

NSG Membership for India and Pakistan: Debating 'Critical' Aspects

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Abstract

The Nuclear Suppliers Group (NSG) is seized with membership applications of India and Pakistan. It is the first time in the history of the NSG that two non-State Parties to the Treaty on Non-Proliferation of Nuclear Weapons (NPT), and nuclear armed neighbours, are simultaneously vying to become NSG members. Owing to the complexity of the issue, the NSG has chosen a cautious path to discuss 'technical, legal and political' aspects of their membership in the broader context of non-NPT states before considering specific applications. This article begins by tracing the evolution of the NSG and the expansion in its membership to determine if non-NPT status and NSG membership are in anyway reconcilable. Its main section, then, examines several underlying issues within these 'critical' aspects. It concludes that the issue of NSG membership for India and Pakistan provides a rare opportunity that can not only help universalise global non-proliferation norms but may also contribute to stability in South Asia.

Keywords: Treaty on Non-Proliferation of Nuclear Weapons (NPT), Nuclear Safeguards, 2008 NSG Exemption, Non-proliferation Criteria, Enrichment and Reprocessing (ENR), Non-Nuclear-Weapon States (NNWS).

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Introduction

The Nuclear Suppliers Group (NSG), since its inception in 1975, has emerged as an important export control and non-proliferation arrangement. It regulates nuclear trade for peaceful purposes among its 48 members,¹ while ensuring through export control guidelines that nuclear transfers are not misused to develop nuclear weapon capabilities. It, thus, compliments and reinforces the objectives of the Treaty on Non-Proliferation of Nuclear Weapons (NPT). Despite its contribution to controlling proliferation of nuclear weapons, some of the NSG's decisions over the last decade have cast doubt on its credibility as a non-proliferation arrangement. The increasing criticism is based on the NSG's differential relationship with India and Pakistan – two non-NPT States that along with Israel never joined NPT and have developed nuclear weapons. The NPT recognises five States Parties (China, France, Russia, United Kingdom and the United States) as Nuclear Weapon States (NWS) and the remaining States Parties as Non-Nuclear-Weapon States (NNWS). Prior to 2008, the NSG countries did not have nuclear cooperation with India and Pakistan, barring limited cooperation between China-Pakistan and Russia-India permissible under NSG's 'grandfather' and 'safety' exceptions.² Generally, the NSG countries could not have civil nuclear cooperation with India and Pakistan due to their non-NPT status, and more specifically because they do not have Comprehensive Safeguards Agreement (CSA), with the International Atomic Energy Agency (IAEA). Instead both countries apply facility-specific safeguards on civil facilities.

¹ The NSG uses the terms of 'participation' and 'Participating Governments' for membership and members respectively in official documents. This article uses the latter terminologies for the sake of clarity and convenience.

² International Atomic Energy Agency, Information Circular 254/Rev.13/Part 1, "Communication received from the Permanent Mission of the Republic of Korea to the International Atomic Energy Agency regarding Certain Member States' Guidelines for the Export of Nuclear Material, Equipment and Technology," November 8, 2016, <http://www.nuclearsuppliersgroup.org/en/nsg-documents>. NSG Guidelines allow nuclear transfers by NSG members to non-CSA or non-NPT States under two exceptional circumstances: when nuclear transfers agreement has been contracted either before April 3, 1992 or, in later cases, when agreement contracted before a State declaring adherence to NSG Guidelines ('grandfather' exception) and when safe operation of a safeguarded civil nuclear facility is threatened ('safety' exception).

The NSG selectively reversed its three-decade old policy to allow nuclear trade with India in 2008 under a country-specific exemption from the CSA requirement,³ while continuing to maintain restrictions against Pakistan (and Israel).

The NSG is now seized with the 'membership' applications of India and Pakistan. This is an unprecedented situation for the NSG in several ways. It is the first time in the Group's history that two non-NPT nuclear-armed States are simultaneously vying to become its members. Both States have civil and military facilities, with overlaps in some cases, thus raising the original issue of 'diversion' from civil to military programmes. They also share a history of bilateral relations marred with wars, crises and unresolved territorial disputes. Nuclear weapons on both sides raise the spectre of a future conventional war spiralling into a nuclear exchange with global implications. These unique attributes make the NSG legitimately concerned about what the membership of India and Pakistan would mean for its own future as a multilateral export control arrangement.

In fact, the complexity of the issue has already prompted the NSG to tread a more cautious and deliberative path. Instead of directly considering specific applications, the NSG made an interim decision in 2016 to hold thorough discussions on 'technical, legal and political aspects' of the NSG membership for India and Pakistan, in the broader context of non-NPT States.⁴ The statement implies that the NSG is treating non-NPT States as a 'group problem' rather than dealing with each non-NPT State on case-by-case basis. These discussions are continuing with no decision in sight in the near future.⁵

³ International Atomic Energy Agency, Information Circular 734, "Communication Dated 10 September 2008 Received from the Permanent Mission of Germany to the Agency Regarding a 'Statement on Civil Nuclear Cooperation with India'," September 19, 2008, <http://www.nuclearsuppliersgroup.org/en/nsg-documents>.

⁴ Nuclear Suppliers Group, "Public Statement of NSG Plenary Meeting," press release, June 23-24, 2016, http://www.nsg-online.org/images/2016_Public_Statement_Final.pdf.

⁵ Nuclear Suppliers Group, "Public Statement of NSG Plenary Meeting," press release, June 22-23 2017, http://www.nsg-online.org/images/NSGPlenaryBernPublic_Statement_final.pdf; and Nuclear Suppliers Group, "Public Statement of NSG Plenary

The initial part of this article sets the context by tracing the origin and the evolution of NSG, as well as the expansion of its membership to determine if non-NPT status and NSG membership are in anyway reconcilable. It also discusses the relationship of India's 2008 NSG exemption with membership of non-NPT States. The main part of the article then examines three 'critical' aspects of NSG membership of non-NPT States.

Origin and Evolution of the NSG

The NSG was created as a direct consequence of India's first nuclear test in 1974. In violation of the 1956 bilateral civil nuclear cooperation agreement with Canada, India extracted plutonium from the Canada India Reactor Utility Services (CIRUS) reactor, for which heavy water was provided by the US, to conduct a so-called 'peaceful nuclear explosion' (PNE). Canada and the US fully understood (as did others) that a PNE was technologically no different from a nuclear weapon test.⁶ Itty Abraham explains that 'this reactor choice and the battle to keep the CIRUS reactor unsafeguarded was explicitly made in order to keep [nuclear weapon] options open... a military intent was imputed to the PNE.'⁷ US Secretary of State Henry Kissinger during a meeting with his Canadian counterpart on June 11, 1974, termed India's PNE argument as a 'total nonsense'. The two diplomats also admitted that their 'lousy'

Meeting," press release, June 14-15, 2018,

http://nuclearsuppliersgroup.org/images/NSG_Public_statement_2018_final.pdf.

⁶ Department of External Affairs, GoC, *Canada's Nuclear Non-Proliferation Policy* (Government of Canada, 1985), 7, https://inis.iaea.org/collection/NCLCollectionStore/_Public/21/020/21020770.pdf. Prior to the 1974 nuclear test, in a letter, the Canadian Prime Minister warned his Indian counterpart that any proliferation of nuclear explosive devices based on Canadian supplied nuclear material would entail review of the country's civil nuclear cooperation with India. Jerome Kahan and Charles Van Doren, *Executive Secretary George S. Springsteen to Secretary of State Kissinger, 'Analytical Staff Meeting,' Enclosing 'Discussion Paper on U.S. Nuclear Nonproliferation Policy'*, report (Washington, D.C.: History and Public Policy Program Digital Archive, Wilson Center, 1974), <http://digitalarchive.wilsoncenter.org/document/119775>.

⁷ Itty Abraham, "'Who's Next?' Nuclear Ambivalence and the Contradictions of Non-Proliferation Policy," *Economic and Political Weekly XLV*, no. 43 (2010): 48-56 (54), <https://ap4.fas.nus.edu.sg/fass/seaai/interest/nuke%20ambivalence%20epw.pdf>.

safeguards had failed to prevent nuclear weapon proliferation by India.⁸ At the regional level, India's nuclear test strengthened Pakistan's resolve to pursue its own nuclear deterrent, and ultimately both States demonstrated their nuclear weapon capability in 1998.

With India's 1974 nuclear test, the major nuclear suppliers realised that the NPT alone would not suffice and a complimentary non-proliferation effort appeared necessary. The NPT was strong in curbing the *demand side* of the proliferation puzzle, as it obligated NNWS to never develop nuclear weapons, but the *supply side* remained unplugged due to unhindered stock of nuclear technology for peaceful purposes, including nuclear weapon-enabling enrichment and reprocessing (ENR) technologies. This was the backdrop in which India's nuclear test occurred and provided the impetus for establishing the NSG. It is pertinent, however, not to confuse NSG's origin with the pre-NPT discussions in Ottawa and Western Suppliers Groups (1958-1967), which narrowly focused on determining the scope of IAEA safeguards.⁹

Developing countries initially viewed the NSG (or perhaps continue to do so) as a technology denial cartel. They considered NSG's export controls as an infringement on their 'inalienable right' to peaceful uses of nuclear technology promised by the NPT. This apparent conflict in the two instruments significantly slowed down NSG's export control development for more than a decade. Former Polish NSG Chairman, Tadeusz Strulak, attributes this inactive period to internal differences within the Group where commercial considerations overshadowed the

⁸ Kahan and Doren, *Executive Secretary George S. Springsteen to Secretary of State Kissinger, 'Analytical Staff Meeting,' Enclosing 'Discussion Paper on U.S. Nuclear Nonproliferation Policy'*.

⁹ Isabelle Anstey, "Negotiating Nuclear Control: The Zangger Committee and the Nuclear Suppliers' Group in the 1970s," *The International History Review* 40, no.5 (2018): 1-21 (3), <https://doi.org/10.1080/07075332.2018.1449764>; and Astrid Forland, "Negotiating Supranational Rules: The Genesis of International Atomic Energy Agency Safeguards System" (PhD diss., University of Bergen, Bergen, 1997), https://inis.iaea.org/collection/NCLCollectionStore/_Public/29/032/29032393.pdf.

mutual desire to strengthen nuclear export controls.¹⁰ Learning from this initial experience, the NSG underscored in 1992:

IAEA system of safeguards as a crucial element for ensuring the peaceful uses of nuclear energy [and]...the need to ensure that commercial competition does not compromise their mutually shared non-proliferation objectives.¹¹

During the early 1990s to mid-2000s, the NSG adopted a number of measures that have significantly enhanced export controls on civil nuclear trade: additional guidelines were adopted to regulate dual-use transfers and nuclear transfers were made conditional upon CSA in 1992; catch-all and non-proliferation principles were adopted in 1994 and 2004 allowing NSG to apply restraint on nuclear trade of non-listed and listed items, respectively. The NSG's decision in 2011 further restricted transfer of ENR technologies only to NPT States, also implementing Additional Protocol (AP) based on IAEA's Model Additional Protocol (MAP), in addition to CSAs.¹² The MAP implemented by NNWS provides the IAEA with a broader mandate to determine with greater accuracy if a State is or is not pursuing a weapons programme under the garb of a civil nuclear programme. The nuclear weapons possessing States, NPT or non-NPT alike, however have the liberty to pick and choose elements from the MAP to negotiate a country-specific AP.

¹⁰ Tadeusz Strulak, "The Nuclear Suppliers Group," *The Nonproliferation Review* 1, no. 1(1993): 2-10 (3), <https://doi.org/10.1080/10736709308436518>.

¹¹ Nuclear Suppliers Group, "Press Statement of Nuclear Suppliers Meeting," press release, April 3, 1992, http://www.nuclearsuppliersgroup.org/images/Files/Documents-page/Public_Statements/1992-Press.pdf.

¹² International Atomic Energy Agency, Information Circular 254/Rev.10/Part 1, "Communication Received from the Permanent Mission of the Netherlands Regarding Certain Member States' Guidelines for the Export of Nuclear Material, Equipment and Technology," July 26, 2011, <https://www.iaea.org/sites/default/files/publications/documents/infcircs/1978/infcirc254r10p1.pdf>.

Expansion in NSG: Indispensability of NPT for Membership?

Early on, the ability to supply nuclear items was the sole determining factor in order to become part of the NSG, and not adherence to the NPT. Amongst the founding members, Japan and France became State Parties to the NPT in 1976 and 1992, respectively. In 1976, the UK proposed inclusion of India, Pakistan, Iran and Brazil in the NSG, but the idea was dropped on account of apprehensions that further enlargement of the Group at that stage would complicate negotiations of the NSG Guidelines.¹³ Former Chairman of the NSG Working Group on Dual-Use Regime, Carlton E. Thorne, explains that membership did not become a 'recognized concept' until 1993.¹⁴ During this time, mere adherence to the NSG Guidelines constituted membership and members were in fact called as adherents.¹⁵ It was only in 1993 that the NSG adopted 'new procedural arrangements to formalize its membership', which *presumably* for the first time introduced five 'factors to be considered' for membership.¹⁶ The NSG's official history, first released in 1997, suggests that NSG *certainly* took into account these factors for considering membership applications.¹⁷ These five factors, which are reflected on NSG's official website, include:

¹³ Anstey, "Negotiating Nuclear Control: The Zangger Committee and the Nuclear Suppliers' Group in the 1970s," 12; and US Department of State, Government of the United States, "Nuclear Suppliers Meeting, April 28-29, 1977," telegram, May 3, 1977, 5, <https://nsarchive2.gwu.edu/nukevault/ebb467/docs/doc%2017C.pdf>.

¹⁴ Carlton E. Thorne, "Multilateral Nuclear Export Controls: Past, Present and Future" (speech, Vienna, October 7, 1997), Nuclear Suppliers Group, 30, <http://www.nuclearsuppliersgroup.org/en/nsg-documents>.

¹⁵ Nuclear Suppliers Group, "Press Statement of Nuclear Suppliers Meeting-1992."

¹⁶ Nuclear Suppliers Group, "Public Statement of the Nuclear Suppliers Group (NSG) Meeting," press release, April 1, 1993, http://www.nuclearsuppliersgroup.org/images/Files/Documents-page/Public_Statements/1993-Press.pdf.

¹⁷ International Atomic Energy Agency, "Communication Received from the Permanent Mission of Australia on Behalf of the Member States of the Nuclear Suppliers Group," Information Circular 539, September 15, 1997, <https://www.iaea.org/sites/default/files/infcirc539.pdf>.

1. The ability to supply items (including items in transit) covered by the Annexes to Parts 1 and 2 of the NSG Guidelines;
2. Adherence to the Guidelines and action in accordance with them;
3. Enforcement of a legally based domestic export control system which gives effect to the commitment to act in accordance with the Guidelines;
4. *Adherence to one or more of the NPT, the Treaties of Pelindaba, Rarotonga, Tlatelolco, Bangkok, Semipalatinsk or an equivalent international nuclear non-proliferation agreement, and full compliance with the obligations of such agreement(s)* (emphasis added);
5. Support of international efforts towards non-proliferation of weapons of mass destruction and of their delivery vehicles.¹⁸

The phrase that these are ‘factors to be considered’, and not ‘criteria’, implies that an applicant can still become an NSG member, if it is compliant in one or more factors but lacking in others, as long as it takes forward the objectives of the NSG. Barring the founding members, a survey of later membership shows that not all NSG members such as Austria and Estonia are nuclear suppliers,¹⁹ while some others such as Cyprus and Malta may be important possibly due to transshipment activity from their seaports (Factor 1). Similarly, every State vying to become an NSG member can show supporting credentials for international non-proliferation efforts (Factor 5). Nonetheless, adherence to NSG Guidelines and having a corresponding national export control regime (Factors 2 and 3) are *sine qua non* for membership. In fact, a State usually informs IAEA regarding its national export control policies, necessarily including adherence to NSG Guidelines, before applying for membership. It makes sense that these five factors were conceived with NPT States (Factor 4) in mind as prospective NSG members, and not taking into account a contingency scenario of a non-NPT State seeking NSG membership. The

¹⁸ NSG, “Participants,” *Nuclear Suppliers Group*, accessed February 11, 2019, <http://www.nuclearsuppliersgroup.org/en/about-nsg/participants1>.

¹⁹ European Nuclear Safety Regulators Group, “Nuclear Energy in the EU,” *European Nuclear Safety Regulators Group*, accessed February 11, 2019, <http://www.ensreg.eu/members-glance/nuclear-eu>.

NSG plenary statements of 2017 and 2018 validate that membership of NPT applicants is being discussed in context of these five factors, thereby, creating a distinction from 'technical, legal and political' aspects of membership for non-NPT applicants.²⁰ Reportedly, Jordan and Namibia are the two NPT applicants presently seeking NSG membership.²¹

The fundamental question to ask is how adherence to NPT (Factor 4) would apply to non-NPT States. Is adherence to the NPT a sacrosanct factor for membership or is there any precedence when this condition was set aside? Argentina and Brazil are two States that became NSG members in 1994 and 1996 respectively, while they were yet to join the NPT. They were, however, States Parties to the Nuclear Weapon Free Zone (NWFZ) in Latin America and Caribbean (the Treaty of Tlatelolco), when they joined NSG. Is it fair to conclude from this example that *adherence* to one of the NWFZs can compensate for a prospective NSG member's non-NPT status? Can India and Pakistan benefit from this proposition or precedence?

While it is evident that non-NPT cannot become States Parties to any of the NWFZs, does this also mean that they cannot in any way reflect their *adherence* to one or more of these NWFZs? All NWFZs have some Protocols which require ratification by the NPT NWS. The significance of the Treaty of Tlatelolco is that, unlike all other NWFZs, it does not mention NWS by name as defined in the NPT, for the basic reason that it predated the NPT. Pakistan and India could use this legal lacuna to unilaterally indicate their adherence to the Treaty of Tlatelolco Protocols, thereby impersonating as NPT equivalent NWS, and apparently, creating a semblance of meeting Factor 4 for NSG membership. Admittedly though, this stratagem is unlikely to advance the membership prospects of either India or Pakistan.

²⁰ Nuclear Suppliers Group, "Public Statement of NSG Plenary Meeting-2017"; and Nuclear Suppliers Group, "Public Statement of NSG Plenary Meeting-2018."

²¹ "Jordan Joins Nuclear Suppliers Group," *Jordan Times*, May 25, 2017, <http://www.jordantimes.com/news/local/jordan-joins-nuclear-suppliers-group>; and "Process of Becoming Nuclear Supply Group Member Slowing Down Namibia's Plan," *Namibian Broadcasting Corporation*, October 13, 2016, <https://www.nbc.na/nsg>.

Relationship of 2008 Exemption with Membership of Non-NPT States

On September 5, 2008, the then-Indian External Affairs Minister Pranab Mukherjee stated that India was ready to undertake certain non-proliferation obligations,²² which the NSG took into account the next day to grant an exemption to the State from the CSA requirement in NSG Guidelines, thus enabling it to become eligible for importing items listed on NSG's Control Lists. These were the same commitments India had expressed in a joint statement with the US in 2005.²³ The US later argued in a 2011 paper, submitted to the NSG, that by taking into account those earlier commitments, India should be considered for NSG membership.²⁴ In 2016, former NSG Chairman from Argentina, Rafael Grossi, was reportedly tasked by the NSG to propose a set of criteria for membership of non-NPT States.²⁵ Although Grossi's proposed criteria did not come to fruition, they provided unique insight into the NSG's deliberations on membership of non-NPT States in relation to the 2008 exemption decision, which are described in Table 1:

²² Embassy of India, Washington, D.C., "Statement by External Affairs Minister of India Mr. Pranab Mukherjee on the Civil Nuclear Initiative," press release, September 5, 2008, https://www.indianembassy.org/archives_details.php?nid=993.

²³ US Department of State, Government of the United States, "Joint Statement by President George W. Bush and Prime Minister Manmohan Singh," press release, July 18, 2005, <https://2001-2009.state.gov/p/sca/rls/pr/2005/49763.htm>.

²⁴ US Department of State, GoUS, "'Food for Thought' Paper on Indian NSG Membership" (Government of the United States, 2011), <https://www.armscontrol.org/system/files/nsg1130.pdf>.

²⁵ Daryl G. Kimball, "NSG Membership Proposal would Undermine Nonproliferation" (Washington, D.C.: Arms Control Association, 2016), <https://www.armscontrol.org/blog/ArmsControlNow/2016-12-21/NSG-Membership-Proposal-Would-Undermine-Nonproliferation>.

Table-1
Comparison of Commitments:
2008 Exemption versus Grossi Formula

India-NSG Exemption September 6, 2008 (Commitments made by India)	Grossi's Membership Formula December 12, 2016 (Commitments sought from Non-NPT Applicant)
Similar Commitments	
Deciding to separate civilian nuclear facilities in a phased manner.	Have clear and strict separation of civilian nuclear facilities from non-civilian nuclear facilities.
Filing a declaration regarding civilian nuclear facilities with IAEA, as per Separation Plan.	Provide and maintain a declaration to the IAEA that identifies all civilian nuclear facilities.
Committing to sign and adhere to the AP regarding India's civil nuclear facilities.	Have in force with the IAEA an AP covering identified civilian nuclear facilities.
Continuing its unilateral moratorium on nuclear testing.	Commitment not to conduct any nuclear explosive test
Dissimilar Commitments	
Refraining from transfer of ENR technologies to non-possessor States and supporting international efforts to limit their spread.	Commitment not to use any transferred item by NSG member or any item derived from transferred items in unsafeguarded facilities or activities.
Readiness to work with others for concluding the Fissile Material Cutoff Treaty (FMCT).	Clear description of intentions and policies in support of the Comprehensive Test Ban Treaty (CTBT).
Instituting a national export control system, harmonising national export control lists and Guidelines with those of NSG and committing to adhere to NSG Guidelines.	Commitment to support and strengthen the multilateral non-proliferation and disarmament regime.

Source: Author's compilation.

Table 1 juxtaposes commitments India made in return for the 2008 exemption and commitments sought from non-NPT applicants as proposed by Grossi. The ‘similar commitments’ indicate that Grossi’s formula largely replicated those non-proliferation benchmarks, which India had already committed to in 2008. The difference merely is that what India was ‘intending to do’ in 2008 was seen as ‘having done’ in 2016. In ‘dissimilar commitments’, while reference to FMCT and CTBT may be notable, these commitments are framed in a way that both India and Pakistan could possibly agree to them without bringing any change in their respective policy positions. India also concluded an Additional Protocol with IAEA as part of commitments to get NSG exemption, but it excluded all relevant MAP provisions that could ascertain ‘completeness and correctness’ of a purely peaceful programme. That is why in February 2009, a senior IAEA official called it the ‘Mickey Mouse Additional Protocol.’²⁶

Two additional elements in Grossi’s proposal required a commitment that one non-NPT State would not block membership of another non-NPT state, and that Pakistan would require another consensus decision by the NSG (exemption from CSA) to become eligible for civil nuclear cooperation, even after becoming a member. Pakistan certainly views these elements in Grossi’s formula as discriminatory and akin to denying the State membership as well as civil nuclear transfers from NSG. If India were to become an NSG member before Pakistan, it would have the leverage, overtly or covertly, to oppose the country’s membership. If both were to become NSG members simultaneously, India would still be in a position to prevent consensus on the exemption decision in favour of Pakistan. Most importantly, if the criteria for membership consisted of the same or higher commitments, then logically exemption and membership should form part of one consensus decision. Whatever would be kosher for India should also become kosher for Pakistan, if the latter meets the same benchmarks.

²⁶ United Nations, “India’s Additional Protocol: A Limited Step Forward,” telegram, February 27, 2009, https://wikileaks.org/plusd/cables/09UNVIEVIENNA87_a.html.

This background was necessary before examining several underlying issues within the technical, legal and political aspects of membership of the NSG for non-NPT States.

Technical Aspects

These are the aspects that carry the potential to undermine the NSG's export controls and non-proliferation objectives if proper safeguards are not ensured in the Group's overall relationship with non-NPT States:

Preventing Diversion of NSG Transferred Items to Military Programmes

This aspect warrants clear separation in the civil and military streams of nuclear programmes in India and Pakistan. Pakistan's case is relatively simpler than India's. Since the NSG has not yet exempted Pakistan from the CSA requirement, the Group is not engaged in full civil nuclear cooperation with Pakistan. Limited nuclear cooperation with China, permissible under the NSG's grandfather clause, is subject to IAEA's facility-specific safeguards. Pakistan has also committed to apply IAEA safeguards on existing as well as future civil nuclear facilities inside the country.²⁷ Nevertheless, the State has not submitted a 'separation plan' to IAEA regarding its civil facilities on the pattern of India's Separation Plan. However, this should not pose a problem to Pakistan, when such a requirement is made part of the criteria for membership.²⁸

India submitted a Separation Plan to the IAEA in 2006, as part of its commitments to gain NSG exemption, but it is not deemed fit for the purpose it intended to achieve since it does not clearly distinguish the civilian safeguarded programme from the unsafeguarded military programme. It allows India to keep eight civilian power reactors (from 22 such reactors) and fast breeder reactors outside the IAEA safeguards. The

²⁷ International Atomic Energy Agency, "Statement by the Leader of the Pakistan Delegation at the Sixty First Annual General Conference of IAEA," press release, September 18-22, 2017, <https://www.iaea.org/sites/default/files/gc61-pakistan-statement.pdf>.

²⁸ Kamran Akhtar (Director General, Arms Control and Disarmament, Ministry of Foreign Affairs Pakistan, Islamabad), in discussion with the author, October 10, 2018.

following statements from the Separation Plan should have been a matter of concern for the NSG:

India will offer only those civilian facilities for safeguards, which are ‘no longer engaged in activities of strategic [military] significance’;
‘The overarching criterion would be a judgment whether subjecting a facility to IAEA safeguards would impact adversely on India’s national security.’
‘Civilian facility’ would be the one determined by India as ‘not relevant to its strategic [military] programme.’²⁹

According to some reports, India’s Separation Plan creates a third ‘civilian unsafeguarded’ stream with potential to contribute to India’s military programme and fissile material production.³⁰ The State is estimated to produce significant amounts of weapon-grade plutonium from these unsafeguarded power reactors.³¹ Similarly, the unsafeguarded prototype fast breeder reactor can contribute up to 140 kilograms of weapon-grade plutonium per year, enough to produce 35 nuclear weapons each year.³²

²⁹ International Atomic Energy Agency, Information Circular 731, “Communication Dated 25 July 2008 Received from the Permanent Mission of India Concerning a Document Entitled ‘Implementation of the India-United States Joint Statement of July 18, 2005: India’s Separation Plan’,” July 25, 2008, <https://www.iaea.org/sites/default/files/publications/documents/infcircs/2008/infcirc731.pdf>.

³⁰ Kalman A. Robertson and John Carlson, *The Three Overlapping Streams of India’s Nuclear Programs*, report (Cambridge: Belfer Center for Science and International Affairs, Harvard Kennedy School, 2016), <https://www.belfercenter.org/sites/default/files/legacy/files/thethreesoverlappingstreamsfindiasnuclearpowerprograms.pdf>.

³¹ Zia Mian, A. H. Nayyar, R. Rajaraman and M. V. Ramana, “Fissile Materials in South Asia and the Implications of the US-India Nuclear Deal,” *Science and Global Security Journal* 14, no. 2-3 (2006): 117-143, <https://doi.org/10.1080/08929880600993022>.

³² Alexander Glaser and M. V. Ramana, “Weapon-Grade Plutonium Production Potential in the Indian Prototype Fast Breeder Reactor,” *Science and Global Security* 15, no. 2 (2007): 85-105, <https://doi.org/10.1080/08929880701609154>. As per some estimation, modern nuclear warhead requires 4 kilograms of weapon-grade Plutonium. Harold A. Feiveson, Alexander Glaser, Zia Mian and Frank N. von Hippel, “Production, Uses, and Stocks of Fissile Materials,” in *Unmaking the Bomb: A Fissile Material Approach to Nuclear Disarmament and Nonproliferation* (Cambridge: MIT Press, 2014), 39.

Coupled with inconsistencies in India's Separation Plan, significant concern exists with respect to its 'country-specific' safeguards agreement with the IAEA. Another report identifies the safeguards agreement apparently in violation of the IAEA Statute as it gives 'a cloak of legitimacy to the use of safeguarded facilities and material to benefit India's unsafeguarded, "strategic", nuclear program.' For instance, India can substitute safeguarded plutonium with unsafeguarded plutonium of lower isotopic quality, use safeguarded nuclear material in facilities in the unsafeguarded programme and vice versa.³³

Both India's Separation Plan and safeguards agreement note the State's emphasis to have uninterrupted access to fuel supplies and, in an event of interruption, to have a strategic reserve of fuel supported by the NSG members. The India-US civil nuclear cooperation agreement of 2007 also makes it obligatory for States Parties for 'development of a strategic reserve of nuclear fuel to guard against any disruption of supply over the lifetime of India's reactors.'³⁴ The NSG Guidelines consider a violation of IAEA safeguards and explosion of a nuclear device by a State as the scenarios that could lead to suspension of fuel supplies.³⁵ If these scenarios are operationalised in India's case, the assurance of uninterrupted supplies and building a strategic reserve would be seen in conflict with the NSG's own rules. The NSG needs to rectify these technical anomalies during the course of developing criteria for membership of non-NPT States, and in India's case also by reviewing implementation of the 2008 exemption decision.

³³ John Carlson, "India's Nuclear Safeguards: Not Fit for Purpose" (paper, Belfer Center for Science and International Affairs, Harvard Kennedy School, Cambridge, 2018), 4-6, 8, <https://www.belfercenter.org/sites/default/files/files/publication/India%E2%80%99s%20Nuclear%20Safeguards%20-%20Not%20Fit%20for%20Purpose.pdf>.

³⁴ Agreement for Cooperation Concerning Peaceful Uses of Nuclear Energy (123 Agreement), US-India, August 3, 2007, http://www.reading.ac.uk/web/files/123agreement/TEXT_123_AGREEMENT.pdf.

³⁵ International Atomic Energy Agency, Information Circular 254/Rev.13/Part 1, "Communication Received from the Permanent Mission of the Republic of Korea to the International Atomic Energy Agency Regarding Certain Member States' Guidelines for the Export of Nuclear Material, Equipment and Technology," November 8, 2016, <https://www.iaea.org/sites/default/files/publications/documents/infcircs/1978/infcir254r13p1.pdf>.

Controlling Spread of Sensitive Materials and Technologies

ENR technologies have always been treated distinctly as ‘sensitive exports’ warranting special export controls in NSG Guidelines. The Group finally agreed in 2011 to restrict ENR transfers to States Parties to the NPT, applying CSAs and Additional Protocol.³⁶ This decision merits special attention vis-à-vis membership of non-NPT States. Despite the 2011 revision of NSG Guidelines, India continues to interpret the 2008 decision as a ‘clean exemption’ necessarily involving eligibility for ENR transfers. Indian decision-makers refer to the US statement, which presumably suggested that the ‘NSG’s NPT references, including those in the ENR Guidelines, in no way detract from the exception granted to India by NSG members in 2008.’³⁷ This statement is in contrast to former Secretary of State, Condoleezza Rice’s testimony to the US Congress, in which she had given assurances that India will not be eligible for sensitive ENR technologies.³⁸ The former Netherlands NSG Chairman, Piet de Klerk, who oversaw the review of NSG Guidelines in 2011, stated in an interview that India knew about the impending revision on ENR transfers and it was made clear to it even before the revision that it will not be eligible for the transfers.³⁹ While no ENR transfers to India have occurred so far, it is critical for the NSG to clarify its institutional position on this issue.

³⁶ Nuclear Suppliers Group, “Public Statement of NSG Plenary Meeting,” press release, June 23-24, 2011, http://www.nuclearsuppliersgroup.org/images/Files/Documents-page/Public_Statements/2011-06-Public_statement_2011_NSg_v7_-_final.pdf.

³⁷ US Department of State, Government of the United States, “Commitment to U.S.-India Civilian Nuclear Cooperation,” press release, June 23, 2011, <https://2009-2017.state.gov/r/pa/prs/ps/2011/06/166878.htm>.

³⁸ Committee on Foreign Relations, GoUS, *United States-India Peaceful Atomic Energy Cooperation and U.S. Additional Protocol Implementation Act*, report (Washington, D.C.: Government Printing Office, 2006), 164, <https://www.congress.gov/congressional-report/109th-congress/senate-report/288>.

³⁹ Piet de Klerk, “The NSG in a Time of Change: An Interview with NSG Chairman,” interview, *Arms Control Association*, September 30, 2011, https://www.armscontrol.org/act/2011_10/Interview_NSg_Chairman_Piet_de_Klerk.

Reviewing Full Implementation of the 2008 NSG Exemption

Are the NSG and India implementing the 2008 exemption decision as per reciprocal commitments and obligations?

The exemption decision has three parts: the first part relates to India's commitments; the second part exempts the CSA requirement for the State to have nuclear cooperation with NSG States but retains a restriction on ENR transfers, as per NSG Guidelines *amended from time-to-time*; and the *oft-ignored* third part creates a mechanism in the NSG to oversee *all aspects* of implementation of the exemption.⁴⁰ India has since concluded more than ten nuclear cooperation agreements with NSG States to acquire nuclear reactors or material, despite serious concerns of diversion in its Separation Plan and safeguards agreement. Grossi's formula also unwittingly admits deficiencies in India's commitments to plug proliferation loopholes, such as evidenced in the Separation Plan, when it calls for 'clear and strict separation of current and future civilian nuclear facilities from non-civilian nuclear facilities.'⁴¹

Every NSG plenary meeting statement indicates that the implementation of *all aspects* of the 2008 NSG exemption are under discussion, but what remains unclear is if the NSG has applied any corrective measures to address the proliferation and diversion concerns.⁴² Regardless of the NSG's decision on membership of non-NPT States, it is incumbent upon the Group to ensure that the 2008 exemption decision is implemented in full letter and spirit.

Building Non-Proliferation Criteria

Politics aside, the pathway to membership would likely be some technical criteria comprising non-proliferation benchmarks that these non-NPT States could be asked to meet before joining the NSG. The 2008 NSG exemption, Grossi's formula and Pierre Goldschmidt's comprehensive

⁴⁰ International Atomic Energy Agency, Information Circular 734.

⁴¹ Kimball, "NSG Membership Proposal would Undermine Nonproliferation."

⁴² Nuclear Suppliers Group, "Public Statement of NSG Plenary Meeting-2018."

fourteen-point criteria⁴³ presents a full spectrum of non-proliferation commitments, ranging from *de minimis* (weakest) to *de maximis* (strongest). Annex 1 highlights a spectrum of criteria on important non-proliferation benchmarks for NSG membership of non-NPT States.

The positive side of the *de minimis* criteria for membership e.g. 2008 exemption decision would be that its acceptability by India and Pakistan would be higher, but the concerns of proliferation or diversion would remain. Likewise, the *de maximis* criteria e.g. ending fissile material production, ratification of CTBT would undoubtedly have greater non-proliferation value, but the acceptability of these benchmarks by India and Pakistan is highly questionable. Any onerous criteria that would impinge upon national security interests of non-NPT States would not appear objective from their standpoint. Similarly, the criteria that do not offer any tangible non-proliferation commitment, despite its high acceptability potential, would be seen by the NSG as not being objective either. Thus, it is a challenging task for the Group to balance out two extremes and develop a set of criteria, acceptable to both non-NPT States but which at the same time satisfy NSG members on account of non-proliferation commitments. The drafters of the criteria could consider the following guiding principles:

- a. Nuclear and dual use transfers should be verifiable completely and correctly through IAEA safeguards to address diversion/proliferation concerns.
- b. Criteria should be non-discriminatory (equally applicable to each non-NPT State).
- c. Criteria should contribute to strengthening of the global non-proliferation norms.

In this regard, a related issue, which possibly questioned the neutrality of Grossi's formula, was that even after becoming an NSG member, Pakistan would still require a separate consensus decision by the

⁴³ Pierre Goldschmidt, "NSG Membership: A Criteria-Based Approach for Non-NPT States" (Washington, D. C.: Carnegie Endowment for Peace, 2011), <https://carnegieendowment.org/2011/05/24/nsg-membership-criteria-based-approach-for-non-npt-states-pub-44147>.

NSG i.e., exemption from CSA, to benefit from civil nuclear cooperation with NSG States.⁴⁴ Zahir Kazmi, Director General, Arms Control and Disarmament Affairs Branch at the Strategic Plans Division of Pakistan, states:

Pakistan's position is quite clear. We support a non-discriminatory and objective criteria-based approach for NSG membership, and making exemption a separate consensus decision from membership is inherently discriminatory.⁴⁵

Pakistan's position is grounded in principle as well as logic. If the State was willing to take on additional non-proliferation obligations, then it also deserves to benefit from civil nuclear cooperation from the NSG. Likewise, if India is considered for NSG membership on the basis of the same commitments it made in 2008 (that is the US position and Grossi's formula), then it makes logical sense to subsume exemption as part of the membership decision for Pakistan, if Pakistan fulfills those criteria as well.

Legal Aspects

The NSG, being a voluntary arrangement, can draw its legal strength from the NPT, relevant NWFZs, NPT Review Conference documents and UN Security Council (UNSC) resolutions. Nearly all NSG plenary statements consistently reiterate that the NPT forms the cornerstone of the global non-proliferation regime.⁴⁶ Since all NSG members are UN members and States Parties to the NPT, they are legally bound to implement its provisions and relevant UNSC resolutions. Some of the NSG members also have legal obligations under respective NWFZs to which they are States Parties. Three aspects of NSG membership of non-NPT States may have legal connotations.

⁴⁴ Kimball, "NSG Membership Proposal would Undermine Nonproliferation."

⁴⁵ Zahir Kazmi (Director General, Arms Control and Disarmament Affairs Branch, Strategic Plans Division, Rawalpindi), in discussion with the author, August 15, 2018.

⁴⁶ Nuclear Suppliers Group, "Public Statement of NSG Plenary Meeting-2018."

Customary International Law

It is still debatable if customary international law applies to nuclear matters. Republic of the Marshall Islands filed a lawsuit at the International Court of Justice (ICJ) in 2014 against the NPT NWS as well as the three non-NPT nuclear-armed States for not fulfilling their nuclear disarmament obligations. The case against the three non-NPT nuclear-armed States was based on violation of customary international law, since all three States endorse the objectives of non-proliferation and nuclear disarmament in their public pronouncements. The lawsuit was eventually dismissed as it did not come under the purview of ICJ.⁴⁷ NSG membership, if accorded to the non-NPT States, could raise the possibility of re-establishing the remit of customary international law, since all NSG members who are also States Parties of the NPT have specific obligations towards nuclear disarmament, while the non-NPT NWS do not have any such legal obligation. Some States may argue that if the three non-NPT States are accorded membership, these States must also agree to accept disarmament obligations at par with the rest of the NSG members.

'Nuclear Weapon State' Status of non-NPT States

The NSG official website and documents continue to state that NSG was created following the nuclear explosion by a 'non-nuclear weapon State', thus clearly noting what India's legal status is vis-à-vis international law based on the NPT. The NPT, however, has no *locus standi* to treat either India or Pakistan as NNWS as both States never foreswore their right to develop nuclear weapons by joining the NPT. The Group, therefore, faces the legal question vis-à-vis NPT that under what status, NWS or NNWS, non-NPT States would be accepted in the NSG. As noted before, the apparent lacuna in the Treaty of Tlatelolco with general reference to NWS may not render any help to India and Pakistan to be legally recognized as *de jure* NWS. India's unilateral observance of the Treaty and Indian Ambassador's statement that 'the Treaty is open... to all powers

⁴⁷ For example, see International Court of Justice, "Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India): Summary of the Judgment, October 5, 2016, <https://www.icj-cij.org/files/case-related/158/19164.pdf>.

possessing nuclear weapons' may not bring any change in India's legal status.⁴⁸

After India and Pakistan conducted nuclear tests in 1998, UNSC adopted Resolution 1172, which not only called upon both States to join NPT as NNWS, it also unambiguously pointed out that 'India or Pakistan cannot have the status of a nuclear weapon State.'⁴⁹ During that time, the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (OPANAL), the organisation implementing the Treaty of Tlatelolco, also called upon the two countries to join the NPT as NNWS, albeit not that explicitly.⁵⁰ However, this differentiation of NWS and NNWS is essentially legal but the NSG would need to address this issue as well.

CSA as a Pre-Condition for Nuclear Transfers

While the NSG members decided to selectively exempt the CSA pre-condition for civil nuclear cooperation with India, the NSG members, being States Parties to the NPT, remain under legal obligation to implement CSA pre-condition for nuclear transfers, as unanimously endorsed ever since in the outcome document of the fifth NPT Review and Extension Conference in 1995.⁵¹ Moreover, some NSG members have

⁴⁸ Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, "Statement by Joint Secretary (D&ISA) at the Fiftieth Anniversary of the Treaty of Tlatelolco," press release, February 14, 2017; and Venkatesh Varma, "presentation," in *A World Free of Nuclear Weapons: Is it Desirable, is it Possible? How could it be Achieved?* ed. Luiz Filipe de Macedo Soares (Mexico City: OPANAL Publication, 2017), 68, http://www.opanal.org/wp-content/uploads/2017/02/OPANAL_Seminar_2017.pdf.

⁴⁹ United Nations Security Council, Resolution 1172, "International Peace and Security," June 6, 1998, <http://unscr.com/en/resolutions/1172>.

⁵⁰ Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, Resolution C/E/Res.38, "The Nuclear Tests Carried Out by the Government of India," May 14, 1998, http://www.opanal.org/wp-content/uploads/2018/09/C_Res_38_1998_eng.pdf; and Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, Resolution C/E/Res.39, "Nuclear Test Carried out by the Islamic Republic of Pakistan," May 29, 1998, http://www.opanal.org/wp-content/uploads/2018/09/C_Res_39_1998_eng.pdf.

⁵¹ United Nations Office for Disarmament Affairs, "1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons:

also included the CSA pre-condition for nuclear transfers as a specific legal obligation in respective NWFZs such as Central Asian and South Pacific NWFZs.⁵² This is primarily a legal question for the relevant NSG members to introspect if they are violating a legal obligation under the NPT or NWFZs, but it may also merit discussion within the NSG under legal aspects of membership of non-NPT states.

Political Aspects

Like all other regimes, the non-proliferation regime is not immune from political influences. The NSG will have to factor in how the following political aspects will impinge upon its decision-making on the issue of membership of non-NPT States:

Geopoliticisation of NSG

In the evolving world order, the US perceives China as a potential challenger to its global hegemony, and consequently, India emerges as a counterweight to contain China's rising power.⁵³ This is the premise of the India-US strategic partnership. Against this backdrop, the US committed to 'adjust international regimes'⁵⁴ to enable India's nuclear cooperation with the NSG, which led to the 2008 exemption decision. The access to foreign nuclear material and technologies with unclear separation and loose safeguards carry the potential to enhance India's nuclear weapon capability. Ashley Tellis argues that India's enhanced nuclear weapon arsenal actually advances the US' security interests.⁵⁵ India has lately been

17 April-12 May 1995," May 12, 1995,
<https://www.un.org/disarmament/wmd/nuclear/npt1995/>.

⁵² United Nations Office for Disarmament Affairs, "Nuclear-Weapon-Free Zones," accessed February 11, 2019, <https://www.un.org/disarmament/wmd/nuclear/nwzf/>.

⁵³ White House, GoUS, *National Security Strategy of the United States of America*, (Government of the United States, 2017), <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>.

⁵⁴ US Department of State, Government of the United States, "Joint Statement by President George W. Bush and Prime Minister Manmohan Singh."

⁵⁵ Ashley J. Tellis, *India as a New Global Power: An Action Agenda for the United States*, report (Washington, D.C.: Carnegie Endowment for International Peace, 2005), <http://carnegieendowment.org/files/tellis.india.global.power.final.pdf>.

accorded Strategic Trade Authorization-1 (STA-1) status, which is usually extended to the North Atlantic Treaty Organization (NATO) allies and members of export control regimes, including the NSG. The STA-1 status allows India swift access to high-end US military technology and equipment.⁵⁶ India may also be pushing for its NSG membership bid with a similar strategic rationale.

The 'All-Weather Strategic Cooperative Partnership' between Pakistan and China is seen as a competing geopolitical alignment to the US and Indian interests. Though this partnership has existed for decades, the signing of the multi-billion dollar China-Pakistan Economic Corridor (CPEC), as a flagship project of China's Belt and Road Initiative (BRI), adds to its significance.⁵⁷ There is, however, little evidence to support if Pakistan's joining of CPEC or its increasing bilateral engagement has had a direct influence on China's position on NSG issues. If this had been true, China would not have joined consensus on the 2008 exemption decision and would have been vocal in supporting Pakistan's membership bid. Contrary to Indian perceptions, China has not even opposed the country's membership bid. China's position is pragmatic and principled. Owing to the unique status of non-NPT States, Beijing has called for a two-step approach. In the first step, the NSG should develop non-discriminatory criteria applicable to all non-NPT States, and in the second step to consider country-specific membership applications, simultaneously or separately.⁵⁸

⁵⁶ "US Officially Makes India NATO-Level Trade Partner in Strong Message to China over NSG," *Hindustan Times*, August 4, 2018, <https://www.hindustantimes.com/world-news/us-issues-notification-for-india-s-inclusion-in-sta-1-category/story-QinehikDL2EjwA5aRutzN.html>.

⁵⁷ Ministry of Foreign Affairs, Government of Pakistan, "Joint Statement between the Islamic Republic of Pakistan and the People's Republic of China on Establishing the All-Weather Strategic Cooperative Partnership," press release, April 20, 2015, <http://www.mofa.gov.pk/pr-details.php?mm=MjczMw>.

⁵⁸ Ministry of Foreign Affairs, Government of China, "China Supports the Notion of Two-Step Approach within the Nuclear Suppliers Group to Explore a Non-Discriminatory Formula Applicable to All Non-NPT States," press release, September 13, 2016, https://www.fmprc.gov.cn/mfa_eng/wjbxw/t1397219.shtml; and Ministry of Foreign Affairs, Government of China, "NSG Launches Two-Step Intergovernmental Process to Address the Issue of Non-NPT States' Participation" press release, November 11, 2016,

Deciphering Motives of non-NPT States

The press statement released by the Indian Ministry of External Affairs after the 2016 NSG plenary meeting sought urgent consideration of the country's membership application to develop '40% non-fossil power generation capacity by 2030' and thus, helping India to 'move forward on the Paris Agreement.'⁵⁹ Both these justifications are inherently flawed. By virtue of the 2008 exemption, India already benefits from nuclear cooperation with NSG members. The State's non-membership in no way constrains it from achieving its energy or climate change objectives. Several analyses point to 'status' as India's primary objective to join the NSG. Recognition of India's Nuclear Weapon State status is deemed as its *ultima ratio*.⁶⁰ The basic logic behind this argument is that the P-5 States are the veto-wielding permanent members of the UNSC, and coincidentally they are also the recognized NWS by the NPT. So, while India cannot join the NPT, the other route it can adopt is to be recognised as an equivalent nuclear weapon State such as NPT NWS, with the 'same benefits and responsibilities such as the US.'⁶¹ So, arguably, India's NSG membership could become the stepping-stone for potential UNSC's permanent membership in the future.

Various official press releases and statements elicit Pakistan's two motives for joining the NSG: desire to be mainstreamed into the nuclear order - its position in support of a non-discriminatory and criteria-based approach signals the State's willingness to accept non-proliferation commitments, when they would equally apply to India and Pakistan; and the country's desire to gain access to civil nuclear technology from NSG members.⁶² Pakistan, therefore, sees exemption and membership as one

https://www.fmprc.gov.cn/mfa_eng/wjbxw/t1414825.shtml.

⁵⁹ Ministry of External Affairs, Government of India, "Spokesperson's Comments on NSG Plenary Meeting in Seoul," press release, June 24, 2016, http://mea.gov.in/press-releases.htm?dtl/26949/Spokespersons_comments_on_NSNG_Plenary_meeting_in_Seoul.

⁶⁰ Mark Hibbs, "Eyes on the Prize: India's Pursuit of Membership in the Nuclear Suppliers Group," *The Nonproliferation Review* 24, no. 3-4 (2018): 275-296, <https://doi.org/10.1080/10736700.2018.1436253>.

⁶¹ US Department of State, Government of the United States, "Joint Statement by President George W. Bush and Prime Minister Manmohan Singh."

⁶² For example, see Ministry of Foreign Affairs, Government of Pakistan, "Pakistan Applies for the Membership of the Nuclear Suppliers Group (NSG)," press release,

consensus decision rather than two decisions as depicted in Grossi's formula.

Universalising Non-Proliferation Norms

Universalising non-proliferation norms would primarily mean that non-NPT States have the same kind of obligations (commitment to non-proliferation, cease the arms race and engage in nuclear disarmament) and the same kind of rights (full access to peaceful nuclear technology), as given to NPT NWS. It is almost certain that neither of these States would give up their nuclear weapons and join NPT as NNWS, nor does amending NPT to accommodate these States as NWS appear feasible. In fact, several previous proposals have failed to operationalise, as these were closely linked to the NPT.⁶³ For instance, having a separate Protocol to NPT that accepts *de facto* NWS status of non-NPT States may be as difficult as amending the NPT itself.⁶⁴ Another novel proposal seeks a regional NPT modeled on the original treaty, where P-5 powers commit to sharing peaceful nuclear cooperation.⁶⁵ The operationalisation of this proposal is contingent upon agreement between global powers and regional States, which again is difficult to achieve. Moreover, this approach loses any incentive for India as it is already enjoying civil nuclear cooperation with the NSG due to the 2008 exemption decision.

The criteria-based NSG membership approach, which requires non-NPT States to take on most of the NPT's obligations and in turn enjoy full

May 20, 2016, <http://www.mofa.gov.pk/pr-details.php?mm=MzczOA>; Muhammad Nawaz Sharif, "Address by Mr. Muhammad Nawaz Sharif, Prime Minister of the Islamic Republic of Pakistan at the 71st UNGA Session" (speech, New York, September 21, 2016), United Nations General Assembly, http://www.un.org/ga/search/view_doc.asp?symbol=A/71/PV.11; and Inter Services Public Relations, press release no.615/2017, December 21, 2017, <https://www.ispr.gov.pk/press-release-detail.php?id=4459>.

⁶³ Jenny Nielsen, "Engaging India, Israel and Pakistan in Non Proliferation," *Disarmament Diplomacy* no. 86 (2007), <http://www.acronym.org.uk/dd/dd86/86jn.htm>.

⁶⁴ Avner Cohen, Thomas Graham Jr., "An NPT for Non-Members," *Bulletin of the Atomic Sciences* 60, no. 3 (2004): 39-44, <https://doi.org/10.1080/00963402.2004.11460786>.

⁶⁵ Adil Sultan, "Regional Non-Proliferation Regime (RNR): A New Approach to Integrating De Facto Nuclear Weapon States into the International Non-Proliferation Regime: The Case of South Asia," *IPRI Journal* VII, no.2 (2007): 14-28.

nuclear cooperation with NSG, has the potential to solve the longstanding problem of universalising the non-proliferation norms.

Fostering Stability in South Asia

The NSG values itself as a technical forum, yet it cannot absolve itself from the political fallout of its decisions. The unintended consequences of the 2008 exemption were that it helped India enhance its fissile material production capability due to its flawed Separation Plan and inadequate safeguards on foreign supplied nuclear material and technologies. Pakistan considers the 2008 exemption as aggravating regional asymmetries in fissile material stockpiles to its detriment.⁶⁶ It is now crucial for the NSG to determine the ‘opportunity cost’ (or benefit) of its decision on membership of non-NPT States.

In the post-1998 nuclearisation phase, India and Pakistan entered into an agreement in 1999 to pursue nuclear and conventional Confidence Building Measures (CBMs) and concluded two nuclear CBM agreements pertaining to ‘pre-notification of ballistic missile tests’ and ‘reducing the risks from accidents resulting from nuclear weapons’. Thereafter, however, the bilateral dialogue has suffered intermittency due to regional complexities and divergent priorities. For example, India perceives China as its principal adversary, while Pakistan’s threat perception is India-centric. India has been willing to discuss mutual nuclear restraint, but Pakistan couples nuclear restraint discussions with the conventional balance of forces. Pakistan deems resolution of the Kashmir issue, the disputed territory lying between the two States since 1947, as central to the peace process, for India it is a least priority issue.⁶⁷

⁶⁶ Zamir Akram, “The South Asian Nuclear Balance: An Interview with Pakistani Ambassador to the CD Zamir Akram,” interview, *Arms Control Today*, December 2, 2011, https://www.armscontrol.org/act/2011_12/Interview_With_Pakistani_Ambassador_to_the_CD_Zamir_Akram.

⁶⁷ Feroz Hassan Khan, “Burying the Hatchet: The Case for a ‘Normal’ Nuclear South Asia,” *Arms Control Today*, March 2016, 15-17, <https://watson.brown.edu/files/watson/imce/events/2016/Khan%20-%20Buring%20the%20Hatchet.pdf>.

However, criteria-based NSG membership could become a 'multilateral solution to a regional problem.'⁶⁸ If the NSG obligates the two States to take on an obligation, amongst other non-proliferation measures, to 'cease nuclear arms race' (Article VI of the NPT) as part of the criteria and introduces a mechanism in NSG to oversee its implementation, both sides may be expected to resume stalled bilateral dialogue process and modify their nuclear behaviours in a way that fosters regional stability.

Conclusion

The NPT will mark the fiftieth anniversary of its entry into force in 2020. Despite its imperfectness, the framework and a range of legally binding and voluntary, multilateral, bilateral and unilateral arrangements, treaties and initiatives, have largely served the cause of the non-proliferation of nuclear weapons well. This success of the non-proliferation regime lies in the adherence to its norms by most of its members, and in its dynamism to respond to emerging challenges, regardless of whether the commitments were legal or voluntary in nature.

The NSG represents a success story of the transformation from a technology denial cartel of a selective few to a reasonably representative and effective multilateral export controls arrangement. The Group, however, stands at a crossroads on the issue of membership of non-NPT States. Whatever decision it may take on this issue could have long term implications. Given the complexity and the enormity of the underlying 'technical, legal and political aspects' of the membership of non-NPT States, it does not seem likely that it will be able to forge a consensus in the near future, especially given the burden of a defective and willful disregard of its own guidelines when it agreed to a selective exemption for India. Being an informal and voluntary arrangement, the NSG remains susceptible to political coercion by the US and other major powers, as happened during the 2008 exemption decision. If the NSG decides to accommodate India by creating yet another country-specific exemption, it

⁶⁸ Waseem Qutab, "Fostering Nuclear Stability in South Asia," *Express Tribune*, March 6, 2015, <https://tribune.com.pk/story/848397/fostering-nuclear-stability-in-south-asia/>.

would further undermine its already low credibility and adversely affect the global non-proliferation regime. On the other hand, it is its informal and voluntary character which allows it to develop objective and non-discriminatory criteria for membership of non-NPT that not only advances the objectives of NSG but also integrates India and Pakistan (and possibly Israel later) into the fold of the global non-proliferation regime. Besides other elements of the criteria, the adherence to NPT Articles, particularly Article VI that obligates States to ‘cease nuclear arms race’, if made part of the criteria in some form, would likely contribute to peace and stability in South Asia.

Annex-1
Spectrum of Criteria for Membership of non-NPT States

Commitment Area	Spectrum of Commitments Spectrum of Acceptability			
	Strongest Lowest			Weakest Highest
Fissile Materials	Commit to end fissile material production for nuclear weapons immediately	Commit to end fissile material production for nuclear weapons within specified time frame, pending conclusion of the treaty	Support start of negotiations of a treaty in Conference on Disarmament on the basis of existing or new agreement that comprehensively covers inter alia issues of scope and asymmetries in fissile material stockpiles	Commit to participate in meaningful discussions on all issues concerning fissile materials and work with others towards consensus on a balanced and comprehensive Program of Work in Conference on Disarmament that includes negotiating a treaty on fissile materials for nuclear weapons
Nuclear Testing	Commit to sign/ ratify CTBT before or after other States in Asia	Commit to sign CTBT together with other regional non-NPT State	Commit to conclude a regional nuclear test ban treaty, pending entry into force of CTBT	Declare political intent not to be the first to resume nuclear testing in Asia
Nuclear Security	Be State Party to CPPNM (Amended) and ICSANT and endeavour for full implementation of the two Conventions, as early as practicable		Commit to implement latest IAEA physical protection standards on civil nuclear facilities and invite IAEA Advisory Services as per national requirement	Maintain unilateral moratorium on nuclear testing
NPT Adherence	Make legal commitment to adhere to Articles I, IV and VI of the NPT and take steps towards full implementation		Work with major powers for adherence to Articles I, IV and VI at the regional level	Establish a national nuclear security architecture and participate in international initiatives to learn best practices
Separation of Civil and Military Nuclear Facilities and IAEA Safeguards	Commit to clear and strict separation of civil and military nuclear facilities in entirety and to place all current and future civil nuclear facilities under IAEA safeguards and apply Additional Protocol that is closest to Model Additional Protocol to the extent practicable in a non-NPT State		Commit to separation of civil nuclear facilities from military or unsafeguarded nuclear facilities and place civil nuclear facilities under IAEA safeguards and Additional Protocol on Indian model	Commitment to adhere to the objectives of the NPT
				Facility-specific safeguards without Additional Protocol

Source: Author's own. ■