.

⁵⁰ See Wertz, *supra* note 48, at 7.

⁵¹ *Id.*

⁵² *Id.*, at 8.

for containing the North Korean nuclear threat by freezing North Korea's activities at the Yongbyon nuclear complex and providing stability to U.S.–North Korean relations.⁵³

For the next nine years, the Agreed Framework remained in place amidst rising tensions due to North Korea's ballistic missile program and clandestine efforts to acquire a uranium enrichment.⁵⁴ In October 2002, evidence of North Korea's covert nuclear operations was mounting and the Bush administration sent a delegation to confront North Korea over the issue.⁵⁵ In talks, North Korea confirmed the existence of its clandestine nuclear program.⁵⁶ Finding North Korea to be in violation of the agreed framework, the U.S. then halted shipments of fuel, and by late December of 2002, North Korea retaliated by expelling the IAEA inspectors, lifting the freeze on its nuclear program, and announcing its intention to withdraw from the NPT.⁵⁷ On January 10, 2003, North Korea announced its withdrawal from the NPT, effective as of January 11, 2003.⁵⁸

North Korea justified its withdrawal on Article X of the NPT. Article X guarantees each Party as follows:

In exercising its national sovereignty... the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.⁵⁹

⁵³ Jonathan D. Pollack, *The United States, North Korea, and the End of the Agreed Framework*, Naval War College Review, Vol. LVI, No. 3 at 42-43 (2003) (“By discarding the Agreed Framework, the United States and North Korea decided that they preferred living with future uncertainties and dangers to sustaining or modifying an imperfect formula that had capped Pyongyang’s nascent nuclear weapons program for nearly a decade”).

⁵⁴ *Id.*

⁵⁵ See Wertz, *supra* note 48, at 10.

⁵⁶ See Perry, *supra* note 4, at 82-83.

⁵⁷ *Id.*, at 83-84.

⁵⁸ International Atomic Energy Agency, *Fact Sheet on DPRK Nuclear Safeguards*, (last accessed Apr. 4, 2021) <https://www.iaea.org/newscenter/focus/dprk/fact-sheet-on-dprk-nuclear-safeguards>.

⁵⁹ NPT, Art. X.

A withdrawal relies completely on the “discretionary decision of the relevant state, and other state parties do not submit it [the withdrawal] to any political or legal evaluation.”⁶⁰

Extraordinary events should theoretically provide a hurdle to the withdrawal from the NPT, but North Korea’s withdrawal indicates otherwise. North Korea’s stated reason for withdrawal from the NPT was the U.S.’s alleged ‘hostile policy’ toward North Korea, as the U.S. had identified North Korea as a potential nuclear target in a military contingency and threatened a blockade and military action.⁶¹ Whether North Korea’s allegations held any truth is immaterial for the purposes of Article X, the NPT’s withdrawal provision is simply a means “through which states could denounce the NPT one it is considered to no longer correspond to their interests.”⁶² As written, Article X has been criticized for providing any party who wishes to withdraw from the treaty with an easily accessible escape hatch.⁶³ And with an international legal system predicated largely on state sovereignty and consent, North Korea’s withdrawal from the NPT forecloses the possibility for nonproliferation enforcement under the NPT’s terms.⁶⁴ In the aftermath of North Korea’s withdrawal from the NPT, the next section now turns to the UNSC sanctions regime.

B. The United Nations Security Council Sanctions Regime

Chapter VII of the United Nations Charter provides the legal framework under which the UNSC can take enforcement actions “with respect to threats to the peace, breaches of the peace, and acts of aggression.”⁶⁵ Specifically, Chapter VII Article 39 provides that the “Security

⁶⁰ Caracciolo, *supra* note 22, at 5.

⁶¹ See Kirgis, *supra* note 49.

⁶² Caracciolo, *supra* note 22, at 5.

⁶³ Matthew Liles, *Did Kim Jong-Il Break the Law? A Case Study on How North Korea Highlights the Flaws of the Non-Proliferation Regime*, 33 N.C.J. Int’l. & Com. Reg. 103, 116 (2007).

⁶⁴ *Id.*; For background information on state sovereignty in international law see Samantha Besson, *Sovereignty*, Oxford Public Int’l Law (Apr. 2011) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472> (“Most of the other, if not all institutions and principles of international law rely, directly or indirectly, on State sovereignty”).

⁶⁵ United Nations, *Charter of the United Nations, Chapter VII*, available at <https://www.un.org/en/about-us/un-charter/full-text> (last accessed May 2, 2021).

Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”⁶⁶ Article 42 is a rarely used enforcement mechanism relating to the UNSC’s authorization of the use of force when non-violent means are not an adequate remedy.⁶⁷ Sanctions measures, under Article 4, “encompasses a large array of enforcement measures that do not involve the use of armed force.”⁶⁸ Under Article 41 the

Security Council may decide what measures not involving the use of armed forces are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.⁶⁹

On October 9, 2006, North Korea detonated its first nuclear weapon.⁷⁰ In response, the UNSC unanimously passed its first sanction on North Korea under Article 41, UNSC Resolution (UNSCR) 1718.⁷¹ UNSCR 1718 condemned North Korea’s nuclear test as a clear threat to international peace and security, demanded that North Korea return to the NPT, decided that North Korea “shall abandon all nuclear weapons and existing nuclear programmes in a complete, verifiable and irreversible manner,” and banned any supply of heavy weaponry, missile technology, fissile material, and luxury goods to North Korea.⁷² In addition to the sanctions, Resolution 1718 created the 1718 Committee, consisting of representatives from each country of

⁶⁶ *Id.*, Ch. VII Art. 39.

⁶⁷ United Nations Security Council, *Repertoire of Security Council Practice*, (last visited Apr. 6, 2021) <https://www.un.org/securitycouncil/content/repertoire/actions>.

⁶⁸ United Nations Security Council, *Sanctions*, (last visited Apr. 6, 2021) <https://www.un.org/securitycouncil/sanctions/information>.

⁶⁹ See U.N. Charter, *supra* note 65, Ch. VII Art. 41.

⁷⁰ David E. Sanger, *North Koreans Say They Tested Nuclear Device*, N.Y. Times (Oct. 9, 2006) <https://www.nytimes.com/2006/10/09/world/asia/09korea.html>.

⁷¹ See Eleanor Albert, *What to Know About Sanctions on North Korea*, Council on Foreign Relations, (Jul 16, 2019) <https://www.cfr.org/backgrounder/what-know-about-sanctions-north-korea>.

⁷² Security Council resolution 1718, S/RES/1718 (Oct. 14, 2006).

the security council, and directed the committee to monitor the effectiveness of sanctions against North Korea and provide periodic reports to the UNSC.⁷³ Since 2006, the UNSC has imposed eight additional sanctions on North Korea that reiterate the terms of UNSCR 1718 and enact increasingly punitive restrictions.⁷⁴

The U.S. has also imposed unilateral sanctions that often target a wider scope of economic activities and individuals both in order to combat North Korea's nuclear and ballistic missile programs in general, and to respond to specific North Korean acts of provocation, for example North Korean cyberattacks, human rights violations, and money laundering.⁷⁵ The U.S. has imposed unilateral sanctions on North Korea and certain individuals and entities through both executive orders and legislation such as the North Korea Sanctions and Policy Enhancement Act and the Countering America's Adversaries Through Sanctions Act.⁷⁶ The Executive Orders and legislation permits the President to sanction any person or entity involved in the proliferation of nuclear weapons and seek to restrict North Korea's access to the U.S. and international financial systems.⁷⁷

⁷³ *Id.*, paragraph 12.

⁷⁴ See UNSCR 1874, S/RES/1874 (June 12, 2009) (prohibiting financial assistance to North Korea, expanding arms embargo, and authorizing UN Member states to inspect cargo passing through their borders en route to North Korea); UNSCR 2087, S/RES/2087 (Jan. 22, 2013) (directing 1718 Committee to identify individuals or entities that have assisted North Korea in sanctions evasion); UNSCR 2094, S/RES/2094 (Mar. 7, 2013) (hindering North Korea's nuclear and ballistic missile programs by restricting North Korea's access to hard cash and the international banking system at large); UNSCR 2270, S/RES/2270 (Mar. 2, 2016) (mandating inspections on cargo destined for, or originating from, North Korea, asset freezes on all North Korean Government and Worker's Party entities, expanding list of prohibited luxury goods); UNSCR 2321, S/RES/2321 (Nov. 30, 2016) (significantly restricting North Korean exports, including the exportation of coal); UNSCR 2371, S/RES/2371 (Aug. 5, 2017) (banning certain North Korean exports, banning countries from allowing North Korean laborers, prohibits North Korean joint ventures with other nations); UNSCR 2375, S/RES/2375 (Sep. 11, 2017) (caps petroleum and bans natural gas imports, directs 1718 committee to identify maritime vessels assisting North Korea in sanctions evasion); and UNSCR 2397, S/RES/2397 (Dec. 22, 2017) (bans imports of heavy machinery, transportation vehicles, and industrial equipment, directs countries to expel all North Korean laborers, requires countries to seize any ships caught smuggling contraband into North Korea) all available at, <https://www.un.org/securitycouncil/content/resolutions-0>.

⁷⁵ See Albert, *supra* note 71.

⁷⁶ U.S. Department of the Treasury, *North Korea Sanctions*, (last visited Apr. 10, 2021) <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/north-korea-sanctions>.

⁷⁷ *Id.*; Katie Benner, *U.S. Charges 3 North Koreans With Hacking and Stealing Millions of Dollars*, N.Y. Times (Feb. 17, 2021) <https://www.nytimes.com/2021/02/17/us/politics/north-korea-hacking-charges.html>.

Despite the intricate sanctions regime enacted by the UNSC, the overall efficacy of sanctions on North Korea is unclear. Stephen Haggard and Marcus Noland have argued that an authoritarian regime such as North Korea is a “hard target” for economic sanctions because of its willingness and ability to impose the costs of sanctions on their citizens.⁷⁸ As such, living conditions in North Korea are allegedly abysmal.⁷⁹ North Korea is one of the world’s most repressive states and Kim Jong-un’s regime restricts “all civil and political liberties. . . prohibits all organized political opposition, independent media, civil society,” routinely uses arbitrary arrests and punishment of crimes, and extracts forced labor from its population, among other human rights violations.⁸⁰

Similarly, since North Korea has almost completely shut down its borders in response to the COVID-19 pandemic, Daniel Wertz has argued that North Korea’s “willingness to bear considerable self-inflicted economic pain to avoid the perceived national security threat posed by the pandemic raises fundamental questions about the coercive power of sanctions, even if meaningfully enforced.”⁸¹ Indeed, as Kim Jong-un’s regime has demonstrated in its response to the pandemic, North Korea’s perceived national security interests clearly take precedence over its economic interests, despite the cost.⁸²

UNSCR sanctions rely on individual enforcement from each of the U.N member states, which is often uneven, especially in regard to Chinese enforcement of the North Korean sanctions.⁸³ China is by far and away North Korea’s largest trade partner, and with a primary objective of regime stability in North Korea, China’s tightening or relaxation of sanctions likely

⁷⁸ See Stephen Haggard & Marcus Noland, *Sanctions, Inducements, and the Case of North Korea* (2017).

⁷⁹ Human Rights Watch, *World Report 2019: North Korea* (2019) <https://www.hrw.org/world-report/2019/country-chapters/north-korea>.

⁸⁰ *Id.*

⁸¹ Daniel Wertz, *Special Report: Understanding U.S. and International Sanctions on North Korea*, The National Committee on North Korea (Nov. 2020) https://www.ncnk.org/sites/default/files/issue-briefs/Sanctions_Special_Report.pdf.

⁸² *Id.*

⁸³ *Id.*, at 17.

reflects China's interests and policy objectives rather than requirements mandated by the UNSC resolutions.⁸⁴ Indeed, while consistently voting in favor of the UNSC sanctions against North Korea, when it comes to implementation "China has repeatedly dragged its feet over the years, dramatically increasing its trade with North Korea between 2006 and 2014."⁸⁵ Nicholas Miller of the Carnegie Endowment for International Peace has likened China's actions to providing North Korea with 'shelter' from the international sanctions regime.⁸⁶ Economic sanctions were always going to face long odds of success in preventing North Korea from obtaining nuclear weapons as long as China was willing to account for over eighty percent of North Korea's international trade, in effect insulating North Korea from the international economy and undermining the spirit and effectiveness of the UNSC sanctions.⁸⁷

Scholars have also argued that North Korean sanctions simply serve to embolden Mr. Kim to continue to bolster his nuclear arsenal as a deterrent to a perceived hostile policy, and that sanctions are simply futile measures when it comes to convincing North Korea to give up its nuclear weapons.⁸⁸ On the flip side, scholars have pointed out that sanctions signal to the international community at large that North Korea's behavior will not go unpunished, and that any country contemplating following in North Korea's footsteps can expect similar condemnation from the international community.⁸⁹ And finally, sanctions, when pursued

⁸⁴ Eleanor Albert, *The China-North Korea Relationship*, Council on Foreign Relations, (June 25, 2019) <https://www.cfr.org/backgrounder/china-north-korea-relationship>.

⁸⁵ Vipin Narang & Nicholas Miller, *North Korea Defied the Theoretical Odds: What Can We Learn From Its Successful Nuclearization?*, Carnegie Endowment for Int'l Peace (Mar. 19, 2018) <https://carnegieendowment.org/2018/03/19/north-korea-defied-theoretical-odds-what-can-we-learn-from-its-successful-nuclearization-pub-75834>.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See Eleanor Albert, *What to Know About Sanctions on North Korea*, Council on Foreign Relations, (Jul. 19, 2019) <https://www.cfr.org/backgrounder/what-know-about-sanctions-north-korea>; John Park and Jim Walsh, *Stopping North Korea, Inc.: Sanctions Effectiveness and Unintended Consequences*, MIT Security Studies Program (Aug. 2016) <https://www.belfercenter.org/sites/default/files/legacy/files/Stopping%20North%20Korea%20Inc%20Park%20and%20Walsh%20.pdf>.

⁸⁹ *Id.*

simultaneously with diplomacy, can be a bargaining chip and provide leverage in the form of sanctions relief for commensurate actions towards denuclearization in negotiations.⁹⁰ And Victor Cha notes that “we have to remember that sanctions always receive criticism as an ineffective policy instrument until they are proven to work,” and the 2016 and 2017 sanctions have been the harshest and most comprehensive to date, and are “having an undeniable bite on the regime.”⁹¹

However, as the most recent 1718 Committee report notes, North Korea continues to “maintain and develop its nuclear and ballistic missile programs in violation of Security Council resolutions,” and is expected to continue with state sponsored sanctions evasion once it reopens its borders from its self-imposed COVID-19 lockdown.⁹² And even still, in its locked down state, North Korea is still evading sanctions and smuggling illicit oil with China’s help.⁹³ North Korea has managed to remain outside of the legal framework of the NPT and has resisted the international pressure of the UNSC sanctions regime to obtain nuclear weapons, raising questions about the efficacy of the current legal framework for nuclear nonproliferation under international law.

II. Breaking the Cycle: President Trump’s Approach to North Korea

Before turning to how the Biden administration should handle North Korea moving forward, it is necessary to address where U.S.–North Korea relations currently stand, and particularly how President Trump’s unique approach to North Korea has framed the issue for President Biden moving forward. Before delving into President Trump’s approach, Section II(A) will briefly detail the six party talks and Section II(B) will address the Obama administration’s

⁹⁰ *Id.*

⁹¹ Victor Cha and David Kang, *Nuclear North Korea: A Debate on Engagement Strategies*, 204 (2018).

⁹² UNSC, *Final Report of the Panel of Experts submitted pursuant to resolution 2515*, (Mar. 4, 2021) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/034/37/PDF/N2103437.pdf?OpenElement>.

⁹³ See Christopher Koettl, *How Illicit Oil is Smuggled into North Korea with China’s Help*, N.Y. Times (Mar. 24, 2021) <https://www.nytimes.com/2021/03/24/world/asia/tankers-north-korea-china.html>.

‘strategic patience’ approach to North Korea. Section II(C) will then discuss President Trump’s inimitable style that has left the Biden administration with the North Korea that stands today.

A. The Six Party Talks and the Recurring Cycle of Diplomacy and Provocation

Following the collapse of the Agreed Framework and North Korea’s withdrawal from the NPT, the U.S. adopted a dual-track policy of diplomacy and economic pressure.⁹⁴ In August 2003, China and the U.S. engaged North Korea in trilateral discussions concerning North Korea’s nuclear program, and the talks quickly grew to include South Korea, Japan, and Russia.⁹⁵ North Korea continued to produce weapons grade plutonium as the six parties intermittently engaged in discussions with few substantive outcomes until September 19, 2005, when the six parties announced a Joint Statement on Denuclearization.⁹⁶ In the 2005 Joint Statement, the parties reaffirmed the overarching goal of the verifiable denuclearization of the Korean peninsula and North Korea committed to abandoning its nuclear weapons and nuclear program and recommitting to the NPT in return for economic assistance.⁹⁷ The Six Parties agreed to take coordinated steps in a phased manner “in line with the principle of ‘commitment for commitment, action for action.’”⁹⁸ However, the agreed framework of the Joint Statement was never implemented. Soon after the Joint Statement was announced, the U.S. imposed financial sanctions on North Korean money laundering in Macau, which provoked a strong reaction from Pyongyang and resulted in North Korea pulling out of the discussions and conducting multiple missile tests leading up to North Korea’s first nuclear weapons test in 2006.⁹⁹ The six party talks continued to sputter along until 2009, when the Obama administration

⁹⁴ See Wertz, *supra* note 48, at 10.

⁹⁵ See Kelsey Davenport, *Six Party Talks at a Glance*, Arms Control Association (June 2018) <https://www.armscontrol.org/factsheets/6partytalks>.

⁹⁶ See Wertz, *supra* note 48, at 10.

⁹⁷ Joint Statement of the Fourth Round of the Six Party Talks, Beijing, September 19, 2005, (last visited Apr. 10, 2021) <https://2001-2009.state.gov/r/pa/prs/ps/2005/53490.htm>.

⁹⁸ *Id.*, paragraph 5.

⁹⁹ See Albert, *supra* note 88.

took office and North Korea attempted to launch a satellite into orbit, drawing the condemnation of the UNSC, to which North Korea responded by expelling all nuclear inspectors, declaring that it would no longer be bound by the Joint Statement and conducting a second nuclear weapons test, bringing an end to the Six Party talks.¹⁰⁰

B. Strategic Patience and the Obama Administration

North Korea welcomed President Obama into office with its second nuclear weapons test in 2009, immediately escalating tensions with the new administration and pushing President Obama to adopt a strategy of ‘strategic patience’ with regard to North Korea.¹⁰¹ President Obama was determined to “break the cycle of provocation, extortion, and reward” that had come to define U.S.–North Korean relations.¹⁰² The theory behind strategic patience was to refrain from rewarding North Korea’s provocative behavior with concessions and making it clear to North Korea that the United States would only return to the negotiating table if North Korea displayed a willingness to take verifiable steps towards denuclearization.¹⁰³ Strategic patience amounted to “essentially ignoring North Korea and waiting for North Korea to make the first move.”¹⁰⁴ In the end, the two sides could not even meet each other’s preconditions for diplomacy, and North Korea detonated its fourth nuclear weapon in 2016 after the U.S. rejected North Korea’s offer to discuss a peace treaty without addressing denuclearization.¹⁰⁵ Instead of engaging in direct negotiations with North Korea and rewarding North Korea for its provocative actions, the Obama administration focused on deterrence and containment, reinforcing the U.S.’s

¹⁰⁰ See Mark Landler, *North Korea Says it Will Halt Talks and Restart its Nuclear Program*, N.Y. Times (Apr. 14, 2009) <https://www.nytimes.com/2009/04/15/world/asia/15korea.html> and CNS Staff, *North Korea’s Nuclear Test and its Aftermath: Coping with the Fallout*, NTI (June 25, 2009) <https://www.nti.org/analysis/articles/north-koreas-nuclear-test-aftermath/>.

¹⁰¹ See Cha and Kang, *supra* note 91, at 194.

¹⁰² Jeffrey Bader, *Obama and China’s Rise: An Insider’s Account of America’s Asia Strategy* 31 (2012).

¹⁰³ See Wertz, *supra* note 48, at 12.

¹⁰⁴ See Cha and Kang, *supra* note 91, at 194..

¹⁰⁵ See, Reuters Staff, *U.S. rejected North Korea peace talks offer before last nuclear test: State Department*, Reuters (Feb. 21, 2016) <https://www.reuters.com/article/us-northkorea-nuclear/u-s-rejected-north-korea-peace-talks-offer-before-last-nuclear-test-state-department-idUSKCN0VU0XE>.

commitment to its allies in the region in South Korea and Japan and maintaining the stance that “the United States does not, and never will, accept North Korea as a nuclear state.”¹⁰⁶ However, while Obama implemented strategic patience, North Korea continued to test ballistic missiles and nuclear bombs in violation of UNSC sanctions, leading the outgoing President Obama to warn the incoming President Trump that North Korea posed the biggest threat to U.S. national security and should be a foreign policy priority for the incoming administration.¹⁰⁷

C. Breaking the Cycle: ‘Fire and Fury’ and Trump’s Approach to North Korea

Donald Trump’s presidency marked a dramatic departure from many of the presidential norms of previous administrations, including in foreign policy.¹⁰⁸ Adopting an “America first” foreign policy, Trump backed away from traditional U.S. allies, threatened to pull out of NATO, and cozied up to leaders of authoritarian regimes.¹⁰⁹ Foregoing the multilateral approach to North Korea adopted by most of his predecessors, President Trump favored a unilateral approach to the nuclear threat posed by North Korea comprised of insults, threats of nuclear war, and one-on-one summitry between himself and Kim Jong-un.¹¹⁰ Section C.1 details how President Trump and Kim Jong-un escalated tensions and threatened nuclear war prior to their first summit in Singapore. Section C.2 then turns to the Singapore and Hanoi summits and the respective fallout from each.

1. *Insults, Threats of Nuclear War, and an Invitation to Talk*

¹⁰⁶ Cha and Kang, *supra* note 91 at 194.

¹⁰⁷ Gerald F. Seib, Jay Solomon and Carol E. Lee, *Barack Obama Warns Donald Trump on North Korea Threat*, W.S.J. (Nov. 22, 2016) <https://www.wsj.com/articles/trump-faces-north-korean-challenge-1479855286>.

¹⁰⁸ David Montgomery, *The Abnormal Presidency: the definitive list of the 20 presidential norms Trump broke*, Wash. Post (Nov. 10, 2020) <https://www.washingtonpost.com/graphics/2020/lifestyle/magazine/trump-presidential-norm-breaking-list/>.

¹⁰⁹ *Id.*; See also President Trump’s inaugural address, (Jan. 20, 2017) (last visited Apr. 11, 2021) <https://www.npr.org/2017/01/20/510629447/watch-live-president-trumps-inauguration-ceremony>.

¹¹⁰ See Robert Blackwill, *Trump’s Foreign Policies are Better Than They Seem*, CFR Special Report No. 84 (Apr. 2019) https://www.cfr.org/sites/default/files/report_pdf/CSR%2084_Blackwill_Trump.pdf; James Doubek, *Trump Meets North Korea’s Kim Jong-un and Says Nuclear Negotiations Will Resume*, NPR (June 30, 2019) <https://www.npr.org/2019/06/30/737365074/trump-to-meet-kim-jong-un-at-dmz>.

President Trump's approach to North Korea began by responding to North Korean provocation by exchanging insults with Kim Jong-un and threatening nuclear war. On July 28, 2017, during a weapons test, North Korea launched an intercontinental ballistic missile that, for the first time, theoretically could target the U.S. mainland.¹¹¹ In response to the international condemnation and increased sanctions following the test, North Korea promised retribution on the U.S., to which President Trump answered, "North Korea best not make any more threats to the United States. They will be met with fire and fury like the world has never seen."¹¹² As North Korea continued to test ballistic missiles and nuclear weapons, Trump bucked tradition and further escalated tensions by threatening nuclear war.¹¹³ On September 19, 2017, in a speech to the U.N. General Assembly President Trump referred to Kim Jong-un as a "Rocket man on a suicide mission" and threatened to "totally destroy" North Korea if forced to defend the U.S. or its allies.¹¹⁴ In response to President Trump's speech to the U.N., Kim Jong-un released an official statement calling President Trump a "dotard", a "gangster fond of playing with fire," and a "frightened dog."¹¹⁵ Despite the name-calling and threats of nuclear war, in March of 2018 Kim Jong-un extended an invitation to President Trump to discuss nuclear issues, which Trump accepted, leading to President Trump and Kim Jong-un's first high-level summit in Singapore.¹¹⁶

2. *The Singapore and Hanoi Summits*

¹¹¹ David E. Sanger, Choe Sang-Hun & William J. Broad, *North Korea Tests a Ballistic Missile That Experts Say Could Hit California*, N.Y. Times (Jul. 28, 2017) <https://www.nytimes.com/2017/07/28/world/asia/north-korea-ballistic-missile.html>.

¹¹² Peter Baker and Choe Sang-Hun, *Trump Threatens Fire and Fury Against North Korea if it Endangers U.S.*, N.Y. Times (Aug. 8, 2017) <https://www.nytimes.com/2017/08/08/world/asia/north-korea-un-sanctions-nuclear-missile-united-nations.html>.

¹¹³ See Blackwill, *supra* note 110, at 24.

¹¹⁴ Ali Vitali, *Trump Threatens to 'Totally Destroy' North Korea in First U.N. Speech*, NBC News (Sep. 19, 2017) <https://www.nbcnews.com/politics/white-house/trump-un-north-korean-leader-suicide-mission-n802596>.

¹¹⁵ Phil McCausland, *Kim Jong Un Calls President Trump a 'Dotard' and 'Frightened Dog'*, NBC News (Sep. 21, 2017) <https://www.nbcnews.com/news/world/north-korea-s-kim-jong-un-calls-president-trump-frightened-n803631>.

¹¹⁶ Michael R. Gordon, Louise Radnofsky, and Jonathan Cheng, *Trump Agrees to Meet North Korean Leader Kim Jong Un*, W.S.J. (Mar. 8, 2018) <https://www.wsj.com/articles/kim-jong-un-invites-trump-to-meet-in-north-korea-1520555014>.

On June 12, 2018, President Trump met with North Korean leader Kim Jong-un and became the first sitting U.S. president to meet in person with a North Korean leader.¹¹⁷ The summit produced a statement signed by both parties and contained four principle declarations: (1) The U.S. and North Korea commit to establish new diplomatic relations; (2) the U.S. and North Korea will join their efforts to build a lasting and stable peace regime on the Korean Peninsula; (3) North Korea commits to work toward complete denuclearization of the Korean Peninsula; and (4) the U.S. and North Korea commit to recovering POW remains from the Korean War.¹¹⁸ In a press conference after the summit, President Trump also unilaterally pledged to suspend the annual U.S. – South Korean military exercises and announced that North Korea had promised to destroy a missile testing facility.¹¹⁹ After returning to the U.S. on June 13, President Trump declared that “everyone can feel much safer than the day I took office. There is no longer a Nuclear Threat from North Korea.”¹²⁰

Despite President Trump’s assertion that there was no longer a nuclear threat from North Korea after the Singapore summit, the document itself utilized vague language and failed to impose any substantive obligations on North Korea in terms of denuclearization. The Singapore statement contains “no commitment to a declaration of weapons. There is no commitment to verification. There is no timeline.”¹²¹ In addition to the vague terms of the agreement, by meeting with Mr. Kim in a highly publicized summit, President Trump offered Kim Jong-un and his regime the international legitimacy and prestige it has long coveted, without requiring any

¹¹⁷ See Sue Mi Terry and Victor Cha, *Assessment of the Singapore Summit*, CSIS (June 12, 2018)

<https://www.csis.org/analysis/assessment-singapore-summit>.

¹¹⁸ See Joint Statement of President Trump and Chairman Kim Jong Un at the Singapore Summit, (June 12, 2018)

<https://th.usembassy.gov/joint-statement-president-donald-j-trump-united-states-america-chairman-kim-jong-un-democratic-peoples-republic-korea-singapore-summit/>.

¹¹⁹ See Terry and Cha, *supra* note 117.

¹²⁰ Eileen Sullivan, *Trump Says There is No Longer a Nuclear Threat After Kim Jong Un Meeting*, N.Y. Times (June 13, 2018) <https://www.nytimes.com/2018/06/13/us/politics/trump-north-korea-nuclear-threat.html>.

¹²¹ Terry and Cha, *supra* note 117.

significant concessions in return.¹²² In fact, President Trump was the only one to make concessions when he pledged to suspend U.S. – South Korean military exercises, another long sought goal of North Korea.¹²³ President Trump also praised Kim Jong-un, citing their “special bond” and later touting their “love letters” and the “beautiful letters” President Trump received from the North Korean leader.¹²⁴ Victor Cha has also pointed out that “Singapore will be remembered as Kim’s coming out party as leader of the world’s newest nuclear weapons state. That will be the domestic narrative in North Korea.”¹²⁵

President Trump and Kim Jong-un left the Singapore summit with the intent to meet again to discuss denuclearization, and their second summit occurred on February 27 and 28, 2019, in Hanoi, Vietnam.¹²⁶ On February 28, President Trump and Mr. Kim cut off negotiations without reaching a deal on denuclearization.¹²⁷ Reportedly, both President Trump and Mr. Kim asked for concessions the other side was not willing to give, with Kim asking for the removal of the recently imposed sanctions for a continued moratorium on weapons testing, a limit on nuclear stockpiles, and potentially shutting down the Yongbyon nuclear facility, while President Trump sought to dismantle North Korea’s entire nuclear weapons program.¹²⁸

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See David Nakamura, *Trump-Kim Summit: Trump says after historic meeting, ‘We have developed a very special bond,’* Wash. Post (June 12, 2018) https://www.washingtonpost.com/politics/trump-kim-summit-trump-says-we-have-developed-a-very-special-bond-at-end-of-historic-meeting/2018/06/12/ff43465a-6dba-11e8-bf86-a2351b5ece99_story.html and Pia Deshpande, *Trump touts ‘Beautiful Letter’ from Kim Jong Un,* Politico (June 11, 2018) <https://www.politico.com/story/2019/06/11/trump-touts-beautiful-letter-from-kim-jong-un-1360138>.

¹²⁵ See Terry and Cha, *supra* note 117. But see John Delury, *South Korea Can Save the Nuclear Talks*, Foreign Affairs (Mar. 7, 2019) (“the ‘maximum engagement’ strategy that U.S. President Donald Trump initiated a year ago remains the best approach... the notion that somehow not talking to countries is punishment to them is ridiculous. Summits did not put Kim in power—his father and grandfather maintained control and ‘legitimacy’ for seven decades without meeting a U.S. President—nor do they keep him there”).

¹²⁶ *Trump and Kim meet for Vietnam Summit*, BBC News (Feb. 27, 2019) <https://www.bbc.com/news/av/world-47389460>.

¹²⁷ Kevin Liptak and Jeremy Diamond, *‘Sometimes you have to walk’: Trump leaves Hanoi summit with no deal*, CNN (Feb. 28, 2019) <https://www.cnn.com/2019/02/27/politics/donald-trump-kim-jong-un-vietnam-summit>.

¹²⁸ See Sue Mi Terry, *Assessment of the Trump-Kim Hanoi Summit*, CSIS (Feb. 28, 2019) <https://www.csis.org/analysis/assessment-trump-kim-hanoi-summit>; See also John Delury, *South Korea Can Save the Nuclear Talks: After Hanoi, Back to Seoul*, Foreign Affairs (Mar. 7, 2019) <https://www.foreignaffairs.com/articles/north-korea/2019-03-07/south-korea-can-save-nuclear-talks>.

Despite leaving Hanoi without an agreement, and a widespread belief among scholars that President Trump’s highly publicized summits were largely a failure in terms of addressing North Korea’s nuclear threat, President Trump did demonstrate that North Korea will not engage in provocative action when they are engaged in negotiations, as evidenced by their self-imposed two-year moratorium on weapons tests in 2018 and 2019.¹²⁹ President Trump’s approach to North Korea marked a dramatic departure from the approaches of previous U.S. administrations, and despite his claims to have solved the North Korean nuclear threat, President Trump left “behind a North Korea with a nuclear program that is more ambitious than ever, after touting his on-and-off diplomacy and ‘personal relationship’ with Mr. Kim.”¹³⁰

III. How the Biden Administration Should Move Forward with North Korea

As the Biden administration nears the conclusion of its “full review” of the United States’ approach in regards to a nuclear North Korea, the international community will soon discover how President Biden plans to address North Korea moving forward.¹³¹ For its part, North Korea has maintained its animosity towards the new administration, recently claiming that President Biden made “a big blunder” by calling North Korea’s nuclear arsenal a threat to U.S. security and warning that the United States would face “a very grave situation” as long as it maintains its “hostile policy” towards the Kim regime.¹³² Thus far, the Biden administration has signaled that it is likely to chart a path between the comprehensive deal sought by Trump and the ‘strategic

¹²⁹ See Choe Sang-Hun, *North Korea is no longer bound by nuclear test moratorium, Kim says*, N.Y. Times (Dec. 31, 2021) <https://www.nytimes.com/2019/12/31/world/asia/north-korea-kim-speech.html>.

¹³⁰ Choe Sang-Hun, *Kim Jong-un Uses Party Congress to Double Down on Nuclear Program*, N.Y. Times (Jan. 13, 2021) <https://www.nytimes.com/2021/01/13/world/asia/north-korea-kim-jong-un-nuclear.html>.

¹³¹ See Reuters, *supra* note 12.

¹³² Choe Sang-Hun, *North Korea Warns Biden Against ‘Hostile Policy,’* N.Y. Times (May 1, 2021) <https://www.nytimes.com/2021/05/01/world/asia/north-korea-biden.html>.

patience’ of the Obama administration, instead relying on a “calibrated practical approach that is open to and will explore diplomacy” with North Korea.¹³³

While we wait to see how the Biden administration will implement its ‘practical approach’ to North Korea, here are a few steps the new administration should take to effectively address a nuclear North Korea. Section III.A explains that for the sake of the NPT and the international legal nonproliferation regime, the Biden administration should maintain a public posture of the complete and verifiable denuclearization of North Korea, but understand that complete denuclearization is a long-term goal. Part III.B details how the new administration should continue to apply economic pressure and enforce the international sanctions regime against North Korea. Part III.C addresses how the Biden administration should reengage with our strategic allies in the region to bolster deterrence and containment. And finally, Part III.D explains why the Biden administration should engage North Korea and pursue reciprocal and proportional measures that will foster stability and decrease tensions in the region.

A. The Biden Administration Should Maintain a Public Stance of the Complete Denuclearization of North Korea

The Biden administration should maintain a public posture that the United States seeks the complete, verifiable denuclearization of North Korea for the sake of the NPT and the international legal regime for nonproliferation. Every U.S. presidential administration that has dealt with either the prospect or reality of a nuclear North Korea has adopted the stance that the United States is unwilling to accept North Korea as a nuclear weapons state.¹³⁴ Biden must do the same.

¹³³ Nandita Bose, *Biden administration sets new North Korea policy of practical diplomacy*, Reuters (Apr. 30, 2021) <https://www.reuters.com/world/asia-pacific/biden-administration-has-completed-north-korea-policy-review-white-house-2021-04-30/>.

¹³⁴ See Cha and Kang, *supra* note 91, at 194. (“All presidents have threatened the use of force and said that ‘all options are on the table,’ and no American president has ever indicated any willingness to live with a nuclear North Korea”).

Accepting North Korea, a former state party to the NPT, as a de facto nuclear weapons state would strike a serious blow to the international nonproliferation regime.¹³⁵ As previously discussed, the NPT already has systemic weaknesses and today “the NPT regime is widely regarded as a system in distress.”¹³⁶ By maintaining a public stance that the United States will never accept North Korea as a NWS, the Biden administration can send a firm message to any current NNWS with potential aspirations of following in North Korea’s footsteps, i.e. withdrawing from the NPT and pursuing a nuclear weapon, that any such country will be met with condemnation instead of initial backlash followed by eventual acceptance of the country’s nuclear weapons.¹³⁷ As Steven E. Miller has pointed out, “to many, the failure of the NPT system to prevent North Korea’s acquisition of nuclear weapons. . . is a disturbing symptom of the imperfection of the regime,” and backing away from the complete denuclearization of North Korea would send the wrong message to many “disgruntled [NNWS] states that believe their interests are not being served within the NPT system.”¹³⁸

The Biden administration should not back away from the complete denuclearization of North Korea, even if complete denuclearization is unrealistic in the short term.¹³⁹ Kim Jong-un’s recent insistence that North Korea is a nuclear power and the cementation of nuclear arms in North Korea’s constitution signal that complete denuclearization is likely not in the cards for the

¹³⁵ See Mishra, *supra* note 29, at 1054 (“recognition of North Korea as a de facto NWS would undermine the Grand Bargain and set the Treaty on a perilous course that, if unchanged, would likely culminate in its collapse”).

¹³⁶ Steven E. Miller, *Nuclear Collisions: Discord, Reform & the Nuclear Nonproliferation Regime*, *Am. Acad. of Arts & Sci.* at 2 (2012) (“[the NPT] is commonly described as troubled, jeopardized, derailed, unraveling—eroding under the pressure of unresolved compliance crises, inadequate enforcement, diplomatic friction and distrust, spreading nuclear technology, and member state dissatisfaction”); see also *supra* Section I.A.1.

¹³⁷ See Jozef Goldblat, *Ban on Nuclear-Weapon Proliferation in Light of International Law*, in *Nuclear Proliferation and International Security 9* (Morten Bremer, et al. eds., 2007).

¹³⁸ Miller, *supra* note 135 at 2-3.

¹³⁹ See Daniel R. Coats, *Statement for the Record: Worldwide Threat Assessment of the US Intelligence Community*, (Jan. 29, 2019) <https://www.dni.gov/files/ODNI/documents/2019-ATA-SFR--SSCI.pdf> (“we continue to assess that North Korea is unlikely to give up all of its nuclear weapons and production capabilities, even as it seeks to negotiate partial denuclearization steps to obtain key US and international concessions. North Korean leaders view nuclear arms as critical to regime survival”).

Biden administration and will not be a realistic solution any time soon.¹⁴⁰ Negotiations at the Hanoi summit allegedly broke down after President Trump sought a comprehensive agreement dismantling North Korea's entire nuclear weapons program, while Mr. Kim envisioned more meager concessions.¹⁴¹ If the Biden administration does engage North Korea, as discussed further below, it should make clear that while complete denuclearization of North Korea is the long-term goal, the administration is willing to bargain over more realistic, smaller steps and make reciprocal and proportional concessions that build trust, decrease tensions, and enhance stability in the region. In sum, the Biden administration should adhere to the longstanding U.S. position of the complete denuclearization of North Korea for the sake of the NPT, with the understanding that complete denuclearization is something to work towards in tandem with short-term security assurances, not something Biden can expect North Korea to commit to before engaging in substantive negotiations.

B. Continue to Pursue and Enforce the International Sanctions Regime With a Caveat

It is imperative that the Biden administration continue to pursue and enforce the international sanctions regime against North Korea, but with the understanding that economic pressure is a means to get North Korea back to the negotiating table, not a solution in and of itself.¹⁴² Since the UNSC imposed its first sanctions on North Korea in 2006 following North Korea's first nuclear test, we have seen that sanctions alone have not been an effective tool in preventing North Korea from obtaining nuclear weapons.¹⁴³ The international sanctions regime

¹⁴⁰ See Sang-Hun, *supra* note 10 (“Kim Jong Un uses recent party congress to double down on nuclear program”).

¹⁴¹ See Terry, *supra* note 128.

¹⁴² See *supra* Section II.

¹⁴³ See Joseph Yun and Frank Aum, *A practical approach to North Korea for the next US president*, Bull. of the Atomic Scientists (Oct. 2, 2020) <https://thebulletin.org/2020/10/a-practical-approach-to-north-korea-for-the-next-us-president/> (“Far from persuading North Korea to denuclearize, however, the pressure approach only seemed to intensify its pursuit of a credible nuclear deterrent. . . Ultimately, a theory premised solely on pressure is futile if the targeted regime responds adversely to it, actively seeks to circumvent it, is willing to endure high costs and civilian suffering, and is aided by third countries that are unwilling or unable to apply it effectively”).

has, however, inflicted heavy costs on North Korea, as evidenced by the fact that North Korea's revenues from exports to China crashed by almost ninety percent in 2018 following the last round of major UNSC sanctions.¹⁴⁴ Similarly, it is telling that Kim Jong-un requested sanctions relief in return for any further concessions on denuclearization during the Hanoi summit.¹⁴⁵ Further, North Korea has imposed what is likely its harshest economic burden on itself, when it completely shut down its borders in response to the Covid-19 pandemic.¹⁴⁶ There is little question that North Korea is beginning to feel the extended detrimental effects of both sanctions and the pandemic.¹⁴⁷

The Hanoi summit between Trump and Kim Jong-un demonstrated that North Korea is willing to offer at least partial rollbacks of its nuclear program in return for sanctions relief.¹⁴⁸ While President Trump rejected the offer in Hanoi, it is clear that North Korea is willing to negotiate over incremental sanctions relief in return for incremental rollbacks that could “not only reduce security risks in the near term, but also pave the way for broader diplomatic solutions down the road.”¹⁴⁹ China has signaled that they are more concerned with regime stability and having a relatively stable anti-U.S. ally on their border than enforcing sanctions.¹⁵⁰ And, as long as China is willing to “act as a thermostat, ensuring that the heat never gets too high on their neighbor,” sanctions alone will prove futile.¹⁵¹ While sanctions and economic pressure

¹⁴⁴ *Id.*

¹⁴⁵ See Ankit Panda, *Trump Kim talks: what to make of the Hanoi summit collapse?*, BBC News (Feb. 28, 2019) <https://www.bbc.com/news/world-asia-47382060>

¹⁴⁶ See Choe Sang-Hun, *In North Korea, Coronavirus Hurts More Than Any Sanctions Could*, N.Y. Times (Jul. 4, 2020) <https://www.nytimes.com/2020/07/04/world/asia/north-korea-sanctions-coronavirus.html> (“Closing the border with China crippled the regime’s few remaining methods, legal and otherwise, for bringing in much needed foreign currency”).

¹⁴⁷ Simon Denyer and Min Joo Kim, *North Korea’s Kim Jong Un Acknowledges ‘painful lessons’ as economy suffers*, Wash. Post (Jan. 6, 2021) https://www.washingtonpost.com/world/asia_pacific/north-korea-kim-jong-un-coronavirus/2021/01/06/9a1cca5e-4fd4-11eb-af5-fdaf28cfca90_story.html.

¹⁴⁸ See Christopher Lawrence, *Transactional nuclear diplomacy may provide a path toward ‘grand bargains’ with Iran and North Korea*, Bull. of the Atomic Sci. (Apr. 29, 2021) <https://thebulletin.org/2021/04/transactional-diplomacy-a-path-toward-nuclear-grand-bargains-with-iran-and-north-korea/>.

¹⁴⁹ *Id.*

¹⁵⁰ See Yun and Aum, *supra* note 143.

¹⁵¹ *Id.*

have not proved to be a particularly useful tool by themselves, sanctions offer the Biden administration valuable leverage and bargaining chips in any future negotiations with North Korea, and the Biden administration should continue to encourage the enforcement of the international sanctions regime and continue to enforce unilateral U.S. sanctions as means to an end, to bring North Korea back to the negotiating table.¹⁵²

C. Reengage with Japan and South Korea to Bolster Deterrence and Containment of North Korea's Nuclear Threat.

While Donald Trump pursued a unilateral course of action with North Korea, the Biden administration should reengage with our allies in the region, namely Japan and South Korea, to bolster deterrence in the region and contain North Korea's nuclear threat.¹⁵³ Indeed, while Trump backed away from traditional allies and bickered with South Korea over defense costs, the Biden administration has already signaled that it plans to reengage with South Korea and Japan and lean on international alliances to help deal with the growing threat posed by North Korea.¹⁵⁴ Maintaining stable relationships with Japan and South Korea is essential to combat the steady increase of Chinese influence on North Korea and the fact that China's goals in regard to North Korea differ drastically from U.S. objectives.¹⁵⁵

¹⁵² See *supra* Section II.

¹⁵³ See Montgomery, *supra* note 108.

¹⁵⁴ See Simon Denyer and Min Joo Kim, *U.S. military puts Korean workers on unpaid leave as talks over costs continue*, Wash Post (Apr. 1 2020) https://www.washingtonpost.com/world/asia_pacific/us-military-puts-korean-workers-on-unpaid-leave-as-talks-over-costs-continue/2020/04/01/30186308-73c9-11ea-ad9b-254ec99993bc_story.html (“the impasse stems from President Trump’s demand that Seoul raise more than fivefold its contribution to the cost of stationing about 28,500 U.S. troops in the country, a demand that South Korea says is politically impossible to meet”); Lara Jakes and Choe Sang-Hun, *North Korean Threat Forces Biden Into Balancing Act With China*, N.Y. Times (Mar. 18, 2021) <https://www.nytimes.com/2021/03/18/world/asia/biden-north-korea-china.html> (“the Biden administration is banking on international alliances in the region to help stem the growing threat posed by North Korea’s ballistic and nuclear capabilities”).

¹⁵⁵ See Frank Aum, Jacob Stokes, Patricia M. Kim, Atman M. Trivedi, Rachel Vandenbrink, Jennifer Staats, and Joseph Y. Yun, *A Peace Regime for the Korean Peninsula*, U.S. Inst. Of Peace: Peaceworks No. 157 at 14 (Feb. 2020) (“As China advocates for North Korea’s demands for security concessions from the United States and South Korea, it will try to shift the balance of regional power in ways that are favorable to its interests. It is likely to leverage the peace regime process to advance its strategic aim of eroding the US presence in the region”).

The good news, as Korean expert David Kang notes, is that deterrence has overwhelmingly shown itself to be effective in curbing the threat of a nuclear North Korea, and deterrence will likely continue to work moving forward.¹⁵⁶ Kang argues that “North Korea poses almost no threat of major war to South Korea or the United States as long as the outside world does not attack first. . . Kim Jong-un may be many things, but he is not suicidal.”¹⁵⁷ North Korea demonstrated the ability to destroy all of South Korea and most of Japan, yet there is also little chance that North Korea will ever strike first, as Kim Jong-un does not want to start a war he knows he will lose.¹⁵⁸ Similarly, it is highly unlikely that the United States, Japan, or South Korea would ever preemptively attack North Korea due to the fact that any such attack would result in millions of South Korean, Japanese, and American deaths before North Korea could be subdued.¹⁵⁹ With North Korean leadership that has consistently prioritized regime survival over all else, as long as the United States, Japan, and South Korea maintain a commitment to trilateral defense, where an attack on one is an attack on all, it follows that North Korea will be deterred from actually carrying out an attack.¹⁶⁰

Former Deputy Assistant Secretary of Defense for Nuclear and Missile Defense Policy, Brad Roberts, argues that the credibility of the United States’ promises to defend its allies from a

¹⁵⁶ David C. Kang, *North Korea is Not a Problem to be Solved*, in *Nuclear North Korea: A Debate on Engagement Strategies* 197 (Victor D. Cha and David C. Kang eds. 2018).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*, at 198.

¹⁵⁹ See Zeeshan Aleem and Jonathan Pollack, *An expert warns that a preemptive strike on North Korea would lead to ‘very big war,’* Brookings, (Apr. 18, 2017) <https://www.brookings.edu/on-the-record/an-expert-warns-that-a-preemptive-strike-on-north-korea-would-lead-to-very-big-war/> ([preemptive strike] is analyzed to death, and when we look at it, we come to the same conclusion every time: We would ‘win a war,’ but the price our allies would pay far exceeds whatever the gains would be”); See also Victor Cha, *Giving North Korea a ‘bloody nose’ carries a huge risk to Americans*, Wash. Post (Jan. 30, 2018) https://www.washingtonpost.com/opinions/victor-cha-giving-north-korea-a-bloody-nose-carries-a-huge-risk-to-americans/2018/01/30/43981c94-05f7-11e8-8777-2a059f168dd2_story.html.

¹⁶⁰ See Brad Roberts, *38 North Special Report: Living With a Nuclear-Arming North Korea, Deterrence Decisions in a Deteriorating Threat Environment*, 38 North (Nov. 2020) <https://www.38north.org/wp-content/uploads/pdf/38-North-SR-2011-Brad-Roberts-Nuclear-North-Korea-Deterrence.pdf> (arguing that the United States should pursue a “dual track” approach of extended deterrence with Japan and South Korea combined with diplomatic efforts to engage North Korea).

North Korean attack and to respond as necessary has eroded under the Trump administration.¹⁶¹ If Roberts is correct, the time is ripe for the Biden administration to reassure Japan and South Korea that the United States is committed to their defense and that deterrence will hold. The political obstacles to trilateral defense may be substantial, especially with the strained history between Tokyo and Seoul, but the North Korean threat is likely to take precedence over such concerns.¹⁶² By recommitting to our traditional alliances with Japan and South Korea through activities such as the deployment of strategic assets, missile defense systems, and returning to joint-military exercises with South Korea, the Biden administration can make it clear to North Korea that if they were to carry out an attack on the United States or its allies that they will be met with complete destruction.¹⁶³ While a morbid thought, the theory goes that North Korea has put themselves in a box of their own making, and as long as deterrence holds both sides should be effectively dissuaded from violence.¹⁶⁴ By strengthening our alliances with Japan and South Korea and bolstering U.S. deterrence and containment capabilities, the Biden administration can pursue diplomatic engagement with a reduced threat of a North Korean attack.¹⁶⁵

D. Convey a Willingness to Engage North Korea and Pursue Reciprocal and Proportional Concessions.

With sanctions and deterrence measures in place, the Biden administration should then remain open to, and even convey a desire, to open diplomatic channels between the two countries and engage North Korea in substantive negotiations over their nuclear program and arsenal of nuclear weapons. Previous U.S. administrations diplomatic efforts largely consisted of refusing to make any concessions until North Korea takes significant steps to denuclearize.¹⁶⁶

¹⁶¹ *Id.*, at 10.

¹⁶² *Id.*, at 11 (“The political obstacles to improved trilateral military cooperation are, of course, substantial but they will disappear in a crisis once North Korea has fired the first shot”).

¹⁶³ See Aleem and Pollack, *supra* note 159.

¹⁶⁴ *Id.*

¹⁶⁵ See Roberts, *supra* note 160, at 9.

¹⁶⁶ See Yun and Aum, *supra* note 143.

Even President Trump, who altered the traditional playbook and met with Kim Jong-un himself, made it clear in Hanoi that any concessions from the United States would only come after complete denuclearization.¹⁶⁷ But while understanding that complete denuclearization can remain a long-term goal, the Biden administration must be ready and willing to deal with a nuclear armed North Korea and willing to take incremental steps to stabilize the region and decrease the threat of nuclear war.¹⁶⁸ Expecting Kim Jong-un to commit to complete denuclearization and give up the nuclear arsenal that he views as essential to the regime's survival is unrealistic.¹⁶⁹ And the situation could continue to get worse if the Biden administration does not adopt a more pragmatic approach.¹⁷⁰ Previous U.S. administrations have made the perfect the enemy of the good, and “missed several opportunities in the past to manage incremental risks so as to prevent the situation from worsening.”¹⁷¹

With this backdrop, the Biden administration should engage North Korea in incremental, reciprocal, and proportional concessions.¹⁷² Simultaneous concessions could provide “tangible progress in addressing each side's security concerns [which] then help provide the foundation, trust, and momentum for additional gains down the road.”¹⁷³ The Biden administration will have to decide exactly what it is willing to pay, but the administration could consider offering some sanctions relief, or a halt in U.S.–South Korean military exercises in return for a verifiable freeze

¹⁶⁷ *Id.*

¹⁶⁸ See Markus Garlauskas, *It's Time to Get Real on North Korea: The Biden administration should overhaul America's outdated strategy and the unrealistic assumptions behind it*, U.S. Inst. of Peace (Feb. 9, 2021) <https://www.usip.org/publications/2021/02/its-time-get-real-north-korea> (arguing that Biden should not expect Beijing's cooperation and should develop a strategy to deal with North Korea as a nuclear armed state that is not going to give up its arsenal any time soon).

¹⁶⁹ *Id.*

¹⁷⁰ See Siegfried S. Hecker, Robert L. Carlin, and Elliot A. Serbin, *A Comprehensive History of North Korea's Nuclear Program*, Stan. Ctr. For Int'l. Security and Cooperation (Last updated in 2018) <https://cisac.fsi.stanford.edu/content/cisac-north-korea>.

¹⁷¹ *Id.*

¹⁷² For a comprehensive discussion on graduated reciprocity in tension reduction, See Alan R. Collins, *GRIT, Gorbachev and the end of the Cold War*, Rev. of Int'l. Stud. Vol. 24, No. 2 201-219 (Apr. 1998).

¹⁷³ Yun and Aum, *supra* note 143.

on North Korea’s nuclear and missile programs.¹⁷⁴ Or, the Biden administration could pursue a deal with an eye towards arms reduction.¹⁷⁵ Or, Biden could revive the offer Kim Jong-un put forth to Trump, dismantling the Yongbyon nuclear facility in exchange for partial sanctions relief.¹⁷⁶ Each of these steps could offer short-term security benefits, and “each step that is taken down that road can make the subsequent steps toward reconciliation more realistic.”¹⁷⁷ The basis behind these incremental steps is that North Korea will not give up its nuclear weapons and nuclear program until its security can be assured, and “such assurance cannot be achieved simply but an American promise or an agreement on paper, it will require a substantial period of co-existence and interdependence.”¹⁷⁸ However the Biden administration decides to move forward, it is clear that engagement is the best strategy.¹⁷⁹ An engaged North Korea is less hostile, and engagement decreases tensions and reduces the threat of violence, and the Biden administration should engage North Korea and be willing to move forward with incremental, proportional concessions on the road towards complete denuclearization.¹⁸⁰

Conclusion

While there is no easy solution to dealing with the threat of a nuclear North Korea, the Biden administration cannot ignore the problem and hope it simply goes away.¹⁸¹ The Biden administration should pursue engagement with North Korea while simultaneously enforcing the

¹⁷⁴ *Id.* (“an interim deal that freezes North Korea’s nuclear and missile activities can largely be achieved and verified and would have an immediate security payoff”).

¹⁷⁵ See Toby Dalton and Youngjun Kim, *Negotiating Nuclear Arms Control With North Korea: Why and How?*, Carnegie Endowment for Int’l. Peace (Mar. 2, 2021) <https://carnegieendowment.org/2021/03/02/negotiating-nuclear-arms-control-with-north-korea-why-and-how-pub-84006> (arguing that arms control is the most appropriate mechanism for implementing a strategy to pursue peace and denuclearization simultaneously).

¹⁷⁶ See Lawrence, *supra* note 148.

¹⁷⁷ *Id.*

¹⁷⁸ Hecker, Carlin, and Serbin, *supra* note 170.

¹⁷⁹ See Kang and Cha, *supra* note 90 (“Whether you are a hardliner or softliner, hawk or dove on North Korea, the default strategy on the Korean peninsula today remains engagement”).

¹⁸⁰ *Id.*

¹⁸¹ See Robert Einhorn, *The key choices now facing the Biden administration on North Korea*, Brookings (Mar. 30, 2021) <https://www.brookings.edu/articles/the-key-choices-now-facing-the-biden-administration-on-north-korea/> (Arguing in favor of a phased approach to diplomatic relations).

UNSC sanctions regime and recommitting to the defense of South Korea and Japan and extended deterrence. And, although the complete denuclearization of North Korea is no longer a realistic goal for the short-term, the Biden administration should maintain the public posture of the complete denuclearization of North Korea for the sake of the NPT and the international legal regime for the nonproliferation of nuclear weapons.