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Benjamin Wastler

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HAVING ITS YELLOWCAKE AND EATING IT TOO: HOW THE NSG WAIVER FOR INDIA THREATENS TO UNDERMINE THE NUCLEAR NONPROLIFERATION REGIME

BENJAMIN WASTLER*

Abstract: The Nuclear Suppliers Group (NSG) is a cartel of nuclear suppliers that imposes export restrictions on nuclear trade with states that do not adhere to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) or submit to safeguards administered by the International Atomic Energy Agency (IAEA). The NSG passed a waiver of restrictions on nuclear commerce with India in September 2008 despite India's failure to meet either of these nonproliferation norms. This waiver, largely influenced by the economic and political motivations of large nuclear suppliers, establishes a double standard for India because it provides India with the same trade benefits of NPT members but without the nonproliferation obligations. This Note argues that the NSG waiver threatens to undermine the NPT and global security at-large. The Note proposes ways to narrow the scope of the waiver to prevent further damage to the nuclear nonproliferation regime.

INTRODUCTION

On September 6, 2008, the Nuclear Suppliers Group (NSG), a cartel which regulates exports of nuclear fuel and technology, passed a waiver lifting a thirty-year ban on nuclear trade with India.¹ The waiver marks an unprecedented departure from thirty years of refusal to engage in nuclear trade with states such as India that are not parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and do not place their nuclear industries under safeguards operated by the Inter-

* Benjamin Wastler is Editor-in-Chief of the *Boston College International & Comparative Law Review*. He would like to thank his wife Sarah and his family for their endless support and John Gordon for his wisdom and guidance in the publication of this issue of the *Boston College International & Comparative Law Review*.

¹See *Quantum Politics*, *ECONOMIST*, Sept. 13, 2008, at 48, available at http://www.economist.com/world/asia/displaystory.cfm?story_id=12209404.

national Atomic Energy Agency (IAEA).² The United States lobbied heavily to gain exception for India from NSG rules in order to effectuate the nuclear exchange agreement negotiated by U.S. President George W. Bush and Indian Prime Minister Manmohan Singh in 2005.³ Several other exporting states, eager to meet India's burgeoning energy demands, are negotiating similar nuclear agreements with India.⁴

Although the NSG waiver will likely benefit both India and nuclear exporters, it will severely undermine the NPT, which for forty years has served as the linchpin of the nuclear nonproliferation regime.⁵ The NPT is essentially a bargain between nuclear weapons states and non-nuclear weapons states.⁶ Non-nuclear weapons states agree not to develop nuclear weapons in exchange for nuclear weapons states' commitment to share technology for peaceful purposes and to gradually disarm their nuclear arsenals.⁷ The NSG was created in the aftermath of India's 1974 testing of a nuclear weapon developed with nuclear technology transferred by major nuclear suppliers for peaceful purposes.⁸ The NSG established guidelines in 1975 to ensure that the states that failed to sign the NPT—India, Pakistan, and Israel—were excluded from the benefits of nuclear trade.⁹ The NSG waiver for India, however, diminishes the non-nuclear weapons states' incentive to belong to the NPT.¹⁰ India now receives the same benefits of nuclear trade that NPT parties do but is not required to sign the NPT, to relinquish its nuclear weapons, or to adhere to the other provisions of the treaty.¹¹ The

² Treaty on the Non-Proliferation of Nuclear Weapons pmb., July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT]; see *A Legacy Project*, ECONOMIST, Sept. 13, 2008, at 49, available at http://www.economist.com/world/asia/displaystory.cfm?story_id=12209631.

³ *Quantum Politics*, *supra* note 1, at 48–49.

⁴ Erika Kinetz, *India Open to Nuclear Business with France, Russia*, LIVEMINT, Sept. 26, 2008, <http://www.livemint.com/2008/09/26220917/India-open-to-nuclear-business.html?d=1>.

⁵ *A Legacy Project*, *supra* note 2, at 49.

⁶ See NPT, *supra* note 2, arts. II–VI.

⁷ *Id.*

⁸ See Marvin Miller & Lawrence Scheinman, *Israel, India, and Pakistan: Engaging the Non-NPT States in the Nonproliferation Regime*, 33 ARMS CONTROL TODAY 15, 16 (2003), available at http://www.armscontrol.org/act/2003_12/MillerandScheinman.

⁹ See Daniel Horner, *G-8 Tightens Nuclear Export Rules*, 39 ARMS CONTROL TODAY 33, 33 (2009), available at http://www.armscontrol.org/act/2009_09/G8; George Perkovich, Dir., Nuclear Pol'y Program, Carnegie Endowment for Int'l Peace, *A Realist Case for Conditioning the U.S.-India Nuclear Deal*, Address at a Nonproliferation Policy Education Center (May 15, 2005), available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=18371>.

¹⁰ Perkovich, *supra* note 9.

¹¹ Glenn Kessler, *Senate Backs Far-Reaching Nuclear Trade Deal with India*, WASH. POST, Oct. 2, 2008, at A17, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/01/AR2008100100533.html>.

breakdown of the NPT could have dire implications for the nuclear nonproliferation regime and for global security.¹²

Part I of this Note discusses the history of the nonproliferation movement with emphasis on the origins of the NPT and the NSG. In addition, this section highlights India's relationship vis-à-vis the nuclear nonproliferation regime and provides context for the United States' pursuit of a nuclear agreement with India. Part II examines the framework of the NPT and the NSG's role in protecting the exclusivity of the benefits of NPT membership. This section also identifies how the NSG waiver for India may now undermine these NPT benefits. Lastly, Part III addresses the need for the nuclear nonproliferation regime to engage non-NPT states and evaluates the adequacy of the NSG waiver in doing so. This section then predicts the impact that the NSG waiver will have on the effectiveness of the NPT and suggests ways to mitigate the damage to the nuclear nonproliferation regime.

I. BACKGROUND

A. "Atoms for Peace" and the Birth of the Nonproliferation Movement

When President Eisenhower took office in 1953, he faced the difficult task of managing the global spread of nuclear weapons.¹³ At that time, only the United States, Great Britain, and the Soviet Union had successfully developed nuclear weapons.¹⁴ Many other states, however, sought to acquire the sophisticated technology required to build nuclear weapons or generate nuclear energy for civilian use.¹⁵ Eisenhower faced the choice of either concealing U.S. nuclear technology or sharing it with other states for peaceful energy-generating purposes on the condition that they promise not to divert the technology to develop nuclear weapons.¹⁶

¹² See Saira Yamin, *The U.S., India and the Elusive 123 Deal*, FOREIGN POL'Y IN FOCUS, Sept. 7, 2007, <http://www.fpi.org/fpifxt/4528>.

¹³ Dwight D. Eisenhower, U.S. President, Address to the 470th Plenary Meeting of the United Nations General Assembly (Dec. 8, 1953).

¹⁴ U.S. Department of Energy, Office of History & Heritage Resources, The Manhattan Project: An Interactive History, <http://www.cfo.doe.gov/me70/manhattan/proliferation.htm> (last visited Mar. 15, 2010).

¹⁵ Peter R. Lavoy, *The Enduring Effects of Atoms for Peace*, 33 ARMS CONTROL TODAY 26, 29 (2003), available at http://www.armscontrol.org/act/2003_12/Lavoy.

¹⁶ *Id.*

Opting for the latter course, Eisenhower collaborated with other nuclear supplier states to create the “Atoms for Peace” program.¹⁷ Through this initiative, nuclear supplier states assisted non-nuclear weapons states in building nuclear reactors.¹⁸ In addition, “Atoms for Peace” created the International Atomic Energy Agency (IAEA), an independent agency that reports to the United Nations,¹⁹ to enforce safeguards to prevent recipient states from diverting acquired technology to build nuclear weapons.²⁰ Although some herald “Atoms for Peace” as a successful multilateral effort to stem widespread nuclear proliferation, critics claim that it actually accelerated nuclear proliferation.²¹ India, Pakistan, and Israel each diverted assistance received through “Atoms for Peace” to develop nuclear weapons.²²

B. *The NPT and India’s Non-Adherence*

Largely modeled on “Atoms for Peace,”²³ the NPT opened for signature in 1968.²⁴ Today, 190 countries in the world are parties to the treaty.²⁵ The treaty recognizes the five states that had developed nuclear weapons prior to 1967 as nuclear weapons states²⁶—the United States, Russia, Great Britain, France, and China²⁷—and requires that these states gradually disarm their nuclear arsenals and share technology to assist non-nuclear weapons states in building nuclear reactors for peaceful energy-generating purposes.²⁸ All other states are recognized as non-nuclear weapons states and are prohibited from developing or acquiring nuclear weapons.²⁹

¹⁷ Zia Mian & Alexander Glaser, *A Frightening Nuclear Legacy*, 64 BULL. ATOMIC SCIENTISTS 42, 42 (2008).

¹⁸ *Id.*

¹⁹ International Atomic Energy Agency, The “Atoms for Peace” Agency, <http://www.iaea.org/About/index.html> (last visited Mar. 15, 2010).

²⁰ Lavoy, *supra* note 15, at 27–29.

²¹ *Id.* at 26.

²² *Id.*

²³ *Id.* at 29.

²⁴ United Nations Office for Disarmament Affairs, Treaty on the Non-Proliferation of Nuclear Weapons, <http://www.un.org/disarmament/WMD/Nuclear/NPT.shtml> (last visited Mar. 15, 2010).

²⁵ *Id.*

²⁶ NPT, *supra* note 2, art. IX.

²⁷ Federation of American Scientists, Treaty on the Non-Proliferation of Nuclear Weapons, <http://www.fas.org/nuke/control/npt/> (last visited Mar. 15, 2010).

²⁸ NPT, *supra* note 2, arts. IV–VI.

²⁹ *Id.* art. II.

India is one of four states in the world that is not a member of the treaty.³⁰ While India, Israel, and Pakistan never signed the treaty, North Korea withdrew in 2003 because it sought to develop nuclear weapons.³¹ India refused to sign the treaty largely because it sought a nuclear deterrent to stave off threats from its neighbors Pakistan and China, with which India has enduring border disputes.³² Moreover, India objected to the lack of an ethical rationale for the distinction between nuclear weapons states and non-nuclear weapons states.³³

C. *The Role of the NSG in the Nonproliferation Regime*

The NSG was formed in 1975 to “clamp down” on abuse of nuclear technology provided for commercial purposes but converted into nuclear weapons programs.³⁴ The group was created in response to India’s 1974 test of a nuclear weapon constructed with technology acquired under “Atoms for Peace.”³⁵ The test revealed that non-weapons specific nuclear assistance could be readily converted into weapons development programs.³⁶ The NSG placed an embargo on nuclear trade on all states that had failed to sign the NPT until they accepted the full-scope IAEA safeguards that the NPT requires.³⁷

The NSG waiver for India is ironic because it exempts India from the rules originally designed for it.³⁸ The embargo was intended to penalize India for its abuse of nuclear technology provided for peaceful purposes and to deprive it of the substantial benefits of nuclear trade.³⁹ Indeed, India’s fledgling nuclear industry has suffered from the embargo because India lacks an abundance of uranium deposits and therefore depends on trade to accumulate the materials necessary for

³⁰ Federation of American Scientists, Treaty on the Non-Proliferation of Nuclear Weapons, <http://www.fas.org/nuke/control/npt/> (last visited Mar. 15, 2010).

³¹ *Id.*

³² Brahma Chellaney, Professor of Sec. Studies, Ctr. for Policy Research in New Dehli, The India-Pakistan-China Strategic Triangle and the Role of Nuclear Weapons, Address at l’Institut Français des Relations Internationales Seminar (Mar. 15, 2002), available at http://www.ifri.org/?page=contribution-detail&id=4218&id_provenance=97.

³³ Munish Puri, *India and the NPT—A Nuclear Existential Dilemma*, INST. FOR PEACE & CONFLICT STUD., May 6, 2005, <http://ipcs.org/article/india/india-and-the-npt-a-nuclear-existential-dilemma-1731.html>.

³⁴ Miller & Scheinman, *supra* note 8, at 16.

³⁵ *Quantum Politics*, *supra* note 1, at 48–49.

³⁶ See Nuclear Suppliers Group, History of the NSG, <http://www.nuclearsuppliersgroup.org/history.htm> (last visited Mar. 15, 2010).

³⁷ *Id.*

³⁸ *Quantum Politics*, *supra* note 1, at 48–49.

³⁹ See *id.*

nuclear fission.⁴⁰ Moreover, India's failure to develop a robust nuclear industry has exacerbated its current energy crisis.⁴¹ Thus, the timing of the waiver is puzzling considering that it was granted at precisely the moment when the embargo is having its intended effect.⁴²

D. *Factors Underlying the U.S.-India Nuclear Agreement*

The United States lobbied heavily and overcame resistance by various NSG suppliers to gain exception for India from NSG rules.⁴³ Because the NSG operates by consensus, even one dissenting state could block a measure.⁴⁴ Austria, New Zealand, and Ireland initially objected to the NSG waiver for India on the ground that it would set a dangerous precedent by rewarding India's abuse of acquired nuclear technology.⁴⁵ Despite their reservations, these states ultimately yielded to the interests of states with heavier diplomatic clout and vested economic interests in the waiver, such as Russia and France.⁴⁶

There are several reasons why the United States was willing to "bring its diplomatic muscle to bear on India's behalf."⁴⁷ Most importantly, it believes that the nuclear agreement will forge a strategic alliance with India which will serve to counterbalance the region's other emerging power, China.⁴⁸ Although President Bush may have pressed for the deal primarily in order to bolster his Presidential "legacy"⁴⁹ with the achievement of strengthening Indo-American relations, the nuclear agreement nevertheless received overwhelming support in both houses of Congress.⁵⁰

⁴⁰ *Id.*

⁴¹ See Carin Zissis, *India's Energy Crunch*, COUNCIL ON FOREIGN REL., Oct. 23, 2007, http://www.cfr.org/publication/12200/indias_energy_crunch.html.

⁴² See Charles Ferguson, *Reshaping the U.S.-India Nuclear Deal to Lessen the Nonproliferation Losses*, 38 ARMS CONTROL TODAY 15, 15-18 (2008), available at http://www.armscontrol.org/act/2008_04/Ferguson.

⁴³ *Quantum Politics*, *supra* note 1, at 48-49.

⁴⁴ Wade Boese, *NSG, Congress Approve Nuclear Trade with India*, 38 ARMS CONTROL TODAY 27, 28 (2008), available at http://www.armscontrol.org/act/2008_10/NSGapprove.

⁴⁵ See *U.S.-India Nuclear Accord Approved*, BBC NEWS, Sept. 6, 2008, http://news.bbc.co.uk/2/hi/south_asia/7601932.stm.

⁴⁶ See Boese, *supra* note 44, at 28.

⁴⁷ *Quantum Politics*, *supra* note 1, at 48-49.

⁴⁸ Demetri Sevastopulo, *U.S.-India Nuclear Deal Clears First Hurdle*, FIN. TIMES (London) Sept. 28, 2008, <http://www.ft.com/cms/s/0/bdff77de-8d7f-11dd-83d5-0000779fd18c.html>.

⁴⁹ *A Legacy Project*, *supra* note 2, at 49.

⁵⁰ See Boese, *supra* note 44, at 28. The House of Representatives approved the nuclear deal 298 to 117 on Sept. 27, 2008, and the Senate approved the deal 86 to 13 on Oct. 1, 2008. *Id.*

Furthermore, proponents of the agreement claim that it officially brings India into the nonproliferation fold and rewards India for its voluntary nonproliferation commitment over the last thirty years.⁵¹ In spite of its non-adherence to the NPT, India has abided by many nonproliferation norms.⁵² For instance, India has voluntarily adopted the strict export regulations of the NSG and refused to share nuclear technology with rogue states such as North Korea, something which cannot be said of neighboring Pakistan.⁵³ India has also imposed a strict safeguards regime on its own nuclear facilities and criminalized the trade and brokering of sensitive nuclear technology.⁵⁴

Finally, supporters of the deal justify the NSG waiver as a necessary means of combating global climate change.⁵⁵ India is the world's fifth largest consumer of energy, but nuclear energy amounts to only three percent of its total output.⁵⁶ India's energy consumption will continue to rise as its economy expands.⁵⁷ A transition from dependence on fossil fuels to nuclear energy will allow India to reduce its carbon footprint because generating nuclear energy produces no carbon emissions.⁵⁸

II. DISCUSSION

A. *The NPT Framework*

The NPT rests on three pillars: nonproliferation, disarmament, and the peaceful use of nuclear energy.⁵⁹ Signatory members' commitment to nonproliferation is found in Articles I, II, and III of the treaty.⁶⁰ Article I prohibits the five nuclear weapons states from transferring nuclear weapons to non-nuclear weapons states or assisting or encouraging them in any way to manufacture nuclear weapons.⁶¹ Critics of the NSG waiver claim that nuclear trade with India violates weap-

⁵¹ See Esther Pan & Jayshree Bajoria, *The U.S.-India Nuclear Deal*, COUNCIL ON FOREIGN REL., Oct. 2, 2008, <http://www.cfr.org/publication/9663/>.

⁵² See *id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ William S. Cohen, Op-Ed., *The India Nuclear Deal: The Merits*, FORBES, Sept. 30, 2008, http://www.forbes.com/2008/09/30/india-nuclear-senate-oped-cx_wc_0930cohen.html.

⁵⁶ See Zissis, *supra* note 41.

⁵⁷ See *id.*

⁵⁸ Cohen, *supra* note 55.

⁵⁹ Jenny Nielsen, *Engaging India, Israel and Pakistan in the Nuclear Non-Proliferation Regime*, 86 DISARMAMENT DIPL. 13, 14 (2007), available at <http://www.acronym.org.uk/dd/dd86/86jn.htm>.

⁶⁰ NPT, *supra* note 2, arts. I-III.

⁶¹ *Id.* art. I.

ons states' Article I obligations because it assists India's nuclear weapons program.⁶² Although the NSG waiver prohibits India from using imported nuclear technology for weapons-producing purposes, the flow of uranium imports for civilian reactors will free up more of India's domestic uranium for weapons-grade enrichment.⁶³ Whether this indirect aid to India's nuclear weapons industry constitutes assistance in violation of Article I of the NPT remains an open question.⁶⁴

Meanwhile, Article II provides that non-nuclear weapons states may not receive, manufacture, or acquire nuclear weapons and must submit to IAEA safeguards to prevent them from diverting civilian nuclear resources to build nuclear weapons.⁶⁵ Abandoning nuclear weapons ambitions was a serious decision for many states, especially those with nuclear weapons capabilities.⁶⁶ Ultimately though, these states concluded that assistance for civilian nuclear programs outweighed the military utility or prestige of nuclear weapons.⁶⁷

In Article VI of the treaty, nuclear weapons states and non-nuclear weapons states agree to "pursue negotiations in good faith on disarmament measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament."⁶⁸ The vagueness of this provision's language has allowed weapons states to justify retention of their nuclear arsenals.⁶⁹ Nevertheless, the United States and Russia, which possess the largest nuclear arsenals by far, have substantially reduced the size of their stockpiles.⁷⁰ Disarmament is inextricably linked to nonproliferation because weapons states will never fully disarm until they are confident that nuclear proliferation does not threaten their security.⁷¹

⁶² Pan & Bajoria, *supra* note 51.

⁶³ *Id.*

⁶⁴ See Ashley J. Tellis, *Atoms for War? U.S.-India Civilian Nuclear Cooperation and India's Nuclear Arsenal*, CARNEGIE ENDOWMENT FOR INT'L PEACE, June 2006, <http://www.carnegieendowment.org/files/atomsforwarfinal4.pdf> (analyzing whether the United States' assistance to India constitutes a violation of Article I of the NPT).

⁶⁵ NPT, *supra* note 2, art. III.

⁶⁶ Interview by Renee Montagne with Mitchell Reiss, Senior Assoc., Ctr. for Strategic & Int'l Studies, in Culver City, CA (NPR radio broadcast Apr. 17, 2006), *available at* <http://www.npr.org/templates/story/story.php?storyId=5345504>.

⁶⁷ *Id.*

⁶⁸ NPT, *supra* note 2, art. IV.

⁶⁹ See *Q&A: Nuclear Disarmament*, BBC NEWS, Dec. 11, 2006, http://news.bbc.co.uk/2/hi/in_depth/6103398.stm.

⁷⁰ *Id.*

⁷¹ See Sergio Duarte, High Representative for Disarmament Affairs, Remarks at United Nations Brainstorming Session on Disarmament and Nonproliferation: Breaking the Sta-

Article IV of the treaty discusses members' inalienable right to use nuclear energy for peaceful purposes.⁷² Article V further provides that nuclear technology must be shared on a "non-discriminatory basis."⁷³ Most non-nuclear weapons states signed the NPT under the assumption that peaceful nuclear assistance would be exclusive to signatory members of the treaty.⁷⁴ The opening of nuclear trade with India, however, exposes a flaw of the NPT: no provision prohibits nuclear supplier states from providing civilian nuclear assistance to states outside the treaty.⁷⁵ Without such exclusivity rights, it is unclear why a non-nuclear weapons state would continue to remain a party to the treaty.⁷⁶

Significantly, Article X allows a party to the treaty the right to withdraw if "extraordinary events, related to the subject matter of this treaty, have jeopardized the supreme interests of its country," as long as it gives three months notice.⁷⁷ North Korea, which withdrew from the treaty in 2003, three years before it tested its first nuclear weapon, is the only country to exercise this provision.⁷⁸ Although the withdrawal provision has historically not been a threat to the sustained vitality of the NPT, the commencement of nuclear trade with a non-adherent state such as India may give some countries reason to question their continued NPT membership and to consider withdrawal.⁷⁹

B. *The Implications of the NSG Waiver*

Since its inception in 1975, the NSG has excluded non-NPT members who refuse to submit to IAEA safeguards from the benefits of nu-

lemate (Aug. 11, 2007), available at <http://disarmament.un.org/speech/duarte11082007.htm>.

⁷² NPT, *supra* note 2, art. IV.

⁷³ *Id.* art. V.

⁷⁴ See Daryl Kimball, *The Nuclear Nonproliferation Treaty (NPT) at a Glance*, ARMS CONTROL ASS'N, <http://www.armscontrol.org/factsheets/nptfact> (last visited Mar. 15, 2010).

⁷⁵ See Paul Reynolds, *Nuclear Weapons: Can They Be Stopped?*, BBC NEWS, Sept. 22, 2004, <http://news.bbc.co.uk/2/hi/americas/3680418.stm>.

⁷⁶ See Pavel Padvig, *A Silver Lining to the U.S.-India Nuclear Deal*, BULL. ATOMIC SCIENTISTS, Oct. 14, 2008, <http://www.thebulletin.org/web-edition/columnists/pavel-podvig/a-silver-lining-to-the-us-india-nuclear-deal>.

⁷⁷ NPT, *supra* note 2, art. X.

⁷⁸ See Daryl Kimball, *Chronology of U.S.-North Korean Nuclear and Missile Diplomacy*, ARMS CONTROL ASS'N, <http://www.armscontrol.org/factsheets/dprkchron> (last visited Mar. 15, 2010).

⁷⁹ See Ashton B. Carter, *How Washington Learned to Stop Worrying and Love India's Bomb*, FOREIGN AFF., Jan. 10, 2007, <http://www.foreignaffairs.com/> (enter article title in search box; then follow hyperlink).

clear trade.⁸⁰ The NSG, therefore, fills the gap in the NPT that threatened to diminish the non-nuclear weapons states' imperative to remain members.⁸¹ The NSG waiver for India, however, reopens this fissure in the NPT by undermining the exclusivity of rights to nuclear trade it once protected.⁸² Some question whether the waiver is the beginning of a slippery slope of exemption for current or potential proliferators.⁸³

Granted, the NSG is not likely to provide another waiver in the near term.⁸⁴ The other three non-adherent states—Israel, Pakistan, and North Korea—are much more at odds with the nonproliferation regime.⁸⁵ Israel, for instance, shrouds its nuclear arsenal in secrecy and does not formally acknowledge it for fear of provoking a nuclear arms race in the Middle East.⁸⁶ Granting a similar waiver to Israel would surely infuriate Israel's enemies in the region who have abided by their nonproliferation obligations.⁸⁷ Pakistan, meanwhile, has lost credibility with the nonproliferation regime because of its sharing of nuclear secrets with rogue states such as North Korea and Iran.⁸⁸ Likewise, North Korea is unlikely to obtain such a waiver because of its past defiance of NPT obligations.⁸⁹ Prior to its withdrawal from the treaty in 2003, North Korea repeatedly reneged on its promises not to use nuclear technology for weapons-producing purposes and frequently denied IAEA inspectors access to its nuclear facilities.⁹⁰

Moreover, the NSG waiver for India includes several conditions intended to limit the damage to the nonproliferation regime.⁹¹ These conditions include: India's formal pledge to sustain its voluntary moratorium on nuclear testing; India's adoption of NSG guidelines regarding nuclear export restrictions; and India's acceptance of IAEA safe-

⁸⁰ See Daryl Kimball, *Nuclear Suppliers Group (NSG) at a Glance*, ARMS CONTROL ASS'N, May 2006, <http://www.armscontrol.org/factsheets/NSG>.

⁸¹ See Daryl Kimball, *Text, Analysis, and Response to NSG "Statement on Civil Nuclear Cooperation with India"*, ARMS CONTROL ASS'N, Sept. 6, 2008, <http://www.armscontrol.org/node/3345>.

⁸² See *id.*

⁸³ Miller & Scheinman, *supra* note 8, at 18–19.

⁸⁴ See Nicholas Burns, Former Undersecretary of State for Pol. Aff., Remarks at Brookings Institution Panel Discussion: The U.S.-India Nuclear Agreement (July 30, 2008), available at http://www.brookings.edu/events/2008/0730_india.aspx.

⁸⁵ See Miller & Scheinman, *supra* note 8, 16–19.

⁸⁶ *Id.*

⁸⁷ Nielsen, *supra* note 59, at 14.

⁸⁸ See Miller & Scheinman, *supra* note 8, at 18.

⁸⁹ See *id.*

⁹⁰ Kongdan Oh & Ralph Hassig, *North Korea: A Rogue State Outside the NPT Fold*, BROOKINGS INST. FOREIGN POL'Y AGENDA, Mar. 1, 2005, http://www.brookings.edu/articles/2005/0301northkorea_hassig.aspx.

⁹¹ See Kimball, *supra* note 81.

guards on several of its nuclear facilities.⁹² In theory, these conditions serve to “bring India into the nuclear nonproliferation mainstream” and to justify the NSG’s exceptional treatment of India.⁹³

Nevertheless, the NSG waiver for India may prompt several NPT members to consider withdrawing from the treaty.⁹⁴ Iran, widely suspected to be covertly developing nuclear weapons, may argue that it is even more entitled to relief from nonproliferation rules because, unlike India, it has adhered to the NPT since its creation.⁹⁵ Other states that have kept clean nonproliferation records despite nuclear weapons capabilities may infer from the India precedent that if they withdraw from the NPT and develop nuclear weapons, the NSG would gradually accommodate them too.⁹⁶ In the near term, states in volatile regions such as Japan, South Korea, Turkey, and Egypt may initiate nascent fissile material production for bomb-making purposes as a means of hedging their bets.⁹⁷

III. ANALYSIS

A. *The Urgency and Delicacy of Engaging the Non-NPT States*

As several commentators have expressed, there is an urgent need for the nonproliferation regime to engage states that do not adhere to the NPT.⁹⁸ The nuclear weapons capabilities of these states affect the regional security of NPT members.⁹⁹ The presence of nuclear weapons in India and Pakistan reinforces China’s need for a nuclear deterrent while Israel’s nuclear arsenal fuels Iran’s pursuit of one.¹⁰⁰ Meanwhile, all NPT members fret that the non-adherent states will disseminate nuclear weapons technology to rogue states or terrorists.¹⁰¹ Lack of universality in nonproliferation agreements and looming nonproliferation threats stymie disarmament talks and further weaken the NPT.¹⁰²

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See Perkovich, *supra* note 9.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See, e.g., Miller & Scheinman, *supra* note 8, at 18–19; Nielsen, *supra* note 59, at 13–14.

⁹⁹ See Nielsen, *supra* note 59, at 16–17.

¹⁰⁰ *Id.*

¹⁰¹ See Mary H. Cooper, *Nuclear Proliferation and Terrorism*, 14 CONG. Q. RESEARCHER 297, 299–301 (Apr. 2, 2004), available at http://www.iaea.org/NewsCenter/Focus/cqr_proliferation.pdf.

¹⁰² Nielsen, *supra* note 59, at 13.

Because it is unforeseeable that the non-adherent states will relinquish their nuclear weapons and sign the NPT, some experts suggest alternative ways to obtain nonproliferation commitments.¹⁰³ One important means of engagement would be to acquire their signature to the Comprehensive Test Ban Treaty (CTBT).¹⁰⁴ Testing nuclear weapons is the only reliable way to ensure their readiness for deployment in a military encounter.¹⁰⁵ Absent nuclear weapons tests, it may be less likely that states would use them.¹⁰⁶ Another important step for nonproliferation would be the non-adherent states' adoption of the Fissile Material Cutoff Treaty (FMCT).¹⁰⁷ The FMCT would ban the production of any additional fissile material that could be used to produce nuclear weapons.¹⁰⁸ Any engagement of outlier states must proceed carefully because making large concessions may erode the value of the nonproliferation commitments of the NPT members.¹⁰⁹

The NSG waiver for India fails to bring India into the nonproliferation fold and enacts lasting damage on the nonproliferation regime.¹¹⁰ Most significantly, the waiver severely undermines the NPT and may provoke several non-weapons states to withdraw and to institute nuclear weapons programs.¹¹¹ This result would be devastating not only for the nonproliferation regime but also for global security at-large.¹¹² The proliferation of nuclear weapons into the hands of more states increases the scenarios in which nuclear weapons plausibly may be used.¹¹³ This increased utility of nuclear weapons will fuel arms races and lead to a breakdown of collective security arrangements.¹¹⁴

¹⁰³ Edward Markey & Ellen Tauscheur, Op-Ed., *Don't Loosen Nuclear Rules for India*, N.Y. TIMES, Aug. 20, 2008, at A23, available at <http://www.nytimes.com/2008/08/20/opinion/20markey.html>.

¹⁰⁴ *Id.*

¹⁰⁵ Perkovich, *supra* note 9.

¹⁰⁶ *See id.*

¹⁰⁷ Miller & Scheinman, *supra* note 8, at 18–19.

¹⁰⁸ *Id.* at 18.

¹⁰⁹ Perkovich, *supra* note 9.

¹¹⁰ Kimball, *supra* note 81.

¹¹¹ *See* Perkovich, *supra* note 9.

¹¹² *See id.*

¹¹³ Kofi Annan, Sec'y-Gen., United Nations, Lecture on Nuclear Disarmament and Nonproliferation (Nov. 28, 2006), available at <http://www.un.org/News/Press/docs/2006/sgsm10767.doc.htm>.

¹¹⁴ *See* Perkovich, *supra* note 9.

B. *Balancing the Costs and Benefits of the NSG Waiver*

The nonproliferation commitments India made to obtain the NSG waiver are “not in any way equivalent to the legal obligations and commitments made by the members states of the NPT.”¹¹⁵ The waiver acknowledges India’s promise to separate its civilian reactors from its military reactors and to place all existing civilian reactors under IAEA safeguards.¹¹⁶ This is a “major step,” some experts say, because the nonproliferation regime has formerly failed to induce India to accept any international safeguards on its nuclear facilities.¹¹⁷ India’s commitment, however, does not include future nuclear facilities.¹¹⁸ Indian Prime Minister, Manmohan Singh, insists that India reserves the right to determine whether future reactors, either civilian or military, are subject to IAEA safeguards.¹¹⁹

The NSG waiver also fails to clarify whether supplier states can suspend nuclear trade with India if it resumes testing nuclear weapons.¹²⁰ Although the waiver recognizes India’s formal pledge to continue its voluntary moratorium on nuclear testing, India maintains that it retains the “right to undertake future tests, if it is necessary.”¹²¹ Most supplier states will likely suspend nuclear trade with India should it resume testing, but the waiver should have established clear sanctions for India in such a scenario.¹²²

Another shortcoming of the waiver is that it does not limit India’s future production of weapons-grade fissile material.¹²³ This commitment would have been a significant victory for the nonproliferation regime since all nuclear weapons states except China are taking steps to limit their production of fissile material.¹²⁴ It is likewise lamentable that the safeguards imposed on India’s civilian reactors will not apply to the fissile material produced prior to India’s nuclear agreement with the United States.¹²⁵

¹¹⁵ Kimball, *supra* note 81.

¹¹⁶ Pan & Bajoria, *supra* note 51.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See Kimball, *supra* note 81.

¹²¹ Rama Lakshmi, *In India, Outcry Over U.S. Letter*, WASH. POST, Sept. 4, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/03/AR2008090303197.html>.

¹²² See Kimball, *supra* note 81.

¹²³ See Pan & Bajoria, *supra* note 51.

¹²⁴ Kimball, *supra* note 81.

¹²⁵ See Pan & Bajoria, *supra* note 51.

Unlike NPT members, India has made no formal commitment to disarmament.¹²⁶ Given that disarmament ultimately requires the universal commitment of nuclear weapons states, India's recalcitrance will continue to hamper the disarmament movement, already the weakest pillar of the NPT.¹²⁷ India's continued buildup of nuclear weapons may spark a nuclear arms race with China and Pakistan, which would further destabilize an already combustible region.¹²⁸

To be sure, the NSG waiver does harmonize India's nuclear export restrictions with those of the NSG.¹²⁹ Bringing India's export control system in line with the NSG will help quell the fears of those who worry about the transfer of sensitive nuclear weapons technology to rogue states or terrorists.¹³⁰ Nevertheless, this commitment hardly brings India further into the nonproliferation fold because India already had a rigorous export control system with which nonproliferation experts were largely satisfied.¹³¹ The NSG likely could have exacted more significant concessions from India in light of its immediate energy crisis.¹³² By opening nuclear trade with India and permitting it to possess and to build nuclear weapons, the NSG is essentially allowing India to have its yellowcake and eat it too.¹³³

C. *The Impact of the NSG Waiver on the NPT*

The NSG waiver undercuts the NPT because it "devalues the restraint" the non-nuclear weapons states of the NPT have exercised in forsaking nuclear weapons.¹³⁴ Many of these states are beginning to question their allegiance to a nonproliferation regime that rewards India's "obstinacy" and enhances its "status" in the process.¹³⁵ In attempt-

¹²⁶ Kimball, *supra* note 81.

¹²⁷ See Cooper, *supra* note 101, at 301, 310.

¹²⁸ See Kimball, *supra* note 81.

¹²⁹ *Id.*

¹³⁰ See Pan & Bajoria, *supra* note 51.

¹³¹ See *id.*

¹³² See Ferguson, *supra* note 42, at 18.

¹³³ Richard Haass, *Iran, India, and the Case for Double Standards*, COUNCIL ON FOREIGN REL., May 14, 2006, http://www.cfr.org/publication/10685/india_iran_and_the_case_for_double_standards.html. Yellowcake is milled uranium oxide, a compound which can be enriched to make weapons-grade uranium. Brendan I. Koerner, *What Is Yellowcake, Anyway?*, SLATE, July 18, 2003, <http://www.slate.com/id/2085848/>.

¹³⁴ Perkovich, *supra* note 9.

¹³⁵ See, e.g., Brad Glosserman & Bates Gill, Op-Ed., *Bush's Nuclear Deal with India, Bigger Consequences to Consider*, JAPAN TIMES, Oct. 29, 2008, <http://search.japantimes.co.jp/cgi-bin/co20081029a1.html>; *U.S.-India Nuclear Pact—A Double Standard?*, DEUTSCHE WELLE, Mar. 3, 2006, <http://www.dw-world.de/dw/article/0,,1922131,00.html>.

ing to court NPT outlier states into the larger nonproliferation fold, the NSG has effectively alienated many NPT members.¹³⁶ States with nuclear capabilities in volatile regions may strongly consider withdrawing from the NPT, initiating nuclear weapons programs, and playing the waiting game for accommodation from the nonproliferation regime.¹³⁷

For instance, Iran is enriching weapons-grade uranium, and some believe it will soon develop its first nuclear weapon.¹³⁸ The sustained U.S. military presence on its eastern and western borders and its persistent hostility towards Israel are likely to spur its pursuit of a nuclear deterrent.¹³⁹ The NSG waiver for India weakens the moral force of any argument against Iran obtaining nuclear weapons because it implicitly recognizes India's right to possess them despite breaking nonproliferation rules in acquiring them.¹⁴⁰

Even states with clean nonproliferation records may reconsider their nuclear options now that the primary benefit of NPT membership, access to peaceful nuclear energy, has been extended to non-NPT members.¹⁴¹ States in volatile regions such as Japan, South Korea, Egypt, and Turkey may wonder whether they too can attain access to nuclear trade, but from outside the NPT.¹⁴² Since North Korea's successful nuclear test in 2006, Japan and South Korea feel increasingly vulnerable despite being under the U.S. security umbrella.¹⁴³ The United States' failure to prevent a nuclear-armed North Korea and its shifting of alliances between Pakistan and India in South Asia have begun to undermine its credibility as a reliable ally in Asia.¹⁴⁴ Iran's defection from the NPT would be damaging to the NPT, but the withdrawal of a state with a clean nonproliferation record like Japan would be crippling.¹⁴⁵

¹³⁶ See Nielsen, *supra* note 59, at 13.

¹³⁷ Perkovich, *supra* note 9.

¹³⁸ See Seymour Hersh, *The Iran Plans*, NEW YORKER, Apr. 17, 2006, at 30, http://www.newyorker.com/archive/2006/04/17/060417fa_fact.

¹³⁹ Erich Marquardt, *Why Nuclear Weapons May Be in Iran's National Interests*, POWER & INT. NEWS REP., Aug. 20, 2003, http://www.pinr.com/report.php?ac=view_report&report_id=80&language_id=1.

¹⁴⁰ See Op-Ed., *Mr. Bush's Asian Road Trip*, N.Y. TIMES, Mar. 7, 2006, at A20, available at http://www.nytimes.com/2006/03/07/opinion/07tue1.html?incamp=article_popular.

¹⁴¹ Perkovich, *supra* note 9.

¹⁴² See *id.*

¹⁴³ See Glosserman & Gill, *supra* note 135.

¹⁴⁴ See *id.*

¹⁴⁵ See Strobe Talbott, President, Brookings Inst., Remarks at Brookings Institute Panel Discussion: The U.S.-India Nuclear Agreement (July 30, 2008), available at http://www.brookings.edu/events/2008/0730_india.aspx.

Of course, it is unlikely that the NSG waiver will provoke a mass exodus from the NPT.¹⁴⁶ Nuclear weapons are very expensive to build, yet they provide little military utility.¹⁴⁷ The devastating impact of the atomic bombs dropped over Japan contributed to the nuclear taboo that has formed against using them.¹⁴⁸ Despite its nuclear standoff with Pakistan, even India has adopted a nuclear “no first use policy.”¹⁴⁹ In addition, many states would not take the gamble of withdrawing from the NPT because they might not gain an NSG waiver.¹⁵⁰ Few states have energy markets near the size of India’s and would not attract the level of interest that India did among nuclear suppliers.¹⁵¹

Nevertheless, nuclear weapons are still largely believed to bestow “great power” prestige upon their possessors.¹⁵² Iran, which views itself as a great civilization, pursues nuclear weapons capabilities with the “widespread and enthusiastic” support of its people.¹⁵³ Possessing a nuclear weapon may deter a larger state with much more advanced military forces from invading.¹⁵⁴ The threat of developing nuclear weapons has been used as a bargaining chip by North Korea to attain aid from the international community to ensure regime survival.¹⁵⁵ Some states may determine that acquiring a military “equalizer” or garnering respect or attention at home or abroad is worth the risk of temporary alienation in the nonproliferation regime.¹⁵⁶

D. *Mitigating the Damage to the Nonproliferation Regime*

To prevent the complete breakdown of the NPT, the NSG should narrow the scope of its waiver for India as much as possible.¹⁵⁷ First, the

¹⁴⁶ See Burns, *supra* note 84.

¹⁴⁷ Reiss, *supra* note 66.

¹⁴⁸ Nina Tannenwald, Assoc. Professor, Watson Inst. Int’l Studies, Prepared Remarks to the 2005 Carnegie Endowment Nonproliferation Conference: The Taboos, Secrets and Hidden History of Nuclear Weapons (Nov. 7, 2005), *available at* http://www.carnegieendowment.org/static/npp/2005conference/presentations/tannenwald_remarks.pdf.

¹⁴⁹ Federation of American Scientists, Nuclear Weapons, <http://www.fas.org/nuke/guide/india/nuke/index.html> (last visited Mar. 15, 2010).

¹⁵⁰ Perkovich, *supra* note 9.

¹⁵¹ See Burns, *supra* note 84.

¹⁵² Christopher W. Hughes, *North Korea’s Nuclear Weapons: Implications for the Nuclear Ambitions of Japan, South Korea, and Taiwan*, 3 ASIA POL’Y 75, 81 (2007).

¹⁵³ Esther Pan, *Iran: The Nuclear Threat*, COUNCIL ON FOREIGN REL., Sept. 6, 2005, <http://www.cfr.org/publication/8830/>.

¹⁵⁴ Hughes, *supra* note 152, at 80.

¹⁵⁵ *Id.* at 81.

¹⁵⁶ See *id.*

¹⁵⁷ See Kimball, *supra* note 81.

NSG should clarify that any additional nuclear testing would necessitate a complete suspension of nuclear trade with India.¹⁵⁸ Permitting India to get away with conduct that the 180 signatories of the CTBT condemn would weaken an international norm that has gradually built strength in the last few decades.¹⁵⁹ Second, the NSG should require that any future bilateral agreements make all current and future Indian nuclear reactors subject to IAEA safeguards.¹⁶⁰ Such a requirement would nullify the loophole in the U.S.-India nuclear agreement that permits India to designate future reactors as civilian or military.¹⁶¹ Accordingly, India's weapons-making capacities and ability to stockpile fissile material would be curtailed.¹⁶² Finally, the NSG should limit all reprocessing and enrichment transfers of nuclear material to NPT members, which would exclude India.¹⁶³ This measure would deprive India of the opportunity to divert sensitive "dual-use" technology for weapons-producing purposes against its promises, as it has done in the past.¹⁶⁴

CONCLUSION

The damage is done. The NSG waiver has permanently discredited both the NSG and the NPT, which, along with the IAEA, have been the bulwarks of the nonproliferation regime. By creating a double standard for India, the NSG flouted its own rules and undermined the exclusive rights to nuclear energy that NPT members formerly enjoyed. Contrary to the claims of proponents of the NSG waiver for India, it fails to bring India into the nonproliferation fold and alienates the NPT members that have abided by their nonproliferation commitments. Several of these states may withdraw from the treaty and develop their own nuclear arsenals. Such a result would trigger the unraveling of the nonproliferation regime and threaten global security. Alas, the only action that can now be taken is for the NSG to narrow the scope of its waiver for India to limit further damage to the NPT and the nonproliferation regime.

¹⁵⁸ *Id.*

¹⁵⁹ See Perkovich, *supra* note 9.

¹⁶⁰ See Pan & Bajoria, *supra* note 51.

¹⁶¹ See *id.*

¹⁶² See Ferguson, *supra* note 42, at 18–21.

¹⁶³ *Id.*

¹⁶⁴ *Id.*