



***The NPT Withdrawal Clause and its Negotiating History***

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## Introduction

The starting point for any analysis of the negotiating history of the NPT withdrawal provisions, Article X.1, is a comparison with the withdrawal article of the Partial Test Ban Treaty (PTBT), Article IV, upon which it was based. 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. The unshaded text highlights the additional requirements added to the PTBT text by the architects of the NPT. It has to be assumed that these additional conditions were not added accidentally: rather they were included with specific purposes in mind. Moreover, their apparent effect was to impose additional restrictions on states contemplating to withdraw from the NPT from those specified for PTBT parties.

The most exhaustive analysis of the NPT withdrawal clauses has been provided by Mohammed Shaker. Additional material on Article X.2 and the general circumstances surrounding the negotiation of the withdrawal article has been provided by Bunn *et al.* In Shaker's words, these additional provisions over the PTBT 'provide an additional brake on hasty withdrawal action without limiting the basic right of withdrawal'.<sup>1</sup>

### I. The Right to Withdraw

In legal relationships parties can arguably contest that what is not specifically prohibited by the treaty is therefore allowed. This argument was used by the US administration in arguing to the US Senate that NATO nuclear sharing arrangements could continue under the NPT. Similarly, the opposite interpretation may be equally credible: that unless expressly included, an act is not allowed.

Although the NPT specifically describes a set of requirements for withdrawal, the omission of such a clause would not necessarily prohibit states from exercising their sovereign right to withdraw. Indeed it can be argued that this right always exists and is paramount over treaty commitments whether specific withdrawal clauses existed or not. During the negotiation of the NPT text, the USSR argued that a detailed withdrawal clause was unnecessary as State Parties always have this sovereign right to withdraw from a treaty. However, they also expressed concern that the specific inclusion of a withdrawal article might be interpreted by some as negating the existence of this sovereign right, unless it was expressly included in that article.

These USSR objections to the inclusion of any withdrawal article in the treaty appear in part to have been related to a belief that 'any special termination and revision clauses would generally further the assumption that a treaty can be denounced only in the way provided, and not in any other way'.<sup>2</sup> A more modern interpretation of such clauses

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<sup>1</sup> Shaker, 1980, p. 893

<sup>2</sup> Lysen, 1994, p.138

in multilateral disarmament treaties, however, suggests that they 'do not preclude the operation of other grounds for termination, in particular the principle *inadimplendi non est adimplendum* and the *clausula rebus sic stantibus*.'<sup>3</sup> These other grounds for treaty termination or legal withdrawal, outlined by the rules on treaty interpretation in the Vienna Convention of the Law of Treaties, can also be used to argue that suspension of membership in a disarmament treaty is an alternative way of seeking to pressure other states to fulfil disarmament objectives than the "extraordinary events" clause.<sup>4</sup>

Article X.1 can be traced back to a US proposal. The Americans defended their insistence on its specific inclusion as a necessary requirement to ensure Senate ratification. Quite why this should be so remains unclear. The text also appears to be a compromise between the US and USSR positions over this matter by including both the idea that withdrawal was conditional, but at the same time starting with the recognition of the existence of the unconditional right of a state to withdraw in exercising its national sovereignty.

Although the US and USSR were the co-chairmen of the ENDC throughout the NPT negotiations, and their interests are reflected in the final text, they also had to take into account the concerns of other key states if they were to persuade all potential proliferators to sign and ratify the treaty. These states included Italy and West Germany, were at the time were concerned with the possibility of NATO dissolving and also wanted to keep alive the option for an MLF. According to Bunn *et al* it was these states that the drafters had in mind particularly when crafting the extension clause (Article X.2) and the withdrawal clause (Article X.1). The main concerns of the Germans and the Italians were threefold:

- maintaining 'the option for the acquisition of nuclear weapons by a multilateral European institution';
- avoiding any indefinite promise not to acquire nuclear weapons; and
- avoiding a treaty with an 'unlimited duration without undertakings by the haves to disarm that might forever divide the world into haves and have-nots'.<sup>5</sup>

The analysis by Bunn *et al* provides further detail on the negotiations of the extension provision. The U.S. and the USSR wished for an indefinite duration clause, but included the 25 year delay in deciding on the duration of the treaty to gain agreement by Italy and Germany. Similarly, Bunn *et al* indicate that 'as a concession to Italian, German and other have-not concerns about promising to foreswear nuclear weapons for an unpredictable future when the haves were not at the same time promising to disarm, the draft contained both a withdrawal clause...and a provision for a conference to review the operation of the Treaty...but without power to limit the further duration of the Treaty except by formal treaty amendment.'<sup>6</sup>

## II. Grounds for Withdrawal of the NPT

Shaker argues that the negotiations from 1965 onwards on the NPT's withdrawal clause were related to those over the similar clause in the PTBT signed in late 1963. The negotiations over withdrawal from the PTBT revolved around acts by third parties which

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<sup>3</sup> Ronzitti, 1991, p.121

<sup>4</sup> *Ibid*

<sup>5</sup> Bunn *et al*, 1991, p. 3

<sup>6</sup> Bunn *et al*, 1991, p.5

would be the only legitimate grounds for withdrawal. In particular three grounds for withdrawal had been discussed in the PTBT context:

- any party not fulfilling its obligations under the treaty;
- nuclear explosions by a State not party to the treaty under circumstances which might jeopardize the withdrawing party's national security; and
- the occurrence of nuclear explosions under circumstances in which it was impossible to identify the State conducting the explosions and that such explosions, if conducted by a party to the treaty, would violate the treaty or, if not conducted by a party, might jeopardize the withdrawing party's national security.<sup>7</sup>

In 1963 the USSR did not want to directly specify potential nuclear states, such as China, and thus the qualifying phrase "related to the subject matter of this Treaty" appears to have been regarded by them as a means of covering actions by these states. In 1967 the Treaty of Tlatelolco also included a not dissimilar provision (Article 28.4). The flexibility and adaptability of the wording 'extraordinary events' and 'related to the subject matter of this Treaty' appealed to the US and USSR as it enabled them to hint at these actions and actors without specifying them.

According to Shaker, neither regarded it as 'desirable' to determine in advance 'the exact boundaries' of the 'extraordinary events' 'related to the subject matter of the Treaty'.<sup>8</sup> On the other hand, the wording of the NPT left judgements on the existence of the extraordinary events completely to the discretion of the withdrawing state. This had at least two effects. One was that it allowed Germany, Italy and other potential proliferators to take the view that the end of NATO etc. would free them to withdraw from the treaty. At the same time, it allowed a party to exercise the right of withdrawal in the event of the violation of the Treaty by a third party, rather than invoking the suspension or termination of the Treaty under the principles of treaty law.

During the NPT negotiations, even though there was a lack of clarity among the drafters of the Treaty on the definition of 'extraordinary events related to the subject matter of this Treaty', U.S. officials did give prominence to violation of, or non-compliance with, the Treaty by other parties as qualifying grounds for withdrawal.<sup>9</sup> Other specific qualifying grounds mentioned by U.S. Secretary of State Dean Rusk were the dissolution of NATO and the eruption or wars.<sup>10</sup>

NNWS were asked to contribute to the formulation of the withdrawal clause, and one of those which took a close interest in the issue of restrictions on the grounds for withdrawal was the UAR (i.e. Egypt).<sup>11</sup> It argued that withdrawal should not be 'a matter of absolute discretionary power but should depend on non-observance of the treaty arising from its non-application or violation by a contracting party, or from the fact that a third state is supplying NW to another'.<sup>12</sup> The connection between withdrawal and failure to fulfil obligations relating to disarmament was also discussed during the drafting negotiations. Burma, for example, suggested revising 'the withdrawal clause to

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<sup>7</sup> Shaker, 1980

<sup>8</sup> *Ibid*

<sup>9</sup> Shaker, 1980, p.889

<sup>10</sup> *Ibid*

<sup>11</sup> *Ibid*

<sup>12</sup> *Ibid*

make failure to fulfil in good faith the provisions of the article on nuclear disarmament a basis for withdrawal'.<sup>13</sup>

The NNWS also argued that 'if the intentions of the treaty to achieve cessation of the nuclear arms race and to obtain nuclear disarmament have in reality been blatantly disregarded, parties to the treaty may come to regard this as an extraordinary event jeopardizing their own supreme interests'.<sup>14</sup> In that context, Brazil and Nigeria made formal proposals for delimiting the grounds for withdrawal by making it clear that it was up to the state withdrawing to make the judgement of its necessity, not others. Brazil, for example, submitted amendments to Article VII of the draft of 24 August 1967 to indicate that

"...Each Party shall...have the right to withdraw...if it decides that there **have arisen or may arise** circumstances related with the subject matter of this Treaty which **may affect** the supreme interest of its country...".<sup>15</sup>

Nigeria attempted to introduce more details into Article VII of the identical treaty drafts of 24 August 1967 by specifying the following grounds for withdrawal:

"(a) that the aims of the Treaty are being frustrated;  
(b) that the failure by a State or group of States to adhere to the Treaty jeopardizes the existing or potential balance of power in its area, thereby threatening its security;  
(c) that any other extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country".<sup>16</sup>

Following Canadian criticism of the Nigerian proposal, mainly based on the rationale that there would be a delay in Treaty ratification if there was a perceived threat of non-adherence of other states, Nigeria proposed amendments to Article X of the draft of 11 March 1968 which indicated that 'grounds for withdrawal were not only the "extraordinary events" but also other "important international developments" which "have jeopardized, or are likely to jeopardize, the national interests" of the country'.<sup>17</sup>

These proposals and criticisms of the provisions for withdrawal during negotiations of the NPT formed the basis for Shaker's assessment that 'withdrawal from the NPT would be a highly controversial issue'.<sup>18</sup> According to him 'it is hard to imagine that a decision to terminate...the NPT would be taken strictly on the basis of considerations affecting the subject matter of the Treaty itself. A decision to end such an agreement, it was argued, would require a far-reaching re-alignment of the country's foreign policy stance.'<sup>19</sup> He therefore regarded the provisions of the withdrawal clause as being carefully and intentionally worded, as the issue was clearly a sensitive one and the exercise of this right by any state would clearly have major international implications.

### **III. Procedures for Withdrawal from the NPT:**

The following section briefly provides comments on the intentions and purposes of the stated procedures for withdrawal from the NPT found in Article X.1. There are four basic conditions that a State Party must fulfil to legally withdraw from the Treaty:

- it must give notice of withdrawal to all Parties to the NPT;

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<sup>13</sup> Shaker, 1980, p.890

<sup>14</sup> *Ibid*

<sup>15</sup> Shaker, 1980, p.891

<sup>16</sup> Shaker, 1980, pp.891-2

<sup>17</sup> Shaker, 1980, p. 892

<sup>18</sup> Shaker, 1980, 893

<sup>19</sup> *Ibid*

- 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”**

The requirement for a State Party to notify all Treaty Parties of its intention to withdraw was a provision lifted from the PTBT. According to Shaker, the Brazilian delegation objected to this requirement, claiming that State Parties should only have to provide such notice to the three Depositary Governments.<sup>20</sup> Reasoning for this objection is not provided by Shaker’s analysis but given Brazilian/ Argentine relations, it may have been driven by regional concerns, or just to place on the depositaries the task of notifying all parties, rather than 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, and thus is a provision specific to the NPT. It was also objected to by the Brazilian delegation, who argued both that the issue was not one which was automatically a concern for the Security Council, and also that the Council would consist of states other than NPT parties, and these should have no role in decisions concerning the Treaty. Shaker, however, argues for the provision on the grounds that the UNSC would be a suitable forum for such a notice as the withdrawal by a State Party was likely to be based on security considerations. He further notes that since the withdrawal might indicate ‘an imminent acquisition of NW by the withdrawing states’, UNSC resolution 255 concerning security guarantees might be relevant and thus justify UNSC action under Article 34 of the Charter<sup>21</sup>.

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

This provision was not inherited from the PTBT or any other contemporary arms control treaty, such as the Outer Space Treaty, and or the Tlatelolco Treaty. Indeed the Romanian delegation submitted a formal amendment to Article VII of the drafts of 24 August 1967 to delete any reference to such a statement.<sup>22</sup> Shaker’s analysis of the Rumanian position was that it felt that a notice of withdrawal to States Parties and the UNSC would suffice. It also argued that the ‘content of the notice came within the exclusive competence of the government of the state finding itself in such a situation’<sup>23</sup>.

Critics of this provision often 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’.<sup>24</sup> As Aust indicates, while the wording of the withdrawal provision (‘if it decides’) ‘gives a discretion to the withdrawing party’, the additional requirement to give a statement of extraordinary events requires the party to ‘have grounds for its decision’.<sup>25</sup> This limiting clause may have been intended to prevent arbitrary withdrawal, and increases the responsibility of

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<sup>20</sup> Shaker, 1980

<sup>21</sup> *Ibid*

<sup>22</sup> *Ibid*

<sup>23</sup> *Ibid*, p. 896

<sup>24</sup> Ronzitti, 1991, p.120

<sup>25</sup> Aust, 2000, p.228

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.

This requirement in itself therefore arguably places a burden of proof on the withdrawing state to provide a credible case, increasing the transparency of “illegitimate” withdrawals. This condition also suggests that the withdrawal case will be reviewed and the UNSC and the international community will pass a judgement on it. The explicit requirement for a statement allows for a more rapid and detailed diplomatic response, as the omission of such a requirement would make one difficult except in general terms, and thus would make an illegitimate withdrawal more feasible.

#### **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. Shaker’s analysis does not indicate any notable objection to this condition.

#### **IV. Some Conclusions**

- As Shaker says, the further provisions in the NPT over the PTBT ‘provide an additional brake on hasty withdrawal action without limiting the basic right 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.
- In that context the UNSC has the right to review the grounds for withdrawal, and pass a judgement on them, though not to veto it.
- The terms of the treaty cannot prevent a state withdrawing, but it should do so in the manner prescribed by the Treaty. If it does not, the legal and practical consequences remain uncertain, and presumably are at the discretion of the UNSC.
- It also seems that the scenarios under discussion at the time the Treaty was negotiated revolved around the withdrawal of states as a consequence of non-compliance by states parties within the Treaty or acts by states outside the Treaty. There appears to have been little thought given to situations where a state within the Treaty was to withdraw in the absence of such events.

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