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**P. Goosen, 'Nuclear Non-Proliferation Treaty (NPT):  
South African Position and Preparations for the NPT  
Review and Extension Conference'**

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**Summary:**

The memo suggests to pick additional fixed periods extension of the NPT with a green-light mechanism. In addition, need for significant majority and establishing better relations with other states

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NUCLEAR NON-PROLIFERATION TREATY (NPT) : SOUTH AFRICAN POSITION  
AND PREPARATIONS FOR THE NPT REVIEW AND EXTENSION CONFERENCE

VERSEND AAN

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## 1. SUMMARY

- 1.1 This report contains background on the development of a South African position on the extension of the Nuclear Non-Proliferation Treaty (NPT). It also outlines the positive reactions to the initiatives taken by South Africa, and makes a number of recommendations on the steps which should be taken in the run-up to the April Conference. Also included for ease of reference is the legal opinion on Article X.2 of the NPT which we distributed at the 4th Preparatory Committee meeting in New York during January 1995.

## 2. BACKGROUND

2.1 Previous communications concerning the Treaty on the Non-Proliferation of Nuclear Weapons and the forthcoming NPT Review and Extension Conference refer.

2.2 South Africa has to date taken care not to commit itself publicly to any one of the extension options which are provided for in Article X.2 of the NPT. Article X.2 provides that:

"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."

2.3 The debate surrounding the extension of the NPT has become very divisive with widely differing positions being adopted along the North/South divide. The Western nuclear weapon states, Russia and their allies are arguing for the indefinite and unconditional extension of the NPT. They argue that the NPT is the cornerstone of the international nuclear non-proliferation regime; and that the security and economic interests of all states will be best served if the NPT is extended indefinitely in 1995. Ambassador Thomas Graham of the United States stated at the Fourth PrepCom that the "indefinite extension of the NPT is an absolute requirement to maintain a stable strategic environment that will be conducive to further progress (on nuclear disarmament, negative and positive security assurances, etc)". The proponents of indefinite extension believe that a strong and dependable NPT would encourage further progress in bilateral and multilateral efforts to eliminate the threat posed by nuclear and other weapons of mass destruction, while ensuring that parties' access to the fullest range of nuclear-related commodities and technologies was protected. It will be recalled that Ambassador Graham (the Acting Deputy Director of the United States Arms Control and Disarmament Agency (ACDA)) visited South Africa during 1994 to discuss this issue. The visit was very positive despite the fact that we did not indicate what South Africa's position on the extension issue was. It was clear that the United States recognises the leading role which South Africa could play in this regard, and the groundwork was laid for further consultations.

2.4 The countries of the South/Non-Aligned Movement (NAM) have generally avoided committing themselves publicly to any one of the Article X.2 extension options. There is, however, widespread dissatisfaction within the Movement as to the failure of the nuclear weapon states to meet their Article VI disarmament obligations, and with the difficulties which have been experienced with the flow of nuclear technology to the developing world (Article IV). According to a

recent edition of the Disarmament Times the key point of agreement within the NAM is that "the viability of the Treaty depends on the nuclear weapon states fulfilling their nuclear disarmament obligations ... Therefore the goal for these states is to find a formula that would be long enough to make the Treaty durable, but with some mechanism for continuing pressure on the nuclear weapon state; leverage that would be lost, they feel if the NPT is extended indefinitely." (Article entitled "Constructive NPT PrepCom, But Tug-of-War on Extension" by Rebecca Johnson and Jim West).

It should further be noted that the final Non-Aligned Movement (NAM) document, which was adopted at the 31 May to 3 June 1994 Cairo meeting, calls for a fresh appraisal of the fulfilment of the obligations of Nuclear Weapon States under Article VI of the NPT and expressed the hope that any pending issues relevant to the Treaty shall be overcome, including the provision of credible security assurances and adequate technical assistance to all Non-Nuclear Weapon States to ensure the availability of nuclear materials, equipment and technology for peaceful purposes on a non-discriminatory, predictable and long term basis.

2.5 South Africa initially argued that we could not adopt a position on the extension issue on the grounds that:

- The Government of National Unity should be provided with enough time to study the issue in detail, and that there was sufficient time before the April 1995 Conference for a decision to be taken; and
- We would require sufficient time to consult with members of the regional groups to which we which we belong - Africa Group and the Non-Aligned Movement - before making a final decision.

As the Department will recall, however, it was noted in a Memorandum addressed to the Minister and dated 24 August 1994 that whilst it is obviously in our national interest that the NPT should be extended, there is no overriding reason which determines that South Africa should support any specific option provided for in the Treaty. The arguments put forward by both sides to the debate are valid. The developed countries argue that the NPT is the cornerstone of the international nuclear non-proliferation regime; and that the security and economic interests of all states will be best served if the NPT is extended indefinitely in 1995. The developing countries argue that the NPT is discriminatory in that it favours the nuclear weapon states and in that these countries have not met their disarmament obligations under the Treaty. It was our recommendation that we should not bind ourselves to a final option, and that we should rather maintain a flexible

position where we could act as the broker between the NAM and the developed countries. It was argued that this flexibility will allow us to explore possible solutions which address the concerns of the various sides in the debate and which could achieve consensus support.

2.6 This policy has proven to be successful as is evidenced by the widespread recognition which has been given to the position which we have privately been arguing. As was outlined in Departmental memorandums prepared and submitted during May 1993 and August 1994, as well as in the Statement which we delivered at the 4th Preparatory Committee (PrepCom) meeting (New York, 23-27 January 1995), an extension which has the potential of drawing support is a rolling extension of successive fixed periods which would extend the Treaty in perpetuity, but where a positive vote would be required between each of the succeeding periods to initiate the start of the following period. In the statement which we delivered in New York it was stated that:

"A "positive" mechanism ... 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."

2.7 The reason which can be ascribed to the support and favourable comment which our proposal has received is that whilst it does not give the proponents of the various arguments everything which they have demanded, it is the only alternative which addresses the core arguments of all sides:

- In the case of the proponents of indefinite extension it provides for extension in perpetuity (indefinite) by rolling/successive fixed periods.
- In the case of the countries arguing for "some mechanism for continuing pressure ..., leverage that would be lost if the NPT is extended indefinitely" our proposal provides for the positive vote which will be required to initiate each successive period.

The success of the South African proposal which has been identified as the middle ground is evidenced in articles

which appeared in the "Disarmament Times" and "ACRONYM" publications. These are the only two mainstream disarmament related publications which have been published since the Fourth PrepCom meeting in New York when South Africa unveiled the so-called "Third Option":

- The Disarmament Times (Vol XVIII, No 1, February 1995) : "While most Northern speakers favoured the indefinite and unconditional extension, as they had at previous PrepComs, there were growing concerns among the Northern allies that they may not have enough votes for indefinite extension. There are signs that some form of extension by additional fixed periods will ultimately gain majority support. For the first time a growing number of non-aligned states called for a series of renewable fixed periods linked to progress in nuclear disarmament ... The third option of successive fixed periods which may be a compromise solution, rather than choosing between a single fixed period or indefinite extension, raises questions of its own. If continuation is not automatic, how would the Treaty be terminated or prolonged? How many fixed periods should there be and what would be the length of each period? A five year review process is already in the Treaty, but how would that affect extension decision-making? One possibility, as detailed in a legal opinion submitted by South Africa to the PrepCom, is to devise "a decision making mechanism... to trigger the succession of the fixed periods" in order to make it different from indefinite extension. This mechanism-essentially a "yes" or "no" vote on continuation-could be invoked "at the time of a review conference held near the end of a fixed period, [where] parties should be able to decide on the future of the NPT." The South African paper says, "This interpretation is in fact consistent with the idea of periodic review of the NPT... The principle of effectiveness also dictates that this interpretation is the only reasonable one." ... The debate concerning the third option may well be at the heart of the Conference this spring."
  
- ACRONYM article entitled "Extending<sup>\*</sup> the Non-Proliferation Treaty: The Endgame" (No 5, February 1995) : Ecuador and South Africa seemed to favour a form of 'rolling extension' - the third option of successive periods. Much of South Africa's speech was devoted to the extension question, also submitting a separate legal analysis. This argued that a rolling extension in which a positive vote is taken to move to each succeeding period, is the interpretation most consistent with the negotiators' assumed intention to provide three distinct options. By the South African analysis, a specified number of fixed periods

presupposes eventual termination, and would therefore add up to the second option of a single fixed period, while a rolling extension in which successive periods follow automatically unless there is a specific vote to terminate (as in the Bunn Van Doren option) would be tantamount to indefinite extension. In conclusion, South Africa appeared to support a rolling extension as most "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'..." Though only a small proportion of States Parties put their views formally in the exchange of views, it is clear from informal discussions that many states are giving serious consideration to the third option, as a way of providing both durability and pressure ... Spearheaded by South Africa's well argued legal analysis, there is a discernible shift of interest among non-aligned states towards the third extension option of successive fixed periods. While indefinite extension is the clear first choice of the great majority of declared preferences-some 70 States Parties-and should by no means be ruled out, the tide appears to be turning. A growing acceptance of the legal and practical validity of the rolling extension option may win over many states which the Northern allies had counted on not wanting to jeopardise the NPT."

- 2.8 Further evidence of the success of the position which we have adopted is the invitation which has been extended for South Africa to join a small group of countries from across regional group boundaries which would meet to discuss possible actions which will ensure that the April NPT Conference has a successful conclusion. This invitation was extended to South Africa and a group of other countries which attended a dinner hosted by the Canadian Delegation to the Conference on Disarmament in Geneva. Represented at the dinner were the Ambassadors to the Conference on Disarmament from Canada, Australia, Germany, Colombia and Ethiopia; the Director General for Arms Control from the Japanese Foreign Ministry in Tokyo; and senior Embassy officials from the Conference on Disarmament Missions's of Argentina, Hungary, Peru, Philippines, the Republic of Korea, and South Africa. The dinner was confined to non-nuclear weapon state members of the NPT. The primary focus of the discussion at the dinner was the South African proposal of a "Third Option" for the extension of the NPT.
- 2.9 In the final weeks before the start of the NPT Review and Extension Conference in New York (17 April to 12 May 1995) it must be expected that the proponents of indefinite extension, and in particular the United States and its allies, will exert maximum pressure and influence to convince other countries to support their position of



indefinite and unconditional extension. South Africa will especially be focused upon because of our role in the NAM, in Africa, in Southern Africa, and because of our status as the only country to have voluntarily and unilaterally given-up the nuclear weapon option. It is essential for us to withstand this pressure. Any commitment to indefinite extension without consideration of the concerns which have been expressed by member countries of the NAM will weaken our position in the Movement and undermine any endeavour for South Africa to either play a leadership and/or brokers role on disarmament/non-proliferation issues.

### 3. RECOMMENDATIONS

#### 3.1 EXTENSION ISSUE AND SOUTH AFRICA'S POSITION

It is strongly recommended that South Africa should maintain its current position until the start of the 1995 NPT Review and Extension Conference. The "Third Option" is widely recognised as a South African proposal. As is being noted by commentators this option is drawing support, and "the debate concerning the third option may well be at the heart of the Conference" (Disarmament Times). In our opening statement at the Conference (either at the beginning of the Conference or at the start of the Extension discussions) we should make it clear that South Africa supports the extension of the NPT in perpetuity, and that we believe that the security of the international community will be severely damaged if the NPT is weakened. We should also make the point that South Africa took the decision to destroy its nuclear weapons and to become a State Party of the NPT because we saw our security being guaranteed by the provisions of the Treaty. It is for this reason also that we have become an active sponsor of an African Nuclear Weapon Free Zone Treaty. We would therefore not oppose or be unhappy at a decision of a majority of the States Parties at the Conference to extend the Treaty indefinitely. We believe, however, that the in perpetuity/indefinite extension of the Treaty can be achieved in another way - rolling fixed periods with a positive vote - which will also go some way in addressing the concerns of those States which (rightly or wrongly) feel that whilst the Treaty should be durable, it is necessary to find some mechanism for continuing pressure on the nuclear weapon states; leverage that they believe would be lost if the NPT is extended indefinitely.

We should, however, make it clear that anything less than in perpetuity extension will weaken the Treaty. So also would the rolling/successive fixed periods option if it is linked to progress in other areas or if the periods are too short or too long. The nuclear weapon states will never accept periods of five years because in their view it will weaken the Treaty by continuously and at short periods

bringing its continued extension into question. The logical period would be for 25 years, but this is unlikely to be accepted by the members of the NAM.

Finally we should make it clear that we believe that any decision which is taken by a "50% plus 1" majority would weaken the Treaty. It would undermine the commitment to the NPT of those who are left on the outside. Any decision would need to be taken by a significant majority which in all likelihood will need to include key countries especially from within the NAM. To ignore and exclude a country such as Iran which has the potential of becoming a "threshold state" would be a mistake. It would also be a mistake not to include other countries such as Indonesia, Mexico, Nigeria, etc all of whom have been very critical of the functioning of the Treaty and who have made radical extension proposals. In disarmament circles there is understanding for the critical position of Egypt vis-a-vis the Israeli position as an acknowledged nuclear threshold state. A "no" vote by Egypt will therefore be understood in the Middle East context and will not be seen as a vote against the Treaty. This would, however, not be so in the case of the others.

### 3.2 LOBBY ACTION FOR SUPPORT OF SOUTH AFRICA'S POSITION

To obtain support for South Africa's views on the extension issue it is recommended that the Department should approach the SADC countries (both in capital and in Pretoria) to provide them with copies of the South African legal opinion which was unveiled at the 4th PrepCom. During the discussions with our interlocutors from the SADC countries it is recommended that we should explain our support for the in perpetuity (as opposed to indefinite) extension of the Treaty, as well as our belief that it is possible to extend the Treaty in this way whilst still maintaining leverage over the nuclear weapon states especially with regard to their Article VI disarmament obligations. We should take care in these discussions not to indicate that this is our fixed position, but merely to hand over the legal opinion and express our belief that it is possible to extend the Treaty in perpetuity whilst maintaining leverage. Our support for this position should be deduced, not openly stated. It is essential that we allow ourselves enough flexibility to play a role at the April Conference. If we lock ourselves in prematurely then we will undermine any opportunity which we might have to play the role of broker.

Consideration could also be given to initiating a similar action with key States in other parts of the World. Examples of the countries which we could approach are the African members of the IAEA (thereby strengthening our role as the leading country in Africa on nuclear issues -

Designated Seat on the IAEA Board of Governors issue), Brazil (even though they are not yet a States Party to the NPT), Colombia, Ecuador, Peru, Indonesia (as the NAM coordinator), Iran, India and Pakistan (even though the latter two are not States Parties to the NPT).

NO ACTION should be taken elsewhere (especially at multilateral missions) because this will expose South Africa's tactics and position at too early a stage. *or any other delegates. delegates.*

### 3.3 THE PROPOSAL THAT THE MINISTER SHOULD ATTEND THE CONFERENCE

The proposal that the Minister could possibly attend the NPT Review and Extension Conference should be carefully considered. The extension of the NPT has become an extremely divisive issue and has generated strong feelings, especially along the North/South divide. Consideration should be given as to whether it would be correct to expose the Minister's prestige and credibility into this debate.

### 3.4 PREPARATION FOR SOUTH AFRICAN PARTICIPATION AT THE CONFERENCE

It should be noted that the April Conference is not only for the extension of the NPT. The Conference will also be reviewing the implementation of the Treaty (peaceful uses, safeguards, disarmament, etc) over the last five years. This Mission has obtained copies of the Final Document of the 1990 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons" which will assist the Department and the Atomic Energy Corporation (AEC) in their preparations for the review. (The references of the Final Document are NPT/CONF.IV/45/1, NPT/CONF.IV/45/2 and NPT/CONF.IV/45/3.) Whilst South Africa has done much work on the extension issue, and we are well advanced in the formulation of our position, it is also essential that we should prepare positions on the Review side.

The April NPT Review and Extension Conference will be organised along the following lines:

- Plenary meetings of the Review Conference;
- Meetings of Main Committee I on nuclear disarmament which will be chaired by Nigeria;
- Meetings of Main Committee II on safeguards which will be chaired by Hungary;
- Meetings of the Main Committee III on peaceful uses of nuclear energy which will be chaired by the Netherlands;
- Meetings of the Drafting Committee which will be chaired by Poland;
- Meetings of the Credentials Committee which will be chaired by a member of the NAM (most probably Venezuela) and

- Plenary meetings of the Extension Conference.

The meetings of especially the 2 Plenaries, the 3 Main Committees and the Drafting Committee are likely to (and have in the past) taken place in tandem with one another. For South Africa to continue playing a leading role it will be essential for our delegation to be present and participate in all these meetings. The South African delegation should therefore comprise:

- The Minister (if it is decided that he should attend);
- The Permanent Representative, New York and an official from the Mission;
- Mr Abdul Minty, who is the advisor to the Minister on these issues and whose participation has been dealt with under cover of separate Memorandums.
- The Ambassador and an official from the Mission in Vienna. The Mission is accredited to the International Atomic Energy Agency (IAEA) which is responsible for the implementation of the NPT safeguards. The issues dealt with at the Conference and South Africa's positions will have a direct bearing on our bid to be designated to the IAEA Board of Governors in June 1995.
- The Minister (Disarmament), Geneva who has been responsible for preparing and developing the South African position on the extension issue and who participates in the work of the Conference on Disarmament in Geneva. Mr Goosen has also done the preparations for and participated in the Preparatory Committee meetings which have been preparing for the April Conference. Most of the representatives from other countries will, as in the case of the previous PrepComs, be drawn from the delegations to the Conference on Disarmament in Geneva. This official will focus on the Plenary meetings of the Extension Conference and the meetings of the First Main Committee on Disarmament.
- An official from the Desk (Route MA80) which is responsible for Disarmament and Non-Proliferation Affairs.
- An official from the Atomic Energy Corporation (AEC), Dr Nic von Wielligh, who has extensive knowledge on safeguards and who would be able to focus on the work of the Third Main Committee dealing with peaceful uses of nuclear energy

It will be recalled that after the September 1994 IAEA General Conference the Minister instructed that a working group should be established to prepare South Africa's position on the NPT with a view to assisting South Africa's bid to be designated to the IAEA Board of Governors. This Group consists of Mr Abdul Minty, Amb Roux (Vienna) and Mr

P Goosen (Geneva). As was envisaged these persons are all included in the delegation.

The Department is reminded that it will be necessary to prepare credentials for the Delegation. New York will be able to establish whether it is necessary for credentials to be prepared for the entire delegation or for the leader only. New York should also make the necessary Hotel reservations as early as possible because it can be expected that the Conference will be attended by large numbers of delegations.

### 3.5 SOUTH AFRICA'S LEGAL OPINION

As the Mission in New York will recall the UNGA 49 adopted a Nigerian resolution in terms of which the Secretary General of the UN is requested to compile a document of legal interpretations of Article X.2 of the NPT for distribution at the Review and Extension Conference. According to our information states Parties have until 1 March 1995 to submit their interpretations to the secretariat.

### 4. ANNEXURE 1 : SOUTH AFRICAN LEGAL OPINION ON ARTICLE X.2 OF THE NPT

#### QUOTE

#### **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