NPT, Where Art Thou? The Nonproliferation Treaty and Bargaining: Iran as a Case Study

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I. INTRODUCTION

In the past two years, the world has witnessed two significant nuclear proliferation problems unfold. In early 2003 North Korea withdrew from the Treaty on the Non-Proliferation of Nuclear Weapons1 ("NPT")—the legal instrument that occupies center stage in the international nonproliferation regime—and later admitted to manufacturing nuclear weapons.2 Iran poses a different kind of problem. On the one hand, Iran remains a signatory to the NPT, claims that its pursuit of nuclear technology is for peaceful purposes only, and—after some deception—appears to have substantiated its claim by submitting to intrusive inspections of its nuclear facilities.3 On the other hand, since its revolution in 1979, Iran has been governed by religious clergymen prone to putting ideology ahead of national interests and generally has been hostile to the interests of the United States. It has also been linked to terrorist activity4 and has acquired advanced ballistic missile technology from North

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1 Treaty on the Non-Proliferation of Nuclear Weapons (1970), 21 UST 483 (hereinafter NPT).
2 James Brooke and David E. Sanger, North Koreans Say They Hold Nuclear Arms, NY Times A16 (Feb 11, 2005).
Korea (and perhaps China). Furthermore, in the wake of Iran's brutal war with Iraq in the 1980s, high-ranking Iranian officials indicated that the acquisition of nuclear weapons is consistent with Iranian security needs.

Given Iran's more troublesome attributes, Europe and the United States wish to prevent it from acquiring nuclear weapons and following in North Korea's footsteps. The Western democracies are particularly worried about Iran's nuclear ambitions because it seeks to control the nuclear fuel cycle—the process used to convert uranium ore into enriched uranium and, after using the enriched uranium as fuel in a nuclear reactor, to reprocess the spent fuel in order to extract the unconsumed portion of uranium. The Iranian government claims that it wants to enrich uranium only for its civilian nuclear reactors and for research purposes, and correctly asserts that this right is granted by the NPT. Control of the fuel cycle, however, makes it easier for a state to pursue a clandestine nuclear weapons program and makes it more difficult for other countries to "coerce or influence" that state through supply-side disincentives. Thus, the Western democracies are left with a choice between relying on the NPT's nonproliferation regime, allowing Iran to control the fuel cycle, or somehow forcing or convincing Iran to forego its legal right to enrich uranium.

Relying solely on the current nonproliferation regime may be undesirable. The NPT and the associated safeguards system created by the International Atomic Energy Agency ("IAEA") make it more costly for a state to develop a clandestine nuclear program, but a country like Iran may be willing to incur this...

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7 Stephen Fidler, Roula Khalaf, and Gareth Smyth, *Doubts Persist over Tehran's True Intentions regarding Its Nuclear Programme*, Fin Times 17 (Sept 9, 2004) (quoting a member of Iran's parliament stating that "the IAEA has now had time to verify Iran's position, and we can now insist on our right to enrich uranium.").


9 Fathi, *Citing Peaceful Uses*, NY Times § 1 at 6 (cited in note 3).

10 Cahn, *Determinants of the Nuclear Option* at 189 (cited in note 8). The nuclear fuel cycle provides two avenues for acquiring weapons-grade material: plutonium and highly-enriched uranium. As Cahn points out, it is much easier to chemically separate weapons-grade plutonium from spent nuclear fuel than it is to create highly-enriched uranium in the first instance. Thus, "[i]f a nation wishes to pursue a nuclear option it is clear that it will seek self-sufficiency with respect to all steps of the nuclear fuel cycle," for example, the reprocessing of spent fuel. Id. For a good summary of the technical issues, see Richard L. Williamson Jr., *Law and the H-Bomb: Strengthening the Nonproliferation Regime to Impede Advanced Proliferation*, 28 Cornell Int'l L J 71, 77-82 (1995).
cost in exchange for greater security, regional influence, or national prestige. The same country also may wish to develop civilian nuclear power for legitimate economic reasons. Iran, for example, may seek to reduce the opportunity cost of consuming its oil and natural gas domestically—as opposed to exporting them—in order to meet its rising energy demand. Iran also may wish to develop a robust civilian nuclear sector to diversify and modernize its economy and provide jobs for its rapidly growing workforce.

In this Development, I argue that the NPT cannot effectively deter nonproliferation on its own terms, nor can it do so by virtue of establishing a "nonproliferation norm." Instead, because of its broad language, the security uncertainties characteristic of the post–Cold War geopolitical landscape, and the desire of nuclear weapon states to maintain their monopoly, the NPT is able to deter nuclear proliferation only insofar as it encourages bargaining between "threshold states" and more powerful countries dissatisfied with the NPT's

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11 There is much debate in the political science literature regarding the causes of nuclear proliferation. One school embraces only national security as a cause and rejects other "nonrealist" notions like national prestige. See, for example, Bradley A. Thayer, The Causes of Nuclear Proliferation and the Utility of the Non-Proliferation Regime, in Thomas, ed, The Nuclear Non-Proliferation Regime 75, 76, 99–101 (cited in note 6). Other scholars believe there is a more complex set of causes. See, for example, Scott D. Sagan, Why Do States Build Nuclear Weapons? Three Models in Search of a Bomb, 21 Ind Security 54 (Winter 1996–1997) (exploring causes other than national security, such as domestic politics and national identity).

12 See Akbar Etemad, Iran, in Harald Müller, ed, A European Non-Proliferation Policy 203, 209–10 (Oxford 1987) (stating that before Iran's 1979 revolution, the Iranian government had concluded that reliance on nuclear power generation was necessary to meet the country's rapidly expanding energy needs). Etemad also states that despite its postrevolution economic depression, Iran's expanding population and rural electrification efforts have maintained a high demand for "energy of all kinds." See also Iran to Increase Electricity Capacity by 3,000 Megawatts, Persian Journal (Nov 24, 2004), available online at <http://www.iranian.ws/iran_news/publish/article_4606.shtml> (visited Feb 22, 2005) (stating that Iran currently imports more electricity than it exports).

13 Interview with Joseph Cirincione, Senior Associate and Director, Non-Proliferation Project, Carnegie Endowment for International Peace, Chicago Public Radio's Worldview program (Nov 19, 2004), audio file available online at <http://www.chicagopublicradio.org/audio_library/wv_ranov04.asp#19> (visited Jan 22, 2005) (stating that Iran believes it would gain an "economic benefit" if it controlled the entire fuel cycle).


15 The phrase "threshold state" has been used to describe countries that are within reach of the technological means to develop nuclear weapons and that must decide whether or not to accelerate or abandon their programs. See, for example, Shibashis Chatterjee, Nuclear Non-Proliferation and the Problem of Threshold States 16–17 (Minerva 1999).
default rule of allowing uranium enrichment. In other words, the NPT's effectiveness does not lie in its legal prohibition on nuclear weapon development; rather, its effectiveness stems from providing a broad baseline against which states can bargain. Section II provides a background on the nonproliferation framework under the NPT and examines why it enables bargaining. Section III highlights Iran's particular case and some probable characteristics of states willing to attempt this type of bargaining. A brief conclusion follows in Section IV.

II. THE NPT'S NONPROLIFERATION REGIME

The NPT is generally regarded as the centerpiece of the nuclear nonproliferation regime—the main instrument of international law aimed at controlling the spread of nuclear weapons. Originally set to expire after twenty-five years, in 1995 the signatories to the NPT approved its indefinite renewal. Its central aim is to prevent the spread of nuclear weapons to states that did not possess them at the time of its inception, while also allowing those states to enjoy the benefits of peaceful nuclear energy. The goal of giving countries access to nuclear energy in exchange for placement of their nuclear programs under a system of international inspection is sometimes termed the “grand bargain” of the NPT.

A. THE NPT'S LEGAL FRAMEWORK

The NPT creates two separate categories of nations: nuclear weapon states—countries that “manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967”—and nonnuclear weapon states. Under Articles I and II of the treaty, nuclear weapon states agree not to transfer or assist in the development of “nuclear weapons or other nuclear explosive devices,” and nonnuclear weapon states agree not to receive or seek...

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16 It is worth mentioning here that this Development is intended as a positive account of how the NPT seems to be operating in today's world, and is not intended as a normative stance on the NPT's soundness as an instrument of international law.

17 There are several other bilateral and regional security agreements that fall within the nonproliferation regime. For a concise summary, see Williamson, 28 Cornell Int'l L J at 118–21 (cited in note 10).


19 Traub, The Netherworld of Nonproliferation, NY Times ¶ 6 at 49 (cited in note 3).

20 NPT, art IX, ¶ 3 (cited in note 1).
the same.\textsuperscript{21} Article III compels nonnuclear weapon states to enter into a subsidiary agreement with the IAEA, accepting the latter’s safeguards system for “the exclusive purpose of verification of the fulfillment of its obligations assumed under” the NPT to prevent “diversion of nuclear energy from peaceful uses to nuclear weapons.”\textsuperscript{22} In exchange, Article IV of the NPT provides that nonnuclear weapon states are granted the “inalienable right . . . to develop research, production and use of nuclear energy for peaceful purposes without discrimination.”\textsuperscript{23} It is this text in Article IV that grants nonnuclear weapon states the right to control the nuclear fuel cycle. The NPT also contains an exit provision; under Article X a nonnuclear weapon state, with three months notice to the other parties, can exit the treaty if “extraordinary events” jeopardize that state’s “supreme interests.”\textsuperscript{24}

As noted, the IAEA is the agency empowered by the NPT to establish and apply safeguard mechanisms. It seeks to accomplish the NPT’s twin aims of preventing the diversion of peaceful nuclear energy to the production of nuclear weapons and providing assistance for the development of peaceful nuclear technology.\textsuperscript{25} To fulfill its requirement of accepting IAEA safeguards, a nonnuclear weapon state must complete negotiations with the IAEA within two years of ratifying the NPT.\textsuperscript{26} The result of the negotiations is a detailed agreement typically requiring the nonnuclear weapon state to establish an accounting system for various types of nuclear material\textsuperscript{27} and to inform the agency about any nuclear facilities.\textsuperscript{28} The agreement also establishes the process and scope of inspections.\textsuperscript{29} If a nonnuclear weapon state violates its agreement

\textsuperscript{21} Id, arts I, II.
\textsuperscript{22} Id, art III, ¶ 1, 2.
\textsuperscript{23} Id, art IV, ¶ 1.
\textsuperscript{24} Id, art X, ¶ 1.
\textsuperscript{26} NPT, art III, ¶ 4 (cited in note 1).
\textsuperscript{28} Id, arts 42–49.
\textsuperscript{29} Id, arts 70–82. A country may also agree to the IAEA’s “Additional Protocol,” which details more intrusive inspection practices. See Model Protocol Additional to the Agreement(s) Between State(s) and the International Atomic Energy Agency for the Application of Safeguards, IAEA Doc No INFCIRC/540, available online at <http://www.iaea.org/Publications/Documents/Infcircs/1998/infcirc540corrected.pdf> (visited Feb 22, 2005). Iran has signed the Additional Protocol. Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, IAEA Doc No
with the IAEA—by not disclosing the quantities of nuclear material or the location of nuclear facilities, for example—the agency can refer the matter to the UN Security Council, which in turn may impose sanctions on the violating country.\footnote{IAEA Statute, art XII(C) (cited in note 25).}

\section*{B. The Nonproliferation Regime in Today's World}

Most commentators consider the NPT to be an overall success.\footnote{See, for example, Williamson, 28 Cornell Int'l L J at 122–28 (cited in note 10); David Sloss, \textit{It's Not Broken, So Don't Fix It: The International Atomic Energy Agency Safeguards System and the Nuclear Nonproliferation Treaty}, 35 Va J Int'l L 841, 845 (1995) (refuting criticisms that the IAEA safeguards system lacks robustness); Simpson and Howlett, \textit{The Future of the Non-Proliferation Treaty} at 4–5 (cited in note 14).} Recent proliferation problems have sparked fresh criticism, however.\footnote{See, for example, Woodard, 25 NC J Int'l L & Comm Reg at 368 (cited in note 18) (arguing that the current safeguards system is limited because a given technology can serve both civilian and military purposes); Traub, \textit{The Netherworld of Nonproliferation}, NY Times § 6 at 49 (cited in note 3) (stating that “the bargain enshrined in the [NPT] . . . is effectively defunct” because the “threshold issue” in nonproliferation is uranium enrichment); Fidler, Khalaf, and Smyth, \textit{Doubts Persist over Tebran's True Intentions}, Fin Times at 17 (cited in note 7) (stating that diplomats consider “the permission to enrich for peaceful purposes . . . as an inherent weakness” in the NPT).} With regard to the problem of threshold states, three features of the NPT's nonproliferation regime are of particular relevance. The first concerns the NPT's broad language, and is well stated by Rathjens:

Nothing in the [NPT] prohibits a state from developing indigenous capacities for the production of fissionable materials or producing and stockpiling such materials or other components that might be used in nuclear weapons. These lacunae are particularly troublesome because the development of facilities for uranium enrichment and spent fuel processing . . . can be rationalized, albeit with greatly varying degrees of credibility, as being consistent with non-military nuclear power aspirations.\footnote{George Rathjens, \textit{Nuclear Proliferation Following the NPT Extension}, in Thomas, ed, \textit{The Nuclear Non-Proliferation Regime} 25, 26–27 (cited in note 6).}

Rathjens captures the inherent tension in the NPT: by allowing indigenous production capabilities, including control of the fuel cycle, the NPT allows nonnuclear weapon states to reach the brink of developing nuclear weapons while still operating within their treaty obligations. A country can therefore legitimately stockpile nuclear material, withdraw from the NPT using the Article X exit provision, and declare itself a nuclear power.\footnote{Id at 27.}
Second, the NPT’s perceived successes must be analyzed in the post–Cold War context. During “their worldwide competition for influence,” the United States and the Soviet Union entered into security arrangements with many countries, which in turn reduced the incentive for those countries to pursue nuclear weapons. This “bipolarity” ended with the Cold War, making security arrangements in various regions more uncertain. Uncertainty with regard to security, in turn, will probably lead a greater number of states to conclude that nuclear weapons are consistent with their security interests—such weapons will be perceived as a way to ensure security and regional influence “in an anarchic world.”

Third, some view the NPT not as a global effort to halt the spread of nuclear weapons for the good of humanity, but as a tool of the nuclear “haves” to maintain their monopoly on nuclear weapons. In other words, nuclear weapon states desire nonproliferation not for its own sake, but also to ensure their own security and military superiority by being the only states legally allowed to possess nuclear weapons. It follows that the nuclear weapon states have more at stake with respect to nonproliferation than do nonnuclear weapon states. Therefore, it is unlikely that nuclear weapon states will submit to the NPT’s default rule of allowing uranium enrichment by nonnuclear weapon states.

These three features—the NPT’s broad language, uncertainties regarding security in the post–Cold War geopolitical landscape, and the nuclear weapon states’ self-interest—allow countries to bargain their right to enrich uranium under the NPT in exchange for more favorable economic or security arrangements. This “bargaining option” is available to countries that have no interest in ultimately developing nuclear weapons, and it allows countries to avoid the negative diplomatic consequences and possible sanctions associated with outright withdrawal from the NPT. Iran, whether or not it eventually seeks to develop nuclear weapons, seems to be pursuing the bargaining option with some degree of success.

35 Id.
36 Thayer, The Causes of Nuclear Proliferation at 78 (cited in note 11).
37 Id at 103. See also Daniel I. Okimoto, Japan’s Non-Nuclear Policy: The Problem of the NPT, 15 Asian Survey 313, 315 (1975) (stating that Japan delayed signing the NPT partially because it perceived “a joint US-USSR desire to freeze the world’s military status quo” and that the NPT’s ultimate aim was “the perpetuation of the present structure of superpower hegemony.”).
38 Thayer, The Causes of Nuclear Proliferation at 112 (cited in note 11).
39 Currently, Iran is in talks with France, Germany, and the UK (by way of an IAEA steering committee) to determine a final incentives package in return for Iran halting all uranium enrichment activity. IAEA Press Release, Iran–EU Agreement on Nuclear Programme (Nov 14, 2004), available online at <http://www.iaea.org/NewsCenter/Focus/IaeaIran/eu_iran14112004.shtml>
III. WHAT KINDS OF STATES WILL BARGAIN NPT RIGHTS?

Are the security uncertainties resulting from the end of Cold War-era bipolarity, by themselves, enough to ensure that more threshold states are on the horizon? Probably not, although shifting alliances and continuing regional instabilities weigh heavily in favor of this proposition. Iran’s case is instructive, however, because it illustrates other characteristics that are typical of a country able to use its NPT enrichment rights to pressure nuclear weapon states to bargain. These attributes may prove useful in predicting whether a country will be motivated to engage in enrichment bargaining.

First, the threshold state will not merely have security concerns, but it will have legitimate security concerns coupled with a concurrent need to grow its economy. This is a straightforward consequence of cost justification—in order to trade NPT enrichment rights, a state must acquire the means to enrich. This includes specialized technology and trained personnel, and is very costly. If a state undertakes this enterprise for the sole purpose of trading NPT rights for economic incentives and the bargain never materializes, the costs would far exceed the benefits of domestic enrichment capabilities. On the other hand, if the state also is in a precarious security position, enrichment technology gives it the ability to create nuclear weapons. This is a large benefit because it can be realized without actual weapons production; merely having the capability to build nuclear weapons may tip the geopolitical scales in the state’s favor.

Iran meets this first criterion. While it has large oil and natural gas reserves, its economy was decimated during its eight-year war with Iraq in the 1980s. At the end of the war, a population boom doubled Iran’s size from 35 million in 1979 to nearly 70 million today. As a result, 70 percent of Iran’s citizens are under the age of thirty, creating a great need for job growth. In addition to its

(visited Feb 22, 2005). Meanwhile, US policy objectives remain somewhat ambiguous. On the one hand, the US has agreed to support “limited” incentives—including allowing the sale of spare aircraft parts to Iran and dropping its objections to Iran’s efforts at joining the WTO—in return for the Europeans’ commitment to refer Iran to the UN Security Council should it resume enrichment. Carla A. Robbins, US to Back Incentives For Iran to Shift Course, Wall St J A12 (Mar 11, 2005). On the other hand, there are reports of secret US reconnaissance missions in Iran intended to yield targets for possible military strikes against Iranian nuclear facilities. See Seymour M. Hersh, The Coming Wars: What the Pentagon Can Now Do in Secret, The New Yorker 40, 42–43 (Jan 24, 2005). Indeed, in attempting to provide a “stick” to go along with the Europeans’ “carrot,” the ambiguous US approach is not wholly inconsistent, and is in itself part of the bargaining process.

40 Etemad, Iran at 210 (cited in note 12).
41 Index Mundi, Iran Population, available online at <http://www.indexmundi.com/iran/population.html> (visited Feb 22, 2005).
economic needs, Iran’s security situation is precarious; it is surrounded by four of the world’s eight nuclear powers—Pakistan and India to the east, Russia to the North, and Israel to the west.43 Further, Iran is made nervous by the substantial presence of the United States military in Afghanistan and Iraq, Iran’s direct neighbors to the east and west.

Moreover, a threshold state probably will be at odds politically with the Western democracies. This is related to the first characteristic—it is the Western democracies that, for the most part, can provide the economic concessions and security guarantees that would cost justify the entire enterprise. A country seeking a more favorable economic position or a better security arrangement presumably would pursue such goals using diplomatic channels if possible, since diplomacy is far less costly than trading uranium enrichment rights. Furthermore, acquiring the means to enrich uranium carries with it adverse diplomatic consequences because the state will be criticized for wishing to “go nuclear.” While this reputation cost will be less for a state with favorable relations with the West (those with good relations are less likely to criticize each other diplomatically), it nevertheless weighs against a state resorting to bargaining enrichment rights if it has other means of bargaining available.

Iran is a good example of such a state. Its revolution in 1979 resulted in the overthrow of a monarchy, the establishment of a quasi-democracy framed within an Islamic theocracy, and the end of any meaningful diplomatic relations with its one-time ally, the United States. A series of diplomatic and foreign policy missteps by both sides, both at the time of the Iranian revolution and afterwards, have further damaged an alliance of strategic importance to both countries.44 In addition, Iran’s poor foreign policy choices throughout the 1980s,45 coupled with the United States’ influence in discouraging other nations from dealing with Iran, resulted in Iran’s relatively poor relations with other industrialized nations. Iran has been active in repairing its diplomatic relations with Europe in the last several years, but only the United States can provide the security guarantees that Iran seeks.46

43 Arnaud de Borchgrave, Tough Nuclear Neighborhood, Wash Times (Oct 27, 2004), available online at <http://washingtontimes.com/commentary/20041026-090659-7596r.htm> (visited Feb 22, 2005). It should be noted that Pakistan, India, and Israel are not signatories to the NPT, so they are not “nuclear weapon states” as the term is defined within the NPT.


45 Including, for example, Iran’s promise to export its 1979 revolution to the entire Muslim world, and the order issued by Iran’s former supreme leader, Ayatollah Khomeini, calling for the assassination of author Saiman Rushoe.

46 Interview with Joseph Cirincione (cited in note 13) (stating that the key to any deal with Iran is US approval, since “only the US can provide the security guarantees that Iran wants”).
The attributes mentioned thus far—the concurrent need for both economic growth and a better security arrangement, along with unfavorable relations with the Western democracies—are also true of North Korea. Thus one might ask why Iran and North Korea pose different problems, as I initially claimed. From the point of view of the United States, the two pose radically different diplomatic problems because North Korea has nuclear weapons and Iran does not (yet). From another point of view, North Korea and Iran are different only insofar as they weighed differently the relative benefits of security and economic incentives. In other words, North Korea found the benefits of security to outweigh the probable economic or security incentives provided by the United States, whereas Iran seems to have placed a greater emphasis on economic incentives, at least for the moment.

IV. CONCLUSION

By virtue of the IAEA safeguards system, the nonproliferation regime established by the NPT is intricate and makes it costly for a nonnuclear weapon state to successfully cheat by establishing a clandestine nuclear weapons program. The NPT's broad language, however, gives countries the legal right to enrich and reprocess uranium for peaceful purposes. This default rule is unfortunate for countries that wish to prevent nuclear weapon proliferation because enrichment technology can be easily used to manufacture nuclear weapons, and some countries are willing to incur the costs of cheating. Furthermore, some countries may use the threat of cheating to bargain for economic and security concessions from wealthier nations that wish to maintain the nuclear status quo.

Solely criticizing the broad language of the NPT is tempting, but doing so places too much emphasis on the normative value of nonproliferation and too little emphasis on states’ self-interest. Such criticism also suffers from hindsight bias; as a matter of political reality, the NPT would have enjoyed little credibility had it sought to restrict the right to develop peaceful nuclear technology. This would have been seen as an attempt by the nuclear weapon states to retain a monopoly on all nuclear technology and would have discouraged countries from signing the NPT in the first place.

Conceptualizing the issue as one of bargaining, however, better captures the true state of affairs—states can contract around legal rights that they have acquired through multilateral agreements. Under this view, the NPT does not serve to establish legal norms, but rather gives parties a baseline from which to bargain. Further, regional security uncertainties resulting from the Cold War’s end will spur more countries to capitalize on their NPT rights because uranium enrichment will either provide security or enable them to negotiate for better economic and security terms. Therefore, bargaining with threshold states is likely...
to increase over time. This is not necessarily bad—providing economic and security incentives in exchange for nonproliferation may be more effective than solely relying on multilateral treaty regimes. Of course, the success of bargaining between states is a matter of politics, not law; thus the sustainability of a nonproliferation bargaining regime will ultimately depend on how much it is valued by political leaders.

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47 David A. Koplow and Philip G. Schrag, *Carrying a Big Carrot: Linking Multilateral Disarmament and Development Assistance*, 91 Colum L Rev 993, 994 (1991) ("In short, the wealthy countries, which stand to benefit the most from the establishment of a more stable international military environment, should be willing to pay for it.")