

# Critical Observation on Article X of the NPT :

“Reinterpretation of the conditional right and institutional mechanism for avoiding the gap”

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## I. Introduction: Historical Perspective

A comparative analysis of the negotiating history of the NPT withdrawal provisions, Article X.1, alongside the withdrawal article of the 1963 Partial Test Ban Treaty (PTBT), Article IV, is both interesting and illuminating. This is the case primarily because the former is based upon the latter.

Article X.1 of the NPT states:

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

The shaded text above is Article IV of the PTBT, while the underlined portions are the additional requirements by the architects of the NPT. It is logical to believe that these additional conditions were included with specific purposes, rather than being added accidentally. Their apparent effect was to impose additional restrictions on states contemplating to withdraw from the NPT beyond those specified for PTBT parties. In Shaker’s words, these additional provisions over PTBT provide “an additional brake

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\* The views in this paper are those of the author and do not represent the positions of the Government of the Republic of Korea.

on hasty withdrawal action” without limiting the basic rights of withdrawal.

During the negotiation, the USSR argued that a detailed withdrawal clause was unnecessary as State Parties always have this sovereign right to withdraw from a treaty. They expressed concern that the specific inclusion of a withdrawal article might be interpreted by some as negating the very existence of this sovereign right. On the other hand, the USA defended their insistence on its specific inclusion as a necessary requirement to ensure Senate ratification.

It is noteworthy that Italy and West Germany in the late sixties had major concerns on the withdrawal clause, as well as the extension clause (Article X.2). We can only infer that they wanted to maintain ‘the option for the acquisition of nuclear weapons by a multilateral European institutions,’ and at the same time to avoid making any open-ended commitment to not acquire nuclear weapons.

In hindsight, it could be understood that the US and USSR, the co-chairmen of the ENDC throughout the NPT negotiations, made a compromise of making any withdrawal conditional, while simultaneously recognizing the existence of the right of a state to withdraw.

## **II. Conditions, or Procedures, for Withdrawal from the NPT**

There is no denying that a state has a sovereign right to withdraw from the NPT in all aspects: historically as seen above; legally as stipulated by the Vienna Convention of the Law of Treaties; literally as defined in the NPT clause itself.

However, it is clear and evident that there are four basic conditions that a State Party must fulfill to legally withdraw from the Treaty:

- it must give notice of withdrawal to all parties to the NPT;
- it must give notice of withdrawal to the United Nations Security Council;
- it must provide a statement of the extraordinary events which the State Party considers to have jeopardized its supreme interests; and
- the withdrawal notice must be provided 90 days in advance of the effective withdrawal date

### **1. “give notice of withdrawal to all the Parties to the Treaty”**

This requirement was a provision from the PTBT. It is interesting to recall that

the Brazilian delegation objected to this idea, claiming that State Parties should only have to provide such withdrawal notice to the three Depository Governments. Presumably, it might have been driven by regional concerns such as Brazilian/Argentine relations, or just by the believed preference that the task of notifying all parties should be placed on the depositories, not the withdrawing state.

## **2. “give notice of withdrawal to the UNSC”**

The requirement for a State Party to notify the United Nations Security Council of its intention to withdraw was not inherited from the PTBT. Thus, this is a new provision specific to the NPT. It was also objected to by Brazil, who argued both that the issue was not one which was automatically a concern for the Security Council, and that since the Council would consist of states other than NPT parties, the Security Council should have no legitimate role in decisions concerning the Treaty.

Nevertheless, the dominant view was that the UNSC would be a suitable forum for such a notice as withdrawal by a State Party was likely to be based on security considerations. Shaker further notes that since the withdrawal might indicate ‘an imminent acquisition of nuclear weapons by the withdrawing states,’ UNSC resolution 255 concerning security guarantees might be relevant and thus justify UNSC action under Article 34 of the Charter.

## **3. “make a statement of the extraordinary events which the withdrawing Party regards as having jeopardized its supreme interest”**

This provision is very new and unique in that other arms control treaties, such as the Outer Space Treaty and the Tlatelolco Treaty, do not have a similar clause. Indeed, the Romanian delegation submitted a formal amendment to delete any reference to such a statement. Romania was of the view that a notice of withdrawal to States Parties and the UNSC would suffice and that the ‘content of the notice came within the exclusive competence of the government of the state finding itself in such a situation.’ In this vein, critics of this provision stress that ‘the judgement on whether extraordinary events have taken place belongs to the party, even though the process of auto-interpretation is tempered by the criterion of good faith.’

However, this seemingly extraordinary clause may have been intended to prevent arbitrary withdrawal and also increases the responsibility of the withdrawing party to provide a statement “spelling out” the specific factors ‘related to the subject matter of

this treaty' which it considers a threat to its interests. As a result, this requirement places a burden of proof on the withdrawing state to provide a credible case, increasing the transparency of "illegitimate" withdrawals. This clause also implies that the withdrawal case will be reviewed and the international community including the UNSC, will pass judgement on it. It can be further argued that this explicit requirement for a statement allows for a more rapid and detailed diplomatic response.

#### **4. "withdrawal notice should be given three months in advance"**

The condition that a withdrawal notice should be given three months in advance to the UNSC and the State Parties was one inherited from the established time limit from the PTBT. There was no notable objection to this condition.

### **III. Mechanisms for Avoiding Gap**

#### **1. Conditionality of the Right to Withdraw**

From the above-mentioned considerations of literary and historical analysis, it is clear that the right to withdraw from the NPT has the following conditionality and/or implications:

- The new provisions in the NPT over the PTBT provide an additional condition on withdrawal action without limiting the basic rights of withdrawal.
- The judgement of what constitutes extraordinary events is something for the withdrawing state itself to determine, though it also implies that the act cannot be an arbitrary one: it must be purposeful.
- The UNSC has the right to review the grounds for withdrawal.
- If a state does not meet the conditions for withdrawal prescribed by the Treaty, the legal and practical consequences remain unclear, and are presumably at the discretion of the UNSC.

In this context, it is noteworthy that there is a strong voice, in particular from academia and legal practitioners, for the Security Council's mandate and responsibility in case of withdrawal. Bunn and Rhinelanders argue that the language and history of Article X, combined with the provisions of the UN Charter, effectively constitute a request by NPT parties that the Security Council has a clear authority to stop a withdrawal, to impose sanctions on the withdrawing NPT party, or to require such a party to give up nuclear materials or equipment acquired while it was still a party to

the NPT.

## **2. Major Institutional Deficits**

Therefore, the current Article X poses the following fundamental questions, leaving a major institutional hiatus:

- What should and can be done if a State Party withdraws from the NPT after violating the Treaty?
- What are the implications of NPT withdrawal for continued application of IAEA safeguards?
- On a larger picture, what can be done to prevent withdrawal by bolstering benefits of staying within the NPT regime?

## **3. Various Proposals to Fill the Gap**

### **A. Responding to withdraw**

#### **□ UNSC**

- The Security Council must promptly and carefully consider the potential consequences of the withdrawal for international peace and security as well as the “extraordinary events” cited by the party. In this vein, Dr. ElBaradei called upon, through his seven steps to strengthen the NPT regime in 2005, the Security Council to act swiftly and decisively on the case of any country that withdraws from the NPT.
- In a case of withdrawal from the NPT by a violator, the Council should consider the full range of options provided by the Charter, including under Chapter VII.
- The Security Council could ask the IAEA for all relevant information it may have about the country in question, including the status of safeguards compliance.
- As a permanent measure, in case of withdrawal from the NPT by a Party in non-compliance, which poses a direct and grave challenge, the Security Council should adopt a generic and legally binding resolution with the following key elements [*Pierre Goldschmidt*] :
  - such withdrawal constitutes a threat to international peace and security, as defined under Article 39 of the UN Charter;
  - all materials and equipment provided under a comprehensive safeguards agreement would have to be frozen and, as soon as possible, removed from the state under IAEA supervision and remain under the Agency’s safeguards.

## ❑ IAEA Board of Governors

- Although the IAEA has no specific role in matters of Treaty withdrawal *per se*, it has specific statutory authority and responsibilities in the event of a Party's non-compliance with nuclear safeguards.
- Accordingly, the IAEA and its Board of Governors can consider the following:
  - measures for continued safeguarding of nuclear equipment and material in a withdrawing State, should that Party meet the requirements of Article X;
  - prompt reporting to the United Nations Security Council of any safeguards or other compliance concerns;
  - suspension of supply agreements between IAEA and a State in non-compliance with its safeguards obligations;
  - suspension of IAEA technical assistance to such a party, whether on grounds provided in the IAEA statute, as a matter of policy, or as directed by the United Nations Security Council;
  - withdrawal of material or equipment provided under IAEA auspices to a State in non-compliance with its safeguards obligations, pursuant to Articles XII.A.7 and/or Article XII.C of the IAEA statute.
- However, in the case of indigenously produced nuclear material and items, it is not clear whether the above-mentioned mechanisms can be applied.

## ❑ Nuclear Supply

- There should be no further nuclear supply to a country in violation of the NPT that has withdrawn or made a notification of withdrawal. Nor should such a withdrawing party be allowed to benefit from the use of nuclear materials and equipment that it imported while it was party to the Treaty.
- To this end, NPT nuclear supplier States should seek, through appropriate means, to halt the use of nuclear material and equipment and to secure the elimination of such items or their return to the original supplier. In particular, the Nuclear Suppliers Group is encouraged to incorporate an "obligation of return" upon NPT violation or withdrawal as a condition of supply in its export guidelines.

## **B. Bolstering Benefits of the NPT**

- States Parties adhere to the NPT because it contributes to maintaining and strengthening international peace and security. Therefore, it is crucial that States Parties steadfastly enjoy this benefit of the Treaty through strengthening the effectiveness of the NPT regime.
- In all activities designed to promote the peaceful uses of nuclear energy, preferential treatment should be given to the non-nuclear-weapon States Parties to the Treaty, taking the needs of developing countries particularly into account. [*para 16, Principles and Objectives for Nuclear Non-Proliferation and Disarmament (NPT/CONF.1995/32(Part I), Annex*]
- For providing security assurances for the NPT non-nuclear weapons States, the nuclear-weapons States should reaffirm Security Council resolution 984 (1995) as well as their own relevant declarations. To this effect, the effectiveness of the nuclear-weapon-free zones should be ensured.
- Meaningful nuclear disarmament should be continuously implemented.

## **IV. Conclusion : Personal Thoughts**

### **1. The heart of the matter**

As the issue of withdrawal by States that are in violation of the Treaty has emerged as an important subject of debate around the 2005 NPT Review Conference. Since then, various proposals were circulated, among others, by the European Union, Australia, USA, Korea, Japan, Canada, and Iran. With the exception of Iran and South Africa, who claimed respectively that focusing on issues like Article X would only divert the attention from real tasks, and that discussion of withdrawal should be limited to interpretation of Article X, major commonalities can be summed up as:

- The Security Council is best placed to deal with this case with its mandate on international peace and security and to make legally binding decisions, including on the issue of continuing safeguards.
- (not a government proposal yet) The Security Council should make a generic and legally binding resolution or decision, including on the issue of continuing safeguards.
- The issue of perpetuating safeguards should be addressed in the context of the IAEA.

## **2. Reality and alternative: “perpetuating safeguards & liability for past violation” and “due response mechanism”**

Now, let's consider the options in terms of practicability. The bottom line is that every State has the sovereign right to withdraw from the NPT. Furthermore, amending the NPT for making withdrawal itself illegal is virtually impossible without the unanimous support of the international community, which is highly unlikely for the foreseeable future. At the same time, it must be recognized that the Security Council is essentially a political organ. Additionally, it should not be forgotten that the five permanent members in the Security Council have the right to veto.

These intrinsic and structural limits mean that the Security Council cannot necessarily provide an ideal solution in terms of non-proliferation at all times, unless the Security Council adopts generic and preemptive resolutions, which, in turn, looks unlikely in the near future.

In summary, to cope with the withdrawal issue, the enhanced role and responsibility of the Security Council is both required and indispensable. International consensus is slowly emerging in this direction. Nevertheless, given the structural problems and realistic consideration, it seems difficult to expect that the Security Council will preemptively adopt a generic and binding measure against all kinds of withdrawals.

Therefore, we can envisage a two-pronged approach: on one hand, placing minimum principles regarding interpretation of Article X with an emphasis on getaway violators and on the other hand, an international response mechanism against the notice of intent to withdraw.

### **□ General Principles**

First, as an alternative and the absolutely minimal condition against unfaithful violators, the measures for “perpetuating safeguards” and “liability for past violations” should be the impending goals as interim measures. This goal could be achieved via the following measures;

- the Security Council's adoption of a legally binding decision in this specific scope
- a protocol amending comprehensive safeguard agreements to perpetuate safeguards on existing material
- a formal statement by the NPT Review Conference

- insistence by nuclear suppliers both on bilateral agreements and on the NSG's adoption of a rule requiring nuclear suppliers to incorporate an 'obligation of return' requirement upon NPT violation or withdrawal as a condition of supply
- as a complementary step, enlarging or newly establishing nuclear-weapons-free zones

#### **□ Response mechanisms**

Second, as response mechanisms, a wide range of views were expressed on what international mechanisms should be recognized or established to guide states in responding to the notice of intent to withdraw from the NPT. The prominent suggestions so far are as follows:

- depositary consultation process (EU)
- emergency meeting of the Security Council (Australia, USA)
- emergency meeting of States Parties (ROK)

These views are not necessarily mutually exclusive and multiple processes can be simultaneously pursued. However, in light of limited membership and the essentially opaque nature of depositary consultation and, to a less degree, the Security Council, institutionalization of emergency meeting of States Parties seems to have more relevance and legitimacy. ///

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