

**BILATERAL AGREEMENTS PROVIDING
NEGATIVE SECURITY ASSURANCES TO
STATES PARTY TO THE
NUCLEAR NON-PROLIFERATION TREATY**

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After several years of quiescence, it appears that the issue of negative security assurances will become a more prominent and contentious issue during and after the 1990 Nuclear Non-Proliferation Treaty (NPT) Review Conference. During the negotiation of the Nuclear Non-Proliferation Treaty, the non-nuclear weapon states maintained that the Treaty should include negative security assurances from the nuclear weapons states, promising that the non-nuclear weapon states would not be subject to nuclear attack if they ratified the NPT.

Such assurances were not included in the NPT, but the United States, United Kingdom and the Soviet Union undertook to deal with the issue in some other form. The issue of negative security assurances remains linked to the NPT regime, however, and has been considered at prior NPT Review Conferences.

The United States issued its current statement on negative security assurances on June 12, 1978, at the UN General Assembly Special Session on Disarmament. The declaration reads:

The United States will not use nuclear weapons against any non-nuclear weapons state party to the NPT or any comparable internationally binding commitment not to acquire nuclear explosive devices, except in the case of an attack on the United States, its territories or armed forces, or its allies, by such a state allied to a nuclear-weapons state or associated with a nuclear-weapons state in carrying out or sustaining the attack.¹

¹ [1978] Digest of United States Practice in International Law 1610.

1. Criticisms of the Present Policy

This policy was reaffirmed at the 1980 and 1985 NPT Review Conferences, but dissatisfaction with it is common among Third World NPT parties. The most frequently stated criticisms are that the nuclear weapons states have not complied with their obligation to develop a common formula for negative security assurances, and that the existing assurances are not legally binding.

The latter of these criticisms also lends itself to the charge, made by NPT opponents, that the Treaty regime is discriminatory. While the NPT legally binds non-nuclear weapons states not to obtain nuclear explosives, and enforces that obligation through IAEA safeguards, the nuclear weapon states appear unwilling to enter into an equally binding commitment not to attack the non-nuclear weapon states with the weapons only they are permitted to retain.

Charges that the NPT regime discriminates in favor of the nuclear weapons states, and that those states have not even lived up to the obligations they do incur under the NPT, will arouse increasing interest as the time to decide on NPT extension comes closer. There may therefore be a connection between the increased visibility of negative security assurances and the approach of the 1995 extension conference. Anything that might be done to defuse this issue could have a favorable impact on the Treaty's future.

An earlier report on this issue² considered a number of possible ways the United States might respond to it during and after the 1990 NPT Review Conference. The present paper will examine, in more depth, one of the proposals discussed there, the adoption of bilateral agreements with non-nuclear weapon states.

2. Bilateral Agreements Policy as a Partial Solution

In the absence of any serious movement towards a common policy on negative security assurances with the USSR, the United States government could undertake a simple, constructive unilateral measure by adopting a general policy of willingness to conclude bilateral agreements on negative security assurances with non-nuclear weapon states party to the NPT. This would involve no change in existing United States policy on the use of nuclear weapons, as declared in 1978.

Rather, it would change the form in which that policy is expressed, to take account of the apparently unequal nature of the obligations assumed by the non-nuclear and nuclear weapons states (binding treaty vs. statement of policy). Even if Egypt, Nigeria and the other proponents of legally binding negative security assurances refused to enter into such agreements, the fact that the United States had declared itself willing to do so would take much of the steam out of their complaint that the

² B. Carnahan, UNITED STATES POLICY ON NEGATIVE SECURITY ASSURANCES: A REASSESSMENT (1989). The Executive Summary of that report appears as Annex B.

nuclear weapon states were unwilling to express their assurances in a legally binding form.

If such agreements were entered into, a two-tiered set of negative security assurance obligations would result. Those that had been reduced to agreement would be formally binding in international law, while all other non-nuclear weapon states would benefit from the general policy first enunciated in 1978.

The actual agreements could take the simple form of an exchange of diplomatic notes. The United States' negative security assurance formula could be incorporated by reference rather than being repeated, making them very short indeed (see Annex A). Incorporation by reference would be the preferred drafting technique in most cases anyway. Egypt, Nigeria and other vocal critics of the negative security assurances situation are all members of the neutral and non-aligned movement, and would undoubtedly object to inclusion of language from the American formula raising the possibility that they might someday be "allied . . . or associated with" a nuclear weapon state in an attack on another nuclear weapon state.

3. Advantages of Bilateral Agreements: Reinforce Link to the Future of the NPT

It is normal practice to include provisions on duration in international agreements, whether multilateral or bilateral. This practice would allow the United States, in the context of bilateral agreements on negative security assurances, to formally

underline the direct link between such assurances and the continued viability of the NPT (see suggested language in the Annex A). This would serve to remind those NPT parties who might be leaning towards limiting the extension of the Treaty after 1995 of yet another way in which the existence of the NPT increases their own security.

Again, this benefit might be obtained in considerable measure even if few or no such agreements are actually concluded. The inclusion of appropriate language in a United States draft, furnished to interested states, might make the point equally well that all negative security assurances are directly tied to the continued force of the NPT regime.

4. Advantages of Bilateral Agreements Policy over a Multilateral Treaty on Negative Security Assurances

The negotiation of a multilateral treaty on negative security assurances has been the subject of desultory discussion in the Conference on Disarmament since 1980, but little progress has been made, due largely to differences between the Soviets and the Western nuclear powers over the formula to be adopted. Even if agreement could be reached in the CD on a treaty using American language on negative security assurances, however, a policy of concluding bilateral agreements would be preferable to a multilateral convention for several reasons.

4.1 Assurances Would Be Limited to Countries the United States Recognizes and With Whom We Have Diplomatic Relations

By their nature, bilateral agreements on negative security assurances could only be entered into with states recognized by the United States. As a practical matter, they would probably be concluded only with those recognized states who maintain diplomatic relations with us. In the case of a multilateral convention, on the other hand, any government meeting whatever criteria are set out in the convention could deposit an instrument of ratification or accession. A multilateral convention on negative security assurances might, for example, be open only to states party to the NPT.

For the United States, this problem would be most acute in the case of North Korea, which is now a party to the NPT. If North Korea ratified a multilateral convention on negative security assurances, to which we were also a party, this might weaken the credibility of our policy of nuclear deterrence in the Korean peninsula. We could, of course, claim that we had no treaty obligations to North Korea under such a convention because we do not recognize it as a state. Logically, however, the United States would then have difficulty explaining why we regard North Korea as bound by the NPT.

4.2 The United States Would Increase Its Flexibility in Creating and Terminating Negative Security Assurances

A general policy of concluding negative security assurance agreements with NPT parties would not obligate the United States

to actually conclude an agreement with any particular country. We could thus avoid giving legally binding assurances to countries whose actual compliance with the NPT is questionable, such as Iraq.

If such a state approached us and requested the conclusion of an agreement, this would provide an opportunity to seek additional assurances of NPT compliance. The United States might condition the actual conclusion of an agreement on the other party's acceptance of additional verification measures.

5. Could Nuclear Weapons Credibly Deter Chemical Attacks?

We would also have the option of withholding an agreement for other reasons related to security and arms control. For example, if the United States eventually destroys its deterrent stockpile of chemical weapons under a multilateral chemical weapons convention or other arrangement, we might want to defer offering security assurances to NPT parties who appear to be seeking chemical weapons, such as Libya and Iraq. This would leave open the option of deterring the use of chemical weapons against U.S. forces by such countries by means of nuclear weapons.

If a country with which we had already entered into a security assurances agreement began to develop a CW capability, the United States could give notice of an intent to terminate the agreement. Because such agreements would be bilateral, the notice of intent could be given privately, in low key manner.

Without constituting a direct threat, such a notice would serve as a clear warning to the country concerned that its pursuit of chemical weapons could have adverse security consequences.

Finally, there is the unlikely contingency that a state with whom we had concluded a negative security assurance agreement might obtain a chemical weapons capability too rapidly for the United States to give notice of termination before its own forces were threatened by that capability. If that should occur, the United States could nevertheless threaten the use of nuclear weapons to deter a chemical attack.

This could easily be done, without violating any international obligations, by invoking the doctrine of belligerent reprisal. Under this principle, a state whose own armed forces have been attacked with an illegal weapon or in an unlawful manner³ may itself carry out a retaliatory attack using means that would otherwise violate some legal obligation. The retaliation need not involve the same weapon or means as was used in the attack that precipitated it.

³ The United States is on record that it regards the first use of chemical weapons to be a violation of international law even for states not party to the 1925 Geneva Protocol. See [1980] Digest of United States Practice in International Law 1026, 1031.

6. Conclusion

In summary, a policy of offering to conclude bilateral negative security assurance agreements with individual NPT parties would allow the United States to counter some of the main criticisms of our current NSA policy at little or no political or military cost. Such a policy would give us far more flexibility than would a multilateral NSA agreement, and could serve as a useful adjunct to our efforts to maintain the vitality of the NPT regime beyond 1995.

ANNEX A

I have the honor to refer to the United States declaration of June 12, 1978, on negative security assurances to non-nuclear weapon states, issued by Secretary of State Vance to the Special Session on Disarmament of the United Nations General Assembly.

Upon your acceptance, the United States will regard that declaration as legally binding in its relations with _____, and this exchange of notes will constitute an international agreement for that purpose between our governments. This agreement will continue in force so long as both parties remain bound by the Nuclear Non-Proliferation Treaty of 1968. It may be terminated by either party on three months' notice.⁴

(Complementary close.)

⁴ Because parties may withdraw from the NPT on three months' notice (Article X, paragraph 1), that period seems appropriate for an agreement closely linked to the NPT regime; more recent arms control agreements have adopted a six month notice period.

ANNEX B

UNITED STATES POLICY ON NEGATIVE SECURITY ASSURANCES: A REASSESSMENT

Executive Summary

During the negotiation of the Nuclear Non-Proliferation Treaty (NPT), the United States, Great Britain and the USSR indicated that if the negotiations were successful they would offer assurances against nuclear attack to the non-nuclear weapon states party to the treaty. On the basis of these statements, the demand for including such assurances in the text of the Treaty itself was dropped by those non-nuclear weapon states that had been insisting on it.

Thereafter, each nuclear weapon state issued its own negative security assurance (NSA) in the form of a statement of policy. The United States issued its NSA statement in 1978. Some of these statements are mutually inconsistent, and it has proven impossible for all the nuclear weapon states to agree on a common formula that could be reduced to a legally binding treaty. The non-nuclear weapon states have regularly complained about this situation at NPT Review Conferences and in other forums, and have called for the conclusion of a legally binding NSA commitment by the nuclear weapon states.

Some of the non-nuclear weapon states may intend to make this matter a major issue at the Fourth NPT Review Conference in 1990. Indications of this intent have been seen in both the Review Conference Preparatory Committee and at the 1989 Nonaligned Summit meeting.

While it is too late to negotiate a common NSA agreement before the 1990 NPT Review Conference, there are several alternative actions the United States could undertake to upgrade the status and importance of its own NSA statement. These actions are:

- Unilaterally declare the our NSA to be legally binding;
- Offer to enter into bilateral NSA agreements with non-nuclear weapon state NPT parties;
- Enter into a binding agreement with the UK on NSA;
- Issue a Presidential Executive Order on our NSA policy;
- Reissue the NSA in a Presidential message.

Taking one or more of these actions could, at no significant cost to American security, signal to the non-nuclear weapon states that the United States regards their security concerns as politically important. Finally, the United States should make it clear at the Conference that our NSA policy only applies to states in compliance with their NPT obligations.