

COMMENTARY

The Duration of the Nuclear Non-Proliferation Treaty: Sudden Death or New Lease on Life?

THOMAS GRAHAM, JR.*

The Treaty on the Non-Proliferation of Nuclear Weapons, which came into force in 1970, has played a significant role in constraining countries from acquiring nuclear weapons. Despite its high degree of success, however, the indefinite continuation of the Treaty is currently being threatened. Third World countries, in an attempt to challenge what they view as the discriminatory role of the Treaty in dividing the world into nuclear haves and have-nots, have made assertions that it will automatically expire at the end of its initial period of authorization in 1995.

The negotiating history and text of the Treaty reveal, however, that the life of the Treaty beyond its initially authorized period can only be decided at a conference of its parties. In addition, the parties are constrained by the terms of the Treaty itself to choose between continuing the Treaty either indefinitely or for a fixed period or periods of time. The conference may not impose new and substantive conditions for the continuation of the Treaty. If a conference is not held or if no agreement is reached, the Treaty will continue in force indefinitely until the parties can agree otherwise. Thus, rather than automati-

* Thomas Graham, Jr., is General Counsel of the United States Arms Control and Disarmament Agency. The views expressed in this article are his own and are not necessarily those of the Agency or the United States Government.

cally expiring, the Treaty will, in fact, automatically continue in force beyond 1995.

I. BACKGROUND

In 1968, the United States Atomic Energy Commission foresaw a world that might have as many as twenty-eight nuclear powers.¹ The danger that such a world would pose cannot be overstated. The problems of protecting United States national security in what is essentially a bipolar nuclear world are serious enough, but these would be greatly compounded if United States planners had to contend with many nuclear threats, including some from small and unstable countries. In the words of one Swiss official, "Between two nuclear powers it's a game of chess, among four, it's bridge, among a dozen, it would be poker, roulette or any of those games controlled by chance."² This danger would be exacerbated if nations which support international terrorism acquired nuclear weapons. *The Fifth Horseman*,³ a novel in which Colonel Qaddafi holds New York hostage with a hidden nuclear device and threatens to detonate it unless Israel immediately withdraws from the occupied territories, creates a frightening scenario which illustrates this danger.

Fortunately, these various predictions have not come true. Instead, the world community has used law and public opinion to create an atmosphere that is hostile to nuclear weapon proliferation. The principal means of accomplishing this has been the Treaty on the Non-Proliferation of Nuclear Weapons⁴ (the NPT or the Treaty).

II. DESCRIPTION OF THE TREATY REGIME

The NPT is the bulwark of the international effort to create a legal regime to stem the proliferation of nuclear weapons. Recognition of the problems of nuclear proliferation began shortly after the dawn of the nuclear age in 1945. After years of deliberation and negotiations inside and outside the United Nations, the parties created the NPT.⁵ The Treaty was signed in 1968 and entered into force on March 5,

1. See Non-Proliferation Treaty: Hearings Before the Senate Comm. on Foreign Relations, 90th Cong., 2nd Sess. 31 (1968).

2. G. Fischer, *The Non-Proliferation of Nuclear Weapons* 31 (1971).

3. L. Collins & D. Lafierre, *The Fifth Horseman* (1980).

4. Opened for signature July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161 [hereinafter the NPT or the Treaty].

5. Wulf, *NPT Review Conference: A Measure of Success*, 56 Wisc. L. J. 57 (1986) (citing Willrich, *Perspective on the NPT Review Conference*, Stanley Foundation Occasional Paper No. 7, at 1 (1975)).

1970.⁶ It currently has 140 parties, more than any other arms control agreement.⁷

The NPT provides for several constraints. It prohibits the nuclear-weapon States,⁸ the United States, Great Britain, and the Soviet Union, from transferring nuclear explosive devices to any recipient, whether or not that recipient is a party to the NPT, or assisting non-nuclear-weapon States in manufacturing or otherwise acquiring nuclear explosive devices.⁹ The NPT prohibits non-nuclear-weapon States from manufacturing or otherwise acquiring nuclear explosive devices.¹⁰ The Treaty also provides for safeguards, to be applied by the International Atomic Energy Agency (IAEA).¹¹ Upon agreeing to the Treaty, non-nuclear-weapon States agree to accept safeguards which ensure that nuclear material located in their States is not diverted to the manufacture of nuclear weapons or other nuclear explosive devices.¹² Moreover, all States agree to accept safeguards to ensure that nuclear material and equipment exported to any non-nuclear-weapon States, whether or not they are parties to the Treaty, are not likewise diverted.¹³

III. DISAPPOINTMENTS AND SUCCESSES

The development of the NPT regime, while largely successful, has been marked by two failings. The principal disappointment has been that several States that are at or near the nuclear threshold have refused to become parties to the Treaty. Examples are India, which has already conducted a nuclear explosion,¹⁴ as well as Israel, Pakistan, and South Africa which, according to published reports, now

6. *Id.*

7. For a list of Parties to arms control treaties, see U.S. Arms Control and Disarmament Agency, *Arms Control and Disarmament Agreements* (1982).

8. The NPT, *supra* note 4, art. IX, para. 3. The definition of nuclear-weapon State in Article IX, paragraph 3 of the Treaty is a State that has manufactured and detonated a nuclear weapon or other nuclear explosive device prior to January 1, 1967. This includes the United States, Great Britain, the Soviet Union, France, and China. France and China are not yet parties to the Treaty, but France explicitly and China more obliquely have indicated that they will act as though they are parties.

India is not a party. Should it join the Treaty, it will likely be treated as a non-nuclear weapon State, but special provisions pertaining to India may prove necessary given that it exploded a nuclear device in 1974. See L. Spector, *The Undeclared Bomb* 82 (1988).

9. The NPT, *supra* note 4, art. I.

10. *Id.*, art. II.

11. *Id.*, art. III, para. 1. Safeguards monitor the flow of nuclear materials at nuclear installations through audits of plant records and inventories. Spector, *supra* note 8, at 456.

12. *Id.*

13. *Id.*, art. III, para. 2.

14. See Spector, *supra* note 8, at 82.

conduct unsafeguarded nuclear activities with potential weapons applications.¹⁵ These activities have brought them close to a nuclear weapon capability. There are several other States, such as Brazil and Argentina, that remain outside of the Treaty regime and that have unsafeguarded aspects to their less developed nuclear programs.¹⁶ The world has been left in the uneasy position of seeking to dissuade these non-party States through a variety of means, including direct and indirect political pressure, the denial of nuclear equipment and material, and security assistance programs and other bilateral arrangements.

A further disappointment to some of the parties to the Treaty has been what they assert is the slow progress in the development of more comprehensive arms control measures.¹⁷ Several non-nuclear-weapon States, in particular, have stated that they consider that their commitment to refrain from obtaining nuclear weapons has not been matched by a commitment from the nuclear-weapon States to achieve nuclear disarmament.¹⁸ Some of these non-nuclear-weapon States have

15. See L. Dunn, *Controlling the Bomb: Nuclear Proliferation in the 1980s* 44-56 (1982). There has been a variety of physical evidence to support the belief that those countries may be developing a nuclear weapon capability. For example, Israel operates an unsafeguarded reactor. *Id.* at 48. India operates an unsafeguarded reactor and two unsafeguarded reprocessing plants. Spector, *supra* note 8, at 92. South Africa operates an unsafeguarded enrichment plant that has produced fuel for its Safari research reactor. *Id.* at 288. Pakistan operates an unsafeguarded enrichment plant. Dunn, *supra*, at 45.

States have also made announcements, which other governments must take seriously, that suggest their intentions. In August 1988, South Africa announced that it has the capability to produce nuclear weapons should it want to do so. *New York Times*, Aug. 14, 1988, § 1, at 16, col. 1. Similar statements include the following 1978 statement attributed to the then-imprisoned former Prime Minister of Pakistan Zulfikar Ali Bhutto: "We know that Israel and South Africa have full nuclear capability. The Christian, Jewish and Hindu civilizations have this capability. The Communist powers also possess it. Only the Islamic civilization was without it, but that position was about to change." Dunn, *supra*, at 44 (citing *Pakistan Close to Full Nuclear Capability*, *Financial Times* (London), Oct. 5, 1978). Also, in June 1981, former Israeli Defense and Foreign Minister Moshe Dayan said that Israel "ha[s] the capacity" to build the bomb "in a short time." *Id.* at 49 (citing "Dayan Says Israeli's Have the Capacity to Produce A-Bombs," *New York Times*, June 25, 1981). More recently, former Pakistani President Zia declared in an interview with *Time* magazine that "Pakistan has the capability of building the bomb," while also giving the assurance that "Pakistan is not indulging in a nuclear experiment for military purposes." *Time*, Mar. 30, 1987, at 42.

16. Dunn, *supra* note 15, at 60.

17. The Parties agreed in the Treaty to pursue more comprehensive arms control agreements. See the NPT, *supra* note 4, art. VI, which provides: "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."

18. See, e.g., *The Second Review Conference*, [1980] 5 Y.B. Disarmament 128, U.N. Sales No. E.81.IX.3.

asserted that the future of the Treaty depends primarily on the fulfillment by the nuclear powers of their obligation to pursue disarmament measures.¹⁹

These disappointments, though significant, have been overshadowed by the Treaty's success in both controlling the proliferation of nuclear weapons and facilitating trade in legitimate nuclear materials. The Treaty has had considerable success in curbing the acquisition of nuclear weapons by additional countries.²⁰ Those States that have become parties have adhered to the Treaty's provisions. Among the NPT signatories, all of the nuclear-weapon States and most of the non-nuclear-weapon States have concluded safeguards agreements with the IAEA to verify their undertakings.²¹ Most importantly, the Treaty has created a negative aura that now surrounds the very idea of nuclear proliferation. The NPT sends a clear message from a majority of the States of the world that they will not welcome the attainment of nuclear weapons by additional States.

When the Treaty came into force in 1970, the acquisition of nuclear weapons was changed from an act of national pride to an act of international outlawry. To recognize this, one need only consider the case of India, which conducted its nuclear detonation in 1974²² and is the most recent country to have admitted conducting such an explosion.²³ India believed that it was constrained by the new international environment to conduct its test in secret and admitted to testing only a "peaceful nuclear explosive."²⁴ Nevertheless, unlike the experience of the nuclear-weapon States that conducted their first test prior to 1970, India's action was met with worldwide condemnation.²⁵ As a result,

19. *Id.* at 130.

20. Since the Treaty went into effect, only India has admitted to joining the group of States that have conducted a nuclear explosion, and only a few other States are suspected of having crossed or being near the nuclear threshold. See *supra* notes 14-16 and accompanying text.

21. See, e.g., Agreement between the United States of America and the International Atomic Energy Agency for the Application of Safeguards in the United States, Nov. 18, 1977, 32 U.S.T. 3059; T.I.A.S. No. 9889; Agreement between the International Atomic Energy Agency, the Government of Australia and the Government of the United States of America for the Application of Safeguards, Sept. 26, 1966, 17 U.S.T. 1612, T.I.A.S. No. 6117.

22. See *supra* note 8.

23. See Statement by the Indian Atomic Energy Commission on Nuclear Explosions, May 18, 1974, reprinted in United States Arms Control and Disarmament Agency, Documents on Disarmament 146 (1974) [hereinafter 1974 Documents].

24. *Id.*

25. See, e.g., Statement by Prime Minister Bhutto on Indian Nuclear Explosion [Extracts], May 19, 1974, reprinted in 1974 Documents, *supra* note 23, at 146-148; Statement by the Japanese Representative (Nisibori) to the Conference of the Committee on Disarmament: Indian Nuclear Explosion, May 21, 1974, reprinted in 1974 Documents, *supra* note 23, at 150-151; Statement by the Swedish Representative (Eckerberg) to the Conference of the Committee

India has not conducted a nuclear explosion since its initial test and has refrained from developing nuclear weapons.²⁶

The Treaty has had an additional impact on legitimate trade in nuclear materials. The Treaty provides the international legal basis for controlling such commerce and reducing the risk that it might lead to nuclear weapons proliferation. By providing for IAEA safeguards and other non-proliferation assurances, the Treaty regime helps to make such commerce possible. Certainly, today's trade in nuclear reactors, nuclear materials, and related equipment can exist in its present form only because of the considerable assurance provided by the NPT that such trade will not contribute to the acquisition of nuclear weapons by additional States.

IV. THE DURATION OF THE TREATY

Despite its high degree of success, the indefinite continuation of the Treaty is currently being threatened. This is reflected in a dispute over the Treaty's duration provision. The Treaty entered into force in 1970 for a twenty-five year period, after which it will continue in force for an additional time, with the length of this period still to be determined.²⁷ Paragraph 2 of Article X of the Treaty provides:

Twenty-five years after entry into force of the Treaty, a conference shall be convened to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods. This decision shall be taken by a majority of the Parties to the Treaty.²⁸

Thus, the nature of the Treaty's duration beyond twenty-five years will be decided by the parties in a conference to be called anytime after March 5, 1995.²⁹

on Disarmament: Indian Nuclear Explosion, May 21, 1974, reprinted in 1974 Documents, *supra* note 23, at 152; Statement by the Canadian Representative (Barton) to the Conference of the Committee on Disarmament: Indian Nuclear Explosion, May 21, 1974, reprinted in 1974 Documents, *supra* note 23, at 151-152.

26. Dunn, *supra* note 15, at 47 (citing Paul F. Power, *The Indo-American Nuclear Controversy*, 19 *Asian Survey* 582-83 (1979)).

27. The NPT, *supra* note 4, art. X, para. 2.

28. *Id.*

29. Several arms control treaties require regular five-year review conferences and, as a result, the question as to when such conferences must be held has been previously addressed. The practice in such review conferences is that the conferences be held not later than the anniversary year of the treaty in question. If this interpretation is applied, the twenty-five year conference must be held between March 5, 1995 and March 4, 1996. Before the key 1995-96 review, the Parties will hold a regular five-year Review Conference in 1990. See *id.*, art. VIII, para. 3 (provision requiring five-year review conferences). It can be anticipated that pressure

Casual and incorrect references to the "expiration of the treaty" in 1995, however, are being used to threaten the continuation of the NPT. Although India is not even a party to the Treaty, Prime Minister Ghandi, declared in a speech before the United Nations that the Treaty will "expire" in 1995 and called for its replacement.³⁰ Likewise, Nigeria stated at the United Nations that it believes that the Treaty expires in 1995 and that "there may be no incentive for some non-nuclear-weapon States to endorse the extension of the life of the Treaty" at that time.³¹

These statements should be viewed in the context of a political background in which certain Third World nations are advocating the expiration of the NPT on the basis that the Treaty regime is discriminatory. Some such nations use this issue as a device to pressure the nuclear-weapon States to do more to limit their own nuclear arsenals. Others object to the concept of being required by Treaty to remain permanently in a nuclear have-not status. In this context, normally arcane legal interpretations of the Treaty duration provision have potentially great international significance. Should the interpretation of these nations prevail, it could strengthen their hand in bringing

will begin building at that time for changes in the Treaty regime, with the threat that the Treaty will end if these demands are not met.

30. On June 9, 1988, Indian Prime Minister Rajiv Ghandi stated in an address to the Third Special Session on Disarmament of the United Nations General Assembly:

We propose that negotiations must commence in the first stage itself for a new Treaty to replace the NPT, which expires in 1995. This new Treaty should give legal effect to the binding commitment of nuclear weapon States to eliminate all nuclear weapons by the year 2010, and of all non-nuclear weapon States to not cross the nuclear weapons threshold.

[Third Special Session on Disarmament of the United Nations General Assembly, June 9, 1988.]

31. 43 U.N. GAOR First Comm. (9th Mtg.) at 62, U.N. Doc. A/C.1/43/PV.9 (1988). This statement was made by the Nigerian representative to the United Nations General Assembly's First Committee on October 20, 1988 in the following context:

The security assurances provided for in the NPT have been subjected to various interpretations. The refusal of the nuclear-weapon State parties to the Non-Proliferation Treaty to provide legally binding assurances to non-nuclear-weapon State parties, especially those that do not belong to either of the two military alliances, seriously calls to question the utility of the NPT. Unless the non-nuclear-weapon States that have renounced the nuclear option in a legally binding manner under the NPT, obtain legally binding assurances against the use or threat of use of nuclear weapons . . . recognized within the context of the Treaty, those States will not feel justified in the action they have taken in the interest of humanity. It is for that reason that the Nigerian delegation considers as imperative, the conclusion of an additional Protocol of the Non-Proliferation Treaty, to provide such assurances. Until this is done, there may be no incentive for some non-nuclear-weapon States to endorse the extension of the life of the Treaty when it expires in 1995.

Id. at 61-62.

about an end to the Treaty regime. It is critical, therefore, to understand the exact meaning of the duration provision.

In my opinion, the negotiating history and text of Article X of the NPT lead to the following conclusions:

- The Treaty's Depositary Governments, the United States, Great Britain, and the Soviet Union, are obligated to call a Conference in 1995-96 to consider the further duration of the Treaty.³²
- The Conference, by a majority vote of the parties, is to decide whether the Treaty will thereafter continue indefinitely, for a fixed period, or for fixed periods. Because this decision is authorized by Article X, it does not require amendment of the Treaty.
- The Conference cannot impose new and substantive conditions for the continuation of the Treaty without amending the Treaty.
- The Treaty does not automatically expire after 25 years. If the Conference is boycotted, or if it is held and no agreement is reached, the Treaty will continue indefinitely until the parties agree otherwise by majority vote.

V. NEGOTIATING HISTORY OF THE TREATY'S DURATION PROVISION³³

The NPT parties consciously departed from the standard arms control treaty duration clause, which provides for an unlimited duration. In particular, the 1963 Limited Test Ban Treaty provided for its "unlimited duration"³⁴ and the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America was of a "permanent nature" and

32. See *supra* note 29 and accompanying text. Article X does not explicitly state that the Depositaries shall convene the twenty-five-year Conference, but their obligation to do so seems implicit from their similar obligations under article VIII, paragraph 3, to convene five-year Review Conferences and under article VIII, paragraph 1, to convene conferences to consider proposed amendments to the Treaty. Also, the regular five-year Review Conference required by article VIII would be held in 1995. This raises the possibility of two conferences in the same year, or the more likely probability that the two Conferences will be combined.

33. This negotiating history was drawn from the three volume book by Mohammed I. Shaker, *The Nuclear Non-Proliferation Treaty: Origin and Implementation 1959-1979* (1980). Mr. Shaker was a member of the Egyptian delegation during the Treaty negotiations and the President of the 1985 Treaty Review Conference. He continues to be a leading expert on non-proliferation issues.

34. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, art. IV 14 U.S.T. 1313, 1319, T.I.A.S. No. 5433, 480 U.N.T.S. 43, 49 [hereinafter Limited Test Ban Treaty].

to remain in force "indefinitely".³⁵ The 1961 Antarctic Treaty³⁶ and the 1967 Outer Space Treaty³⁷ do not contain explicit duration provisions, but are assumed to be of unlimited duration. The unlimited duration of these treaties has been acceptable in part because they contain provisions whereby individual parties can withdraw from the treaty under certain circumstances.³⁸

In marked contrast to most earlier arms control treaties, in the negotiation of the NPT there was disagreement as to whether to have a treaty of unlimited duration or one that would be in force for a period of years and was renewable.³⁹ The final Treaty provision for a twenty-five year conference was a compromise between these two views.

The United States and the Soviet Union, the two countries that were the primary drafters of the Treaty, initially favored a treaty of "indefinite" or "unlimited" duration.⁴⁰ The August 17, 1965 draft treaty of the United States stated in Article VI that:

This Treaty shall remain in force indefinitely subject to the right of any party to the Treaty to withdraw from the Treaty if it decides that extraordinary events related to the subject matter of the Treaty have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other signatory and acceding States 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.⁴¹

The provision that a party could withdraw is known as the "supreme interests" withdrawal clause. First used in the 1963 Lim-

35. Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, art. 30 22 U.S.T. 762, 782, T.I.A.S. No. 7137, 634 U.N.T.S. 281, 354.

36. Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

37. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, opened for signature Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205.

38. Customary international law, codified in the Vienna Convention on the Law of Treaties, also provides certain rights of termination or withdrawal. Vienna Convention on the Law of Treaties, May 23, 1969, arts. 54-64, 1155 U.N.T.S. 331. The U.S. is not a party to the Vienna Convention but accepts many of its provisions as being expressions of customary international law.

39. Shaker, *supra* note 33, at 859.

40. *Id.*

41. The United States of America: draft treaty to prevent the spread of nuclear weapons, art. VI, U.N. Doc. ENDC/152 (1965), reprinted in U.N. DCOR Supp. (Jan.-Dec. 1965), U.N. Doc. DC/227, Sec. A, Annex 1.

ited Test Ban Treaty,⁴² it has become a standard clause in arms control treaties, including the recent INF Treaty.⁴³ Thus, the initial U.S. proposal was for a treaty of indefinite duration from which any party could withdraw pursuant to the supreme interests clause. Meanwhile, the September 24, 1965 Soviet draft duration provision called for a treaty of "unlimited" duration in language identical to that in the comparable provision of the Limited Test Ban Treaty.⁴⁴

On August 24, 1967, the United States and Soviet Union tabled identical draft treaties.⁴⁵ With respect to the duration provision, these drafts were similar to the earlier Soviet draft provision, but they incorporated modifications from the American draft. These modifications required that notice of withdrawal be given to the United Nations Security Council as well as to the other parties, and that such notice include a statement of the extraordinary event causing the withdrawal.⁴⁶

During the negotiation of the Treaty, however, several other prospective parties objected to the U.S.-Soviet proposal for a treaty of unlimited duration. In essence, these countries sought to protect their right, without needing to invoke the supreme interests clause, to con-

42. See Limited Test Ban Treaty, *supra* note 36, art. IV.

43. The Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, art. XV, para. 2.

44. Shaker, *supra* note 33, at 859. The Soviet draft duration provision provided:

This Treaty shall be of unlimited duration.

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.

Union of Soviet Socialist Republics: draft resolution, U.N. Doc. A/C.1/L.338 reprinted in 20 U.N. GAOR Annex I (agenda Item 106, U.N. Doc. A/5976, (1965)). For the identical Limited Test Ban Treaty language, see Limited Test Ban Treaty, *supra* note 34, art. IV.

45. For the text of the identical treaty drafts see United States of America: draft treaty on the non-proliferation of nuclear weapons, U.N. Doc. ENDC/192 (1967), Union of Soviet Socialist Republics: draft treaty on the non-proliferation of nuclear weapons, U.N. Doc. ENDC/193 (1967), reprinted in U.N. DCOR Supp. (1967-1968), U.N. Doc. DC/230/Add. 1, Annex 4, Secs. 6 and 8.

46. The duration provision tabled by both the Soviet Union and the United States provided:

This Treaty shall be of unlimited duration.

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.

Id. at 949.

duct their nuclear programs outside of the NPT framework, and even to obtain nuclear weapons should changing international circumstances compel them to do so.

Italy was one of the countries favoring an alternative approach. On October 24, 1967, it proposed amending the U.S.-Soviet draft as follows: "The present treaty shall have a duration of X years. It shall be automatically extended for terms equal to its initial duration for those governments which, subject to six months' notice, shall not have made known their intention to withdraw."⁴⁷

The Italian proposal is interesting in that it highlights the two conflicting interests in the duration provision. On one hand, some parties did not want to bind themselves for an "unlimited" period in an uncertain world.⁴⁸ On the other hand, a simple limited duration provision could have created significant political obstacles to renewal of the Treaty. All the political difficulties that were encountered in agreeing on the Treaty initially might be revisited if the Treaty were designed to end without the affirmative action of the parties. Moreover, if the parties had to face the possibility that the Treaty might only exist until a specified date in the future, they would feel pressure to be prepared to obtain nuclear weapons immediately after that date. The Italian proposal would have overcome this conflict by allowing a party to withdraw merely by giving notice after a fixed period of years, but otherwise having the Treaty continue indefinitely.

The split of opinion extended to the NATO alliance. In addition to Italy, the Federal Republic of Germany objected to a treaty of unlim-

47. Shaker, *supra* note 33, at 860 (citing U.N. Doc. ENDC/PV.350 (1967), para. 9).

48. The Italian representative at the negotiations expressed this as follows:

[F]uture generations will have to live, even on a strictly technological level, in a setting very different from the present one. To imprison them in an iron corset, which could not be adjusted to the changing conditions of history, would in our opinion expose that corset to the danger of bursting.

Id. at 860 (citing U.N. Doc ENDC/PV.341 (1967), paras. 8-11).

The Swiss Government, in an aide-mémoire, stated that it opposed an unlimited duration because they believed that to subscribe to such a commitment was hardly conceivable in a field where development is as rapid and unpredictable as that of nuclear science, emphasizing the technical, economic, political and military implications:

[I]t would be preferable that the Treaty should be concluded for a definite period, at the end of which a review conference would decide about its renewal. During that interval the nuclear-weapon States could adopt specific measures aimed at a limitation of armaments. The non-nuclear-weapon States certainly cannot take the responsibility of tying their hands indefinitely if the nuclear-weapon States fail to arrive at positive results in that direction.

U.N. Doc. ENDC/204 (1967), para. 5, reprinted in U.N. Doc. DC/230/Add. 1, Annex 4, Sec. 21.

ited duration,⁴⁹ whereas Canada supported the U.S. position.⁵⁰

In such circumstances, a compromise was essential in order to reach an agreement. In considering all suggestions, the compromise was decided between the United States and Soviet Co-Chairmen of the negotiations, and was presented in the identical U.S. and Soviet draft texts of January 18, 1968.⁵¹ The text became, without change, article X of the Treaty:

1. 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.
2. Twenty-five years after the entry into force of the Treaty, a Conference shall be convened to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods. This decision shall be taken by a majority of the Parties to the Treaty.⁵²

In agreeing to the text of article X, the Egyptian delegate to the negotiations made clear his interpretation of the compromise: Egypt was not agreeing to a Treaty regime that would end in twenty-five years. In a March 16, 1967, speech to the Eighteen Nation Disarmament Committee, United Arab Republic Representative Khallof stated that Egypt supported "the principle of the indefinite duration of the treaty."⁵³ Speaking to the same body on February 20, 1968, he added that while the UAR continued to support a treaty of unlimited duration, "we are ready to accept paragraph 2 of Article X if it is generally supported and cannot in any way make possible the termi-

49. *Id.* at 862 (citing Furet, *La République Fédéral d'Allemagne et les armements nucléaires*, 74 *Revue Générale de Droit International Public* 341, n. 67 (1970)).

50. *Id.* at 863 (citing U.N. Doc. ENDC/PV.371 (1968) para. 66).

51. *Id.* at 861.

52. The NPT, *supra* note 4, art. X.

53. Statement by the U.A.R. Representative (Khallaf) to the Eighteen Nation Disarmament Committee: Nonproliferation of Nuclear Weapons, Mar. 16, 1967, U.N. Doc. ENDC/PV.294 (1967), at 4-12, reprinted in United States Arms Control and Disarmament Agency, *Documents on Disarmament* 154, 156 (1967).

nation of the treaty twenty-five years after its entry into force."⁵⁴

Moreover, the U.S. legislative history of the Treaty ratification hearings indicates that the view of the U.S. Representative to the Eighteen Nation Disarmament Committee was that the Treaty could not be terminated at the twenty-five year Conference.⁵⁵ Thus, both the negotiating history of the Treaty and legislative history behind the United States' ratification of the Treaty clearly indicate that it was intended to be of indefinite duration.

VI. EXAMINATION OF THE TREATY TEXT

The text of Article X is instructive as to the logic of the compromise that was reached during the negotiations. Paragraph 1 of Article X is the supreme interests clause, which was continued without change from the texts of August 24, 1967.⁵⁶ This paragraph provides the means for individual parties to withdraw if they consider it necessary to do so, albeit requiring them to give three months' notice and a statement of the supreme interests they consider to be jeopardized. While this paragraph was not designed in response to concerns of

54. Statement by the U.A.R. Representative (Khallaf) to the Eighteen Nation Disarmament Committee: Nonproliferation of Nuclear Weapons, Feb. 20, 1968, U.N. Doc. ENDC/PV.367 (1968), at 4-15, reprinted in United States Arms Control and Disarmament Agency, Documents on Disarmament 78, 87 (1968).

55. The following is one of a series of questions posed by Senator Cooper during the Treaty ratification hearings, along with the answer provided by the State Department.

Was Article X opposed by the U.S. or U.S.S.R.? If so, what were their objections?

The United States and the Soviet Union each originally contemplated that the treaty would be of unlimited duration, but there would be a right of withdrawal if a party found that extraordinary events related to the subject matter of the treaty had jeopardized its supreme interests. This was reflected in the U.S. draft treaty of August 17, 1965, the Soviet draft treaty of September 24, 1965 and the identical U.S. and Soviet drafts of August 24, 1967.

The second paragraph of Article X first appeared in the identical revised drafts presented to the Eighteen Nation Disarmament Committee by the U.S. and Soviet Co-Chairmen on January 18, 1968. In commenting to the Committee on this new provision, the United States representative said: "While remaining mindful of the strength of the arguments for a treaty of unlimited duration, the Co-Chairmen have carefully considered the comments of those members of the Committee who have expressed concern about a treaty of this type having no limit in time. As a consequence we have concluded a provision for a conference to meet twenty-five years after the treaty has entered into force to decide *how much longer* the treaty should continue. In recommending this change, the Co-Chairmen have also recognized the widespread desire that the treaty be assured a life-span adequate to enable it to serve effectively as a stable foundation upon which other vitally needed measures of nuclear disarmament can be built."

Non-Proliferation Treaty: Hearings Before Senate Comm. on Foreign Relations, 90th Cong., 2nd Sess. 51 (1968) (emphasis added).

56. See *supra* note 45 and accompanying text.

those States that opposed an unlimited duration provision, it nevertheless functions to meet some of their concerns. Supreme interests clauses are included in arms control treaties precisely because the future cannot be foreseen. While nations can express in a treaty their present intentions to be bound by that treaty in the future, they must also recognize that events, unforeseen and perhaps unforeseeable, may occur that would make continued adherence to the treaty unwise. Under the supreme interests clause, a party may decide to withdraw where such events are "extraordinary" and where they jeopardize that party's "supreme interests." Thus, to the extent that participants objected to an unlimited duration provision because it might limit their ability to withdraw in order to respond to future events, the supreme interests clause offers them a means of doing so.

However, because the supreme interest clause was in the draft treaty texts throughout the debate over duration, it cannot be viewed as part of the compromise to end that controversy. Rather, the essence of the compromise was to provide for the twenty-five year Conference. For those supporting the U.S.-Soviet position, the Conference was a mechanism to ensure both that the Treaty would last at least for a generation and that the parties would not be put in a position where they might have to face the imminent end of the Treaty after twenty-five years. Meanwhile, those countries acquiesced, at least for the initial twenty-five year period, to those who opposed an unlimited duration.

Thus, the twenty-five year period before the Conference and the fact that the Conference could not terminate the Treaty but only agree as to the nature of its continued duration ensured that the Treaty would last at least for a generation. The essence of this compromise was expressed by the Department of State during the Senate ratification hearings on the Treaty as recognizing the "widespread desire that the treaty be assured a life-span adequate to enable it to serve effectively as a stable foundation upon which other vitally needed measures of nuclear disarmament can be built."⁵⁷

The negotiating history and text of the Treaty provide ample indication of the parties' intention that the Treaty would not end at the end of the initial twenty-five year period. Indeed, no country participating in the negotiations ever argued as much. Should the twenty-five year Conference fail to reach any conclusion, there is nothing which indicates an intention that the Treaty would thereby come to an end. To the contrary, much of the sentiment that was expressed

57. *Id.*

was that it would be dangerous to create such a potential. Should the Conference fail to reach a conclusion, the Treaty will continue indefinitely, until the parties agree otherwise.

Similarly, the Conference does not have the power to end the Treaty at the Conference. Rather, the power of the Conference is limited to continuing the Treaty indefinitely, for a fixed period, or for fixed periods. This is the conclusion reached by Mohammed Shaker in his study of the Treaty:

The jurisdictional scope of the contemplated conference appears to be limited to the following three alternatives: the extension of the NPT's duration indefinitely; or for an additional fixed period; or for additional fixed periods. . . . While the conference is apparently not juridically entitled to terminate the NPT, it has the right to extend the duration of the Treaty for 'an additional fixed period' at the end of which there may not be further extensions.⁵⁸

VII. THE CONFERENCE

The Treaty requires the Depositary States (the United States, the United Kingdom and the Soviet Union) to call the Conference twenty-five years after entry into force of the Treaty.⁵⁹ When the Conference meets, the parties will have reason to decide that the Treaty should be given an unlimited duration. The Treaty has been a successful treaty, even if that success is qualified, and this success, over a period of twenty-five years, should be sufficient for the parties to decide to make the Treaty permanent. Indeed, it is difficult to imagine the parties deciding to end the Treaty, given the degree to which international efforts to allow nuclear commerce have been integrated into a network of safeguards agreements. Moreover, giving the Treaty an unlimited duration would allow the parties to send the strongest possible signal that the further proliferation of nuclear weapons will not be tolerated.

58. Shaker, *supra* note 33, at 864-65. While there does not appear to be any directly opposing authority, George Fischer states that the United Kingdom had wanted the Non-Proliferation Treaty to have an indefinite period and Spain had proposed twenty years. He then states that: "The preparatory work shows that in spite of the ambiguity of the text, Art. X(2) allows the majority of Parties to put an end to the Treaty after twenty-five years." Fischer, *supra* note 2, at 133. This statement is not inconsistent with the conclusion of this Commentary that the twenty-five year Conference has the power to decide that the Treaty will end at some future time, but not the power to decide that the Treaty will end at the Conference itself or that the Treaty will terminate in the absence of action by the parties at the Conference.

59. See *supra* note 32.

Alternatively, the Conference may extend the Treaty for "additional fixed periods." This phrase gives the Conference leeway to extend the Treaty for successive periods. Such a course might be most acceptable to parties who fear that an unlimited duration to the Treaty would forever divide the world into nuclear and non-nuclear States. Thus, for example, the Conference could extend the Treaty for an unlimited succession of twenty-five year periods, provided that the parties meet every twenty-five years to certify that the Treaty is working well and should be continued.

The third option for the Conference would be to extend the Treaty only for a fixed period. At the end of the period, the Treaty would end. Thus, while a majority of the parties cannot immediately terminate the Treaty at the Conference, they can vote to have the Treaty terminate after an additional period. However, while extending the Treaty for an extremely short period, such as one week, would be technically acceptable under article X, paragraph 2, such an act of de facto termination would be construed as contrary with the spirit this provision. Thus, the purpose of article X, paragraph 2, is to provide a means to determine the additional increment or increments for which the Treaty will be extended, not to serve as a termination provision.

One option that is not available to the Conference would be to impose new and substantive conditions for the continuation of the Treaty without amending its terms. The only actions that are permitted by a treaty are those contained in its provisions as agreed by the parties. The Treaty's duration provision represents the parties' agreement that the Conference can agree to give the Treaty an indefinite duration, or extend it for a fixed period or periods. The parties did not agree that the Conference could extend the Treaty with substantive conditions attached; the only way that this could happen, therefore, would be to amend the Treaty. While the Conference can make a decision on Treaty duration by a simple majority vote of the parties,⁶⁰ amending the Treaty requires more. Article VIII provides that an amendment must be submitted to the Depositary Governments, which shall circulate it to all the parties.⁶¹ If requested to do so by one-third or more of the parties, the Depositary Governments shall convene a conference of the parties to consider the amendment.⁶² The amendment can only take effect if it is approved by a majority vote of the parties to the Treaty, including the unanimous votes of all

60. The NPT, *supra* note 4, art. X, para. 2.

61. The NPT, *supra* note 4, art. VIII, para. 1.

62. *Id.*

nuclear-weapon State parties and all other parties which, on the date the amendment is circulated, are members of the IAEA Board of Governors.⁶³ The amendment takes effect for those parties which ratify it once it has been ratified by a majority of the parties, including all of those parties required to approve the amendment unanimously.⁶⁴ Thus, it is more difficult for the parties to amend the Treaty than to act under article X, paragraph 2.

In the unlikely event that the Conference is boycotted, or for some reason does not occur, or if it occurs but is unable to decide on any of the extension alternatives, the Treaty will automatically continue until the parties agree otherwise. As the text of the duration provision and its negotiating history indicate, the provision for a twenty-five year Conference is not itself a termination provision. Rather, the Conference is a challenge to the parties to reach an agreement on how long the Treaty will continue thereafter.

VIII. CONCLUSION

In 1995, the Treaty parties will be presented with the opportunity to decide the future of the NPT. Article X, paragraph 2, of the Treaty requires that the Depositary Governments convene a Conference at which by majority vote the parties will decide whether the Treaty shall be continued indefinitely or for a fixed period or periods. Given that the problem of nuclear weapons proliferation will remain a most serious threat to world peace and stability well into the future, an agreement at the Conference supporting unlimited duration would be the best outcome.

63. *Id.*, art. VIII, para. 2.

64. *Id.*

VOLUME 29
NUMBER 3
SPRING 1989

VIRGINIA JOURNAL OF INTERNATIONAL LAW

MANAGING BOARD

JOHN C. HITT, JR.
Editor-in-Chief

THOMAS W. BARK
JAMES C. FALVEY
EDWIN L. FOUNTAIN
J. MARTIN WAGNER
Executive Editors

ERIC LINDH FOSTER
JUNE R. MCIVOR
Managing Editors

CONNIE L. ELLERBACH
ELLEN W. HUGHES
JOHN E. MATTHEWS
Articles Editors

DAVID M. BARBASH
CAROLYN J. BROCK
STEPHANIE A. DOBRANSKI
NATHAN V. HOLT, JR.
Notes Editors

DOUGLAS L. KILBY
JONATHAN L. THORNTON
Articles Review Editors

DONNA CHRISTINE WOOD
Research & Projects Editor

SENIOR EDITORIAL BOARD

TRACY A. BAILEY
KEVIN A. BOVE
MARK C. CATANA
AUBRIA D. CORBITT
MIMI E. GILD
COURT GOLUMBIC

A. FRAZER HARRISON
JOHN PAUL HOLSINGER
SUSAN KENNEDY
MICHELLE J. LINK
JUDITHE H. LINSE
RAYMOND E. LOUGHERY

REBECCA A. MATTHIAS
CAMILLE A. MCWHIRTER
RUSSELL L. PRICE
NATHAN B. SMITH
DAVID C. STEWART
WILLARD A. STANBACK

EDITORIAL BOARD

M. ROSALIE BUENAVENTURA
BRIAN H. CORCORAN
CHERRY COX
LYDIA P. CRAWFORD
PETER J. CURLEY
JEFFERY DAHNKE
ANDREW H. DARRELL
SARAH E. DAVIES

JOHN E. DAVIS
ERIC C. EMERSON
TIMOTHY L. FELKER, JR.
W. RHOADES FINNEY
ELISABETH E. Q. HARRIS
CHERYL L. HESSE
BALRAM KAKKAR
JONATHAN S. LAWLOR
JOHN LEIDIG

ELIZABETH A. MCGEARY
MARK C. PAIST
JONATHAN T. REES
KATHRYN REYBURN
JILL RIPANS
REBECCA A. STACK
HERBERT THOMAS
W. FOSTER WOLLEN, JR.

BOARD OF ADVISORS

MANUEL R. ANGULO
RICHARD B. BILDER
DEREK W. BOWETT
DONALD K. DUVAL
WILBUR FUGATE

KEITH HIGHT
CHRISTOPHER C. JOYNER
ROBERT H. KNIGHT
MONROE LEIGH
RICHARD B. LILlich*
DAVID A. MARTIN*

JOHN NORTON MOORE*
STEFAN RIESENFELD
PAUL B. STEPHAN III*
PETER WHITEMAN
RUDIGER WOLFRUM

**Faculty Advisors*

