

“STRESS TESTING” THE DRAFT CONVENTION ON THE PROHIBITION OF NUCLEAR WEAPONS

A CNS Workshop Report



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“Stress Testing” the Draft Convention on the Prohibition of Nuclear Weapons

The negotiations on an international legally binding instrument prohibiting nuclear weapons, which commenced in March 2017, are continuing in New York from June 15–July 7, 2017. In the run-up to the negotiations, many diplomats, officials, activists, and experts had put forth a number of arguments in favor of and against negotiating a ban on nuclear weapons. However, significantly less time and effort had been spent discussing the substance and formulation of the provisions that should be included in the prospective new instrument. Given the push of the core group of states to conclude the negotiations this year, the negotiators have limited time to resolve existing disagreements and draft a strong treaty, minimizing unintended consequences and potential negative impact on the regime.

The March session of the negotiations and the draft convention on the Prohibition of Nuclear Weapons¹ released on May 22 have generated discussion and commentary from a variety of experts in the field on the provisions of the future instrument and their implications. On June 7, the James Martin Center for Nonproliferation Studies (CNS) of the Middlebury Institute of International Studies at Monterey brought together thirteen experts for a one-day workshop “stress testing” the draft convention.² The exercise was designed to examine key provisions of the draft convention, identify potential problems in terms of their implementation, compatibility with other existing instruments and practices, and reactions of states not participating in the negotiations, and seek possible solutions. The organizers did not seek to forge consensus among the participants but rather generate discussion and proposals on ways to address the issues raised by the experts. Participants were also asked to set aside their views on the desirability of a convention as a whole, and instead assume that a ban, as currently drafted, was concluded and opened for ratification.

¹ Draft Convention on the Prohibition of Nuclear Weapons, A/CONF.229/2017/CRP.1, May 22, 2017, <https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/05/A-CONF.229-CRP.1.pdf>.

² The workshop was conducted under the Chatham House rule, and the discussion was conducted on a not-for-attribution basis in order to maximize its frankness. Participants hailed from a politically and geographically diverse group of states, including those in government, academia, and nongovernmental organizations, bringing a wide range of political, technical, and legal views on the ban initiative. CNS is grateful to the Ploughshares Fund for graciously providing the premises for the workshop.

As a result, the views presented in this report are not intended to serve as arguments for or against a convention banning nuclear weapons.

The areas that the workshop covered were: core prohibitions, safeguards/verification, provisions for nuclear-armed states' accession, national implementation, relationship with other treaties, and potential amendments. The articles that were discussed therefore are: Articles 1.1.a, 11.e. and 1.2.a. (General Obligations); Article 3 and Annex (Safeguards); Articles 2, 4, and 5 (Declarations, Measures for States that have eliminated their nuclear weapons, and Measures for situations not covered by Article 4); Article 7 (National implementation), and Article 19 (Relations with other agreements). Workshop participants also had a chance to raise other issues not covered in the agenda. The following is a report on the discussion and proposals that emerged from the workshop.

Core Prohibitions

Article 1.1.a

"1. Each State Party undertakes never under any circumstances to:

(a) Develop, produce, manufacture, otherwise acquire, possess or stockpile nuclear weapons or other nuclear explosive devices..."

Most of the experts consulted shared the view that Article 1.1.a imports some of the imperfections of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), including its grey areas, and indeed compounds them. They identified a tension between leaving terms undefined—a politically and technically simpler and more expedient approach—and clarifying scope and meanings of terms. The latter could generate difficult, technical arguments and would likely result in the need to continue talks past July 7, 2017. It would also possibly preclude nuclear-weapon possessors from eventually joining the treaty, as they will not have been involved in discussing and agreeing the technical parameters of the concepts covered by the convention.

Despite this tension, it was widely agreed that allowing certain terms to remain in the convention without a fuller understanding of states' interpretation of them, would be problematic. An example of this tension is the "development" provision included in Article 1.1.a, and specifically the question of whether it is understood to incorporate research activities, which can be for either weapon-development or defensive purposes. Research is explicitly prohibited in other comparable treaties, including some nuclear-weapon-free zone (NWFZ) treaties. As it is excluded here, should it be assumed that research is not understood by negotiating parties to be part of "development?" A similar issue is likely to be presented by those states that wish to exclude specific mention of nuclear testing in Article 1.1.c, and instead read testing within the meaning of "development."

Participants also agreed that defining or more fully elaborating the meaning of one term would require doing so for all terms in the core prohibitions.

Options for addressing this matter could include:

- clarifying major, already-apparent definitional questions (such as the distinctions between research, development, and manufacture) as part of the negotiating record.
- If research is intended to be read into the meaning of other prohibited activities, include "research for the purposes of acquiring" in the core prohibitions, so as not to preclude defensive research.
- Include an annex with a non-exhaustive list of activities associated with development of nuclear weapons; such a list can be updated subsequently.
- Accept that definitional issues will not be resolved in the text, and that the treaty will suffer from similar imperfections that the NPT does.

Article 1.1.e.

"1. Each State Party undertakes never under any circumstances to:

(e) Carry out any nuclear weapon test explosion or any other nuclear explosion..."

The inclusion of a core prohibition on testing was controversial at the March conference. Some states felt that if the treaty was to seriously promote the development of norms against nuclear weapons, that testing would need to feature. Others expressed concern about including testing, for fear of diluting the perceived primacy of the Comprehensive Nuclear-Test-Ban Treaty (CTBT) on this issue, or of interfering with efforts to build momentum to bring about its entry into force.

The provision will undoubtedly remain contentious for these same reasons. Workshop participants highlighted particular concerns about the relationship between the core prohibition on testing (as currently worded) and other parts of the draft treaty, namely provisions on verification (Article 3) and on interaction with other treaties (Article 19). In the current text, testing prohibitions are accompanied by no provisions on verifications, or references to the CTBT under Article 19. This sets it in marked contrast to the approach taken to ensuring compatibility with the NPT, and to prevent “forum shopping” between the NPT and ban convention—the possibility raised by ban critics that states would consider membership in one or the other, but not feel compelled to remain in both. In order to mitigate these NPT-related concerns, the draft convention currently includes both safeguards measures intended to incorporate non-nuclear-weapon states’ (NNWS) obligations under the NPT as well as a provision in Article 19 that the convention does not affect states’ rights and obligations under the NPT.

The core prohibition on testing and the CTBT does not enjoy the same treatment. As a consequence, many felt that the ban treaty weakens the testing norm as well as the normative value of the ban convention as a whole. Some also noted that states that have not ratified the CTBT, particularly those whose ratification is required for entry into force, could join the ban treaty instead, reap political benefits from having made a commitment

not to test nuclear weapons, but skirt any verification obligations.³ Others countered that any commitment by such states not to test would be a step forward.

Options for addressing this issue include:

- 1) Strengthening the CTBT language in the preamble. For example, the preamble could reaffirm the importance of CTBT's verification system and the importance of CTBT's entry into force.
- 2) Adding "in accordance with the Comprehensive Nuclear-Test-Ban Treaty" in article 1.1.e.
- 3) Adding verification provisions that point to the CTBT's International Monitoring System.
- 4) Adding a provision on the CTBT under Article 19.
- 5) Adding a new measure that requires states to have signed and/or ratified the CTBT in order to be a state party to the ban convention.

Several experts requested a separate clarification on the relationship between the ban convention and the CTBT for the period in which a CTBT is not in force. Some experts, including legal experts, felt that if a ban convention enters into force before the CTBT, it would have primacy. It is therefore recommended that such a clarification be issued during the June-July negotiations as part of a wider discussion over the fabric of CTBT-related provisions in the draft convention. At the same time, if states party to the convention were to commit to act in accordance with the CTBT, several legal experts believed that the absence of the CTBT's entry into force would not be of such significance as to undermine this commitment.

³ As per Annex 2 of the CTBT, forty-four states' ratification is required before that treaty can enter into force. Of those forty-four, the remaining hold-out states include China, North Korea, Egypt, India, Iran, Israel, Pakistan, and the United States.

Article 1.2.a.

“2. Each State Party undertakes to prohibit and prevent in its territory or at any place under its jurisdiction or control:

(a) Any stationing, installation or deployment of any nuclear weapons or other nuclear explosive devices...”

There is a broad agreement among the negotiating states about the need to include stationing in the core prohibitions of the convention. It is indeed logical for an instrument that seeks to delegitimize nuclear weapons to prohibit the deployment of foreign-owned weapons on the territories of states parties. All of the existing NWFZ treaties prohibit stationing on the territories of the zones. A ban on stationing would also help avoid issues with the interpretation of “transfer,” which under the NPT is understood to permit nuclear-sharing arrangements such as those provided for in NATO.

The Netherlands, as the only NATO member and nuclear-weapon-hosting state in the negotiations, will most certainly oppose the prohibition on stationing. Outside the negotiations, the United States, the United Kingdom, and many Western analysts view the ban on stationing (and transit if it were to be included) as targeted against NATO in particular. As such, they argue, it contradicts the prevailing narrative among participants in the prohibition convention negotiations that the “ban targets no state or group of states.”

France, the United Kingdom, the United States, their alliance partners in NATO, and likely allies in East Asia will likely use this provision as one of several components of a campaign to dissuade states, particularly those over which they have leverage, from signing a potential ban convention. They, too, are likely to use the argument that the provision targets particular states, contrary to the insistence of ban proponents. Certain experts felt that NATO states might also highlight the fact that Article 1.1.b and 1.1.c

mirrors language in NPT Article II, whose negotiating record shows that the provision was deliberately framed to allow for nuclear burden-sharing.⁴

Verification: Article 3 and Annex

During the March session of the negotiations, several states raised the issue of verification of the treaty's core prohibitions. It was suggested that implementation of existing International Atomic Energy Agency (IAEA) safeguards would satisfy most of the verification requirements in this regard.

Article 3 of the draft convention obliges states party to accept safeguards to prevent "diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices," in accordance with the draft treaty's annex. The annex further specifies that those safeguards should be pursuant to "the agreement required in connection with the Treaty on the Non-Proliferation of Nuclear Weapons (INFCIRC/153 (corrected))" or its equivalent in scope and effect.

The central issue with Article 3 and the annex is that the safeguards requirement is limited specifically to INFCIRC/153. The draft convention does not make use of the higher verification standard applied by the IAEA: the Additional Protocol. For a number of states at the negotiations, and many outside it, having only INFCIRC/153 listed as a requirement would constitute a roll-back of progress made in strengthening safeguards since the early 1990s.

At present, for states with only comprehensive safeguards (based on INFCIRC/153) in force, the IAEA draws conclusions only about the non-diversion of declared nuclear

⁴ Discussed, for example, in Daniel Khalessi, "Strategic Ambiguity: Nuclear Sharing and the Secret Strategy for Drafting Article I and II of the Nonproliferation Treaty," *Nonproliferation Review*, Vol. 22, Issue 3-4 (April 2016), pp. 421–39, <http://www.tandfonline.com/doi/abs/10.1080/10736700.2016.1155865?journalCode=rnpr20>, and William Alberque, "NPT and the Origins of NATO's Nuclear Sharing Arrangements," *Proliferation Papers*, No. 57, IFRI (February 2017), <https://www.ifri.org/en/publications/etudes-de-lifri/proliferation-papers/npt-and-origins-natos-nuclear-sharing-arrangements#sthash.aliqAPrZ.dpbs>.

materials, whereas for states with both INFCIRC/153 and the Additional Protocol, the Agency can provide assurances about both the non-diversion of declared materials and the absence of undeclared nuclear materials and activities.⁵ Most experts agreed, therefore, that the current Article 3/annex safeguards requirements are not sufficient to verify compliance with the relevant prohibitions under Article 1 of the draft convention.

Furthermore, a question arises regarding safeguards obligations of current nuclear-weapon possessors that disarm and join the convention. After the initial conclusions about their denuclearization are drawn pursuant to what is currently Article 4 of the draft convention, would the former nuclear-armed states also be subject only to the INFCIRC/153 requirement? Some experts pointed out that even a combination of comprehensive safeguards and the Additional Protocol may not be enough to safeguard legacy nuclear states in perpetuity.

While the formulation of paragraph 2 of the annex draws on NPT Article III.1, the reference to INFCIRC/153 makes the obligation narrower than NPT Article III, which requires NNWS to conclude safeguards agreements with IAEA in accordance with its statute and safeguards system.⁶ The NPT language allows for the further development and evolution of safeguards and the possibility that verification measures and agreements beyond INFCIRC/153 (which did not exist in 1968) would be part of the safeguard system.

Workshop participants discussed several potential solutions, some of which are more politically challenging than others:

- The convention should require all states party to conclude with the IAEA both a comprehensive safeguards agreement and the Additional Protocol;

⁵ See, for example, Safeguards Statement for 2016, International Atomic Energy Agency, https://www.iaea.org/sites/default/files/statement_sir_2016.pdf.

⁶ Discussed in John Carlson, "Nuclear Weapon Ban Convention – Overview of First Draft," *Nuclear Threats Monitor*, May 26, 2017, http://www.a-pln.org/blog/blog_view/Nuclear_weapon_ban_convention_%E2%80%93_overview_of_first_draft?ckattempt=3

- States party should be obligated to keep at least the safeguards agreements they had at the time of joining the convention and to commit, in the future, to accept higher verification standards;
- Use the exact NPT language from Article III.1 for the safeguards obligations under Article 3 of the draft convention, or, as suggested by the Belfer Center for Science and International Affairs's John Carlson, have the text commit states to conclude with the IAEA "the agreement required in connection with Article III.1 of the NPT."⁷

Finally, workshop participants agreed that the text of the annex should be incorporated into the body of the text of the convention. In this regard, it was also pointed out that Article 17, which stipulates that the provisions of the convention shall not be subject to reservations, should also stipulate, as is standard for other treaties, that annexes are an integral part of the convention (and as such are not subject to reservations).

Conditions of Supply

Another important issue with the obligations contained in the annex concerns conditions of nuclear trade. Currently, paragraph 3 of the annex provides for different conditions of supply of nuclear material and technologies to the NNWS party to the NPT and "all other states."

The language in para 3 suggests that only NNWS party to the NPT must have comprehensive safeguards in place to receive nuclear material and technologies. Nuclear trade with other states, which would include the nuclear-armed states and the NPT outliers (India, Pakistan, Israel, North Korea), is allowed as long as supplied material and equipment are subject to "applicable safeguards." The text does not specify what those applicable safeguards are, but presumably it could be item-specific safeguards pursuant to INFCIRC/66, the foundational safeguards system of the IAEA, elaborated first in 1965. Such formulation is at odds with the more stringent Nuclear Suppliers' Group guidelines

⁷ Ibid.

(notwithstanding the notable India exemption),⁸ provisions of several NWFZs, and paragraph 12 of Decision 2 of the 1995 NPT Review and Extension Conference. The latter stipulates that new nuclear-supply agreements with NNWS should require comprehensive safeguards “and internationally legally binding commitments not to acquire nuclear weapons or other nuclear explosive devices.”⁹

Even though India, Israel, Pakistan, and North Korea possess nuclear weapons, they do not fall under the NPT definition of a nuclear-weapon state¹⁰ and are therefore considered by default as NNWS. By specifying that comprehensive safeguards are required only of the NNWS party to the NPT, the draft convention would legitimize nuclear trade with the NPT outliers that possess nuclear weapons.

Workshop participants discussed different possible solutions in this regard. If the convention prohibiting nuclear weapons were to discourage any kind of dealings in the nuclear sphere with those that possess nuclear weapons, it could require comprehensive safeguards as a condition of supply to any state. Such a provision, however, would go significantly beyond current practice and the NPT provisions, and nuclear-supplier states, several of whom are participating in the negotiations, will likely find it impossible to accept given their current nuclear-cooperation agreements. Another option is to drop the reference to “party to the NPT” in paragraph 2, point (a) and eliminate point (b). Finally, states may choose to drop this paragraph altogether.

⁸ In 2008, the NSG agreed to grant India an exemption from the requirement of comprehensive safeguards as condition of supply. See, for example, William C. Potter, “India and the New Look of US Nonproliferation Policy,” *Nonproliferation Review* 12 (June 2005), pp. 343–54.

⁹ Decision 2: Principles and Objectives for Nuclear Non-Proliferation and Disarmament, Documents of the 1995 NPT Review and Extension Conference, <http://www.un.org/Depts/ddar/nptconf/2142.htm>.

¹⁰ The NPT defines a nuclear-weapon state as one that had manufactured and detonated a nuclear-explosive device prior to January 1, 1967.

Declarations and Accession of Nuclear-Armed States: Articles 2, 4, and 5

Because the prohibition convention is being negotiated in the absence of nuclear-armed states, its proponents did not envision including detailed provisions on the dismantlement of nuclear weapons. Nonetheless, many states at the March session spoke in favor of including a “join then disarm” option for nuclear possessors. The current draft attempts to accommodate both the “disarm then join” and the “join then disarm” options, in Article 4 and 5, respectively.

Article 4 provides for the possibility of a state dismantling its nuclear weapons before joining the prohibition convention and then submitting to the IAEA verification to provide assurances regarding its denuclearization. Under Article 2 of the draft convention, all states party commit to declare if they had possessed, manufactured, or otherwise acquired nuclear weapons after December 5, 2001.

Issues raised by the experts in this regard included the use and choice of the “cut-off” date for declarations and the scope of verification under Article 4.

The date, December 5, 2001, has generated some confusion. The conference president’s remarks accompanying the draft convention explain that a “cut-off” date was used to relieve South Africa, Belarus, Kazakhstan, and Ukraine, all of whom denuclearized in the 1990s (under different circumstances), from the need to declare past possession and undergo verification pursuant to Article 4. His remarks further indicate that the specific date derives from the 1991 Strategic Arms Reduction Treaty and its Lisbon Protocol, which dictated that the three former Soviet republics would denuclearize—return nuclear weapons stationed on their soil to Russia—by December 5, 2001.¹¹ Many experts agreed, however, that the date was still confusing. Furthermore, some had interpreted the text to

¹¹ Remarks by the President during the presentation of the draft Convention on the Prohibition of Nuclear Weapons, 22 May 2017, Geneva, https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/05/Letter-from-the-Chair_May-24-2017.pdf.

mean that the declarations and Article 4 requirements applied only to those states that acquired nuclear weapons after December 2001, and not those that already possessed nuclear weapons at that time.

Suggested solutions included a clearer phrasing of the declarations requirement in terms of covering all current (and potential future) nuclear-weapon possessors, and either eliminating the “cut-off” date or changing it to one that is more directly tied to the current negotiations (such as the day the negotiations began or concluded).

Post-Factum Verification of Denuclearization

On the verification provisions, some experts believed the kind of access former nuclear-armed states are requested to provide under Article 4.3 is too intrusive, and that no nuclear-armed state would agree to such conditions. Some experts also argued that South Africa had never provided access as complete as Article 4 suggests. Other experts saw it differently: Article 4 was not asking for too much, but rather was still unnecessarily specific. Still others took the view that the access requirements under Article 4 were insufficient.¹²

The provision in question stipulates that,

“4.3. For the purpose of performing the verification required by this Article, the International Atomic Energy Agency shall be provided with full access to any location or facility associated with a nuclear weapon programme and shall have the right to request access on a case-by-case basis to other locations or facilities that the Agency may wish to visit.”

There was broad agreement that Article 4 could request the former nuclear-armed states to provide the IAEA with necessary cooperation and access to verify the correctness and

¹² Carlson, “Nuclear Weapon Ban Convention – Overview of First Draft.”

completeness of its inventory of nuclear materials and activities. Paragraph 3 of Article 4 could then be eliminated.

It was also suggested that Article 4 would never be applied because any (former) nuclear-armed state would be reluctant to join without seeing verification arrangements for other (former) nuclear-armed states. In this regard, it could be helpful to require the Additional Protocol (together with comprehensive safeguards) specifically, as it would provide a more uniform basis for the agreements required by Article 4.

A general concern regarding Article 4 is that, compared to South Africa, current nuclear-weapon possessors have much larger programs and stockpiles, and the verification of their eventual disarmament will be substantially more challenging and take significantly more time.

Accession Pathways for Nuclear-Armed States

Article 5 of the draft convention is meant to accommodate the calls for the “join then disarm” option and provide an accession pathway for states that have yet to dismantle their nuclear arsenals. The article is deliberately open-ended, as the negotiation of detailed elimination and verification provisions is not possible at this point.

The key issue raised with regard to Article 5 as currently drafted is that it lacks clarity of purpose. The current text suggests that a meeting of states party can take up any “proposal for further effective measures relating to nuclear disarmament” and “agree upon additional protocols” to the convention in this regard. Such a broad formulation can include a variety of initiatives and instruments, not necessarily dealing with the elimination of nuclear weapons, such as the fissile material cut-off treaty or bilateral arms-control agreements.

If the prohibition convention is to provide a pathway for the complete elimination of nuclear weapons, Article 5 should be reformulated to focus on that task—that is, provide

clearer guidelines for how a nuclear-armed state that wishes to join the convention can enter into negotiations on the verifiable dismantlement of its nuclear weapons.¹³

Some experts were more comfortable with the broader phrasing of Article 5. However, even if states wish to keep the wide-ranging scope of instruments and initiatives that could be considered and added as additional protocols, how such protocols are to be introduced and negotiated needs to be better defined. In particular, Article 5 should:

- Identify what would trigger the consideration of any proposal on measures related to nuclear disarmament and negotiation of an additional protocol to the convention, and
- Provide guidance as to whether a smaller body (i.e. other than the meeting of states parties) should be designated to conduct such negotiations.

National Implementation: Article 7

“Each State Party shall take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.”

Experts devoted particular attention to Article 7.2, questioning both its framing and merits. One legal expert felt it was not necessary to include this provision, as the convention intends to develop norms about state responsibility. Others felt that it was sensible, but should be revised to make the introduction of national penal legislation optional, potentially by replacing “shall” with “should” in the text of Article 7.2.

¹³ Some suggestions are discussed in Gaukhar Mukhatzhanova, “Provision for the nuclear-armed States’ accession to the Convention on the Prohibition of Nuclear Weapons,” in Tim Caughley and Gaukhar Mukhatzhanova, “Negotiation of Nuclear Weapons Prohibition Treaty: Nuts and Bolts of the Ban,” UNIDIR, June 2017, <http://www.unidir.org/files/publications/pdfs/nuts-and-bolts-en-684.pdf>.

One participant voiced concern over whether they, as a NNWS national who teaches at a nuclear-armed state's nuclear-weapon laboratory, would face penal sanctions, since Article 1.1.f prohibits assistance, encouragement, or inducement "in any way" or of "anyone" to commit actions prohibited under Article 1 of the convention. Experts present, including legal experts, were divided on this point. Some felt that the inclusion of the word "appropriate" meant that it was unlikely such an individual would be the subject of enforcement action. Others felt that because the core purpose of Article 7.2. was to "prevent and suppress" such activity, such enforcement would be possible. States should clarify the extent to which they will be expected to act based on this provision, particularly given its extension to persons within its control or jurisdiction, and given core prohibitions on a sweeping and undefined range of "assistance" and "encouragement" activities.

Relationship with Other Treaties: Article 19

Almost all the experts consulted for this exercise felt that the treaty was insufficiently compatible with the NPT. Concerns expressed in this respect included:

- That safeguards provisions outlined in the treaty weaken progress made in the NPT context, by focusing on INFCIRC/153 as the safeguards standard;
- That core prohibitions on the "transfer" of nuclear weapons utilize the language of NPT Article II and its underlying connotations regarding the permissibility of nuclear burden-sharing, whilst core prohibitions on stationing and installation clearly go beyond such interpretation of NPT Article II;
- That the draft convention misses an opportunity to require states be in good standing with their NPT obligations, thereby mitigating the prospect of so-called "forum shopping," where a state agrees to the weakest practical obligations while claiming political benefits.

Article 19 states that "This Convention does not affect the rights and obligations of the States Parties under the Treaty on the Non-Proliferation of Nuclear Weapons." With respect to this Article specifically, experts foresaw a split in opinion over the political

desirability of the Article's current framing. Article 19 notes that the convention does not "affect" the "rights and obligations" of states party to the NPT. Without a clearer interpretation of "affect," opponents of a ban would reasonably and likely read Article 19 as validating the NPT's discriminatory approach to nuclear-weapon possession. Some felt that this provision was likely to be used by nuclear-armed states to challenge the normative strength of the ban convention. One suggestion put forward for drafters, if they wish to reduce the impression that the ban was acknowledging the legal status of nuclear-weapon states within the NPT, was to drop the reference to "rights" in Article 19 (leaving only mention of "obligations").

Others felt that, even if nuclear-armed states did read the convention in this way, that this framing of Article 19 was unavoidable if the drafters wished to emphasize the convention's compatibility with the NPT as a whole. Whether states participating in the ban negotiations wish to reinforce the compatibility of the convention with the entirety of the NPT, rather than simply the right to peaceful uses of nuclear energy, for example, will need to be clarified and agreed.

Yet others believed that Article 19 was legally unnecessary. Such provisions are not common features of other conventions. Furthermore, if the remainder of the convention is compatible with the NPT in its content, then simple reference to their complementarity in the treaty preamble should be sufficient to achieve Article 19's objectives.

All experts consulted expressed the view that if testing was to be included as a core prohibition in the convention, that Article 19 should also include a similar provision emphasizing its complementarity with the CTBT. Many felt that obvious differences between the approach taken to provisions related to NPT compatibility and those taken to promoting a non-testing norm would undermine the vital importance of the CTBT to the nonproliferation regime.

Some experts also believed that Article 19 should also spell out a relationship between the draft convention and nuclear-weapon-free zones.

Possible Amendments

In addition to provisions within the existing draft convention, experts also considered a range of probable attempted amendments to the text. These are based upon ban discussions in March, during which it was apparent that there are noteworthy constituencies supporting several additional core prohibitions: namely, “transit,” “threat of use,” and “financing.”

Transit

Prohibitions on the transit of nuclear weapons through national territory has long been the subject of controversy in nonproliferation initiatives. This is particularly difficult for states that conduct joint exercises with the United States, or permit the passage of US Navy vessels. The United States maintains a policy of opacity regarding whether any particular surface vessel or submarine is carrying nuclear weapons. Consequently, a ban on transit could require a country to insist on eliciting a declaration from the United States that a particular ship is not nuclear-armed—a request which could create notable friction in its bilateral relationship with Washington.

It is for this reason that “transit” was highly controversial in the context of the South Pacific NWFZ treaty and remains so in the Southeast Asian NWFZ context. Each of the existing NWFZ treaties, with the exception of Tlatelolco (Latin America), allows its states party to decide for themselves whether to allow the transit and visitation of vehicles carrying nuclear weapons. While the Tlatelolco Treaty does not include such a transit provision, several states party to it have stated that they support such an inclusion in the draft convention.

It is likely that an amendment to include “transit” in core prohibitions will be put forward during ban negotiations, and these tensions will resurface. The United States will use “transit” as one point among many to lobby states with which it has some military cooperation, or through whose waters its vessels pass, to refrain from signing the ban. Negotiating parties will need to choose between the merits of transit prohibitions from a normative development perspective, and the risk of potentially having several key NNWS (including those already in existing NWFZs) not ratify the eventual ban convention.

In addition to political issues, implementation of prohibition on transit, for example, through territorial waters, could pose practical difficulties to the states party to the convention.

Options for managing this issue, or finding compromise, could include:

- Clarifying that states may choose to interpret “transit” in the context of assistance provisions, should they wish;
- Use the standard NWFZ language on transit, giving states party the option to prohibit transit;
- Commit states to “do what they can” to prevent the transit of nuclear weapons through their territories. In this regard, the negotiators could draw on the UN Security Council Resolution 1540, which obligates states to establish “appropriate laws and regulations to control export, transit, trans-shipment and re-export” of WMD-related items.¹⁴

Threat of Use

Most experts consulted did not feel that “threat of use” was necessary to include as a core prohibition in the convention. Many either felt that, should states involved in the negotiations feel it was desirable to prohibit, that “threat of use” could be read into the understanding of “use” or “assistance”. Others went further and argued that any clearer language specifically on “threat” should only appear in the preamble. One suggestion was

¹⁴ Operative Paragraph 3.d, United Nations Security Council Resolution 1540, April 28, 2004, [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1540\(2004\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1540(2004)).

that preambular language discussing the 1996 Advisory Opinion of the International Court of Justice be expanded to note that the opinion envisaged threat of use as illegal in circumstances where the use of nuclear weapons is also illegal.¹⁵

Additionally unclear was the intent behind any move to include “threat of use” as an explicit core prohibition. Do supporting states intend to interpret any nuclear-deterrence policy as being tantamount to threat of use? Or do they intend to interpret such a prohibition only in instances where a state has made a verbal threat to use nuclear weapons in a specific circumstance?

The reaction of states outside of ban talks is likely to depend upon which understanding is promoted by the negotiating conference. In the event of a broad reading, all of the nuclear-armed states and their allies are likely to react negatively to this provision. In particular, NATO, Japan, South Korea, and Australia are likely to argue that such an interpretation would unfairly group “responsible” pro-deterrence states with those who regularly and irresponsibly utter threats of use, such as Russia and North Korea. A more narrow and specific interpretation would therefore result in an expectation by the United States’s European and East Asian allies that ban-treaty signatories exert greater pressure on Moscow and Pyongyang to cease their issuance of specific nuclear threats. Either approach is sure to be poorly received in Russia.

Financing

The possibility of including a core prohibition on finance was raised repeatedly during ban negotiations in March. Proponents argue that it would create an important opportunity to exert practical, indirect pressure on nuclear-weapon complexes by encouraging the institutions that finance them to shed those relationships. Financial institutions adopt a risk-based approach to their business, where the prospect of incurring

¹⁵ “Legality of the Threat or Use of Nuclear Weapons,” International Court of Justice, General List No. 95, paragraph 105, section 2C.

reputational risk or financial penalties from authorities in one or more jurisdictions is weighed against the potential earnings from the business relationship in question. Banks or insurance firms, even if they are located in the territory of a non-signatory to the ban, might therefore still be compelled to divest any nuclear weapon-related business.

The idea of a core prohibition on finance encountered three distinct reactions from experts consulted for this report. Firstly, some experts agreed that explicitly presenting states the option of taking stronger action on financing by individuals and entities under its control, was desirable for the reasons mentioned above.

Secondly, and on the contrary, some raised questions in response to the prospect of including financing, similar to those raised in relation to national implementation measures (Article 7). As finance provisions would primarily concern non-state entities and individuals within the jurisdiction of a state party, they commented that it would be out of place in a convention that concerns itself with state responsibility and actors.

Thirdly, several experts expressed concern over the implementation burden and verification difficulties which would be encountered by most states that enact legislation in response to a newfound financing prohibition. States with national proliferation-financing legislation (which tend to be limited to nuclear programs prohibited by the UN Security Council) have experienced significant operational difficulties in monitoring and enforcing compliance.¹⁶ The same applies to legislation concerning other forms of financial crime. Data privacy laws and regulations restricting the sharing of proprietary, financial information is often strict in these same jurisdictions, and limits the ability of regulators to gain a clear insight into the activities of their financial sectors. This is especially problematic in jurisdictions that are home to major financial hubs, and in jurisdictions permitting comparative opacity in financial conduct (including offshore financial centers). Robustly

¹⁶ For a more detailed discussion of the approaches and challenges taken by states to implementing and enforcing their counterproliferation finance obligations, see the recent Mutual Evaluation Reports by the Financial Action Task Force, [http://www.fatf-gafi.org/publications/mutualevaluations/?hf=10&b=0&s=desc\(fatf_releasedate\)](http://www.fatf-gafi.org/publications/mutualevaluations/?hf=10&b=0&s=desc(fatf_releasedate))

and meaningfully implementing new requirements in a ban convention would require fundamental changes to states' approaches to their financial sectors.

Experts spanning these three viewpoints agreed that if states negotiating a ban convention agree that financing should be included in the text, the provision should either be:

- Framed in a similar fashion to Article 7 on national implementation, directing states to take "appropriate" steps, or giving them the option to implement national measures on financing;
- Included within Article 7, by amending the article to read "financial and penal sanctions" and interpreting assistance to give states the ability to act to counter the financing of activities covered in Article 1.1.a.

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