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German Federal Foreign Office, 'British Invitation to the Western Coordination Meeting on 14 January 1994 at the Canadian UN Mission and British Paper on Options and Modalities of NPT Extension'

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EXTENSION OPTIONS, MODALITIES AND POLICY

1. At the NPT Western Group meeting on 25 October 1993 in New York, the UK undertook to produce a paper on the question of NPT extension options and modalities, in order to facilitate further discussion of the Group's extension policy. This paper fulfils that undertaking.

EXTENSION OPTIONSThe Basic Extension Options

2. Article X.2 of the Treaty (copy at A for ease of reference) means that at the Extension Conference in 1995 the parties can only choose between three basic options:

- indefinite extension
- extension for an additional fixed period
- extension for additional fixed periods.

3. The option of extension for additional fixed periods only makes sense if it is accompanied by some decision-making mechanism enabling the parties to decide at the end of each fixed period whether to move on to the next one. Without such a mechanism extension for an unlimited number of additional fixed periods would equate to indefinite extension. Similarly, without such a mechanism extension for a limited number of additional fixed periods would equate to extension for one additional fixed period.

Implications of Indefinite Extension

4. If the parties choose indefinite extension, no further

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decision on extension need ever be taken by them. Each of them would, however, still retain the right of individual withdrawal from the Treaty in accordance with Article X.1 of the Treaty (copy at B for ease of reference). In addition, the fact that the Extension Conference had decided to extend the Treaty indefinitely would not mean that it could never be terminated. This could still be done in accordance with the customary international law which is reflected in Article 54 of the Vienna Convention on the Law of Treaties, VCLT (copy at C for ease of reference, and see paragraph 7 below).

Implications of Extension for an Additional Fixed Period

5. If the parties choose extension for a single fixed period, they can set the fixed period at any length they wish. Whatever length they choose, however, the Treaty will automatically terminate at the end of the chosen period. Article X.2 provides separately for the possibility of a series of additional fixed periods, and it is therefore difficult to argue that if the parties opt in 1995 for extension by a single fixed period they could still decide on a further extension at a subsequent date by the majority specified in Article X.2. That Article only gives authority for the holding of one Extension Conference with decisions taken by the majority of states parties, and a Treaty amendment would be required to enable a second one to take place. The terms of Article VIII.1 and 2 make any amendment to the NPT very difficult to achieve. In the absence of such an amendment a decision to extend the Treaty further could only be taken by all the States Parties.

Implications of Extension for Additional Fixed Periods

6. If the parties choose extension for additional fixed periods, they will need to decide on the length of these periods. Article X.2 offers no guidance on their possible

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countries objected in some prescribed manner.

Immediate Termination

7. Article 42.2 of the VCLT (copy at D) provides that: "termination of a treaty ... may take place only as a result of the application of the provisions of the treaty or of the present Convention". There is no provision in the NPT dealing with termination (as opposed to Article X.2 which deals with extension). Nevertheless, immediate termination could effectively be achieved under Article X.2 if a majority of states parties decided to extend the Treaty for a single fixed period of, say, one week or one day. Leaving that possibility aside, the terms of Article 54 of the VCLT mean that immediate termination could only be achieved if all the parties consented to it.

EXTENSION MODALITIESThe Extension Decision

8. Article X.2 says quite clearly that the decision on extension must be taken "by a majority of parties to the Treaty" (ie not just by a majority of those attending the Extension Conference). There is therefore no legal requirement for a consensus decision on extension. Equally,

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there is no bar to a consensus decision on extension providing that at least a majority of states parties participate in the consensus.

9. Article X.2 says nothing about the precise procedure for taking the extension decision, about how it should be recorded, or about what should be done if there is no majority at the Conference for any decision on extension. It will therefore be necessary for the Extension Conference to have Rules of Procedure which clearly explain how these matter are to be handled within the context of Article X.2's stipulation that any decision on extension must be supported by a majority of states parties.

Rules of Procedure

10. The Rules of Procedure used at NPT Review Conferences in the past (copy at E) are inadequate for these purposes in a number of ways:

- it would be possible under these Rules for a decision on extension by consensus or voting to be taken without the support of a majority of parties;
- there is no provision in these Rules that would enable one to check that a consensus decision on extension included a majority of parties;
- there is no provision in the Rules to explain what should be done if the Extension Conference is incapable of reaching a decision on extension in accordance with Article X.2.

11. The draft Rules of Procedure for the Extension Conference presented in NPT/CONF.1995/PC.I/CRP.1 (also shown in the copy of the Rules at E) ensure that these points are covered. However, at the first Prepcom some members of the

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NPT Western Group expressed concern that if several extension proposals are put to the Conference, these draft Rules do not set out clearly how the Conference will decide the order in which they are considered. The "New C" point in the paper at F, drawn up in the margins of the first Prepcom and circulated to the NPT Western Group then, contains one suggestion for dealing with this point (along with some other more editorial suggestions for amendments to the draft Rules). Prior to the second Prepcom the NPT Western Group needs to decide whether it supports the draft Rules as set out in NPT/CONF.1995/TC.1/CRP.1 or whether it wishes to suggest amendments to them, either along the lines of the paper at F or along other lines.

Recording the Extension Decision

12. The Extension Document should:

- be distinct from any Review Document (to prevent the extension decision being held hostage to every detail of a Review Document);
- limit itself to a bald statement of the essential facts about which of the extension options set out in Article X.2 the Parties have chosen (additional material might later be exploited to diminish the clarity of the extension decision by claiming it involved some element of conditionality, on which see paragraphs 21 - 25);
- record clearly which states participated in the consensus decision or how they voted, if a vote is taken (there will then be no room for doubt that a majority of states parties participated in the consensus decision, or voted for the decision, or about which states they were).

A possible model for an Extension Document is at G.

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Immediate Entry into Force of the Extension Decision

13. Once an extension decision has been made in accordance with Article X.2, it immediately binds all the parties, even those which did not support it. It could not be legitimately argued that any extension decision must subsequently be approved or ratified by States Parties before it comes into force for them. There is no such requirement in Article X.2, in contrast with the ratification requirements in Article VIII.2 for amendments to the Treaty.

14. Nor could any State Party which did not support the extension decision legitimately seek to exercise its individual right of withdrawal from the Treaty as a result of the decision. It cannot be argued that an extension decision taken in accordance with the Treaty is an "extraordinary event".

Continuation in Force of the Treaty if No Extension Decision is Reached

15. There can be no argument that the Treaty cannot last longer than 25 years in the absence of a decision, since Article X.2 provides for the decision to be made at a Conference twenty-five years after the Treaty's entry into force, and for the Conference to decide to continue the Treaty's duration. It is therefore also implicit that the Treaty must continue in force while the Conference is in session.

16. As detailed in paragraphs 2-6 above, Article X (2) of the Treaty envisages only three extension options. Until the extension conference has taken a decision in favour of one of these options the Parties will not have fulfilled their obligations under this part of the Treaty. Accordingly, the

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Conference must remain in existence until such a decision is taken. If taking a decision by the requisite majority proves difficult, the Conference could be adjourned to reconvene later, but it cannot be concluded.

17. There is an argument that the Treaty will be terminated if the Conference fails to reach a decision on extension. This argument is difficult to sustain, since it would in effect amount to a right of termination which is neither provided for in the Treaty nor in accordance with the VOTM (see paragraph 7 above). But in any case the argument should be a hypothetical one for the reasons set out in the preceding paragraph.

EXTENSION POLICYNPT Western Group's Objective

18. There are about 45 states, listed at H, which have subscribed to public statements supporting indefinite extension of the NPT. They include all members of the NPT Western Group. Since there are 162 parties to the NPT at present and may be more at the time of the Extension Conference, a minimum of about another 45 states will be required to ensure indefinite extension if the issue comes to a vote - though, of course, a consensus decision in favour of indefinite extension, or at any rate an overwhelming majority in favour, would be far preferable to a close vote.

Making the Case for Indefinite Extension

19. In making the case for indefinite extension members of the NPT Western Group can argue:

- that indefinite extension would send the most powerful signal possible of responsible states' determination to

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uphold the non-proliferation norms and disarmament aspirations embodied in the Treaty;

- that any other outcome is likely to give aid and comfort to proliferators and to make more difficult the task of achieving the Treaty's wider disarmament goals;

- that indefinite extension is therefore the outcome which best serves the security interests of all parties.

Possible Threats to Indefinite Extension

20. The achievement of indefinite extension could be threatened in two main ways:

- by those who are determined to make indefinite extension conditional on the achievement of other goals;

- by those who are opposed to indefinite extension in any circumstances and would prefer to pursue one of the two other options.

Conditionality

21. A distinction needs to be drawn between "formal" conditionality and "informal" conditionality. "Formal" conditionality would be an attempt to write into any extension decision specific conditions that would have to be met for the extension decision to take effect. "Informal" conditionality would be a refusal to vote for a particular extension decision except in certain circumstances.

22. Attempts at "formal" conditionality would go beyond what is permitted by Article X.2. This only confers authority on the Extension Conference to decide between the three basic options mentioned in the Article. Attempts to go further

than this would amount to amending the Treaty. Amendments to the Treaty can only be made by following the procedures set out in Article VIII.1 and 2. These procedures cannot be short-circuited by decisions taken by a majority of parties at the Extension Conference.

23. An alternative argument might be that the whole notion of an Extension Conference implies it can set formal conditions for any of the extension options. This argument might in particular be put forward in relation to the "additional fixed periods" option, where it is implicit in the Treaty that some condition (as a minimum, a condition dependent on the operation of some decision-making mechanism) will need to be satisfied before each new period has effect.

24. The flaw in this argument is that: the decision-making mechanism in Article X.2 is exceptional in that the Parties to the NPT have allowed a majority to bind all of them; that such a departure from the normal rule of international law (that States are not bound by Treaty provisions without their consent) should be the minimum necessary to give sense to Article X.2; and that this rules out any attempts at "formal" conditionality.

25. By contrast it cannot be argued that there is any legal case against "informal" conditionality. The political case against this kind of conditionality is that the purpose of the Extension Conference should be to demonstrate the parties' united support for the Treaty's importance as a fundamental bulwark of their own and international security. This purpose will be undermined if the parties indulge in undignified arguments amongst themselves about informal conditions for the Treaty's extension. Such arguments could even be counter-productive in their impact on progress towards other nuclear arms control measures. They would certainly not help to convince non-parties that they are

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completely isolated in their opposition to the Treaty.

Alternative Extension Proposals

26. It is possible that other parties will come forward with alternatives to indefinite extension. Of the other options mentioned in Article X.2 it is perhaps unlikely that there will be much support for extending the Treaty for a single fixed period (since, as explained in paragraph 5 above, the Treaty would then terminate at the end of that period). Perhaps more likely is support for the extension of the Treaty by additional fixed periods. Other parties would be within their legal rights to argue for either of these options. The political arguments against this approach and in favour of indefinite extension are set out in paragraph 19.

27. Another possibility, not mentioned by Article X.2, is that some parties will argue for any decision on extension to be deferred for a short period (in order to increase pressure for "informal" conditions for extension to be met). This argument is difficult to sustain in that Article X.2 says the Conference "shall be convened to decide [etc]", not "shall be convened to defer a decision". Nevertheless, for the reasons set out in paragraphs 15-17, the Treaty would not be terminated if the Conference adjourned and a decision was deferred.

28. For political reasons, however, such a deferral is to be avoided if at all possible. It would be highly damaging to the Treaty to defer a decision on its extension since this would give the impression that parties were not sure of its worth. It would lead to doubts about when a final decision would be made. This in turn would replace the current framework of stable expectations created over the last twenty-five years with a destabilising climate of

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uncertainty. Indeed, a long shadow would be cast over the future of international peace and security. This would not serve the interests of any party.

CONCLUSION

29. Members of the NPT western Group may wish to consider:

- whether they accept the analysis in the Extension Options section of this paper;
- whether they accept the analysis in the Extension Modalities section of this paper, and, if so, what attitude they propose to take to the draft Rules of Procedure at the second Prepcom;
- whether they can agree to deploy the arguments in the Extension Policy section in discussion of the extension issue with other states.

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