Treaty Construction: Integrating the American Approaches to Nuclear Arms Control

Robert L. Collings
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INTRODUCTION

Henry Kissinger once said, "It may seem like a paradox to ask diplomacy that it rescue mankind from the horrors of a thermonuclear holocaust ... almost everything conspires against the subtle negotiation, the artful compromise, of classical diplomacy ... negotiations can be successful only if all parties accept some common standard transcending their dispute." 1

Present analyses of nuclear arms control efforts reflect this lack of confidence in international negotiation by focusing on legislative reorganization of domestic regulatory agencies. 2 Congressional emphasis on the control of nuclear commerce, 3 and executive preference for Strategic Arms Limitation Talks (SALT) conferences, indicate that, at a moment when the

2 An informative analysis of recent legislative efforts in this direction is presented in an article by William Doub and Eugene Fidell, "International Relations and Nuclear Commerce: Developments in United States Policy," 8 Law & Policy in Int'l Bus. 913 (1976) [hereinafter cited as Nuclear Commerce].
4 New York Times, March 5, 1977, at 1, col. 1; id., Apr. 16, 1977, at 3, col. 2. Although our formal presentation had been rebuffed, President Carter had faith in the successful outcome of discussions between Soviet Ambassador Dobrynin and the U. S. Secretary of State Vance.
potential for nuclear arms proliferation has never been greater,6 the United States is proceeding with arms control efforts without a coherent plan for integrating those efforts without conflict.

This paper shall attempt to isolate, from the historical welter of nuclear arms control procedures, the fundamental concepts underlying the United States of America’s attempts at arms control. After comparing the various implementing procedures, suggestions are proposed for better coordinating the implementation of the underlying concepts, rather than simply implementing the procedures themselves.

I. AMERICAN NUCLEAR ARMS CONTROL PROCEDURES — AN HISTORICAL VIEW


The Baruch Plan,7 which grew out of several studies, mainly the Acheson-Lillienthal Report,8 attempted implementation of Arms Control through the joint action of the entire world community within the United Nations. The plan called for the ownership of all nuclear materials, and facilities utilizing such materials, by an International Atomic Development

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5 JCAE 2d 4; Nuclear Commerce 916.
6 As we shall see, America has attempted to implement various strategies at different times, as discussed in part I, infra. Plans for international control failed, see note 11 and accompanying text. Present American procedures include bilateral treaties, section I.B., infra, trilateral treaties, section I.D., infra, and multilateral “open” treaties, to which any state may adhere, section I.E., infra. Further complications ensue from the conclusion of treaties with the International Atomic Energy Agency as a party, or treaties creating duties for such international agencies. See note 41, infra.
Agency ("IADA"). Strict inspection and sanctions, coupled with worldwide dispersion of fissile materials, were then thought to be sufficient to assure success in preventing the fabrication of nuclear weapons.¹⁰

The Soviet response was rejection in the form of unacceptable counterproposals.¹¹ Given the apparent unilateral control of the United States of America over atomic energy at this time,¹² it was not surprising that the American recourse to achieve the goal of nuclear non-proliferation was domestic legislation. The Atomic Energy Act of 1946,¹³ in effect, denied the world free access to American nuclear materials and technology.¹⁴ This approach unfortunately included denial of peaceful uses of atomic energy to the world, including underde-

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¹³ Act August 1, 1946, 60 Stat. 755, c. 724.

¹⁴ Although § 8 of the Act permitted the government to supercede its provisions by treaty, this was not done. § 5 restricted export of special (fissile), source and byproduct nuclear materials except pursuant to a U.S.A.E.C. determination of non-weapons potential. § 6 prohibited export of equipment or devices using atomic energy as a weapon, and § 10(a)(1) prohibited the exchange of information on uses of atomic energy for industrial purposes until approved safeguards were in effect. In practice, such exchanges were not carried out, even with our strongest allies. See the exchange of notes between British Prime Minister Attlee and President Truman, I. For. Rel. op. cit. 1249-1253, 1259 (1946). Also, note to the U.S. Ambassador to Belgium, I Foreign Relations of the United States 783-784 (1947).
veloped nations which desperately needed cheap energy sources to aid them in postwar modernization. After the Soviet Union had successfully pursued a nuclear weapons program, President Eisenhower lowered the "Atomic Curtain" somewhat to initiate the "Atoms for Peace" program in 1951. Domestic law, however, did not begin to move to accommodate this international program until the passage of the Atomic Energy Act of 1954.

B. Bilateral Treaties

Both the concept of international control as formulated in the Baruch plan and the concept of unilateral control as expressed by the 1946 Act were to re-emerge during different phases of our subsequent arms control efforts. The latter approach was aided by the 1954 Act changes, which permitted the United States government to conclude bilateral treaties for cooperation in the civil uses of atomic energy. The treaties stringently limited the amount of fissile nuclear material ("spe-
cial nuclear material") 20) a nation receiving such material could keep, 21 and provided for an American veto of subsequent transfers of such material and/or equipment by receiving parties-nations, 22 and for an American right to reclaim any spent materials. 23 Conclusion of such treaties, and the regulation of exports thereunder, were among authorities granted to the United States Atomic Energy Commission. 24

C. IAEA

The Baruch Plan was palely reflected in the creation of the International Atomic Energy Agency 25 in 1956. The IAEA, an independent, non-aligned organization, 26 was authorized to

20 42 USC § 2014(aa).

21 In the 1955 Civil Use Cooperation Agreements, see note 19, supra, the amount of enriched isotope U-235 was limited to 6 kilograms by Article IIB, with enrichment limited to 20%. The United States AEC had discretion to increase this amount, subject to the standards of Article IIB, i.e. amounts needed for efficient operation during cooling cycles or interims of fuel element transport. See, e.g., Cooperation Agreement with Greece, August 4, 1955, 6 UST 2635, T.I.A.S. No. 3310.

22 The procedure was as follows: Under Article IIA of an agreement, the U.S.A.E.C. leased materials to the foreign government. The same article required consultation with the U.S.A.E.C. before the lessee government authorized use of materials by private citizens. Technology and equipment transfers were authorized by Articles I and III, and subsequent transfers to private citizens by Article IV. Transfers outside the foreign nation were prohibited by Article VII unless authorized by the U.S.A.E.C. See, e.g., Cooperation Agreement with Brazil, supra note 19.

23 E.g. Agreement for Cooperation with Denmark, July 25, 1955, art. IIc, 6 UST 2629, 2630, T.I.A.S. No. 3309 which provided in pertinent part: "when any fuel elements containing U-235 leased by the Commission require replacement, they shall be returned to the Commission." To prevent circumvention of the term "require replacement" through the use of irradiation or reprocessing, the article further provided: "except as may be agreed, the form and content of the irradiated fuel elements shall not be altered after their removal from the reactor."

24 52 USC §§ 2073(a), 2074, 2077, 2094, 2112, 2121(c), 2133, 2134, 2153 and 2164, as amended (1970).


26 Article IIIc of the IAEA Statute reads in pertinent part: "In carrying out its functions, the Agency shall not make assistance to members subject to any
develop and disburse nuclear technology and resources\textsuperscript{27} to nations under a system of safeguards, designed by the agency\textsuperscript{28} to prevent the use of materials by or within a receiving nation for the development of nuclear weapons.\textsuperscript{29} Licensing of projects would be based on adequate assurances of cooperation with monitoring and reporting procedures, rather than on international ownership as under the Baruch Plan.\textsuperscript{30}

Improvements in short-range delivery systems for nuclear weapons, and the increase in the numbers of nuclear weapons here and in the Soviet Union led to a race to deploy these weapons during the cold war of the late fifties. The regional alliance of NATO required joint defense planning, hence a modification of our treaty structure with Europe.\textsuperscript{31} Since our treaty structure was bilateral, rights and obligations were readily changed.\textsuperscript{32} The United States commitment to IAEA involved no substantial duties, since contribution was not mandatory, and the United States had no need of IAEA assistance. Legislation was passed to amend domestic laws,\textsuperscript{33} political, economic, military or other conditions incompatible with the provisions of this statute.\textsuperscript{1} 8 UST 1097.

\textsuperscript{27} Unlike the IADA, the IAEA does not own all nuclear materials. Supply of materials is voluntary, IAEA Statute Art. IX, 8 UST 1102 (1956). Its efforts are more those of a "broker" of nuclear technology and material transfers, id. Art. IIIA (1), 8 UST 1095; id., Art. XI C, 8 UST 1104 (1956).

\textsuperscript{28} Id., Article XII, 8 UST 1105 (1956). The agency must approve equipment and facility design subject to requirements of safeguard application and approve chemical processing means to ensure no diversion of materials for military purposes.

\textsuperscript{29} Id., IAEA inspectors have both the right (subsection A(6)) and the responsibility (section C) to ascertain whether Agency projects are being used for military purposes; id., Article XI(F) (4), 8 UST 1105.

\textsuperscript{30} 423 Int'l Conciliation 338, 342 (1946). See note 27, supra.


\textsuperscript{32} Id., Article II(2) provides in part: "Information will not be transferred by the North Atlantic Treaty Organization to unauthorized persons or beyond the jurisdiction of that Organization..." 7 UST 401.

and permit bilateral treaties authorizing the sale or transfer of non-explosive nuclear weapons technology and fuels to NATO allies. Even restricted data on atomic weapons was subject to sharing on a limited basis. Almost as if parallelism dictated, American support to the IAEA increased. The materials donation that followed ratification of the IAEA statute had been ineffective; America still had a virtual monopoly on the facilities utilizing such materials. In the sixties, though, the United States agreed by treaty to subject certain non-military facilities to Agency controls.

D. Internationalization of Control Efforts via Trilateral Treaties.

Thus far, the international control approach, represented by the IAEA, and the unilateral approach of the American treaty system had been separate; the next step was the commingling of these approaches with the signing of a trilateral treaty between the IAEA, United States of America and Japan. The treaty transferred safeguards rights and duties from the United States to the IAEA, and suspended United States

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34 42 USC 2164(c)(1).

35 Act of August 28, 1957, P.L. 85-177 § 7, 71 Stat. 455 authorized distribution by the Commission of 5000 kg. of contained U-235, 500 g. U-233, and 3 kg. plutonium plus matching amounts of special materials contributed by all other members up to July 1, 1960, pursuant to a § 123 agreement. 42 USC 2074, as amended; the authorization was implemented in 1959, see Agreement with the International Atomic Energy Agency for Cooperation in the Peaceful Application of Atomic Energy, May 11, 1959, Art. IIa, 10 UST 1424, 1425, T.I.A.S. No. 4291. (Entered into force August 7, 1959).


38 Agreement with the IAEA and Japan, id., Article I § 3, 14 UST 1266 (1963).
safeguard procedures while the IAEA safeguards, which replaced them, were in operation.\textsuperscript{39}

Perhaps the most interesting provision of the treaty was that which provided for arbitration in the event of a disagreement among the parties concerning the agreement or its applications.\textsuperscript{40} Assuming the validity of the agreement,\textsuperscript{41} it appeared to resolve the difficult issues respecting breach of a multipartite agreement. Would any safeguards exist in the event of a breach,\textsuperscript{42} and if so, whose, and by which party would they

\textsuperscript{39}Id., Article I \$ 5, 14 UST 1267 (1962) provides: "The United States agrees that the rights provided to it by Article IX of the Agreement for cooperation will be suspended with respect to any equipment, devices and materials while they are listed in the inventory provided for in annex A" (to which Agency safeguards are applied — see n. 38).

\textsuperscript{40}Id., Article VI \$ 20, 14 UST 1271 provides that, for any dispute of any nature "arising out of the interpretation or application of this agreement," either negotiation or any other agreed method may first be used to settle the dispute. If these methods fail, the dispute is submitted to an arbitral tribunal according to the procedures of \$ 20.


\textsuperscript{42}Article 27(b), Harvard Research on International Law, 29 AJIL Supp. 1094 (1935) [hereinafter cited as Harvard Research] permits provisional suspensions of obligations by the aggrieved party following a breach. Breach is defined in Article 29(a), id., p. 1077, as failure of a party to perform its obligations in good faith. However, a breach relating to supply questions might be separable from the safeguards question. Id., Article 30, p. 1134. Presumably the continuance of safeguards would not damage the aggrieved party, which appears to be the rationale of Article 29(b). Although the Vienna Convention on the Law of Treaties, 63 AJIL 875 (1969) U. N. Doc A/Conf. 39/27, May 23, 1969 [hereinafter cited as Vienna Convention] does not apply to treaties with parties not states, id. Article 3, p. 876, the theory of breach in Article 60 is helpful. Article 60, section 2(b), 63 AJIL 893 provides "a party (to a multilateral treaty) specially affected by (a) breach (may) invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting state." Thus, under this approach IAEA safeguards would survive a U.S. breach and U.S. safeguards an IAEA breach. McNair states that a breach is to be determined by the measurement of the good faith efforts to comply, where acts are not expressly prohibited by the agreement. McNair, Law of Treaties (Oxford: Clarendon Press) p. 540 (1961).
be administered? Would a breach of IAEA safeguards create any right to remedies in the United States, and what, if any, would be those rights?\textsuperscript{43} What would be the effect of a Japanese declaration invoking \textit{rebus sic stantibus}\textsuperscript{44} to amend its duties or terminate the safeguards\textsuperscript{45} Although the ubiquity of quantitative and procedural restrictions on the transferred materials would probably suffice to show that any lapse in the IAEA safeguards would entitle the United States to reclaim its materials,\textsuperscript{46} the arbitration clause removes uncertainty\textsuperscript{47} in an area where uncertainty is anathema.

\textsuperscript{43}Harvard Research 1092 says yes; provisional suspension would be the right accorded, \textit{id.} p. 1089. The Vienna Convention, Article 60(2), though expressly not applicable, \textit{supra}, note 42, accords the same right. McNair, \textit{op. cit.} 570, 571 writes that the right to abrogate depends on the materiality of the breach, exercise of the right manifestly, absence of waiver respecting the breach, separability of breached provisions from the rest of the agreement and present harm or injury to the party exercising the right. All factors appear to be present for exercise here.

\textsuperscript{44}Also called \textit{clausula rebus sic stantibus}. Literally, "with things standing so," the term refers to the doctrine of changed circumstances. This doctrine teaches that treaties derive their force from the mutuality of interest they embody. When a fundamental change occurs which terminates the interest of one of the Parties to the treaty, that Party has the right to modify or abrogate the treaty, if that interest was a tacit condition of the treaty, 5 Moore, \textit{Digest of Int'l Law} 319 (Washington, 1906); Harvard Research, Art. 28(a), pp. 1096, 1100, Vienna Convention Art. 62(1), p. 894. This is distinguished from a change of circumstance rendering performance impossible. This basis for invalidating a treaty refers to an error on the part of the States parties as to possibility of performance. Harvard Research Art. 29, p. 1126; Vienna Convention Art. 48, p. 890. \textit{Rebus sic stantibus}, by making certain circumstances tacit conditions of treaties, seems to imply that a State cannot bind itself to its own serious detriment, even though performance is possible in fact. Harvard Research 1101. Whether a circumstance is a treaty condition may depend on a broader consideration of the goals of the treaty, and the benefits obtained thereby, as against the fact of a detriment change in circumstances. See \textit{Gaz Case, infra}, notes 61 and 62 and accompanying text. The change must affect the raison d'etre of the treaty. McNair, \textit{op. cit.} 885. See also 14 White- man, \textit{International Law} § 40, p. 478 (Dept. of State Pub. No. 8547, September, 1970). Vienna Convention, Article 62(1)(a), p. 894.

\textsuperscript{45}Given the commitment to safeguards embodied in the NPT, \textit{see, infra}, note 54, it is hard to argue that those same safeguards are a quid pro quo of any supply agreement. \textit{Infra}, note 61.

\textsuperscript{46}\textit{E.g.} Atomic Energy Cooperation Agreement with Japan, June 16, 1958, Articles V, VII, 9 UST. 1383, 1385-7, T.I.A.S. No. 4133 (effective December 5, 1958).

\textsuperscript{47}The breadth of applicability of the arbitration procedure is especially useful, \textit{see} note 40, \textit{supra}. 
Of course, domestic regulation was still felt throughout the cooperative effort. Even with respect to safeguards, the United States Atomic Energy Commission (AEC), as agent for the United States, had implicit regulatory control over safeguards.48

E. Open Treaties

The treaty approach, which until the early sixties had reflected the American desire to unilaterally control nuclear proliferation, continued to adopt the more "international, Baruch-Plan" type of approach with the use of "open" treaties. At first, such treaties were of two types. One was designed to prevent deployment of nuclear weapons in new areas, thus reducing the access of non-nuclear weapon nations to them. Of this type was the Antarctic Treaty.49 No conflicts arose with respect to this treaty because Antarctica was not a strategic site for nuclear weapons, and we had no treaty commitments for the placement of nuclear weapons there.

The second type was the limited test ban treaty.50 It was a direct non-proliferation measure; the cost of underground testing for nations without facilities or land area suitable for preparation is prohibitive.51 Effectively, nations other than the superpowers were committing themselves not to develop reliable atomic arsenals.

48 E.g. Article VII, § 22 of the IAEA - U. S. - JAPAN treaty op. cit. p. 1272 required U.S. approval (i.e. Agency approval) before any changes to the IAEA safeguards could be implemented. Agency authority over equipment and materials not in Annex A of the agreement continued pursuant to Article 2 of the bilateral agreement, cited in note 46, supra, 9 UST 1384.


51 E.g. the cost of preparing the Amchitka test site was reported to be between $110 and $130 million. Senate Hearings, Committee on Foreign Relations, on S.J. Res 165, 91st Cong., 1st sess., September 29, 1969, p. 36.
Subsequent open treaties of the first type have been more readily negotiated, mainly because the deployment or nondeployment of weapons in international areas, such as Outer Space and the Sea Bed, involves fewer conflicts with treaty laws and obligations.

It is somewhat surprising that the superpowers were able to successfully negotiate for, and agree to, the Non-Proliferation Treaty. The political objectives inherent in the negotiations were obviously understood by all parties. For instance, the Soviet Union proposed that the treaty incorporate a non-deployment provision, restricting nuclear weapons to the nuclear-weapon state. Although the provision would not conflict with any express provisions of our defense treaties,

52 Treaty of Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 18 UST 2410, T.I.A.S. No. 6347, 54 AJIL 477, January 27, 1967. Article IV provides: "States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner." Id. p. 2413.


56 USAC & DA, NPT Negotiations 33, 38-40; Willrich, op. cit. 71-72; Firmage, op. cit. 716.
which do not require deployment of atomic weapons,\textsuperscript{67} it would significantly affect understandings with our allies. The Treaty on the Non-Proliferation of nuclear weapons (NPT) was finally drafted to require only that the nuclear-weapon states retain control of such weapons.\textsuperscript{58}

One factor which perhaps facilitated agreement is the tentative nature of the commitment to the NPT as defined by Article X.\textsuperscript{59} This article provides that a party may withdraw on notice if the supreme national interest of the party requires. Senate hearings on the NPT indicate\textsuperscript{60} that it is uncertain what such an exigency might be. Although the United States government might feel that it is in our best interest to maintain a vague bolt-hole from the treaty, a contrary view is possible. It is submitted that removal of ambiguities might be the next step in the evolution of international controls. A draft convention of principals would make the legal rights of the states-parties to the NPT more effective in the event of an attempted exercise of Article X. Judicial scrutiny would be possible. An analogy can be drawn to the case of \textit{Free Zones of Upper Savoy and the District of Gex}.

There the doctrine of rebus sic stantibus was raised by France as a defense to her abrogation of a customs treaty. The Permanent Court of International Justice found that the circumstances which led to the

\begin{footnotesize}
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\item E.g. Security Treaty with Australia and New Zealand, September 1, 1951, 3 UST 3420, T.I.A.S. No. 2493, (effective April 29, 1952), Article IV, \textit{id.} p. 3423, simply obligates each party to "act to meet the common danger" of an attack in the Pacific on any party, "in accordance with its constitutional processes."

\item NPT Articles I and II, 21 UST 487, use a "control" standard rather than the Soviet "access" standard. Article I provides in part: "Each nuclear weapons state party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly..."; NPT hearings 159-161, 219.

\item NPT, Article X(1), 21 UST 493 provides: "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..."

\item NPT hearings, 78, 367-368 (1968, 1969).

\item PCLJ Ser. A/B, No. 46 (June 7, 1932) p. 96; 2 Hudson, World Court Reports 448 (1935).
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agreement had not changed, because nothing in the treaty indicated that the circumstance which had changed, i.e. the existence of a free trade zone in Geneva, had been the quid pro quo of the agreement.62

From a purely organizational viewpoint, the application of NPT requirements has been simple. All nations with whom we have nuclear energy agreements are now subject to IAEA safeguards in one manner or another, with one exception.63 Some nations are bound by the NPT to utilize IAEA safeguards, and have so agreed.64 Others are still parties to trilateral IAEA-United States-third party agreements, transferring safeguards duties to the IAEA.65 Only Italy, which awaits resolution of the IAEA-Euratom negotiations, is not receiving United States aid pursuant to IAEA safeguards.66

Although we have integrated our bilateral treaty approach with a multipartite "international" treaty system smoothly in the mechanical sense, several policy questions are raised in the next sections, before attempting to determine the next organic needs of the multipartite treaty structure as determined by the principles of treaty law.

62 Id., p. 156.

63 Appendices H-2, H-3, JCAE2d 178-179 (1976). Eleven treaties implement IAEA safeguards pursuant to the principles of the NPT; fifteen trilateral treaties transfer safeguards application from U. S. to IAEA. Italy currently operates under safeguards provided by a bilateral agreement of cooperation, but is in the process of bringing into force, with other non-nuclear weapons states in Europe, an agreement for IAEA verification of Euratom safeguards. IAEA and Euratom safeguards are comparable currently, in the view of some persons. See NPT hearings 106 (1968).

64 E.g. Agreement for application of IAEA safeguards to the cooperation agreement with Austria, August 20, 1969, 21 UST 55, TIAS No. 6816 (effective January 24, 1970). In cases such as this, the NPT agreement of the parties forms part of the context for construing rights and obligations of the parties. Harvard Research Article 19(a), p. 970; Vienna Convention, Article 31, p. 885.


66 Although formal agreement has not been reached, Italy is a party to the NPT and a member of Euratom and IAEA. At present U. S. safeguards apply pursuant to the Bilateral Cooperation Agreement with Italy, July 22, 1959, 12 UST 170, T.I.A.S. No. 4689, (effective March 30, 1961). Presumably, some joint Euratom/IAEA safeguards system can be worked out.
II. INTEGRATION OF EXISTING PROCEDURES

A. Supply of nuclear materials.

Should the nuclear fuel requirements of the non-nuclear weapons states be considered a quid pro quo of the present agreements not to acquire nuclear weapons? Under the bilateral treaty structure, supply was specifically determined during negotiations with the nuclear material supplier (United States). Article IV of the NPT appears to alter this somewhat by imposing a general duty of supply on nuclear weapons states. The United States' opinion, as expressed by a chairman of the U. S. A. E. C. is that this imposes no obligation of support absent negotiations of the former kind. However, there might be a question as to the right to terminate supply obligations absent substantial treaty violations, using Article IV(2) as a source of independent obligation once supply has begun pursuant to a treaty of co-operation.

67 E.g. Agreement for Cooperation in Civil Uses of Atomic Energy with Portugal, May 16, 1974, 25 UST 1125, T.I.A.S. No. 7844, (effective June 26, 1974). Article VIII, id. p. 1133 limits the overall quantity to amounts sufficient for the peaceful uses pursued by Portugal. To further limit the transfer of weapons-grade materials, the supplied material may not exceed 20% U-235 in content.

68 NPT, Article IV, 21 UST 483, 489 provides: "All the Parties to the Treaty undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy."

69 Dr. Seaborg stated: "We do not interpret Article IV ... as obliging the United States to meet all requests or demands ... The parties will be expected to cooperate only to the extent that they are in a position to do so, and ... reciprocity may well be a factor ..." Hearings on the Military Implications of the Treaty on the Non-Proliferation of Nuclear Weapons, U. S. Senate Armed Services Comm., 91st Cong., 1st sess., p. 86 (Feb. 27, 1969).

70 Rights and remedies for a breach of the NPT are not articulated in the treaty. Presumably, since safeguards of materials are committed to the IAEA, nuclear weapons-states parties must wait for the non-nuclear weapon state to be declared in violation of safeguards or treaty purposes before action can be taken. While the United States might claim that duty to supply arises from the bilateral treaty, and that, when this is abrogated for breach, or suspended, there is no basis for a claim of breach of Article IV. However, since the IAEA also supervises safeguards of bilateral treaty materials pursuant to trilateral treaties or other treaties with IAEA, it does not appear that the United States could suspend material transfers without first claiming a breach of duty by the IAEA and suspending that organisation's safeguards control. So Article IV, together with the NPT requirement of IAEA
B. *NPT as a Uniform Nuclear Code — definitional problems.*

The United States Congress is presently confused about the proper method for licensing and regulating nuclear commerce.\(^71\) For instance, what might occur if Congress asserts a legislative prerogative to intervene in, and cut off, the export of nuclear material to a nation which it feels is violating duties owed to the United States?\(^72\) Presumably, our "breach"\(^73\) would not release the other nation from a duty to comply with NPT requirements in any subsequent arrangements it made,\(^74\) even with non-party states.\(^75\) Would our determination of a violation have any binding force? Since the IAEA is in charge of safeguards, determinations in that respect would seem to be non-binding. As was noted earlier,\(^76\) the United States might charge the IAEA with failure to carry out its obligations properly, or allege that the NPT violation is occurring with respect to non-regulated, "home-grown" facilities and materials. In the first case, a claim is made which is not within the express control of the states parties, and so might be safeguards application, might create an obligation to supply, once begun pursuant to separate agreement.

\(^71\) Although Congress may have a clear view of what it wishes to accomplish, its view may be unrealistic. See, *e.g.*, Nuclear Commerce 927.

\(^72\) Id., pp. 944-945 and footnotes.

\(^73\) Municipal law is not a defense to the failure to perform treaty obligations on international law. 5 Moore, *Digest of International Law*, p. 365 (1906); Harvard Research Art. 23, p. 662; Vienna Convention Art. 27, p. 884; 14 Whiteman, *International Law* 290 (1970).

\(^74\) Multipartite treaties create obligations to every state-party, so a breach by the U.S. would not relieve an aggrieved party from its duties under the NPT with respect to safeguards or the non-development of atomic weapons. Vienna Convention Art. 60(2), p. 893; Art. II, NPT, 21 UST 487. A breach which affects a central interest of all parties to the treaty, however, may allow the affected parties to withdraw unilaterally from the treaty, ending all obligations. 14 Whiteman, *International Law* 475 (1970).

\(^75\) A treaty cannot be made under present principles of international law which abrogates a treaty with a state not party to the subsequent treaty or eliminates duties owed under the former treaty to such a state. 14 Whiteman, *International Law* 348-349 (1970); Vienna Convention Art. 41, p. 888; Harvard Research Art. 22(b) p. 661.

\(^76\) See note 70, supra.
binding pending an agreed-upon review. Such a claim would be so potentially damaging to both IAEA\textsuperscript{77} and the NPT itself,\textsuperscript{79} that it should not be lightly made. The latter claim would simply involve the states parties in a determination of its validity. It would seem to leave the NPT intact, and so require other nuclear weapon states-parties to be careful about stepping in as supplier. Although not specifically binding on states not party to the bilateral or trilateral supply agreement,\textsuperscript{80} the NPT could create an obligation not to supply for such parties even though arising out of other transactions.\textsuperscript{81} This might be applicable, for instance, to the acquisition of

\textsuperscript{77} Since the trilateral treaty system leaves intact the earlier bilateral treaties under which supplies are transferred, a determination by the U. S. that IAEA safeguards had not been properly applied could lead the U. S. to suspension of the trilateral treaty and application of American safeguards. See, e.g. IAEA — U.S. — India Agreement for application of IAEA Safeguards, January 27, 1971, § 4, 22 UST 200, 201, T.I.A.S. No. 7049. The counterargument that IAEA safeguards alone are applicable to supply, under NPT Art. III § 1, 21 UST 489, seems to fail because such agreements are under the Statute, which provides for dispute, Art. XVII, IAEA Statute, 8 UST 1110 (1956). This article calls for resolution by the I.C.J. if all else fails. American provisional suspension of supplies or application of American safeguards would not be material, permitting the "aggrieved party" to abrogate its own obligations to accept U. S. safeguards under the bilateral treaty, or seek resolution in the Court. Of course, in the latter case the Court could presumably make an American determination fully binding, if it determined that this was needed to preserve jurisdiction. Art. 41, Statute of the International Court of Justice, June 26, 1945. Series D, No. 1, Acts and Documents Concerning the Organization of the Court. (Leyden, Holland: A. W. Sijthoff, May, 1947). This would depend on the Court's jurisdiction over the parties, that is, whether Art. XVII of the IAEA statute invoked full ICJ powers even in the face of a reservation to the ICJ statute, e.g., U. S. declaration, 30 Y.B. of the I.C.J. 80 (1975-6).

\textsuperscript{78} IAEA exists through the voluntary association of other nations. It has no internally generated funds. They are assessed by the General Conference, IAEA Statute, Art. XIV (d) 8 UST 1108, 1109. Its equipment is solicited, see note 25, supra, and much of its services before the NPT depended on the efficiency of its operations. Although the NPT requires IAEA safeguards, that guarantee of support is only as strong as the above source of operating funds and the NPT itself. See note 79, infra.

\textsuperscript{79} The NPT's obligations are always subject to Article X provisions, see note 59, supra.

\textsuperscript{80} See note 75, supra.

\textsuperscript{81} This is the inverse of the text accompanying the preceding footnote. See note 75, supra. In other words, it is submitted that good faith performance of NPT obligations may require inquiry into whether an alleged violation of the other treaty would, if factual, constitute a violation of the NPT by the non-nuclear-weapon state. See note 86, infra.
"reprocessing facilities" by non-nuclear weapon states, if our bilateral agreements were to incorporate the definition of such facilities as illegal under the NPT.

C. **Agreements by Non-Nuclear Weapon States.**

Several problems are associated with the limitation of deployment in non-nuclear weapon states. Problems arising from agreements made by nuclear weapon states inter sese, which result in limiting such deployment, are discussed, infra. With respect to agreements made with or among non-nuclear weapon states, two approaches create two problems.

The recent treaty with Spain for the lease of foreign bases provides for the removal of American nuclear weapons from Spain. While it might be taken to prevent Spanish withdrawal from NPT obligations in the event of American reduction of its deployment elsewhere, this is by no means clear. Such agreements might be leading to a "Scylla and Charybdis" situation in which non-nuclear weapons states all agree to prohibit deployment within their states, while requiring an American defense commitment and viewing other reductions in deployment as a threat to their nation. Perhaps in the event of general, widespread conclusion of agreements there would be presented an obstacle to such a self-serving approach to the NPT treaty.

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83 Parties may create further obligations between themselves such as this, not inconsistent with obligations to other states. Vienna Convention, Art. 41, p. 888; Harvard Research Art. 22, op. cit. pp. 661, 1016, 1024.


86 Generally, treaties must be complied with in good faith. *See, e.g.* Vienna Convention, Art. 26, p. 884.
Another approach has been the creation of "nuclear free" zones, within which nuclear weapons are not to be manufactured or otherwise deployed. One instance of this is the Latin American nuclear free zone, ("LANFZ") created by the Treaty of Tlatelolco. The problem here is definitional; the treaty permits the development and use within the zone of "peaceful nuclear explosives." Presumably, these devices are distinguished from atomic weapons solely by the title and the lack of a military delivery vehicle. That this distinction has real importance is indicated by the declaration of Brazil in connection with its ratification of the treaty. The NPT provides no help, since it also provides for the development and use of such devices.

D. Nuclear Weapons States Agreements and their Nth Nation effects.

The unilateral or superpower side of the two-pronged American approach could damage the NPT's effectiveness in two ways. First, there are nations which view the NPT as a scheme

87 634 UNTS 281, No. 9068, February 14, 1967. Protocol II, in which nuclear weapon states outside the zone agreed to respect it, was signed by the United States on April 1, 1968. 634 UNTS 364, with an appended statement, 634 UNTS 419.

88 Article 18 of the treaty declares in part: "Contracting parties may carry out explosions of nuclear devices for peaceful purposes— including explosions which involve devices similar to those used in nuclear weapons— or collaborate with third parties for the same purpose." 634 UNTS 346.

89 634 UNTS 416.

90 NPT, Art. V, 21 UST 490 provides: Each party to the treaty undertakes to take appropriate measures to ensure that, in accordance with this Treaty, under appropriate international observation and through appropriate international procedures, potential benefits from any peaceful applications of nuclear explosions will be made available to non-nuclear-weapon States Party to the Treaty on a non-discriminatory basis and that the charge to such Parties for the explosive devices used will be as low as possible and exclude any charge for research and development. Non-nuclear-weapon States Party to the Treaty shall be able to obtain such benefits, pursuant to a special international agreement or agreements, through an appropriate international body with adequate representation of non-nuclear-weapon States. Negotiations on this subject shall commence as soon as possible after the Treaty enters into force. Non-nuclear-weapon States Party to the Treaty so desiring may also obtain such benefits pursuant to bilateral agreements.
for nuclear oligopoly by the superpowers. Further superpower agreements can only enhance such a view, and support the use of Article X to pull out of the treaty at some point when the nation has sufficient material, know-how and equipment to enter the arms race. The "Zangger List" and the nebulous "understanding" reached at the London Suppliers Conference may also be jeopardizing a "supreme national interest." An argument is not possible at present to rebut an Article X action since each nation makes its own determination as to when an Article X "extraordinary" event has occurred. Even if it is possible to adjudicate Article X actions in the future, what would be the defense to a charge of aggression or NPT violation based on refusal to supply? Certainly not the "understandings" of the suppliers. This would be a claim of waiver by the non-nuclear state-party without knowledge of what is being waived.

A second problem with superpower agreements relates to Article VI of the NPT which requires efforts by nuclear weapon states parties to reach an agreement for nuclear disarmament. This provision has bothered American officials from the time of ratification to the present. Some party-

91 Joint Committee on Atomic Energy, 94th Cong. 1st sess., 1st Ann. Rep. on the Development, Use and Control of Nuclear Energy for the Common Defense and Security and for Peaceful Purposes, p. 7 (Comm. Print, 1975). Firmaje, op. cit. 63 AJIL 720 (Indian reference to the link between vertical proliferation in production of fissionable materials and the treaty. Vertical proliferation is now used to refer to the quantitative increase of nuclear weapons among the superpowers. JCAE 2d 4 (1976). The change in focus probably results from the huge increase in production of fissile materials as byproducts of peaceful nuclear activities, primarily power reactor operation. JCAE 2d 76 (1976).

92 Nuclear Commerce 952.


94 Compare Art. X, note 59, supra, with the more general doctrine of rebus sic stantibus note 44, supra.

95 McNair, op. cit. 553; Harvard Research 1093.

96 NPT, Article VI, 8 UST 490 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."

97 At the time of ratification, concern centered on whether Article VI would operate to prohibit development of a new weapons system, i.e. the ABM system.
state might prefer to use slowness in the Soviet-American negotiations as a breach of the NPT, in order to terminate duties thereunder, for instance with respect to facilities not subject to control pursuant to other agreements. Use of Article VI would be less open to international condemnation than use of Article X. The Article VI breach charge could even be drawn out into a theory that, by abrogating the NPT, the "aggrieved nation" was inducing the superpowers to agree more swiftly to disarm and thereby championing the cause of international disarmament.

The flaw with this reasoning is that the breach must be material, in order to permit withdrawal by the aggrieved party. The overwhelming military power of the two superpowers, conventional as well as nuclear, would make a claim that disarmament was a major consideration for "joining" the treaty seem absurd, at least without a long history of failure to disarm.

Other approaches hold forth hope for the future integration of efforts. The Mutual Balanced Force Reduction (MBFR) Conferences may reduce tensions between NATO and the Warsaw Pact in Central Europe. If actual reductions in the number of atomic weapons deployed occur, the European nations should be estopped from asserting such events as appropriate for withdrawal from the NPT.

NPT hearings 348-351. But S. Con. Res. 69 is an example of Congressional efforts to meet Article VI requirements. See Hearings on S. Con. Res. 69, 94th Cong., 2d sess., (March 18, 1976) p. 4: "Whereas it is important . . . that the position of the United States Congress be understood with respect to its willingness to give full effect to the terms of the Treaty on the Non-Proliferation of Nuclear Weapons and to take further steps to limit nuclear dangers, (proposal to reduce numbers of weapons) (from text of S. Con. Res. 69).

98 See note 42, supra. Under a treaty with a broad arbitration provision, such a requirement would not be necessary for remedial action. Note 40 supra.

99 JCAE 2d 19 (1976). As of June, 1976, the Warsaw Pact members had not responded to an American proposal to reduce its nuclear force by 1000 weapons in return for Soviet removal from Central Europe of 1 tank army, consisting of 69,000 men and 1700 tanks. However, the Soviet representative has supplied information on Warsaw Pact strength for the first time. New York Times, p. 8, col. 8 (June 11, 1976).

100 In such a situation the states would be agreeing to withdrawal from the entire region, see note 83 and accompanying text.
Soviet-American agreements have no legal effect on "open" treaty obligations, but, because of the pre-eminence of the parties in international politics, may indicate future trends in multilateral arms control. Two recent examples of such treaties, emerging from the Salt talks, are the Threshold Test Ban Treaty (TTBT) and the Treaty concerning Peaceful Nuclear Explosions (PNE Treaty).

The former, like the limited test ban treaty, is of importance because it would, if generally accepted, limit per se nuclear proliferation. The treaty limits tests to 150 kilotons; since poorer nations would tend to develop or acquire high yield weapons because of a limited delivery capacity, the requirements of a threshold treaty would limit arsenals to weapons which could be tested.

The latter treaty unfortunately preserves the nominal distinction between atomic explosives. At the present time there is a difference of opinion as to the overall usefulness of PNEs, given present non-nuclear engineering techniques. One question that arises is whether the PNE treaty could be extended to limit testing without conflicting with requirements of the NPT. It is submitted that, at present, a treaty prohibiting

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101 Open treaty obligations are owed to all nations equally. See notes 75 and 75, supra.


103 Treaty concerning Peaceful Nuclear Explosions, signed in Washington and Moscow on May 28, 1976.

104 On costs of testing, see note 51 supra.


106 Art. V, NPT, 21 UST 490. See note 90, supra.
such testing would breach the NPT. A joint understanding that PNEs are not useful would be hard to rebut. There would then be no "benefit" to be made available. However, such a conclusion should be based more on scientific judgment than on policy decisions.

Subject to this constraint, the PNE treaty accomplishes several objectives. By providing for verification that the test is not used for military purposes, the treaty will stimulate discussion and experimentation to produce a definition of PNEs. Such a definition may have application to other agreements. Further, provision in the treaty for access to test sites by personnel of the other party appears to signal a change in the long-standing Soviet opposition to on-site inspection. While a treaty cannot change Soviet municipal law, it can change policies so as to induce accommodation by the Soviets of a fundamental American principle of arms control.

107 Art. IV, PNE. President’s Message, op. cit. p. 6 (1976).
108 Such as NPT Art. V or Treaty of Tlatelolco Art. 18. See notes 90, 80 supra.
110 Early Soviet Proposals, note 11, supra, contemplated implementation through United Nations Organs. This did not comport with American requirements for effective safeguards. For an example of Soviet stress on national sovereignty, see statement with Gromyko proposal, 423 International Conciliation 377, 378 (1946).
111 See ZILE, SHARLET AND LOVE, THE SOVIET LEGAL SYSTEM AND ARMS INSPECTION pp. 24-25. (New York: Praeger Publishers, 1972). Although the Constitution of the U. S. S. R., Art. 18-a (adopted February 2, 1944) grants republics the right to negotiate and "treat with" foreign states separately, the All-Union government must sanction exercise of the right, since it controls "international relations" under Art. 14-a, id. p. 13. The Presidium of the Supreme Soviet ratifies treaties pursuant to Art. 49-0 of the U. S. S. R. Constitution id. p. 14, but the Supreme Soviet must pass laws to implement treaties domestically, since under Art. 32 it is the only legislative body. Id. p. 21. Laws of the Presidium pursuant to a treaty would have to be ratified id. pp. 21-22.
E. Defensive Nuclear Weapons — a supreme national interest?

The United States Government has always refused to categorically prohibit the "first use" of American nuclear weapons. On the other hand, that government has signed several treaties limiting deployment of such weapons and recent indications are that it will seek an actual reduction in the number of deployed weapons. Although some nations may be pleased with this development, others may view the deployment of nuclear weapons within their country as a security commitment against attack. In some countries American nuclear armaments are viewed as an integral part of their defense planning capability. With increased concern in Congress over adequacy of safeguards in the event of terrorist attacks, the possibility of unilateral withdrawal of these weapons cannot be ignored. Such an act appears to invite application of Article X's pending a change in some internationals legal


114 See notes 49, 52, 53, 85, 87, supra.

115 USAC & DA has stated that "the Vladivostok principle of equal aggregate levels of strategic offensive armaments represents a major step toward the eventual reduction of strategic armaments." Arms Control Report 33 (1976) see also S. Con. Res. 69 § 1, Hearings, op. cit. 4 (1976).


norms (jus cogens), or a protocol containing a statement of principles to which the non-nuclear weapons states adhere.

F. International legal principles—can they define American duties?

In view of the above section, ought the United States to be concerned with the treaty structure as it adds to norms of international law? The Soviet Union, which maintains a larger conventional military force than our own, has in the past sought total nuclear disarmament. Many nations have supported the United Nations resolution prohibiting the use of nuclear weapons in warfare. The legal effect of such resolutions in international law is highly questionable; doubts exist as to the basis for giving effect to such resolutions calling for

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118 Vienna Convention Art. 64, pp. 895 requires treaty conformity with peremptory norms of international law. Whether these norms are dynamic, or even presently ascertainable, is not clear. SZTUCKI, JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES— A CRITICAL APPRAISAL, p. 160 (New York: Springer-Verlag, 1974).


120 LARSON, DISARMAMENT AND SOVIET POLICY 1964-68 (New Jersey: Prentice Hall, 1969) pp. 34-36. The Khruschev approach to general disarmament has not been proposed regularly since the removal of the premier. This is due in part perhaps to the acceptance by many nations of the invasion of sovereignty by international inspectors (including the United States, see note 36, supra). Soviet Foreign Minister Gromyko referred to general disarmament in a speech to the Supreme Soviet on June 27, 1968, informing members of the conclusion of the NPT (not reported in West). NPT hearings 131-132 (1968). As an example of the Khruschev position on general disarmament, see the speech of Mr. Mendelevich of the U. S. S. R. on the U. N. Resolution banning the use of nuclear weapons, Par. 41, 16 UNGAOR 800 (1961).


external (extra-organizational) acts. One might search for authorization, using a constitutional analysis or corroborate the effect on normative international law by basing it on a treaty or generally expressed consensus. If international legal principles are dynamic, the time may come when the United States will have to choose between its own view of national defense requirements, and the position it has held as an architect of the international system of nuclear arms control.

CONCLUSION

Despite the benefits to be gained from superpower agreement, the United States should not lose sight of the international component of our disarmament strategy, and the real legal rights and obligations raised by the “open treaty” structure which implements it. Rather than engaging in unilateral withdrawal of deployed weapons for safety reasons, we should assist the IAEA in developing physical security standards or reach joint agreements as with Spain. And, in so doing, we should not view withdrawal as consent to reduction in our overall nuclear defense system. Many nations may simply be relying on statements such as that issued by the United States in conjunction with the NPT, and on our increased delivery

123 See references to Chiu, op. cit., and Hartmann, op. cit., in note 41, supra. Given the right to collective self defense accorded in Article 51 of the U.N. Charter, the writer doubts that the General Assembly would have such authority as to order nuclear disarmament.

124 Castaneda op. cit. 139. The NPT committed only the task of safeguards to the IAEA, which has no power under its statute to order disarmament or any other action, even with respect to materials subject to its safeguard procedures. Article VI of NPT makes no reference to the U.N., so there is no apparent basis in this treaty for such a U.N. resolution.

125 Id. p. 150 cf. U. N. Res. 1635 (XVI) note 121 supra. The vote was 55-20 with 26 abstentions. This does not appear to support a theory of general consensus sufficient to establish a new peremptory norm of international law. Note 118 supra.

126 Recent efforts have included the development of a system of physical security guidelines for implementation by member states. Doc. INFCIRC/225 (February, 1976). § 3 refers to general requirements of a Physical Protection System, § 5 to those of nuclear materials in use or storage, and § 6 to those for materials in transit.

127 The U. S. declaration provided in pertinent part: “The United States affirms its intention ... to provide assistance, in accordance with the Charter, to any
capabilities. Agreements such as those proposed for the current round of Salt Talks\textsuperscript{128} should be understood and accepted by those nations to whom we have made defense commitments. Equally, understandings such as those reached by the supplier nations should be broadcast, and incorporated into protocols to the NPT expressing such principles as are adopted.

Finally, the trilateral treaty system, about which we have written, should retain the flexibility of arbitration provisions and perhaps contemplate enforcement powers by the IAEA. This would eliminate the need for "understandings" among suppliers, except pursuant to IAEA sanctions. The structure of controls would be more dynamic, because it would incorporate principles derived from individual situations into decisional principles for other cases, without the present cumbersome approach of amending each treaty, or the uncertainty of "open" treaties.

Robert L. Collings

\textsuperscript{128} Note 4, supra. Although the Soviet Union has apparently rejected reduction of strategic delivery vehicles, firm accords limiting numbers to 2400 may be reached, and the Soviets appear willing to discuss new weapons systems.