Developing Consensus on Strengthening Article X(1) of the NPT
Research Brief

January 2015
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Foreword

Since the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) entered into force in 1970, only one State Party—the Democratic People’s Republic of Korea (DPRK) has invoked Article X(1) and claimed its withdrawal from the Treaty. The precedent set by the DPRK continues to highlight the urgent need for State Parties to generate consensus on how best to review implementation of Article X(1)—withdrawal from the Treaty and to stress that it is in all NPT States Parties’ interest to maintain the integrity and credibility of the Treaty by deterring abuse of Article X(1). Over the past decade, a number of proposals have been made by a range of States Parties and groupings but very little progress has been made to strengthen Article X(1) within the NPT Review Process.

From 27 April to 22 May 2015, NPT State Parties will convene at the United Nations Headquarters in New York to review the operation of the Treaty. A number of issues will have an impact on the outcome of this review, including: diplomatic efforts to reach a lasting agreement on the Iranian nuclear programme; recent ongoing conflicts and their (potential) impact on the bilateral commitments between the United States (U.S.) and the Russian Federation; the scope of progress towards disarmament by the Nuclear Weapon States (NWS); the increasing momentum generated by the ‘Humanitarian Impact of Nuclear Weapons’ initiative; and the conference on the establishment of a Middle East Weapons of Mass Destruction Free Zone. Article X(1) will also be discussed during the conference and with that in mind, INENS launched a project in June 2014, with funding from the UK Foreign and Commonwealth Office to explore ways of generating consensus on strengthening Article X(1).

The process leading to this publication included a workshop in New York in October 2014 and a series of consultations with a wider range of government officials and, commissioned chapters by emerging nuclear specialists whose expertise lie in one of the topics of this publication. This report provides a background of the issues relating to Article X(1), exercising the right of withdrawal, safeguards and verification, and export controls, as well as ideas and recommendations that can be taken up at the 2015 NPT Review Conference and beyond. It is hoped that this publication will generate much-needed consensus-building dialogue among NPT States Parties.
The aim of this study is to examine and address some of the concerns of NPT States Parties and groupings on strengthening Article X(1) - withdrawal, of the NPT. In particular, it explores some of the policy and technical issues and puts forward specific steps that can be taken by the NPT States Parties at the upcoming NPT Review Conference which takes place from 27 April to 22 May 2015 at the United Nations Headquarters in New York. This publication focuses specifically on addressing concerns about NPT States Parties that could potentially abuse the Treaty’s provisions and then withdraw from the Treaty or those that benefit from the peaceful uses of nuclear technology under cover of the NPT, withdraw and then use the materials for non-peaceful purposes rather than states that are in compliance and/or do not pose proliferation concerns.

Since the NPT entered into force in 1970, only one State Party- the Democratic People’s Republic of Korea (DPRK) has invoked Article X(1) and claimed its withdrawal from the Treaty. As of January 2015, it claims to remain outside the Treaty regime, has tested nuclear explosive devices and continues to develop its nuclear programme. Despite the DPRK’s actions, NPT States Parties have achieved little progress since the 2005 NPT Review Conference, to explore ways of deterring abuse of and strengthening Article X(1).

There are essentially two forms of abuse of Article X(1):
- Firstly, where a state has violated its obligations and as pressure mounts, it seeks to avoid responsibility for its violations by withdrawing from the Treaty; and
- Secondly States that withdraw and then use materials and/or technology for non-peaceful purposes.

The NPT does not include specific measures or actions to take on withdrawal in the event that a state in violation of its NPT obligations or a potential proliferator State notifies its intention to withdraw. Moreover, the discussion on Article X(1) remains stagnant within the NPT process. Twelve years on since the DPRK claimed its withdrawal from the NPT regime, little progress has been made by NPT States Parties as a collective, to address the issue of withdrawal. Instead, the NPT review process has seen a deep polarisation, in the hardened positions by states that wish to see progress made on strengthening the implementation of Article X(1) on the one hand, and those that believe that discussion and/or review of Article X(1) is a distraction or non-issue on the other. In addition, the issue of withdrawal continues to be framed in the context of the DPRK’s example. Generating consensus in the NPT review cycle requires a collective understanding by NPT States Parties that they all have an interest in maintaining the integrity of the Treaty, and that review of the implementation of Article X(1) is neither about amending the Treaty nor limiting the sovereign right of withdrawal, but rather it is about discouraging states from abusing and/or misusing the provision.

This report focuses on seven themes concerning Article X(1):
- The background to Article X(1) issues;
- Why generating consensus on Article X(1) still matters;
- Exercising the right of withdrawal;
- Safeguards and verification during a notice of withdrawal, and beyond;
- Export controls and the supplier/recipient relationship;
- The role of the NPT review process; and
- The role of the UN Security Council (UNSC).

The final chapter of this report focuses on particular steps and actions that can be taken in the run up to, during and after the 2015 NPT Review Conference.
This report highlights that:

- All NPT States Parties have the sovereign right to withdrawal under Article X(1) of the Treaty, but all States are entitled to undiminished security. The potential threat to international peace and security posed by NPT withdrawal of a state in noncompliance or a potential proliferator State retaining unsafeguarded nuclear facilities and materials should unite NPT States Parties in a common priority to address at the 2015 NPT Review Conference;

- The institutional framework and the role of actors involved, especially the International Atomic Energy Agency (IAEA) Secretariat and Board of Governors, the UN Security Council and NPT States Parties should be clearly determined;

- Implementation of comprehensive safeguards and additional protocol measures is crucial in establishing the peaceful nature of a state’s nuclear programme and is conditional on the state’s continued membership of the NPT. Otherwise, there would be no means to verify the peaceful nature of a withdrawing State’s nuclear programme, or the peaceful uses of nuclear materials and/or equipment acquired and developed prior to withdrawal;

- If an NPT State Party exercises its right of withdrawal, the immediate focus of the international community should be on enabling the IAEA to reach a conclusion on the nature of the withdrawing State’s nuclear programme. During the notification period, the safeguards agreement between the IAEA and the withdrawing State should continue to be implemented to enable the Agency to draw a conclusion on compliance by the withdrawing State with its safeguards agreement;

- The IAEA should consider requesting a special inspection if the information made available by the withdrawing State through explanations made by the State and information obtained from routine inspections is not adequate. The IAEA Board of Governors could also require implementation of measures provided for in the model additional protocol in a withdrawing State with no Additional Protocol in order to facilitate the Agency’s drawing of a conclusion on both the correctness and completeness of the withdrawing State’s declaration. The Agency’s conclusion should happen within the notification period;

- Should the IAEA Board of Governors find the withdrawing State in noncompliance with its safeguards agreement, a referral should be made to the UN Security Council as soon as possible within the notification period in order to enable the Security Council to explore the next steps that need to be taken;

- Upon notification of withdrawal, the UN Security Council should convene as soon as possible within the three months, to allow a window of opportunity to examine the circumstances that have given rise to the decision of the withdrawing State and, if appropriate, to take decisions within that timeframe, and if needed, beyond that, which may restore the security confidence among the States involved, and which may reassure NPT States Parties that the integrity of the Treaty can be maintained after the State concerned has withdrawn i.e. that there are no concerns of the withdrawing State developing a non-peaceful nuclear program;

- Within the three months’ notification period, NPT States Parties should convene a special session to address the concerns of the withdrawing State that have led to the notification of withdrawal, to assess the impact that the impending withdrawal will have on the NPT, and to engage the withdrawing State into a dialogue and explore the possibilities of suspending the withdrawal if the extraordinary events cited by the withdrawing State can be resolved diplomatically;

- Concerning export controls, a Final Document of the 2015 NPT Review Conference could include language aimed at encouraging the Nuclear Suppliers Group (NSG) to adopt as part of its best practice guidelines, the requirement of return of technology upon withdrawal as a standard contractual clause;

- UN Resolutions emphasising that nuclear programs cannot be built on illicitly acquired technology would also send a strong message about the unacceptability of this practice.
1.1 Article X(1) NPT

In the interest of the stability of treaty relations, the general rules on treaty withdrawal have been codified in the 1969 Vienna Convention on the Law of Treaties (VCLT) and are considered to reflect customary international law. Article 54 of the VCLT provides that, inter alia, the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the other contracting States. The VCLT codifies the right to, inter alia, withdraw from the treaty as a reaction to the breach of a treaty (Article 60(1)) and to withdraw from a treaty when a fundamental change in circumstances unforeseen by States Parties renders the treaty inapplicable (Article 62 - *rebus sic stantibus*). As pacta sunt servanda remains the foundational principle governing treaty relations, derogations from treaty obligations have to be interpreted restrictively. The principle of *rebus sic stantibus* is to be applied ‘only in the most exceptional circumstances’ and functions as a ‘safety valve’ which is necessary, to accommodate unforeseen changing circumstances while ensuring that even derogation from the law is governed by the law itself and thereby securing the integrity of international law.

The treaty-specific rules on withdrawal from the NPT are encapsulated in Paragraph 1, Article X of the NPT. This paragraph reads as follows:

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

An initial interpretation breaks down the paragraph into the following core elements:

- all States Parties have a right of withdrawal;
- a State Party can invoke this right when it decides that extraordinary events which relate to the subject matter of the Treaty jeopardise the supreme interests of the State Party;
- in such cases the State Party must give notice to all other States Parties and the United Nations Security Council (UNSC) three months in advance of the withdrawal; and
- such notice must include a statement of the extraordinary events which have jeopardised its supreme interests.

These events must fulfil the following cumulative criteria:

- they must be extraordinary;
- they must be related to the subject matter of the NPT; and
- they must jeopardise the supreme interests of the country.

The first criterion is a method to increase the threshold by means of excluding other events which are not extraordinary as a cause for withdrawal. This would mean that the events jeopardising the interests of a State Party should be unprecedented or exceptional. Nevertheless Article X(1) emphasises the discretion of a State Party to interpret the events it is experiencing and to discern what is extraordinary by stating ‘if it decides’.

The second criterion aims to narrow the scope of extraordinary events to only those events which are related to the subject matter of the NPT. It should be noted that the Treaty text does not preclude acts or omissions of States not party to the NPT being the events that cause a State Party to invoke its withdrawal rights.
The determination arising from the third criterion, as to what exactly can constitute the supreme interests of the country, is at the discretion of the State Party invoking the right of withdrawal. The negotiating history of the NPT, however, does indicate that the supreme interests should be interpreted more restrictively than just any national interest. Furthermore, Article X(1) of the NPT was inspired by the withdrawal clause (Article IV) of the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (also known as the Partial Test Ban Treaty - PTBT), which reads as follows:

Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty three months in advance.

The difference between these provisions is that Article X(1) of the NPT also requires the withdrawing State to inform the UNSC and to include a statement as to the reasons of withdrawal. The included requirements do increase the threshold for a State Party in reaching a decision to withdraw due to the various steps it must undertake to bring into force such a decision. During negotiations at the Conference of the Eighteen-Nation Committee on Disarmament in 1965, U.S. delegate William C. Foster explained that ‘[t]hese requirements have been added because they provide ‘an additional brake on hasty withdrawal action without limiting the basic right of withdrawal. In addition, Security Council notification and explanation are clearly appropriate in view of the serious security ramifications of withdrawal.’

Furthermore, as the UNSC is the primary organ entrusted with the responsibility of maintaining international peace and security, it was deemed appropriate to bring a withdrawal decision before the UNSC, giving the Security Council a window of opportunity to examine the circumstances that have given rise to such a decision and take appropriate measures to address the security situation that such withdrawal would create. For example, the UN Security Council might take decisions that may restore the security confidence among the States involved or that may address the threat created by the withdrawing State. Notice to the other States Parties may allow them to take measures to address the withdrawing State’s concerns or the threat that NPT States Parties may feel is created by the act of withdrawal. To date, the DPRK remains the only State Party to have invoked the right of withdrawal in Article X(1) of the Treaty.

1.2 Article X(1) and the Case of the DPRK

The DPRK attended the 17th General Conference of the International Atomic Energy Agency (IAEA) in 1973 and joined the IAEA the following year at the 19th General Conference. This was followed by the conclusion of an item specific Safeguards Agreement (based on the INFCIRC/66/Rev.2 model) between the DPRK and the IAEA in 1977. Almost a decade later in 1985, the DPRK acceded to the NPT. Different (but not necessarily mutually excluding) reasons are provided as to why the DPRK acceded to the NPT. These reasons include the Soviet Union conditioning the supply of light-water reactors to the DPRK on the latter’s accession to the NPT and the Soviet Union conditioning the provision of nuclear research assistance to the DPRK on the latter’s accession to the NPT.

Concurrently the DPRK and the Republic of Korea agreed on the 1992 Joint Declaration, establishing a comprehensive nuclear arms ban, ban on nuclear reprocessing and uranium enrichment facilities and a reciprocal inspections regime. In 1992, the DPRK signed its Comprehensive Safeguards Agreement (based on the INFCIRC/153 (Corrected) model), as a result of the prior joint declaration with the Republic of Korea. Soon however, the IAEA found inconsistencies between the DPRK’s initial declaration under the Safeguards Agreement and the findings of the IAEA ad hoc inspections between May 1992 and January 1993. The IAEA invoked special inspections under the Safeguards Agreement to examine two sites not listed in the DPRK’s initial declaration. The DPRK continued discussions but refused access for special inspections. Thereupon, in February 1993, the IAEA Board of Governors called upon the DPRK to comply with the request for special inspections. Subsequently, on 12 March 1993, the DPRK issued a notice of withdrawal from the NPT to be effective, three months later, as stipulated in Article X(1).
The DPRK cited the extraordinary events jeopardising its national interests which led to this decision, which include:

- the resumption of U.S.-Republic of Korea military exercises;
- the adoption of the IAEA Board of Governors resolution demanding special inspections;
- the DPRK’s belief in the lack of impartiality and neutrality of certain IAEA officials; and
- the IAEA’s insistence to inspect sites in the DPRK while ignoring the DPRK’s requests for inspections at U.S. bases in the Republic of Korea.

Concluding that the DPRK was in noncompliance with its safeguards obligations, the IAEA Board of Governors called upon the DPRK to allow access to the suspected sites and referred the case of noncompliance to the UNSC. In response, the latter adopted Resolution 825 (1993) calling upon the DPRK to reaffirm its commitment to the NPT, to honour its obligations under the NPT and to comply with its Safeguards Agreement as requested earlier by the IAEA Board of Governors.

Intensive diplomatic efforts resulted in the 1993 Joint Statement, issued by the DPRK and the U.S., one day before the withdrawal of the DPRK was due to take effect. In this Joint Statement, the DPRK decided to suspend its withdrawal from the NPT and to allow IAEA inspections in accordance with its Safeguards Agreement, while the U.S. pledged security assurances of non-intervention and continued diplomatic dialogue with the DPRK. The implementation of the 1993 Joint Statement faced however, various difficulties including the DPRK’s failure to allow all IAEA requested safeguards inspections.

In 1994 the IAEA Board of Governors adopted a resolution resubmitting the DPRK’s noncompliance to the UNSC when the DPRK discharged its fuel rods from one of the suspected sites, which made the verification of the correctness and completeness of the DPRK’s initial report virtually impossible. When the IAEA imposed sanctions by suspending technical assistance, the DPRK decided to withdraw from the IAEA under Article XVIII(D) of the IAEA Statute.

Diplomatic efforts led to the 1994 Geneva Framework Agreement between the DPRK and the U.S. In this agreement the DPRK committed itself to remaining within the NPT and to freeze the operation of its nuclear facilities at Yongbyon under IAEA supervision; while in return the U.S. promised to normalise political and economic ties, to assist the DPRK in replacing its graphite moderated reactors with light-water reactors and to supply the DPRK with heavy oil.

In the years towards 2003 tensions rose high as various commitments remained unfulfilled and the DPRK expelled the IAEA inspectors. In January 2003 the IAEA Board of Governors adopted a resolution, calling upon the DPRK to clarify its uranium enrichment programme. On 10 January 2003, in a letter informing the UNSC and NPT States Parties, the DPRK announced ‘an automatic and immediate effectuation of its withdrawal from the NPT,’ asserting that its withdrawal would enter into force a day later. Subsequently in February 2003, the IAEA adopted another resolution, reporting to the UNSC the DPRK’s noncompliance and the IAEA’s inability to verify the absence of diversion of nuclear material under safeguards.

The UNSC did not immediately respond to this particular situation. In 2006, after the DPRK’s ballistic missile tests, the UNSC adopted Resolution 1695 (2006) in which the UNSC deplored the DPRK’s announcement of withdrawal from the NPT and its pursuit of developing nuclear weapons, and strongly urged the DPRK’s return at an early date to the NPT and the Safeguards Agreement. Similar resolutions were adopted by the UNSC in reaction to the DPRK’s nuclear explosive tests in 2006 and 2009.
2. Why Article X(1) Matters

Hellmut Lagos

2.1 Introduction

As discussed in the previous chapter, Article X(1) allows a State Party to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardised the supreme interests of its country. In February 2005, two years after the DPRK stated its withdrawal from the Treaty, it announced its fabrication and possession of nuclear weapons. As illustrated in the previous chapter, it was apparent that its nuclear weapons program had started before its withdrawal from the NPT, having taken advantage of international cooperation and assistance as a non-nuclear weapon state (NNWS) Party to the Treaty.

At the 2005 NPT Review Conference, Subsidiary Body III, chaired by Ambassador Alfredo Labbe of Chile addressed Article X(1). This issue was given special consideration in the shadow of the DPRK’s example from the Treaty and its previous noncompliance with its non-proliferation obligations. The sovereign right of any State Party to withdraw from the Treaty was once again reiterated, but several delegations expressed the view that withdrawal from the NPT needs to have significant consequences. Various delegations to the Review Conference quoted the Vienna Convention on the Law of Treaties (VCLT) and customary international law as a legal basis for considerations and decisions on withdrawal from the NPT.

The idea that a State Party should remain accountable for any violations committed whilst party to the Treaty after it had withdrawn as well as the denial of nuclear cooperation with a State which had withdrawn from the Treaty were supported by a large number of delegations. Another notion that received considerable support was the idea that the recipient State should return nuclear material and technologies to the supplier State.

The strengthening of the role of the UN Security Council was also recommended by a number of delegations, particularly from the Western European and Other Groups (WEOG). In this context, delegations expressed the importance of the UN Security Council to examine the extraordinary reasons invoked by a withdrawing State and to address the possible consequences of such withdrawal. On the other hand, some States, particularly some within the Non-Aligned Movement (NAM) expressed disagreement about the idea that a withdrawal from the Treaty must be considered a threat to international peace and security. Some delegations proposed the establishment of a procedure in the event of a notice of withdrawal, including the convening of an extraordinary meeting of States Parties to the NPT.

The 2005 NPT Review Conference is considered the biggest failure in the NPT review cycle history as the Review Conference concluded without an agreed final document. The fate of the report of Main Committee III was not different either, in spite of common views expressed on some of the main items addressed in Subsidiary Body III, as some very important differences prevailed. Nevertheless, some substantive progress was achieved in finding a common agreeable language in the draft report. Most of its elements are still relevant today and have inspired new proposals on Article X(1).

At the 2010 NPT Review Conference, taking into account the case of the DPRK, but also considering the possibility that other States engage in a not too distant future a similar process of withdrawal from the NPT, several delegations, including the European Union (EU) and the U.S. emphasised the need for the establishment of clear guidelines for the UN Security Council to consider the circumstances in an eventual announcement of withdrawal and what should be done about programs and nuclear facilities developed while that State was party to the Treaty as a non-nuclear weapon state.

One of the suggestions that was presented was the notion that together with analysing the extraordinary events that
have been invoked to withdraw from the Treaty, the nuclear installations and facilities provided in the context of technical cooperation programs be frozen immediately and be put under the control of the IAEA. This proposal was not accepted as some members from the NAM expressed that this issue should not be considered a priority in light of the pending progress on the implementation of the Treaty. Therefore, these delegations argued that there is no need to address the issue of Treaty withdrawal with new considerations that are redundant to the existing general norms of international law.

2.2 Evolution of the Debate: Shifting to a Holistic Approach

There is a perception by many NPT States Parties that the debate on withdrawal was initiated and has since been particularly promoted by States that are western, developed and/or are nuclear weapon states (NWS). In this context, it is interesting to observe the statement on Article X(1) by the Group of Eight (G8) in 2013. While acknowledging the right of withdrawal from the NPT contained in Article X(1), the G8 considered that the UN Security Council should immediately address any State’s notification of withdrawal from the NPT and that a State Party remains responsible under international law for violations of the NPT committed prior to its withdrawal. Furthermore, the G8 insisted that this issue should remain on the agenda of the NPT review cycle for further discussion, including arrangements for continued safeguarding or disposal of equipment and materials acquired or developed under safeguards during NPT membership.

In the wider context of the NPT debates, the proposals to address the challenges of Article X(1) have been interpreted by some non-nuclear weapon states as yet another initiative of the NWS to limit the rights of NNWS by restricting the legitimate and sovereign right to withdraw in accordance with international treaty law, and give additional importance to the UN Security Council. This fear has not facilitated a positive outcome of these proposals, as a number of NNWS have expressed their persistent frustration over the lack of progress in the disarmament commitments of NWS in accordance with the Preamble and Article VI of the Treaty.

Nevertheless, and in spite of the vague language on disarmament obligations by NWS, and the perceived lack of substantive progress in the disarmament field, the positive impact of the NPT is undeniable. At the beginning of the 1960s, the U.S. government estimated that in the next decades, between thirty and forty states would acquire nuclear weapons. This has not occurred and the Treaty has played an invaluable role in this regard, and has also contributed to guaranteeing the right of all Parties to the peaceful uses of nuclear energy. Therefore, any threat to the integrity of the Treaty can provoke a crisis by affecting the delicate balance between the different provisions of this legal instrument.

The portrayal of the issue of withdrawal as a specific regional case, using the DPRK as precedent, has had both the effect of reducing the discussion to a particular situation and at the same time, producing an association with a negative point of reference that does not contribute to promoting the consideration of Article X(1).

Therefore a new approach should be adopted, that takes into account the vital importance of the integrity and universality of the Treaty for the preservation of peace and security for all states. This new paradigm shifts away from the discussion of ‘haves’ against ‘have nots’ and turns the discussion on strengthening the withdrawal clause under Article X(1) into a common cause of the international community. It is important to reiterate the preservation of the universality and validity of the NPT as the central legal instrument in the area of non-proliferation and disarmament together with the UN Charter. The main critics of the Treaty have always denounced the asymmetric nature of its text, as some States are allowed to possess nuclear weapons while the rest are obliged to be non-nuclear weapon States Parties. Nevertheless, the preservation of the integrity and universality of the NPT is not only not contradictory to the goal of nuclear disarmament but a sine qua non condition for the goals and objectives of the Treaty. There is a general understanding that a decision to withdraw from the NPT could have a significant destabilising effect, not only on regional geopolitical balances but to international peace and security, with the risk of triggering a chain reaction and even a nuclear arms race that could threaten the nuclear non-proliferation regime.
Therefore, it is in the collective interest of all States, both NWS and NNWS to discourage Parties to exercise Article X(1). A significant step to engage all states in working towards the establishment of effective measures for the strengthening of the nuclear non-proliferation regime was UN Security Council Resolution 1887 (2009), which expressed the Council’s concern about the threat of nuclear proliferation and the need for international action to prevent it.

While most of the Working Papers on Article X(1) that have been presented during the review cycles since 2005 are focused on the legal dimension of withdrawal, in order to gain a common understanding on the exercise of the right of withdrawal, it is necessary to address the political nature of this challenge. In that context, the Non-Proliferation and Disarmament Initiative (NPDI), a cross-regional group (Australia, Canada, Chile, Germany, Japan, Mexico, Netherlands, Nigeria, Philippines, Poland, Turkey and the United Arab Emirates) has presented a working paper at the 2014 Preparatory Committee (PrepCom) of the 2015 NPT Review Conference that highlights both the legal and political nature of this issue and develops a set of basic principles that should be considered.

The NPDI working paper, originally drafted by Chile, considers that in order to maintain the integrity and universality of the Treaty, it is necessary to take a holistic approach, both in encouraging parties to remain in the Treaty and in discouraging them from withdrawing. Furthermore, the text emphasises that tangible progress needs to be made in the implementation of the past commitments made within the framework of the Treaty, in particular the 2010 NPT Review Conference Final Document Action Plan, including nuclear disarmament, the negative security assurances, the peaceful uses of nuclear energy and a Middle East zone free of weapons of mass destruction and their delivery vehicles. The inclusion of these references constitutes a significant addition to previous proposals on this subject, as it facilitates an understanding of the linkages between the various priorities of the NPT review cycle and the Treaty provisions.

The NPDI document proposes a set of principles regarding the exercise of the right of withdrawal by a State in order to protect the legitimate interests of all other States Parties, which does not constitute an amendment to the Treaty. Nevertheless, it highlights that the Review Conference has authority to address specifically what might be done to strengthen implementation of the provisions of the NPT. The NPDI proposes to achieve such regulation within the framework of the Treaty and under the authority of the Review Conference. The following chapters of this publication discuss these ideas further.

At the 2015 NPT Review Conference, delegations will have the opportunity to explore the synergies between the different proposals to address this issue in order to build consensus and introduce appropriate relevant language in an outcome document of the Conference. In order to achieve this goal, interested delegations will have to emphasise the collective nature and the persistence of the threats to the preservation of the integrity and universality of the Treaty represented by possible future withdrawals. To this purpose, it is necessary to engage delegations from different regional and political groupings, both NWS and NNWS in order to promote a common, holistic understanding of the need to address this concern as a shared responsibility of all States Parties to the Treaty.
3. Exercising the Right
Dr. Jenny Nielsen

3.1 Introduction

Oft heralded as the ‘cornerstone’ of the nuclear non-proliferation regime, the NPT remains the normative and legal basis of the nuclear non-proliferation regime. With its near universality, only one State Party to the NPT - the DPRK has to date stated its withdrawal from the Treaty. The negotiators of the 1968 NPT included a short withdrawal clause explicitly reaffirming the sovereign right of states in regards to international legal agreements.

The negotiated text of the NPT withdrawal clause does not specify any responsibilities, safeguards provisions or consequences with regards to nuclear material or facilities associated with exercising the right to withdraw. However, as noted by the NPDI at the 2014 NPT PrepCom, ‘under international customary law a State continues to be responsible for any violation of its legal obligations committed prior to its withdrawal from a treaty’ according to article 70 of the Vienna Convention on the Law of Treaties. Henry Sokolski and Victor Gilinsky argue that the ability of a State Party to exercise withdrawal on three months’ notice is one of the NPT’s ‘basic deficiencies’.

The DPRK’s statement of withdrawal in January 2003, followed by three subsequent nuclear tests in 2006, 2009 and 2013 - underscores the need to address and prevent the potential future abuse of the NPT’s provisions as well as established international norms, by any State Party seeking to exercise withdrawal. As analysts have noted, deficiencies of the NPT and the nuclear non-proliferation regime it anchors, given the lack of an ‘established enforcement system...each violation [of the NPT] requires an improvised response’. Since the DPRK’s claim of withdrawal, States Parties and non-proliferation analysts have proposed various recommendations for consolidating an interpretation of responsibilities, procedures and consequences following the sovereign exercise of NPT withdrawal to address the perceived deficiencies of the regime. As Pierre Goldschmidt has argued, ‘the great benefit that the NPT brings to the international community would be dangerously eroded if countries violating their safeguards agreements or the treaty felt free to withdraw from it, develop nuclear weapons, and enjoy the fruits of their violation with impunity’.

3.2 Consolidating responsibilities associated with invoking Article X(1)

States Parties and groupings have proposed specific recommendations for strengthening the implementation of the provisions of the NPT - through the forward looking mandate established at the 1995 NPT Review Conference - by seeking consensus on consolidating the responsibilities, procedures and consequences associated with the exercise of the NPT’s withdrawal clause. Previously, during the 2005 NPT review cycle and the 2010 NPT review cycle, States Parties and groupings submitted detailed proposals for the establishment of procedures and mechanisms to strengthen the non-proliferation regime, including addressing the potential abuse of the withdrawal clause.

It is imperative to stress that these efforts and proposals are in no manner aimed at abridging a Party’s right to exercise withdrawal from the NPT, nor are they aimed at amending the withdrawal clause. The goal of these proposals is to consolidate an agreement on principles and procedures to ensure that a state that has violated the NPT and then withdraws is held accountable for the violation, and that there is an acknowledgment that nuclear assistance provided in good faith under Article IV should be revoked.

Most recently, at the 2010 NPT Review Conference, States Parties to the Treaty addressed Article X(1) in Subsidiary Body
III during the month-long conference in New York, and despite potential language on Article X(1) in the working paper of the Subsidiary Body III Chair, States Parties failed to reach consensus on the issue. As a result, the Final Document Action Plan of the 2010 NPT Review Conference failed to reflect any action points to be taken on Article X(1).

In the 2015 NPT review cycle, States Parties and groupings have similarly proposed recommendations concerning the exercise of the right of withdrawal. Most notably, in a working paper submitted to the 2014 NPT PrepCom, NPDI proposed five specific ‘principles regarding the exercise of the right of withdrawal’47 aimed at preserving ‘the integrity of the non-proliferation regime, the effectiveness of safeguards and the rights of the States Parties remaining in the’ NPT.48 The NPDI’s proposed five ‘principles’ are premised on the basis that ‘it is vital that mechanisms remain in place’ on items - materials, equipment and technology that may have been transferred to a withdrawing state ‘in good faith’- ‘to ensure that they are not diverted to weapons programmes’.49

Reaffirming that the right of withdrawal is governed by the provisions of the NPT, international law and the VCLT, the NPDI’s proposed principles stress that ‘under international law, a withdrawing party is still liable for violations of the Treaty perpetrated prior to the notification of withdrawal’.50 Furthermore, the NPDI’s suggested principles states that ‘withdrawal should not affect any right, obligation or legal situation between the withdrawing State and each of the other States Parties created through the implementation of the Treaty prior to withdrawal, including those related to IAEA safeguards’.51 In sum, the five principles proposed by the NPDI concerning the right of withdrawal from the NPT are as follows:

- The withdrawing State must include a statement of the extraordinary events it regards as having jeopardised its supreme interests as per the conditions and time frameworks specified in Article X(1);
- A withdrawing State remains ‘liable for violations of the NPT perpetrated prior to the notification of withdrawal’. ‘The withdrawal should not affect any right, obligation or legal situation between the withdrawing State and each of the other States Parties created through the Treaty...including...IAEA safeguards’;
- ‘Depositories and States Parties should undertake consultations and conduct every diplomatic effort to persuade the withdrawing State to reconsider its decision’. Regional diplomatic initiatives should be encouraged;
- Nuclear materials, equipment and technology acquired by a withdrawing State ‘must remain under IAEA safeguards or fall-back safeguards even after withdrawal’;
- Nuclear suppliers are encouraged ‘to incorporate dismantling and/or return clauses or fall-back safeguards in the event of withdrawal’ in supply contracts. Nuclear supplying states ‘are invited to adopt standard clauses for the dismantling and/or return of materials, equipment and other relevant goods from a withdrawing party’.52

In its statement to the 2014 NPT PrepCom, the Russian Federation urged the 2015 Review Conference to reach consensus on specific recommendations concerning political measures and procedures to be applied in a case of a withdrawing State, in order to strengthen the NPT.53 Echoing one of the NPDI proposed principles for diplomatic consultations and regional initiatives in response to a withdrawal notification, Russia similarly recommends that in the event of a notice of withdrawal, consultations be held by the Depositories of the Treaty, States and other concerned parties to ‘assess the effects of such a withdrawal’, taking into consideration the IAEA’s conclusions on the withdrawing party’s safeguards compliance.54 Furthermore, Russia proposes that consensus be reached on a recommendation that ‘nuclear material, equipment, technologies and installations of the withdrawing State...should remain safeguarded’.55

Previously, at the 2012 NPT PrepCom, Russia referred to the continued relevance of its joint working paper (with Ukraine) submitted to the 2010 NPT Review Conference, which outlined specific recommendations for responsibilities, procedures and consequences of the exercise to withdraw from the NPT.56 Notably, one of the specific seven recommendations proposed jointly by Ukraine and Russia in their 2010 working paper, proposes that a supplier state could recall the nuclear materials and technologies supplied to the withdrawing state.57 Furthermore, if the supplier state were not to make such a request, or if not feasible for technical reasons, Ukraine and Russia recommended that such materials, facilities and equipment gained by a withdrawing State ‘must be subject to IAEA lifetime safeguards’.58
The statement by the U.S. to the Cluster 3 discussions at the 2014 NPT PrepCom similarly echoed such an argument for the recommendation that ‘nuclear materials, equipment and technologies received from abroad prior to withdrawal’ should remain subject to IAEA (or other) safeguards in perpetuity if returning these to the supplier state(s) is not feasible. In line with these recommendations, the fifth proposed ‘principle’ submitted by the NPDI to the 2014 NPT PrepCom also specifies the incorporation of return clauses in supplier agreements or fall-back safeguards in the event of withdrawal. These issues are elaborated on in the next two chapters.

3.3 Consolidating consensus: other proposed options

In addition to the recommendations and principles proposed by States Parties in the 2015 NPT review cycle, non-proliferation experts have proposed further (perhaps more controversial) options for managing the potential threats posed by future NPT withdrawals. In order to strengthen the nuclear non-proliferation regime and address the potential abuse of the withdrawal clause, Pierre Goldschmidt has previously argued that NPT withdrawal should be dealt with preventative. Goldschmidt proposes proactively addressing this weakness through the adoption of a ‘generic and legally-binding resolution, stating that if a state withdraws from the NPT (an undisputed right under its Article X(1)) after being found by the IAEA to be in noncompliance with its safeguards undertakings, then such withdrawal constitutes a threat to international peace and security, as defined under Article 39 of the UN Charter. Furthermore, Goldschmidt argues that such a resolution ‘should also provide that under these circumstances, all materials and equipment made available to such a state or resulting from the assistance provided to it under a comprehensive safeguards agreement would have to be forthwith frozen and as soon as possible removed from that state under IAEA supervision and remain under the Agency’s safeguards.’ Goldschmidt argues that the adoption of such an UNSC resolution would ‘better deter a state found to be in noncompliance with its comprehensive safeguards agreements from thereafter giving notice of its withdrawal from the NPT and to guarantee a timely and effective Security Council reaction’ in such circumstances.

Henry Sokolski and Victor Gilinsky argue that ‘we need to make it much more difficult...essentially impossible - to exercise the NPT’s withdrawal provision’. They argue that as in the case of the DPRK, a state in violation of the NPT should not legally be allowed to leave the NPT. Furthermore, Sokolski and Gilinsky argue that a state with nuclear technology (either ‘imported or developed indigenously’) should not be allowed to withdraw from the NPT ‘even if it is in good standing at the time’. They contend that ‘a country should not be allowed to leave the treaty legally with technology if obtained as a member, because it did so with the forbearance of other members on the assumption that it was doing so for peaceful uses’.

Given the sovereign right of states to withdraw from the NPT and international legal agreements, efforts to gain consensus at the 2015 NPT Review Conference (or at a future Review Conference) on procedures and recommendations on responsibilities associated with invoking Article X(1) need to be palatable to the broad range of States Parties, and not be perceived to be restrictive in terms of sovereign states’ rights in order to avoid the same fate as at previous Review Conferences. Mindful of the potential of being misperceived as an imposition on development or compromise on state sovereignty, all the various proposed principles and measures regarding Article X(1) responsibilities are carefully premised as not contradictory to such rights and recognised standards of international law. Furthermore, such proposals are clearly stated not to be attempts at revision or amendment of Article X(1).

Gaining consensus on an understanding of procedures and responsibilities associated with withdrawal from the NPT at the upcoming NPT Review Conference- and reaching consensus on a Final Document- will require improving atmospherics between States Parties on other more contentious issues, including implementation of nuclear disarmament commitments and the conference on a Middle East Weapons of Mass Destruction Free Zone. Given the palpable discontent held by States Parties on the perceived lack of fulfilment on various previous commitments, engendering positive atmospherics conducive to consensus-reaching at the 2015 NPT Review Conference will be a significant challenge. The potential threat to international peace and security posed by NPT withdrawal of a state in noncompliance retaining unsafeguarded nuclear facilities and materials should unite States Parties in a common priority to address.
4. Safeguards and Verification
Dr. Sonia Drobysz

4.1 Introduction

Under Article III(1) of the NPT,

*Each non-nuclear-weapon State Party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency and the Agency’s safeguards system, for the exclusive purpose of verification of the fulfilment of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices.*

The Agreement foreseen in Article III(1) is concluded on the basis of document INFCIRC/153 (Corr.), ‘The Structure and Content of Agreements Between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons.’ In line with the requirements of the NPT, it provides for the application of safeguards on all source or special fissionable material in all peaceful nuclear activities within the state’s territory, under its jurisdiction or carried out under its control anywhere; these safeguards are therefore, referred to as “comprehensive” or “full-scope” safeguards. As reaffirmed by the 2010 NPT Review Conference,

*the implementation of comprehensive safeguards agreements pursuant to article III, paragraph 1. of the Treaty should be designed to provide for verification by the IAEA of the correctness and completeness of a State’s declaration, so that there is a credible assurance of the non-diversion of nuclear material from declared activities and of the absence of undeclared nuclear material and activities.*

As of November 2014, 124 States had also brought into force an additional protocol (AP) to their respective safeguards agreement, on the basis of the model developed in document INFCIRC/540 (Corr.). An additional protocol gives the IAEA access on a more routine basis to more information and locations related to the state’s nuclear activities. States Parties to the NPT noted at the 2010 NPT Review Conference that:

*the implementation of measures specified in the model additional protocol provides, in an effective and efficient manner, increased confidence about the absence of undeclared nuclear material and activities in a State as a whole.*

Thus, the implementation of comprehensive safeguards and AP measures is crucial in establishing the peaceful nature of a state’s nuclear programme.

Such implementation is conditional on the state’s continued membership in the NPT itself- paragraph 26 of INFCIRC/153 (Corr.) provides that the state’s safeguards agreement is to remain in force as long as the state is party to the NPT. Exercising the right to withdraw from the Treaty per its Article X(1) would therefore not only release the withdrawing party from the obligation to comply with the Treaty, but also to fulfil its obligations under the safeguards agreement. There would be no means of verifying the peaceful nature of that state’s nuclear programme, or the peaceful uses of nuclear material and/or equipment which was acquired and developed prior to the state’s withdrawal.

Proposals aimed at preventing the diversion or contribution of such material and equipment to military programs and, to ‘preserve the [...] effectiveness of safeguards’ and the integrity of the non-proliferation regime in the event of withdrawal from the treaty have therefore been developed by NPT State Parties and non-proliferation and safeguards analysts. This chapter reviews those recommendations with a view to framing the debate on the types of safeguards-related measures that could be implemented upon announcement by a state of its withdrawal from the NPT and after it has withdrawn.
4.2 Effects of notice of withdrawal on IAEA safeguards

Under Article X(1) of the NPT, a state party deciding to withdraw from the Treaty shall give notice of such withdrawal to all other parties to the Treaty and to the UN Security Council three months in advance. Paragraph 26 of INFCIRC/153 (Corr.) states that the comprehensive safeguards agreement (CSA) will remain in force as long as the State is party to the NPT. During the three months after the notice of withdrawal has been given, the State is still party to the Treaty; its safeguards agreement consequently remains in force.72

Actions of the international community at this stage should focus on enabling the IAEA to reach a conclusion on the nature of the state’s nuclear programme. That would inform any future action and possible sanctions, as explained by Ukraine and the Russian Federation in the working paper submitted at the 2010 NPT Review Conference:

In the event of a notice of withdrawal from the Treaty, the depositaries should hold consultations with all States Parties to the Treaty in order to assess the consequences of such withdrawal, taking into account the conclusion of the International Atomic Energy Agency (IAEA) regarding compliance of the notifying party with its obligations under the safeguards agreement during the period in which it was a party to the Treaty.73

The continuing implementation of the safeguards agreement should enable the IAEA to draw a conclusion on compliance by the withdrawing state with its safeguards agreement, but it is more likely that additional urgent action could be required. Accordingly, the Russia and Ukraine working paper suggested that:

in the event of a notice of withdrawal from the Treaty, the IAEA Board of Governors should be convened in the shortest possible time in order to authorize the Agency to verify compliance of the State withdrawing from the Treaty with its obligations under the safeguards agreement.74

Under any comprehensive safeguards agreement, the Agency may request a special inspection if it ‘considers that information made available by the state including explanations from the State and information obtained from routine inspections, is not adequate for the Agency to fulfil its responsibilities under the agreement’.75 In addition, even for a state with no AP in force, the Board could require implementation of the measures provided for in the Model AP, to facilitate the Agency’s drawing of a conclusion on both the correctness and completeness of the withdrawing state’s declaration.

The withdrawing state would remain responsible for violations of its obligations committed prior to withdrawal.76 Article 70 of the 1969 Vienna Convention on the Law of Treaties between States, applicable to the NPT, states in that regard:

Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: […] does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

The 1986 Vienna Convention on the Law of Treaties between States and International Organisations contains a similar provision. Even though it is not yet in force, it reflects customary international law,77 and can therefore be considered as applicable to the safeguards agreement concluded between a withdrawing state and the IAEA. Therefore, if a state ‘has been found by the IAEA to be in noncompliance with its safeguards agreement, it would be obliged to remedy the relevant safeguards breaches’.78 As provided for in paragraph 19 of the CSA and Article XII.C of the IAEA Statute, the Board of Governors would report such noncompliance with safeguards obligations to the UN Security Council.

During the 2005 NPT review cycle, Australia and New Zealand also proposed in their working paper that, regardless of the IAEA’s action, the UNSC should convene automatically and immediately when any State gives notice of NPT withdrawal.79 Following recommendations in the working papers submitted by the European Union (EU) during the 2010 NPT review cycle and by the NPDI at the 2014 NPT PrepCom,80 the UNSC could, based on the powers conferred by the UN Charter and when appropriate, qualify noncompliance with safeguards and withdrawal from the Treaty as a “threat to international peace and security”. The EU working paper additionally proposed that subsequent actions of the UNSC could include consideration of an IAEA special inspection.81 Implementation of the AP, or the provisions of the model AP in the event the state does not have one in force, could also be requested, and additional sanctions be imposed.
4.3 Safeguards after withdrawal

Article 70 of the VCLT further provides that:

‘unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention [...] releases the parties from any obligations further to perform the treaty’.

After the three months’ notice period has expired, the withdrawing state is released from its NPT obligations. According to paragraph 26 of INFCIRC/153 (Corr.), the comprehensive safeguards agreement remains in force only as long as the state is party to the NPT; termination of the NPT therefore terminates the comprehensive safeguards agreement itself.

Nuclear-weapon-free zone (NWFZ) treaties also require the implementation of full-scope safeguards. If a state were to withdraw from the NPT but not from a NWFZ treaty, it would allow for the continuation of the CSA. However, even though the conditions for exercising withdrawal from certain NWFZ treaties are stricter than those of the NPT, the NPT withdrawing State is likely to seek withdrawal from those other non-proliferation treaties as well.

Nevertheless, as mentioned above, the VCLT also provides that termination does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. As also mentioned above and noted in the NPDI and EU working papers, a withdrawing party would still be responsible for violations of the Treaty perpetrated prior to the notification of withdrawal. Further, among the rights and obligations created through the execution of the NPT are the commitment to peaceful uses and the safeguarding of, materials and equipment acquired prior to withdrawal. The EU noted that, accordingly:

‘as a matter of principle all nuclear materials, equipment, technologies and facilities developed for peaceful purposes of a State party to the Treaty on the Non-Proliferation of Nuclear Weapons remain, in case of a withdrawal from the Treaty, restricted to peaceful uses only and as a consequence have to remain subject to safeguards’.

Various options to ensure the continuity of safeguards after withdrawal have been tabled. On the model of what has been agreed by Albania for example, a special clause could be added to comprehensive safeguards agreements to the effect that if the agreement is terminated for any reason, safeguards shall continue to apply with respect to nuclear material and facilities which are subject to safeguards on the date of termination and/or any nuclear material produced, processed or used in or in connection with such nuclear material or facility after termination of the agreement, including subsequent generations of produced nuclear material. The EU suggested examining

‘the possibility for the IAEA to continue implementing safeguards and, where relevant, certain Additional Protocol provisions, on all nuclear materials, facilities, equipment and technologies initially developed for peaceful purposes, during an indefinite period following a withdrawal’.

Continuity of safeguards would also be ensured by the re-activation of any item-specific safeguards agreements concluded prior to the NPT and the CSA. Unlike CSAs, item-specific safeguards agreements cover only the material and facilities specified in the agreement (largely consisting of items supplied pursuant to a bilateral cooperation agreement prohibiting the receiving state from using such material and/or facilities for any military purposes). In that regard, in accordance with paragraph 24 of INFCIRC/153 (Corr.), the implementation of safeguards under any such agreement is suspended while the CSA is in force. In the event of the termination of the CSA, the implementation of safeguards under the earlier agreements would automatically cease to be suspended. It has therefore been suggested that all non-nuclear weapon states parties to the NPT and to existing comprehensive safeguards agreements conclude new item-specific agreements that would not lapse with NPT withdrawal. Considering the practical difficulties associated with the conclusion of multiple additional agreements, only the most sensitive nuclear fuel facilities such as enrichment and reprocessing plants could be expected to be covered by those perpetual safeguards.
All future bilateral cooperation agreements for the supply of nuclear material and facilities should provide for such “fall-back” safeguards. Nuclear suppliers would therefore have a crucial role in ensuring the continuity of safeguards, but also in ensuring the dismantlement and/or return of supplied items after withdrawal to prevent their use for military purposes. As suggested by many NPT parties, the Nuclear Suppliers Group (NSG) could include a standard clause in all intergovernmental agreements on transfer for the peaceful uses of nuclear energy—forbidding the use of nuclear materials, equipment and technology subject to such agreements, and foreseeing that, in case of NPT withdrawal and termination of the CSA, such nuclear materials, equipment and technology be returned to the supplier State, rendered inoperable or dismantled under international verification.90

4.4 Conclusion

Both during and after notice of the exercise of the right to withdraw from the NPT, IAEA safeguards should be continuously applied in order to verify the peaceful nature of material and equipment acquired and/or developed prior to withdrawal. Procedures aimed at consolidating the consequences of withdrawal should reaffirm and clarify the applicable safeguards legal framework, including the NPT, safeguards agreements (both comprehensive and item-specific), the IAEA Statute, relevant bilateral cooperation agreements, the VCLT and the UN Charter. The institutional framework and the role of all the actors involved, especially the IAEA Secretariat, the IAEA Board of Governors, the UN Security Council and NPT States Parties should also be clearly determined.

Further, it is as important to establish the actions to be taken as it is to agree on the mechanisms for doing so, such as through resolutions of the IAEA Board of Governors and, resolutions of the UN Security Council adopted under Chapter VII of the UN Charter. For example, it has been suggested that the Security Council adopt a generic resolution, independent of any specific case, to set out a roadmap and foresee the consequences of NPT withdrawal.91 Specific circumstances of the cases and the withdrawing State would nevertheless also have to be taken into account, and generic procedures would need to be adapted and tailored to particular cases.
5. Export Controls
Egle Murauskaite

5.1 Introduction

In considering a state’s withdrawal under Article X(1), a frequently expressed concern has been that of controlling the exports of sensitive (i.e. nuclear weapons useable) materials and technology to and from that state. The issue has raised further concern since such a withdrawal could potentially unfold in the context of actual or suspected violations of the NPT with regards to that very proscription against the pursuit of nuclear weapons. However, as this brief explains, the controls of transfers of sensitive and dual-use materials and technologies consist of complex layers of national and international regulations92 - and whilst the NPT serves as the normative foundation of this system, it is not the sole instrument standing between the proliferators and the commodities they need. Over time, other pillars have emerged to support and sustain the shared goal of the international community of preventing new state and non-state actors from obtaining nuclear weapons. Whilst imperfect, the present configuration has made it significantly harder for proliferators to procure the materials and technology they seek, and the regulatory framework has been constantly evolving to keep up with the changing landscape of this illicit trade environment.

5.2 Non-proliferation Framework Today

Under Article III, the NPT prohibits the export of materials and technology “especially designed or prepared for the processing, use or production of special fissionable material” to non-nuclear weapon states, unless the recipient country agrees to monitoring under IAEA safeguards. However, the actual transfers of nuclear materials and technology are primarily controlled by guidelines of the Nuclear Suppliers Group (NSG): its 46 members act in accordance with the NPT (as well as the treaties establishing Nuclear Weapon-Free Zones around the world), but the decision to transfer any particular item in question ultimately lies with their national authorities, after ascertaining to their satisfaction that such a transfer will not contribute to the spread of weapons of mass destruction.93

These NSG criteria apply to recipients and suppliers of technology transfers irrespective of their NPT membership status. For instance, consider the case of India: as one of the three de facto nuclear weapon states (together with Israel and Pakistan), it is not a signatory of the NPT and could only accede to the Treaty as a non-nuclear weapon state under NPT criteria. For years, India has been excluded from nuclear trade by the NSG because of its refusal to submit to the IAEA safeguards criteria. In 2008, the NSG agreed to make an exception and lift this ban based on India’s voluntary commitment to non-proliferation, including the prospect that all of its civilian nuclear facilities would come under the IAEA safeguards as part of the Additional Protocol, rather than any changes to its NPT status or actual implementation of safeguards at that time. Indeed, the NSG’s seemingly increasing willingness to share the benefits of nuclear technology with states that have not accepted the safeguards obligations has been seen as detrimental to the legitimacy of NPT requirements94 and India’s ultimate commitments under the Additional Protocol approved by the IAEA a year later were seen in some quarters as weak.

However, today’s nuclear proliferation trends have shifted from commodities designed for the development of nuclear technology (peaceful or otherwise) towards the pursuit of dual-use items that have standard application in other industries, but could also be used to advance a nuclear weapons program. Export controls and technical border monitoring mechanisms that members of the NPT and NSG have established domestically to comply with their international non-proliferation commitments have made the transfers of goods directly useable in nuclear programs near impossible.
through open channels and increasingly problematic through illicit channels. Subsequently, several states seeking to advance their nuclear programs have taken to seeking parts in order to manufacture such goods on their components internally, moving increasingly towards generic substitutes that despite their lesser suitability nevertheless apparently suffice to plug their domestic technology gaps. In response to this trend, the NSG has added a new set of guidelines regulating the transfers of “equipment, materials, software, and related technology that could make a major contribution to a ‘nuclear explosive activity’, an ‘unsafeguarded nuclear fuel-cycle activity’ or acts of nuclear terrorism,” but that have uses outside this context, and the list of controlled items is updated regularly.

States that are considered of international proliferation concern and have sought to acquire nuclear, as well as relevant dual-use technology include Iran, and the DPRK, both of which were NNWS parties to the NPT at the time of said procurement attempts, as well as Pakistan - a de facto nuclear weapon state outside the NPT regime. Since the DPRK claimed from the NPT in 2003, restrictions on technology transfer to this state continue to be governed by the NSG and the UN frameworks, implemented by domestic regulations of member states. In terms of Iran and the DPRK, UN Security Council Resolutions 1929 (2010) and 2094 (2013) have instituted a comprehensive ban on the transfers of nuclear specific and dual-use technologies, and delivery vehicles, along with proscriptions of financing and logistics that could potentially relate to such transfers. The implementation and compliance with these international sanctions falls on the domestic authorities of UN member states, irrespective of the NPT status or membership.

While the pursuit of materials and technologies consistent with a nuclear weapons program has so far been limited to states, non-state actors have been known to seek radioactive materials (nuclear and radiological) to be used in combination with conventional explosives in so-called dirty bombs. In addition, non-state actors have been the primary facilitators along the supply chain of dual-use items sought by states. In 2004, the UN Security Council Resolution 1540 was adopted to mitigate these threats - it specifically addresses proliferation threats posed by non-state actors, and to that end requires states to adopt and enforce adequate domestic legislation restricting and monitoring the export of sensitive items.

Several states have gone beyond the proscriptions generally agreed to by the UN members. Members of the European Union (EU) have often preceded and exceeded the UN in their regulatory stringency and scope, limiting trade and transactions with Iranian and North Korean entities through their national legislation in compliance with EU rules. The European Commission also launched a Review of export control policy in October 2014, primarily to deal with evolving proliferation threats and to look at the possibility of convergence of effective control mechanisms and regulations. Furthermore, the U.S. arguably has developed the strictest and most extensive regulatory framework concerning proliferation and other economic activities that may contribute to it (including financial transactions, trade, movement of goods and persons etc.). Indeed, many U.S. domestic non-proliferation regulations effectively have an extra-territorial impact. For instance, all financial establishments active in the U.S. market, irrespective of their origin, are required not to transact with or process transactions by any Iranian entities, under the penalty of losing that market access.

5.3 Implications of Withdrawal

The international export control mechanisms outlined in the previous section have evolved as a means of implementing the proscription of the norm of non-proliferation enshrined in the NPT. International agreements like the UNSC Resolution 1540 (2004), the NSG guidelines, and the EU export control regulations of nuclear weapons specific and dual use goods - bind states in a position to share such technology with commitments that extend beyond the NPT, and apply just the same to parties on the demand side that choose to operate outside the NPT framework, or opt out of it at a later date. Similarly, regional level commitments have created Nuclear Weapon-Free Zones in Latin America and the Caribbean (Treaty of Tlatelolco), South Pacific (Treaty of Rarotonga), Southeast Asia (Treaty of Bangkok), Central Asia, and Africa (Treaty of Pelindaba), supporting and deepening the normative commitments contained in the NPT. As a national level, the number of bilateral Nuclear Cooperation Agreements (NCAs) has grown considerably in recent years, placing further obligations on parties to comply with their NPT and safeguards commitments.
While the NPT does not specify what the consequences of withdrawal from the treaty might be, discussions at the 2010 NPT Review Conference and Preparatory Committees for the 2015 NPT Review Conference suggest increasing consensus about the need to suspend technical cooperation with the withdrawing party, and concern about the fate of technology that the withdrawing states have received up to that point. The practical agenda for policymakers at the 2010 NPT Review Conference argued that upon withdrawal from the NPT, states should not be free to continue using nuclear technology they received while party to the treaty - especially concerning the prospect that technology received for peaceful purposes may be redirected towards a weapons program.

The working paper submitted by the Russian Federation and Ukraine at the 2010 NPT Review Conference suggests that, upon the request of supplier states, such technology should be returned, or placed under permanent IAEA safeguards if no such requests are made or if they are not possible to meet under the circumstances. In 2014, in preparation for the 2015 NPT Review Conference, members of the NPDI have further encouraged states supplying nuclear technology to include ‘dismantling and/or return clauses or fall-back safeguards in the event of withdrawal’ in their contractual agreements. In line with emerging best practice of post-export verification of nuclear specific and dual-use goods carried out by manufacturers and national authorities of supplier states, these proposals constitute important steps forward and would be a welcome addition to the NSG framework.

Moreover, a growing number of states have emphasised the need for the IAEA to ascertain whether a state that had expressed its desire to withdraw from the NPT has not violated obligations to the treaty prior to withdrawal. While consensus was not achieved regarding retroactive obligations during the latest (2010) NPT Review Conference, it reflected a deeper sentiment - that withdrawal from a collective security framework carries implications for the security of the remaining parties - and willingness to turn to the UN Security Council mechanism to address such potential emerging threats.

**5.4 Recommendations**

While the NPT continues to serve as an important normative base in stemming the proliferation of weapons of mass destruction, today it is not the principal mechanism through which the actual control and monitoring of transfers of such technology and materials takes place. In the context of maintaining and strengthening these global measures in the face of prospective withdrawals from the NPT, firm steps to prevent the diversion and continued use of imported goods in withdrawing countries would re-affirm global commitment to the spirit of the Treaty through pragmatic and meaningful action.

The first such step could be to encourage the NSG to adopt, as part of its best practice guidelines, the requirement of return of technology upon withdrawal as a standard contractual clause. Furthermore, acknowledging the right of all states to develop peaceful nuclear programmes, it is important to emphasise that such programs cannot be built upon illicitly acquired technology. UN resolutions expressing this sentiment would send a strong message about the unacceptability of this practice. Discussions about the return of technology in the context of withdrawal could be extended to include illicitly obtained items and the appropriate mechanism for requesting their return. It is also important to consider an enforceable mechanism for the retraction of materials and technology obtained through legal or illicit channels, to counteract the likely limited willingness of transgressor states to comply with such requests. Finally, while the framework currently in place is well positioned to curtail the export of sensitive technology to a state outside the NPT framework, strengthening measures to curtail such transfers from withdrawing or non-member states (especially states that are also outside the NSG) is important to consider in advancing the global non-proliferation efforts.
6. The 2015 RevCon and Beyond
Meena Singeleee and Xuejiao Hu

6.1 Introduction

Given that there has been little progress made to date by NPT States Parties as a collective, to strengthen Article X(1), and given the polarisation of perspectives on the issue, NPT States Parties wishing to see progress made need to maintain realistic expectations of what can and should be achieved at the 2015 NPT Review Conference. NPT States Parties that believe that review of Article X(1) is a distraction or a non-issue need to also understand the other side of the argument. For any progress to be made, several steps need to be taken. NPT States Parties should reframe the debate on withdrawal, and move away from framing Article X(1) discussions in the context of the DPRK, to one where the issue is about strengthening both the legal and political dimensions of Article X(1) in order to maintain the integrity of the Treaty.

Efforts aimed at strengthening Article X(1) should be focused on consolidating consensus among all NPT States Parties on the principles, procedures and mechanisms that will ensure that 1) a state that has violated its Treaty obligations and then withdraws is held accountable, and 2) that a state that enjoys the benefits of nuclear technology while Party to the Treaty and then withdraws, is not able to develop a non-peaceful nuclear program.

For withdrawal to be addressed effectively, a three-fold approach could be taken. Firstly, there is a need to increase the incentives of remaining Party to the Treaty. Secondly, the denial of benefits that a State would otherwise receive as a Party, upon notification and exit of the treaty; and thirdly, emphasising on the consequences of withdrawal which would need to be made clear ahead of withdrawal.

The withdrawal clause as illustrated in previous chapters, includes a range of cross-cutting issues. Review of Article X(1) to prevent abuse of the provision can inevitably lead to better and stronger non-proliferation, safeguards and export control mechanism that can contribute to strengthening the non-proliferation regime more broadly.

6.2 Dialogue and Engagement

If NPT States Parties are willing to listen to each other and engage frankly and openly on the issue, significant progress could be made on Article X(1) and arguably on other issues too. Instead of limiting themselves to prepared statements on Article X(1), during the time allocated for debate of the issue during the Review Conference, NPT delegations can inject new momentum on Article X(1) by having a refreshing dialogue (i.e. conversing with each other) on the various issues related to Article X(1). Many of the key issues are reflected in the NPDI working paper, as well as in recommendations and ideas proposed by a range of countries during this review cycle. It is clear from statements made by a number of NPT States Parties that there remain many misconceptions about the technical issues such as safeguards, verification and export controls, and much polarisation on a range of issues in the context of the political dimension of reviewing Article X(1). Several misconceptions can be addressed by engaging these NPT States Parties to explain and clarify the political and legal dimensions that those seeking to see progress on strengthening Article X(1) want to achieve.

In that context, there is an incredibly important role that ‘bridge-building’ States Parties can play. Some countries within the NPDI, as well as other countries seeking progress on Article X(1), that engage regularly with those that perceive discussion of Article X(1) as a lower priority, have a role to play in engaging each other to develop signs of political commitments and willingness to compromise on the issue.
6.3 The Role of the International Atomic Energy Agency

This Review Conference could reiterate and clarify where needed, the role of the IAEA and IAEA safeguards in the context of Article X(1). Much of chapter four of this report has focused on the role of the IAEA Secretariat, the Board of Governors and the Agency’s safeguards regime. Many of the misconceptions on the technical issues relating to Article X(1) are linked for example, to the status of the implementation of safeguards in a withdrawing State. The NPT review process can help clarify these issues.

6.4 The Role of the Nuclear Suppliers Group

Many of the proposals that have been made in this review cycle shifts the debate from ‘haves’ versus ‘have nots’ to exploring the relationship between recipients and suppliers of nuclear technology. Discouraging withdrawal will require addressing these issues among nuclear suppliers, including the Nuclear Suppliers’ Group. Although the issue of withdrawal has previously been brought up at the NSG, there may be a need for more explicit language to be reflected in a Review Conference outcome document that encourages the strengthening of export control measures in the event of notification of withdrawal and exit. Although the NSG does not necessarily need to address withdrawal specifically, by exploring the issues relating to export controls, that impact in the case of withdrawal, as discussed in chapter five of this report, a number of mechanisms can be implemented that in turn can help strengthen Article X(1).

6.5 The 2015 NPT Review Conference

The 2010 NPT Review Conference Final Document Action Plan failed to reflect any language on Article X(1). At the very least, there needs to be language reflected in a 2015 Review Conference outcome document that:

- Reiterates the sovereign rights of NPT States Parties to withdraw from the Treaty in accordance with Article X(1);
- Reassures all NPT States Parties that review of Article X(1) is about preventing abuse of the provision, and not about amending Article X(1) or limiting the right of withdrawal;
- Emphasises that a withdrawing State remains accountable for violations made prior to withdrawal; and
- Encourages NPT States Parties to continue engaging with each other to develop ways of preventing abuse of the Article X(1) provision. This would enable NPT States Parties to keep the issue on the agenda and to continue building consensus in the 2020 NPT review cycle.

However, there is much more that can and should be done. States Parties should aim for an outcome document that includes the above, but go further to include:

- Language encouraging the strengthening of the technical mechanisms such as export controls and safeguards, which in turn would give greater impetus to explore the issues in other fora such as the IAEA and the NSG.
- Language reflecting that withdrawal of any State Party is an extremely significant event for all NPT States Parties and that it is in all States Parties interest to ensure that the appropriate mechanisms are in place in the event of withdrawal and that neither the security of the remaining States Parties is diminished, nor the integrity of the Treaty is eroded.
- Language that reflects the role of the NPT review process and/or other UN mechanisms in engaging a withdrawing State into a dialogue and explore whether the extraordinary events cited as the reason for withdrawal can be resolved diplomatically.

It is clear that Article X(1) cannot be considered in isolation from the other provisions of the Treaty, but the 2015 Review Conference will be a timely reminder to all NPT States Parties that they all have a stake in the Treaty and it is in all their interests to maintain the NPT’s integrity and purpose. As with all other issues to be discussed at the Review Conference, compromises and political commitments will be needed for NPT States Parties to find the middle ground on how best to reflect the review of Article X(1) and forward-looking actions in a 2015 Review Conference outcome document.
Chapter one

1. The VCLT entered into force in January 1980 whereas the NPT entered into force in March 1970. Due to the principle of non-retroactivity, as codified in Article 4 of the VCLT, the Convention’s provisions are only applicable to the NPT in so far as those VCLT rules which are recognised to reflect customary international law. It may be questionable whether all VCLT rules had acquired this customary nature before the adoption of the Convention; or whether some of these rules developed into a customary rule after the conclusion of the Convention through States’ practice and opinio juris. On this matter, the International Court of Justice takes the view that at least some of the rules laid down in the VCLT on treaty withdrawal, termination and suspension may be considered as a codification of existing customary law, at least Articles 60 to 62. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, p. 47; Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgement, ICJ Reports 1973, p. 18; and Gabčíkovo-Nagymaros Project (Hungary/Slovakia), ICJ Reports 1997, p.38. See also Corten, O. and Klein, P. (eds.), The Vienna Convention on the Law of Treaties: A Commentary, Oxford: OUP, 2011, pp. 1236-1238.

2. The requirements are: (i) that there is a fundamental change in circumstances; (ii) that this change must have been unforeseen; (iii) that the existence of those circumstances at the time of the treaty’s conclusion must have constituted an essential basis of the consent of the parties to be bound by the treaty; and (iv) that the effect of the change would radically transform the extent of the obligations still to be performed under the treaty. The preamble of a treaty and the travaux préparatoires (but not exclusively) may aid in determining what those circumstances are that constitute the essential basis of the parties to be bound by the treaty; while provisions within the treaty may also indicate whether that treaty is designed to accommodate change (as observed by the Court in the Gabčíkovo-Nagymaros Project case). Furthermore, the role of Article 45 VCLT must be underlined in introducing further restrictions on rebus sic stantibus. See Gabčíkovo-Nagymaros Project (Hungary/Slovakia), ICJ Reports 1997, p. 63; For a comparative analysis of Article X(1) NPT with the VCLT rules on withdrawal, see Joyner, Daniel and Roscini, Marco., Non-Proliferation Law as Special Regime, Cambridge: CUP, 2012, pp. 156-162. See also Shaker, Mohamed I., The Nuclear Non-Proliferation Treaty: Origin and Implementation, 1959-1979, London: Oceana Publications Inc, 1980, Vol. II, pp. 897-898; and den Dekker, Guido., The Law of Arms Control: International Supervision and Enforcement, The Hague: Martinus Nijhoff Publishers, 2001, p. 356.


4. It should be taken into consideration that it would be a contradiction to define extraordinary events.


6. Shortly after the signing of the NPT, the UNSC adopted Resolution 255 (1968) which provides security guarantees to non-nuclear weapon states with the intention of inter-alia, enhancing their security equation and thereby limiting justifiable grounds for invoking the NPT withdrawal clause.


8. The PTBT and NPT withdrawal clauses have inspired the withdrawal provisions of other treaties, such as Article XIII(2) of the 1972 Biological Weapons Convention, Article XV(2) of the 1972 Anti-Ballistic Missile Treaty [this bilateral agreement has been terminated in result of the United States’ withdrawal decision], Article XV(2) of the 1987 Intermediate Range Nuclear Forces Treaty, Article XVI(2) of the Chemical Weapons Convention, Article IX(2)(3) of the 1999 Comprehensive Nuclear-Test-Ban Treaty, Article 20 of the 1996 African Nuclear-Weapon-Free Zone Treaty, Article 16 of the 2006 Treaty on a Nuclear-Weapon-Free Zone in Central Asia and Article XIV(3) of the 2010 New Strategic Arms Reduction Treaty.

10. The former rule was objected to only by Brazil while the latter rule was objected to by Brazil and Romania. See Shaker, Mohamed I (1980), *The Nuclear non-Proliferation Treaty: Origin and Implementation 1959-1979*, pp. 893-894.
22. Resolution GOV/2645, IAEA Board of Governors, 1 April 1993.
31. It is important to note that a *moratorium* on a decision to withdraw from a treaty is generally not recognised by States as it could seriously undermine the stability of treaty relations. Interestingly, rather than just announcing the decision to ‘revoke the suspension on the effectuation’ of its 1993 withdrawal decision, the DPRK also cites recent events as cause for its 2003 decision. Thereby, this decision is virtually a completely new withdrawal decision, all but in name only.


35. *Resolution 1874*, UNSC, 12 June 2009. For an elaborate analysis of these resolutions, see Güven, Onur., *The Legality of the Demand by the Security Council on North Korea to re-enter the Nuclear Non-Proliferation Treaty*, Utrecht University, Archives, 2010.

**Chapter Two**


38. Burr, Williams. *Intelligence Reports and Estimates of Nuclear Proliferation History since 1966*


**Chapter Three**


44. Ibid.


48. Ibid, p.3.

49. Ibid

50. Ibid

51. Ibid

52. Ibid


54. Ibid, p.3.

55. Ibid

Chapter Four


Ibid., para. 17.


See in that regard, Communication dated 12 March 1993, from the Director General of the IAEA to the Minister for Atomic Energy of the DPRK, annex 8, in Report by the Director General of the International Atomic Energy Agency on behalf of the Board of Governors to all members of the Agency on the non-compliance of the Democratic People’s Republic of Korea with the agreement between the IAEA and the Democratic People’s Republic of Korea for the application of safeguards in connection with the Treaty on the Non-Proliferation of Nuclear Weapons (INFCIRC/419): ‘For the IAEA, which is responsible for the implementation of safeguards in the DPRK, under the Agreement concluded pursuant to Article III of the NPT, I am bound to point out that the Treaty and the Safeguards Agreement remain duly in force until any withdrawal takes effect, i.e. after three months’ advance notice to all other Parties and to the United Nations Security Council.’


Ukraine-Russia WP.2, para. 3.

INFCIRC/153 (Corr.), para. 73. In the case of the DPRK, see Report on the implementation of the agreement between the Agency and the Democratic People’s Republic of Korea for the application of safeguards in connection with the Treaty on the Non-Proliferation of Nuclear Weapons, Resolution adopted by the IAEA Board of Governors, 25 February 1993.


NPT/CONF.2010/PC.1/WP.25, para. 8, EU WP.25, para. 3. See also Goldschmidt, P. (2009), ‘Concrete steps to improve the non-proliferation regime’.
81. EU WP.25, para. 9.
82. See, for instance, Article 13(1) of the South Pacific Nuclear-Free Zone Treaty (Treaty of Rarotonga): ‘This Treaty is of a permanent nature and shall remain in force indefinitely, provided that in the event of a violation by any Party of a provision of this Treaty essential to the achievement of the objectives of the Treaty or of the spirit of the Treaty, every other Party shall have the right to withdraw from the Treaty.’ It seems that unlike the NPT, withdrawal from the Treaty of Rarotonga is not subject to a subjective decision by the withdrawing state that extraordinary events, related to the subject matter of the treaty have jeopardised the supreme interests of the country, but rather to the objective assessment that a party has violated a provision of the treaty.
84. EU WP.25, para.10; NPDI WP.13, Principle C.
85. EU WP.25, para. 10 (c). See also Ukraine-Russia WP.2, para. 6; NPDI WP.13, Principle D; see also discussion in Carlson, J. (2009), p.4.
86. See The text of the Agreement of 1 July 1986 between Albania and the Agency for the Application of Safeguards to All Nuclear Activities of Albania, INFCIRC/359, article 25 (b)(i). An agreement by exchange of letters of 31 October and 28 November 2002 with the Republic of Albania in connection with the Treaty on the Non-Proliferation of Nuclear Weapons, INFCIRC/359/Mod.1, para.1 ‘notwithstanding Article 25 of the SGA, the Comprehensive Safeguards Agreement shall remain in force as long as Albania is party to the NPT.’
87. EU WP.25, para.10(f)
88. These agreements are concluded pursuant to INFCIRC/66/Rev.2, and its predecessor documents.
90. Australia-New Zealand WP.16, p.3. In that regard also, EU WP.25, para.10(d); Final Document of the 2010 Review Conference, para. 121; Ukraine-Russia WP.2, para. 7; NPDI WP.13, Principle E.

Chapter Five
95. It is worth noting that in terms of banned items, the UNSC Resolution 2094 went beyond the NSG guidelines (which were revised later in accordance with it).
97. NPDI WP.13
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