
Preparatory Committee for the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons

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Fissile material cut-off treaty

Provisions regarding implementation of the treaty over time: duration, entry into force and withdrawal

Working paper submitted by Canada and Spain

Introduction

1. In recent years, negotiating a treaty to ban the production of fissile materials for nuclear weapons and other explosive devices, known as the fissile material cut-off treaty, has been a priority in multilateral nuclear disarmament and non-proliferation circles. For the undersigned countries, the treaty continues to be the priority, a necessary step towards the goal of general and complete disarmament enshrined in article 6 of the Treaty on the Non-Proliferation of Nuclear Weapons.

2. The lack of a mechanism able to put a stop to the production of fissile material for nuclear arms, once and for all, is a major loophole in the non-proliferation system. This is why, in spite of many failures at the Conference on Disarmament, we must not lose sight of the goal of a non-discriminatory, multilateral and internationally and effectively verifiable treaty regulating this area, as set forth in General Assembly resolution 48/75 of 16 December 1993, and we must continue to make constructive and substantial contributions within the framework of the Conference on Disarmament or other forums. The submission of views on a fissile material cut-off treaty to the Secretary-General in 2013 and the group of governmental experts in 2014 and 2015, as provided for in General Assembly resolution 67/53 of 3 December 2012, will represent opportunities to continue our efforts towards this goal.

3. Within the scope of the fissile material cut-off treaty, the attention given to the triangle of “definitions, scope and verification” has sidelined certain other aspects that are no less important to the effectiveness of the future treaty. It is worth noting here that there are legal aspects, such as the duration of the treaty, a mechanism for its entry into force and clauses for withdrawal. Although these issues have received less attention, the existing doctrinal corpus, which encompasses a wide range of alternatives, enables us to take stock of the state of play.



4. The present document aims to be a non-comprehensive synthesis of these viewpoints. Nothing could be farther from its aim than to exclude other possible alternatives that, although not considered to date, could arise in the course of future negotiations. The countries undersigned (Spain,...) would like to make a modest contribution to the debate on essential issues for the treaty, without prejudging results, but without sidestepping the challenge of expressing their own preferences.

Duration of the future fissile material cut-off treaty

5. According to article 42.2 of the Vienna Convention on the Law of Treaties, “The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty”.

6. There are two basic alternatives: for the treaty to include a clause stipulating a certain duration, or for it to have an indefinite duration, in which case this could be achieved through a specific clause or the mere omission of any reference to the issue. Two examples of both options can be found in two treaties that constitute essential reference points in this field: the Non-Proliferation Treaty and the Comprehensive Nuclear-Test-Ban Treaty.

7. The Non-Proliferation Treaty was originally to have a duration, after its entry into force, of 25 years, and it was not until the 1995 Review Conference that it was possible to make it an instrument having an unlimited duration. On the contrary, the Comprehensive Nuclear-Test-Ban Treaty, which has yet to enter into force, includes a clause in its article IX.1 that states that its duration is unlimited.

8. Those who opt for the first choice (limited duration) are thinking about the essentially evolutionary nature of international society, so that whatever is agreed in a treaty on a certain date is not set in stone, becoming an impediment to subsequent advances in the future. Those who choose the second option (unlimited duration) are focused on the importance for global security of commitments acquired, so that limiting the time that they are in force would be the equivalent of taking away a great part of their meaning.

9. In the specific case of the fissile material cut-off treaty, the essential nature of banning the production of fissile material for nuclear arms leads us to believe that this commitment, once reached, should be of an indefinite nature. The holding of subsequent treaty review conferences, which could be stipulated according to the model enshrined by the Non-Proliferation Treaty and the Comprehensive Nuclear-Test-Ban Treaty, every five years would constitute instruments flexible enough to promote progress towards increasingly ambitious objectives, within the framework of the treaty itself.

Entry into force of the fissile material cut-off treaty

10. Pursuant to article 24 of the Vienna Convention on the Law of Treaties, a treaty enters into force in such manner and upon such date as it may provide, or as the negotiating States may agree.

11. One of the most controversial elements of the future fissile material cut-off treaty will probably be the mechanism for its entry into force. The aforementioned precedents — the Non-Proliferation Treaty and the Comprehensive Nuclear-Test-

Ban Treaty — offer disparate solutions: the Non-Proliferation Treaty entered into force in 1970, two years after its conclusion, following ratification by the three depositary States (Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and the United States of America) and 40 other States. The Comprehensive Nuclear-Test-Ban Treaty requires, pursuant to article XIV, ratification by 44 States (in accordance with a list included in annex 2 to the Treaty). To date, this has prevented its entry into force, as it has been ratified by only 36 of the 44 States listed in said annex 2.

12. In the case of the fissile material cut-off treaty, the options are: a merely quantitative criterion (whereby the treaty would enter into force once there are a number of ratifications sufficiently representative of the international community), or a qualitative criterion (granting more weight to States parties to the Non-Proliferation Treaty that possess nuclear weapons, as well as States that have not ratified the Non-Proliferation Treaty, to which other qualitative criteria could be extended: States possessing the full nuclear cycle, etc.). The rationale for this second criterion would consist in the undoubted importance of accession by all relevant stakeholders for the fissile material cut-off treaty to be fully effective. The main shortcoming of this system is that it could lead to an excessively rigid mechanism, and end up preventing said treaty from entering into force within a reasonable period of time.

13. For these reasons, it would be advisable to strike a balance between both criteria: quantitative and qualitative. This could be achieved by means of a gradual formula, one taking into consideration the different methods for entry into force of the different parts of the treaty (giving predominance to a qualitative criterion for commitments whose effectiveness depends on ratification by those possessing nuclear weapons); or adding new criteria to make the above more flexible, in the event that certain States parties fail to ratify (for example, automatic entry into force after a certain number of years).

Withdrawal from the treaty

14. Pursuant to article 54 of the Vienna Convention on the Law of Treaties, “The termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the other contracting States”. Going back to the treaties adopted as a reference in previous sections, both the Non-Proliferation Treaty and the Comprehensive Nuclear-Test-Ban Treaty have articles providing for the possibility of withdrawal from the treaty. The Non-Proliferation Treaty (article X.1) contains a clause similar to that once designed for the Partial Test-Ban Treaty, which establishes that notice of such withdrawal shall be given to all other Parties to the Treaty and to the United Nations Security Council three months in advance, and that such notice shall include a statement of the extraordinary events that the State opting for this procedure regards as having jeopardized its supreme interests.

15. Article IX.3 of the Comprehensive Nuclear-Test-Ban Treaty provides for a similar, albeit somewhat more rigid, mechanism to that of the Non-Proliferation Treaty: six months’ advance notice, simultaneously to all other States parties, the Executive Council, the Depositary and the United Nations Security Council, including a statement of the extraordinary event or events that a State party regards as jeopardizing its supreme interests.

16. In the case of the fissile material cut-off treaty, given the potential impact on global security of withdrawal by a State party from a treaty imposing the prohibition to produce fissile material for nuclear weapons, there could be two possibilities: not envisage any clause to this effect (this would necessarily imply reference to the subsidiary legislation contemplated in the aforementioned general international law), or design a sufficiently rigid mechanism in order to enable the other States parties to adopt an appropriate response.

17. Said strengthened mechanism could consist in one of the following measures, or in a combination thereof: the longest possible period for notification of withdrawal (for example, 6/9 months); justification, in writing, of the reasons relating to the treaty that have led the State in question to withdraw; simultaneous notification to more than one body (United Nations Secretary-General, President of the Convention, States parties, Secretary-General of the future fissile material cut-off treaty); calling, within a previously determined period of time, a meeting of States parties/review conference, of an extraordinary nature, to address this issue.
