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South African Legal Opinion on Article X.2 of the NPT

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Summary:

A description of X.2 Article of the NPT and a discussion of three potential outcomes: 1) indefinite extension, 2) extension for an additional fixed period, and 3) extension for additional fixed periods.

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SOUTH AFRICAN LEGAL OPINION ON ARTICLE X.2 OF THE NPT**EXTENSION OF THE NUCLEAR NON-PROLIFERATION TREATY:
INTERPRETATION OF ARTICLE X(2) OF THE TREATY ON THE
NON-PROLIFERATION OF NUCLEAR WEAPONS PREPARED BY THE OFFICE
OF THE CHIEF STATE LAW ADVISER (INTERNATIONAL LAW) OF THE
REPUBLIC OF SOUTH AFRICA**

1. In order to come to the correct interpretation of Article X(2) of the Treaty on the Non-Proliferation of Nuclear Weapons (hereinafter referred to as the "NPT") and to be able to follow the legal arguments in establishing the true meaning of the said Article, it is necessary to consider the principles of treaty interpretation very briefly.
2. Although these principles are not absolute formulae, they are tools in the interpretation of treaties and serve as guidelines in finding the true interpretation of a specific provision. When applying these principles of interpretation, each principle on its own will render little help in the interpretation of a provision, but it is their cumulative effect that will in most cases be indicative of the correct and true meaning of a specific provision in a treaty.
3. Any effort to interpret treaty provisions starts with studying the grammatical construction of the text itself. Words must be construed according to their plain and natural meaning. The Vienna Convention on the Law of Treaties of 1969 stipulates in Article 31(1) that a treaty shall be interpreted in good faith in accordance with the ordinary meaning of the terms. This must be done in context and in light of the object and purpose of that treaty. Where particular words and phrases are unclear, the interpreter should be guided by the general object and context of the treaty. (Although South Africa is not a party to the Vienna Convention on Treaties of 1969, the provisions of this Treaty are regarded as customary international law and therefore applicable to all states regardless of their participation in the Convention.)
4. However, if the grammatical interpretation would result in an absurdity or inconsistency with the rest of the treaty, the grammatical meaning of the text could not reflect the true intention of the parties. Due regard should be paid to the intention of the parties at the time of the conclusion of the treaty and particularly the meaning attached by them to the words and phrases at that time.
5. The principles of reasonableness, consistency and effectiveness are other useful tools in interpreting

treaty provisions. These entail that when interpreting a provision, the reasonable meaning of words and phrases which is also consistent with the rest of the treaty, is to be preferred. In accordance with the principle of effectiveness, the provision should be interpreted in such a way that will render the treaty most effective and useful. Ambiguous provisions should be given an interpretation that is reasonable, effective and consistent with the rest of the treaty.

6. Recourse may also be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion in order to confirm the meaning of a provision in those cases where the principles of ordinary meaning and of object and purpose leave the meaning of the provision ambiguous, absurd or unreasonable (Article 32 of the 1969 Vienna Convention on the Law of Treaties).

7. It is within this framework of set principles that we shall endeavour to find the correct interpretation of Article X(2) of the NPT.

7.1 Article X(2) of the NPT provides as follows:

"Twenty-five years after the entry into force of the Treaty, a conference shall be convened to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods. This decision shall be taken by a majority of the Parties to the Treaty."

7.2 Article X(2) thus leaves three choices open with regard to the extension of the NPT. The conference can choose between the following options:

- a) indefinite extension;
- b) extension for an additional fixed period; or
- c) extension for additional fixed periods.

7.3 Applying the rules of interpretation no difficulty exists in understanding what is meant by the term "indefinitely". If such a decision is taken, the NPT will have an unlimited duration with the usual option for withdrawal by a party as provided for in the NPT or terminated by consent of all the parties after consultation with each other as stipulated in Articles 42 and 54 of the 1969 Vienna Convention on the Law of Treaties.

- 7.4 The second option, namely "additional fixed period" means that, as was done when negotiating the NPT, it is possible for the parties to decide to extend the treaty for a single fixed period only. The time limit of such a fixed period is not indicated and the parties are therefore free to choose any length of time. It is our view that the purpose of the NPT and the practical modalities thereof, such as the International Atomic Energy Agency safeguards required by the NPT, should direct the parties in deciding on the length of such a fixed period. When choosing this option, the parties must realise that after the expiry of the fixed period the NPT will automatically terminate as there is no provision in the Treaty for a second conference to decide on extending the duration of the NPT.
- 7.4.1 The argument also exists that Article X(2) can be interpreted in such a way that after the expiry of the fixed period, Article X(2) can revitalise itself by being applied once again by the parties to decide on the further extension of the NPT in a similar way as was done after the first 25 years. Applying the principle of interpretation that the ordinary meaning must be given to treaty provisions, it is quite difficult to see how Article X(2) can be interpreted to authorise the holding of a second extension conference where the parties can once again decide between the three options. This is in our view too broad an interpretation of Article X(2), but as indicated below compromises will have to be reached and the political will of the parties will in the end determine the choice of the extension option.
- 7.5 The third option leaves parties the choice to decide on extending the NPT for "additional fixed periods", also without specifying the length or number of the fixed periods. The true meaning of this option of extension for additional fixed periods is not clear as the grammatical interpretation thereof leads to ambiguity. The first observation when interpreting this part of the provision is the fact that the grammatical interpretation of this option leaves little practical difference between the different options. For example: four consecutive fixed periods of 5 years (option three) and a single fixed period of say 20 years (option two) are similar, while an unlimited number of additional fixed periods (option three) will have the same effect as an indefinite extension (option one).
- 7.6 This could not have been the intention of the parties when drafting this Article. Terms of a treaty must be interpreted within their context and since the options "indefinite", "period" and "periods" appear in the same context, it warrants the conclusion that the parties

must have meant these options to be truly three different extension options.

7.7 These options can only be different if Article X(2) is interpreted in such a way that the outcome and effect of the extension options differ. In case of an indefinite extension the NPT will not terminate unless all the parties have withdrawn from it under the terms of the Treaty or until terminated in accordance with the provisions of the 1969 Vienna Convention on the Law of Treaties. (See par 4.3 above.) In the case of an extension for a fixed period the NPT will terminate at the expiry of that period.

7.8 This leaves the termination position of the NPT under the option of the fixed periods unsolved. It is clear that in choosing the option of fixed periods, the parties must have intended the possibility of extending the NPT for at least two fixed periods to distinguish it from the second option of a single fixed period. Logically this means that some kind of mechanism must exist in order for one fixed period to be followed by the next. Although the NPT does not explicitly provide for such a mechanism, the need for effectiveness necessitates such an interpretation. To avoid the dangers of unauthorised treaty amendment through interpretation, such a mechanism must be effective and consistent with the rest of the NPT. It is also important that the envisaged mechanism does not infringe unduly on the sovereignty of the parties and should therefore be limited to the minimum necessary to give a meaningful interpretation to this provision.

7.8.1 In search for the true interpretation of the term "fixed periods", guidance could be found in the supplementary means, including the preparatory work of the NPT. The circumstances of the conclusion of the NPT are useful to confirm the meaning resulting from the application of the other interpretation rules. From the travaux préparatoires it is clear that the present wording of Article X(2) was a compromise, but stemmed from an Italian proposal that called for a fixed term for the NPT and the automatic extension for terms equal to its initial duration for those governments that do not indicate their withdrawal from the NPT. This proposal was amended by deleting the idea of automatic extension and to include the convening of a conference of the parties to decide at the end of the first term whether to prolong the duration of the NPT.

7.8.2 As Article X(2) only provides for a single extension conference to be held after the expiry of the initial twenty-five years period, no further extension

conferences can be held in terms of the NPT. The only deduction that can therefore be made, is that if the parties should decide on the fixed periods option, it should be possible for these periods to follow each other. However, to differentiate this option from the indefinite extension option explained above, a decision making mechanism is needed to trigger the succession of the fixed periods.

7.8.3 The parties accepted the idea of the periodic review of the operation of the whole NPT and created the mechanism of review conferences for this purpose. (Article VIII(3)). The fact that no explicit provision was made to this effect in respect of the fixed periods option, does not preclude one from interpreting the NPT in such a way that the mechanism needed for the effective implementation of the fixed periods option can also be covered under the review conferences. At the time of a review conference held near the end of a fixed period, the parties should be able to decide on the future of the NPT. This interpretation is in fact consistent with the idea of periodic review of the NPT. Such a decision making mechanism is also consistent with the idea contained in Article X(2) that the parties should be able to decide by majority vote on the continuation of the NPT. The principle of effectiveness also dictates that this interpretation is the only reasonable one.

7.8.4 The question now remains as to the nature of the decision making mechanism. It is our view that it will be possible to have either a "negative" mechanism or a "positive" mechanism. The choice between these two mechanisms will greatly depend on the political realities and the need for compromise between the different interest groups within the NPT, rather than what is regarded as being strictly correct from a legal point of view.

7.8.5 The "negative" mechanism entails that it would be possible for each fixed period to follow each other automatically, unless the parties decide at the time of the review conference held near the end of any of the fixed periods not to continue with the treaty. This means that the duration of the NPT will be extended automatically unless the parties decide against the automatic roll-over from one period to the next. It also does not mean that a decision of the parties is needed at the end of each fixed period. The NPT will automatically continue through the various fixed terms until the parties decide not to extend it any further.

7.8.6 A "positive" mechanism on the other hand is one where the parties will have a say in the continuation

of the NPT at the end of each of the fixed periods. The NPT will only continue to the next fixed period if the majority of the parties so decided. If at the review conference near the end of each fixed period the majority of the parties bring out an affirmative vote in this regard, the duration of the NPT will extend automatically to the next fixed period. The "positive" mechanism is in our view also consistent with the idea of constant review of the NPT and with the idea contained in Article X(2) that the parties can "...decide whether the Treaty shall continue in force...", in other words a positive decision. A decision making process similar to the one now suggested, is therefore already part of the NPT. If all the parties accept and agree on this interpretation, this interpretation will also be acceptable under the 1969 Vienna Convention on the Law of Treaties as a case of change through subsequent practice in the application of the treaty (Article 31(3)(b)).

8. It is therefore our submission that the parties intended to create three truly different extension options in terms of Article X(2). Each of these options as explained above have different legal implications and results which should be carefully considered by the political decision makers when deciding which option to choose. However, it is also true that the NPT was a product of political bargaining and compromise. There is little doubt that the extension decision to be taken in 1995 on the duration of the treaty will likewise be brought about by the political will of the parties to reach a compromise that will serve their common goal - the prevention of the spread of nuclear weapons - the best.

PRETORIA
27 DECEMBER 1994