

# Washington International Law Journal

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Volume 12  
Number 1 *Symposium: Australia's Tampa  
Incident: The Convergence of International and  
Domestic Refugee and Maritime Law*

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1-1-2003

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### Recommended Citation

Erik A. Corneillier, Comment, *In the Zone: Why the United States Should Sign the Protocol to the Southeast Asia Nuclear-Weapon-Free Zone*, 12 Pac. Rim L & Pol'y J. 233 (2003).  
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# IN THE ZONE: WHY THE UNITED STATES SHOULD SIGN THE PROTOCOL TO THE SOUTHEAST ASIA NUCLEAR-WEAPON-FREE ZONE

Erik A. Cornellier<sup>†</sup>

*Abstract:* U.S. officials are moving away from supporting international law as a mechanism for preventing the proliferation of weapons of mass destruction. For example, the Bush Administration recently refused to sign the Protocol to the Southeast Asia Nuclear-Weapon-Free Zone ("SEANWFZ"). U.S. officials, relying on a policy of nuclear deterrence, maintain that this treaty unnecessarily limits freedom of navigation, creates the possibility of territorial disputes, and accords overly broad negative security assurances to the region. This Comment argues that these concerns are unfounded, and that signing the Protocol would promote U.S. and world security. Successful implementation of SEANWFZ, which requires support from nuclear-weapons states, would promote Southeast Asian security by stabilizing a regime that enhances regional confidence and cooperation. Moreover, signing this protocol is in accord with the United States' duties under the Treaty on the Non-Proliferation of Nuclear Weapons to support the spread of regional nuclear-weapon free zones and provide legally binding negative security assurances to non-nuclear-weapons states. This Comment concludes that the United States government should sign the Protocol to the Southeast Asia Nuclear-Weapon-Free Zone because international law is a more effective mechanism than nuclear deterrence for preventing the spread of weapons of mass destruction.

## I. INTRODUCTION

The advent of nuclear weapons has changed the face of international warfare. Even the smallest nuclear weapons have the power to level cities, killing thousands in the initial blast and leaving others to suffer from lingering radiation.<sup>1</sup> Currently, stockpiles of nuclear weapons are held by only a few nuclear-weapons states, but the spread of nuclear technology to additional states is of great concern to most nations, both nuclear-weapons states and the majority of non-nuclear weapon states.<sup>2</sup>

International law may be the most effective mechanism for limiting the spread of nuclear weapons. However, it will only be effective if the United States and other nuclear-weapons states consent to bind themselves

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<sup>†</sup> The author would like to thank Ambassador Thomas Graham, Jr., and professors Christopher Jones and Joan Fitzpatrick for their teaching and support. The author would also like to thank the staff of the *Pacific Rim Law and Policy Journal* for their diligent efforts.

<sup>1</sup> For a detailed discussion of the environmental impacts of nuclear war, see Stephen Dycus, *Nuclear War: Still the Gravest Threat to the Environment*, 25 VT. L. REV. 753 (2001).

<sup>2</sup> RICHARD BUTLER, *FATAL CHOICE: NUCLEAR WEAPONS AND THE ILLUSION OF MISSILE DEFENSE* 11 (2001).

to international law by reducing current stockpiles and agreeing not to strike non-nuclear weapons states in exchange for the promise that non-nuclear weapons states will not acquire nuclear weapons.

The Treaty on the Non-Proliferation of Nuclear Weapons (“NPT”) is the ultimate “bargain” for global denuclearization.<sup>3</sup> It requires non-nuclear states to remain without nuclear weapons, and it calls on nuclear-weapons states to dispose of all of their weapons.<sup>4</sup> The United States was a leader in forming the NPT after recognizing that the uncontrolled spread of nuclear weapons threatened U.S. security. The Clinton Administration was the main sponsor for indefinite extension of the NPT during the 1995 review.<sup>5</sup> The Bush Administration, however, is unsupportive of the NPT and other arms control treaties because the Administration favors U.S. sovereignty and flexibility over relying on international law to stem proliferation.<sup>6</sup>

Thus, the United States has taken definitive steps backtracking from supporting international arms control in recent years, projecting instead a policy of unilateralism.<sup>7</sup> First, the Senate inflicted a major blow to the global non-proliferation regime by refusing to ratify the Comprehensive Nuclear Test-Ban Treaty (“CTBT”) against the Clinton Administration’s advice in 1999.<sup>8</sup> Second, the Nuclear Posture Review by the Department of Defense called for a resumption of nuclear testing to develop “bunker-busting” mini-nukes for use in battle against stores of chemical and biological weapons.<sup>9</sup> Third, in 2001 President Bush notified Russia that the United States was withdrawing from the Anti-Ballistic Missile Treaty,<sup>10</sup>

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<sup>3</sup> Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT].

<sup>4</sup> *Id.* art. II, VI. For a more extensive discussion of the NPT, see *infra* Part III.

<sup>5</sup> United Nations Final Document on Extension of the Treaty on the Non-Proliferation of Nuclear Weapons, May 11, 1995, 34 I.L.M. 959, 970 [hereinafter Final Document].

<sup>6</sup> Michael Hirsh, *Bush and the World*, FOREIGN AFF., Sept./Oct. 2002, at 35.

<sup>7</sup> *Id.* at 31-32, 35.

<sup>8</sup> Comprehensive Nuclear Test-Ban Treaty, Sept. 24, 1996, 35 I.L.M. 1439; *CTBT Prep Chief To Work on Putting Treaty in Effect*, JAPAN ECON. NEWSWIRE, Apr. 23, 2002, LEXIS, News Group File. The CTBT prohibits nuclear explosions, establishes a multinational monitoring network, and provides for on-site challenge inspections. *Id.*

<sup>9</sup> Thalif Deen, *Disarmament: U.N. Official Criticizes New U.S. Nuclear Posture*, INTER PRESS SERV., Mar. 14, 2002, LEXIS, News Group File.

<sup>10</sup> Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1973, U.S.-USSR, 23 U.S.T. 3435, 944 U.N.T.S. 13 [hereinafter ABM Treaty]; Robert J. Saiget, *U.S. Says It Won't Withdraw from Nuclear Non-Proliferation Treaty*, AGENCE FR. PRESSE, Apr. 4, 2002, LEXIS, News Group File. In general, the ABM treaty prevented the United States and Russia from developing and deploying anti-ballistic missile defense technology. ABM Treaty, *supra*. President Bush announced that the United States would withdraw from the ABM Treaty on December 13, 2001, and withdrawal became effective six months later in June 2002. James M. Lindsay & Michael E. O'Hanlon, *Missile Defense After the ABM Treaty*, WASH. Q. 163 (2002), LEXIS, News Group File. Thirty-one members of the House of Representatives filed a lawsuit against the Bush Administration contending that the President needs

which is considered by many to be the “cornerstone” of international arms control law.<sup>11</sup>

Although President Bush and Russian President Vladimir Putin recently signed the Strategic Offensive Reductions Treaty (“SORT”)<sup>12</sup> in May 2002 to reduce the U.S. and Russian arsenals to 1100 warheads or less, commentators believe that this treaty is an insignificant step toward non-proliferation because the treaty allows both parties to keep thousands of weapons in storage for redeployment in the future.<sup>13</sup>

Critics argue that the Bush Administration’s nuclear arms control policy is hypocritical because it calls for global non-proliferation while the United States maintains a policy of unilateral nuclear deterrence. Deterrence involves attempting to frighten hostile states from attacking by threatening them with nuclear retaliation.<sup>14</sup> The Bush Administration favors keeping nuclear weapons as a stick to wave at potential challengers.<sup>15</sup> Based on this policy, U.S. officials promote agreements that limit the arsenals of other states while preserving U.S. stockpiles.<sup>16</sup>

The desire to preserve nuclear deterrence has prompted U.S. officials to withhold their support of the Southeast Asia Nuclear-Weapon-Free Zone Treaty (“SEANWFZ”), otherwise known as the Treaty of Bangkok.<sup>17</sup> U.S. concerns include the effect the treaty will have on freedom of navigation,

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congressional approval before the United States can withdraw from the ABM Treaty. *Court Ruling on ABM Treaty Lawsuit Expected Within a Few Weeks*, AEROSPACE DAILY, Nov. 4, 2002, at 1, LEXIS, News Group File. The U.S. District Court for the District of Columbia dismissed the lawsuit on December 30, 2002, but Rep. Dennis Kucinich (D-Ohio) plans to appeal the decision. Mark Selinger, *Lawmaker to Appeal Dismissal of ABM Treaty Lawsuit*, AEROSPACE DAILY, Jan. 3, 2003, at 6, LEXIS, News Group File.

<sup>11</sup> THOMAS GRAHAM, JR., DISARMAMENT SKETCHES: THREE DECADES OF ARMS CONTROL AND INTERNATIONAL LAW 144 (2002). Also consistent with these moves away from formal nuclear arms control agreements, the Bush Administration refuses to support ratification of the Biological Weapons Convention, which prohibits the development and use of biological weapons. Convention on the Prohibition of the Development, Production and Stockpiling of Bacterial (Biological) and Toxin Weapons and on their Destruction, *opened for signature* Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163; Michael Barletta et al., *Keeping Track of Anthrax: The Case For a Biosecurity Convention*, BULL. OF THE ATOMIC SCIENTISTS, May 1, 2002, at 57, LEXIS, News Group File.

<sup>12</sup> Treaty Between the United States of America and the Russian Federation On Strategic Offensive Reductions, May 24, 2002, U.S.-Russ., S. TREATY DOC. NO. 107-8 [hereinafter SORT].

<sup>13</sup> See, e.g., Wade Boese & J. Peter Scoblic, *The Jury is Still Out*, ARMS CONTROL TODAY 4, 4-6, (2000); SORT, *supra* note 12.

<sup>14</sup> Kenneth N. Waltz, *More May Be Better*, in THE SPREAD OF NUCLEAR WEAPONS: A DEBATE 1, 3 (1995).

<sup>15</sup> BUTLER, *supra* note 2, at 13-16.

<sup>16</sup> *Id.* at 27 (“There is perhaps one other related thought process . . . the idea that arms control is good, provided it controls the arms of others, but not ours.”).

<sup>17</sup> Treaty on the Southeast Asia Nuclear Weapon-Free Zone, Dec.15, 1995, 35 I.L.M. 635 [hereinafter SEANWFZ]. The member states are listed in Article I(a), and include: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. *Id.* art. I(a). See generally Mark E. Rosen, *Nuclear Weapon Free Zones: Time for a Fresh Look*, 8 DUKE J. COMP. & INT’L L. 29 (1997).

prohibitions on using or threatening to use nuclear weapons within certain zones, and the potential for territorial disputes over zonal boundaries.<sup>18</sup>

This Comment argues that the United States should sign the Protocol to SEANWFZ. Part II provides an overview of the purposes of nuclear-weapon-free-zones (“NWFZs”) and the history of their development. Part III explains the relationship between NWFZs and the NPT. The history and specific provisions of SEANWFZ are described in Part IV. Part V argues that the policy of nuclear deterrence underpinning the Bush Administration’s refusal to support SEANWFZ is counter-productive. Finally, Part VI concludes that the United States should sign the Protocol to SEANWFZ. Part VI also addresses the Bush Administration’s specific concerns with the treaty and outlines the advantages of signing the Protocol.

## II. DEFINITION, PURPOSES, AND HISTORY OF NUCLEAR-WEAPON FREE-ZONE TREATIES

### A. *Definition of Nuclear-Weapon-Free Zones*

NWFZs are treaty agreements that define particular regions that members have agreed to keep free from nuclear weapons. Such agreements prohibit the placement of nuclear weapons in certain territories and include verification measures to ensure compliance. The United Nations General Assembly defines NWFZs as:

[A]ny zone, recognized as such by the General Assembly of the United Nations, which any group of States, in the free exercise of their sovereignty, has established by virtue of a treaty or convention whereby:

- a) The [status] of total absence of nuclear weapons to which the zone shall be subject, including the procedure for the delimitation of the zone is defined;
- b) An international system of verification and control is established to guarantee compliance with the obligations deriving from that [status].<sup>19</sup>

NWFZs effectively enable countries to regulate and prohibit nuclear activity.<sup>20</sup> NWFZs limit proliferation by prohibiting possession, testing,

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<sup>18</sup> Rosen, *supra* note 17, at 62-67. See *infra* Part VI.A for a discussion of U.S. concerns regarding SEANWFZ.

<sup>19</sup> G.A. Res. 3472, U.N. GAOR, 30th Spec. Sess., Supp. No. 34, at 24, U.N. Doc. A/100034 (1976).

deployment, and use of nuclear weapons.<sup>21</sup> NWFZs go beyond mere non-proliferation<sup>22</sup> because they also ban the deployment of strategic weapons by nuclear-weapons states within defined territories.<sup>23</sup> In effect, parties to a NWFZ cannot allow foreign states to place nuclear weapons in the zone.<sup>24</sup>

### B. *History of Nuclear-Weapon-Free Zones*

Arms control became an important aspect of security studies as the arms race between the United States and the Soviet Union charged forward.<sup>25</sup> As a result of fears about the arms race, many non-nuclear-weapons states, especially those states located in conflict areas between nuclear powers, advanced NWFZs to reduce the risk of proliferation and instability caused by the potential deployment of nuclear weapons on their soil.<sup>26</sup> Today, 108 countries on four continents are members of multilateral NWFZ treaties.<sup>27</sup>

NWFZs cover both inhabited and uninhabited territories. Treaties for uninhabited territories include the Antarctic Treaty of 1959,<sup>28</sup> the Outer

<sup>20</sup> See generally Ramesh Thakur, *Stepping Stones to a Nuclear-Weapon-Free World*, in NUCLEAR WEAPONS-FREE ZONES 3, 6-7 (Ramesh Thakur ed., 1998).

<sup>21</sup> *Id.* at 7.

<sup>22</sup> Non-proliferation refers to preventing the wider dispersal of nuclear weapons to states that currently do not possess them. BUTLER, *supra* note 2, at 11.

<sup>23</sup> Jargalsaikhany Enkhsaikhan, *Nuclear-Weapon-Free Zones: Prospects and Problems*, 20 DISARMAMENT 71, 74 (1997).

<sup>24</sup> BILVEER SINGH, ASEAN, THE SOUTHEAST ASIA NUCLEAR-WEAPON-FREE ZONE, AND THE CHALLENGE OF DENUCLEARISATION IN SOUTHEAST ASIA 25 (2000).

<sup>25</sup> See generally RICHARD SMOKE, NATIONAL SECURITY AND THE NUCLEAR DILEMMA: AN INTRODUCTION TO THE AMERICAN EXPERIENCE IN THE COLD WAR 125-48 (1993) (outlining the early history of the development of nuclear arms control).

<sup>26</sup> SINGH, *supra* note 24, at 23-24.

<sup>27</sup> Thakur, *supra* note 20, at 5. SEANWFZ was signed by Brunei Darussalem, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. *Nuclear-Weapon-Free Zones (NWFZs)*, at <http://cns.miis.edu/pubs/reports/pdfs/9707nwzf.pdf> at 40-42 (last visited Nov. 11, 2002). The Treaty of Tlatelolco was signed by Antigua and Bermuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, Uruguay, and Venezuela. *Id.* The Treaty of Pelindaba was signed by Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Cote d'Ivoire, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Togo, Tunisia, Uganda, Tanzania, Zaire, Zambia, and Zimbabwe. *Id.* Finally, the Treaty of Rarotonga includes Australia, the Cook Islands, Fiji, Kiribati, the Marshall Islands, Micronesia, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Solomon Islands, Tonga, Tuvalu, Vanuatu, and Western Samoa. *Id.* See *id.* for a chart of the signatories of each of the four main NWFZs.

<sup>28</sup> Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71.

Space Treaty of 1967,<sup>29</sup> the Seabed Treaty of 1972,<sup>30</sup> and the Moon Treaty of 1979.<sup>31</sup> Four primary NWFZs cover inhabited areas: the Treaty of Tlatelolco made Latin America a nuclear-weapon-free zone in 1967;<sup>32</sup> the South Pacific became nuclear-free in 1985 when the Treaty of Raratonga entered into force;<sup>33</sup> Southeast Asia followed suit in 1995 with SEANWFZ;<sup>34</sup> finally, Africa formed the Treaty of Pelindaba in 1996.<sup>35</sup> Five Central Asian States hope to form a new nuclear-weapon-free zone in April 2003.<sup>36</sup>

Each treaty covering a populated area also includes a protocol for nuclear-weapons states.<sup>37</sup> Protocol signatories promise to uphold the requirements of the treaty and to provide negative security assurances<sup>38</sup> to member states.<sup>39</sup>

### C. *Advantages of Nuclear-Weapon-Free Zones*

Nuclear-weapon-free zones facilitate non-proliferation, regional security, confidence building, and economic stability.<sup>40</sup> NWFZs thus alleviate regional insecurities and allow member states to avoid the economic and environmental costs of nuclear weapons development.<sup>41</sup>

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<sup>29</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *opened for signature* Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 (entered into force Oct. 10, 1967).

<sup>30</sup> The Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, 23 U.S.T. 701, 955 U.N.T.S. 115.

<sup>31</sup> Agreement on the Activities of States on the Moon and Other Celestial Bodies, Dec. 5, 1979, 1363 U.N.T.S. 3 (entered into force July 11, 1984).

<sup>32</sup> Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 634 U.N.T.S. 362.

<sup>33</sup> South Pacific Nuclear Free Zone Treaty, Aug. 6, 1985, 1445 U.N.T.S. 177.

<sup>34</sup> SEANWFZ, *supra* note 17.

<sup>35</sup> African Nuclear Weapon Free Zone Treaty, June 23, 1995, 35 I.L.M. 698.

<sup>36</sup> Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan are working with nuclear-weapons states to draft language for the Central Asian Nuclear-Weapon-Free Zone. *Central Asian Nuclear-Weapon-Free Zone Consultative Meeting Held at Headquarters 17 December*, M2 PRESSWIRE, Dec. 20, 2002, LEXIS, News Group File.

<sup>37</sup> For a chart listing dates of signature by nuclear-weapons states for each Protocol, see Thakur, *supra* note 20, at 5.

<sup>38</sup> Negative security assurances are commitments by nuclear states to refrain from using nuclear weapons against other states. Ben Sanders, *Global Nuclear Issues in the Asia-Pacific Regional Context: Security Assurances and Regional Stability*, 28 DISARMAMENT 1, 2 (1995). See *infra* Parts III.B, VI.A.3, and VI.B.2 for discussions of the importance of negative security assurances in the NPT and SEANWFZ.

<sup>39</sup> Thakur, *supra* note 20, at 7.

<sup>40</sup> See *id.* at 27-29.

<sup>41</sup> See *id.* at 8.

First, NWFZ treaties represent an affirmative agreement to institutionalize non-proliferation by means of a vigorous enforcement system. NWFZs focus on nuclear weapons themselves instead of underlying conflicts between nations.<sup>42</sup> As a result, the treaties minimize the impacts of warfare without overtly addressing the deeper causes of conflicts.<sup>43</sup> Signatory nations to NWFZs take a concrete stance against the placement of nuclear weapons in their region.<sup>44</sup> NWFZs remind the world that many countries have rejected the nuclear option,<sup>45</sup> further marginalizing the theory that nuclear weapons are effective tools of national power through nuclear deterrence.<sup>46</sup> NWFZs institutionalize non-proliferation efforts by bolstering promises not to acquire nuclear weapons under the NPT and by creating a movement toward global disarmament, even in an era where it seems that nuclear-weapons states are not yet willing to make major reductions.<sup>47</sup>

Second, NWFZ treaties are effective because they create enforcement mechanisms for non-proliferation beyond those that are available under the NPT.<sup>48</sup> NWFZs set up systems of regional verification<sup>49</sup> to monitor and enforce compliance with international arms control agreements.<sup>50</sup> Verification measures in NWFZs go beyond the International Atomic Energy Agency ("IAEA") safeguard system under the NPT by adding zonal monitoring systems.<sup>51</sup>

Third, non-nuclear-weapons states are motivated to form NWFZs with their neighbors because NWFZs increase regional security.<sup>52</sup> NWFZs are preventive measures that stabilize the non-nuclear status quo and allow parties to avoid regional involvement in a war between nuclear powers.<sup>53</sup>

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<sup>42</sup> For example, SEANWFZ minimizes the impact of a possible conflict over territory in the South China Seas by preventing parties from using nuclear weapons, instead of resolving the underlying territorial disputes. SINGH, *supra* note 24, at 51. ASEAN leaders promised China that SEANWFZ would not affect existing territorial boundaries. *Id.*

<sup>43</sup> Thakur, *supra* note 20, at 8.

<sup>44</sup> Norachit Sinhaseni, *Southeast Asia Nuclear-Weapon-Free Zone: Next Steps*, 20 DISARMAMENT 63, 70 (1997).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*; Thakur, *supra* note 20, at 23.

<sup>47</sup> Thakur, *supra* note 20, at 24. See also Zachary S. Davis, *The Spread of Nuclear-Weapon-Free Zones: Building a New Nuclear Bargain*, 26 ARMS CONTROL TODAY 16, 18 (1996).

<sup>48</sup> All current NWFZs include significant safeguards. Thakur, *supra* note 20, at 17-18.

<sup>49</sup> Verification refers to the methods used by nations to verify that nuclear materials are not diverted from peaceful nuclear activities to military uses. *Id.* at 16-18.

<sup>50</sup> Thakur, *supra* note 20, at 16-17.

<sup>51</sup> Enkhsaikhan, *supra* note 23, at 75. IAEA safeguards focus on preventing diversion of nuclear material to weapons production, while zonal monitoring systems additionally seek to prevent importation, testing, manufacture, and use of nuclear weapons. *Id.* IAEA safeguards were created pursuant to the NPT, so they predate the formation of many NWFZs. NPT, *supra* note 3, art. III.

<sup>52</sup> Thakur, *supra* note 20, at 8.

<sup>53</sup> *Id.*



Parties also avoid the economic and social costs of regional nuclear arms races.<sup>54</sup> NWFZs are effective confidence-building measures that reduce regional tension.<sup>55</sup> NWFZs are also legal mechanisms for member states to show their peaceful intentions, which builds regional cooperation in the process.<sup>56</sup> For example, SEANWFZ built confidence and regional cooperation on security issues in Southeast Asia.<sup>57</sup>

Finally, NWFZs duplicate and reinforce the basic principles underlying the Nuclear Non-Proliferation Treaty ("NPT").

### III. NUCLEAR-WEAPON-FREE ZONES AND THE NON-PROLIFERATION TREATY

The importance of NWFZs in today's security environment is integrally connected with the development of the NPT because both instruments secure regional non-proliferation commitments. While the NPT is incomplete without legally binding negative security assurances from nuclear-weapons states, NWFZ treaties fulfill this function.

#### A. *The Non-Proliferation Treaty*

The NPT, the centerpiece of global nonproliferation law, was designed to prevent the spread of nuclear weapons to states that did not have nuclear weapons at the time of its inception.<sup>58</sup> Article I requires nuclear-weapons states to refrain from transferring nuclear weapons to non-nuclear-weapons states, or from assisting, encouraging, or inducing any non-nuclear-weapons state to manufacture or acquire nuclear weapons.<sup>59</sup> Article II addresses the behavior of non-nuclear-weapons States Parties, prohibiting them from receiving or manufacturing nuclear weapons.<sup>60</sup> Article III creates safeguards to ensure compliance, including verification procedures administered by the IAEA.<sup>61</sup> Finally, Article VII guarantees the right to

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<sup>54</sup> *Id.*

<sup>55</sup> Enkhsaikhan, *supra* note 23, at 71; *see also* Thakur, *supra* note 20, at 8; U.N. GAOR, 10th Spec. Sess., Supp. No. 4, paras. 63-64, U.N. Doc. A/S-10/4 (1978).

<sup>56</sup> Thakur, *supra* note 20, at 28.

<sup>57</sup> *See infra* notes 97, 148-149 and accompanying text (arguing that SEANWFZ was formed through extensive cooperation and supports regional security in Southeast Asia).

<sup>58</sup> Ambassador Thomas Graham, who promoted indefinite extension of the NPT, stated that "the NPT, is, after the United Nations charter itself, the central document of world peace and security." Thomas Graham, Jr., *The 1995 NPT Review Conference: Future Implications*, in PULLING BACK FROM THE NUCLEAR BRINK: REDUCING AND COUNTERING NUCLEAR THREATS 189 (Barry R. Schneider ed., 1998).

<sup>59</sup> NPT, *supra* note 3, art I.

<sup>60</sup> *Id.* art II.

<sup>61</sup> *Id.* art III.

create NWFZs by stating that “[n]othing in this Treaty affects the right of any group of States to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories.”<sup>62</sup>

The NPT’s success is due in part to its large membership.<sup>63</sup> Today, there are five official nuclear-weapons states that are party to the NPT<sup>64</sup> and three states that are not party to the NPT but possess nuclear capabilities.<sup>65</sup> Thus, with 186 member states, it stands as a symbol of the world’s commitment to ending widespread nuclear proliferation.<sup>66</sup>

The NPT remains important despite the recent acquisition of nuclear weapons by India and Pakistan.<sup>67</sup> This setback does not outweigh the NPT’s success as many nations have abandoned their nuclear weapons while others have ceased trying to acquire them.<sup>68</sup> The NPT deters countries from acquiring nuclear weapons because violators must contend with the strong global sentiment for disarmament.<sup>69</sup>

Despite its success, several countries<sup>70</sup> criticized the NPT because they viewed it as a discriminatory tool.<sup>71</sup> According to this criticism, the NPT was drafted to favor the five official nuclear-weapons states: the United States, Russia, China, Britain, and France.<sup>72</sup> First, critics argue that the NPT was based on Cold War strategic alliance relationships, and it

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<sup>62</sup> *Id.* art VII.

<sup>63</sup> SMOKE, *supra* note 25, at 145-147. The NPT includes 181 non-nuclear weapons states and five nuclear-weapons states, which covers the whole world excluding Israel, India, Pakistan, Cuba, and North Korea. GRAHAM, *supra* note 11, at 327; *N. Korean FM Tells UN Nuclear Pact Pull-out Effective From Saturday*, AGENCE FR. PRESSE, Jan. 11, 2003, LEXIS, News Group File (North Korea announced its intention to withdraw from the NPT as of January 11, 2003).

<sup>64</sup> The United States, Russia, the United Kingdom, France, and China are the official nuclear-weapons states under the NPT. GRAHAM, *supra* note 11, at 257.

<sup>65</sup> The three so-called nuclear-capable states that are not party to the NPT are India, Pakistan, and Israel. *See id.* at 327.

<sup>66</sup> SMOKE, *supra* note 25, at 145-47.

<sup>67</sup> General John M. Shalikashvili, *Report on the Findings and Recommendations Concerning the Comprehensive Nuclear Test Ban Treaty*, ARMS CONTROL TODAY, Jan./Feb. 2001, at 20. For example, South Africa had nuclear weapons, but it disassembled and destroyed them to become a member of the NPT. BUTLER, *supra* note 2, at 7.

<sup>68</sup> Shalikashvili, *supra* note 67, at 20.

<sup>69</sup> SMOKE, *supra* note 25, at 146.

<sup>70</sup> Of the original sponsors of the NPT, Germany, Italy, and Sweden were not confident that it would be verifiable until a provision requiring review after 25 years before indefinite extension was added to alleviate their concerns. GRAHAM, *supra* note 11, at 25. The NPT had more critics at the time of the Review Conference, which mainly consisted of states in the Non-Aligned Movement (“NAM”). *Id.* at 260. These countries were led by Indonesia, Mexico, Egypt, and Malaysia during negotiations, and they used the NPT extension issue to leverage progress on disarmament from nuclear-weapons states. *Id.* at 260. The NPT extension debate is further explained in this section and the following section of this Comment.

<sup>71</sup> The actions of India, Pakistan, North Korea, and Iraq show the importance of addressing these concerns. SINGH, *supra* note 24, at 7-11.

<sup>72</sup> *Id.* at 7.

granted special treatment in terms of technology transfers.<sup>73</sup> For example, Article IX(3) defines a nuclear-weapons state as "one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January, 1967."<sup>74</sup> In effect, this provision preserves the superiority of the nuclear powers at the time the treaty was signed while prohibiting subsequent acquisition by states without nuclear weapons.<sup>75</sup>

Second, the structure of the original draft of the NPT arguably preserved the right of proliferation for states that already possessed nuclear weapons.<sup>76</sup> Many developing countries objected that the arms race between current nuclear-weapons states was equally as dangerous as proliferation to new states, since the United States and the Soviets already had enough nuclear weapons to threaten the existence of the entire planet.<sup>77</sup>

The drafters of the NPT anticipated the concerns about discrimination and attempted to address those concerns by including a provision requiring disarmament of nuclear-weapons states and periodic review of the agreement. First, Article VI requires parties to "pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament."<sup>78</sup> Second, the NPT also includes a review provision that limited its enforceability to twenty-five years, after which members would negotiate whether to extend it indefinitely.<sup>79</sup> This provision gave suspicious states an opportunity to withdraw from the treaty if they felt the bargain was ineffective.<sup>80</sup>

Pursuant to the review provision, the parties met in 1995 for the Review Conference.<sup>81</sup> Despite some effort toward disarmament by the United States and the Soviet Union,<sup>82</sup> critics of the NPT were still not convinced of the nuclear-weapons states' commitment to disarmament.

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<sup>73</sup> *Id.*

<sup>74</sup> NPT, *supra* note 3, art. IX(3).

<sup>75</sup> See generally SINGH, *supra* note 24, at 7-11.

<sup>76</sup> See *id.* at 6-8.

<sup>77</sup> *Id.* at 7.

<sup>78</sup> NPT, *supra* note 3, art. VI.

<sup>79</sup> *Id.* art. X(2).

<sup>80</sup> GRAHAM, *supra* note 11, at 257-58.

<sup>81</sup> *Id.* at 258.

<sup>82</sup> See Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater, Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43 (entered into Force Oct. 10, 1963); ABM Treaty, *supra* note 10; Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3462; Treaty on the Limitation of Strategic Offensive Arms, June 18, 1979, U.S.-USSR, S. EXEC. DOC. Y, 96-1 (1979) (did not enter into force); Treaty on the Elimination of Intermediate-Range and Shorter-Range Missiles, Dec. 8, 1987, U.S.-USSR, S. TREATY DOC. NO. 100-11 (1988); Treaty on the Reduction and Limitation of Strategic Offensive Arms, July 31, 1991, U.S.-USSR, S. TREATY DOC. NO. 102-20 (1991); Treaty on Further Reduction and Limitation of Strategic

*B. Elements of the Bargain for Indefinite Extension of the NPT in 1995*

Ultimately, member states agreed to extend the NPT indefinitely at the NPT 1995 Review Conference, but nuclear-weapons states were forced to make some new promises in exchange for support from critics. Two of the demands relate to NWFZs: Non-nuclear states called on nuclear-weapons states to (1) provide legally binding negative security assurances and (2) support the spread of regional NWFZs.<sup>83</sup> The 1995 Final Document on Extension of the Treaty on the Non-Proliferation of Nuclear Weapons ("Final Document") strikes a bargain between nuclear-weapons states and non-nuclear-weapons states for indefinite extension of the NPT with language that meets these competing demands.<sup>84</sup>

Paragraph 8 of the Final Document calls for stronger negative security assurances for non-nuclear-weapons states.<sup>85</sup> There are two types of security assurances.<sup>86</sup> Positive security assurances are promises to come to another nation's aid if it is attacked with nuclear weapons.<sup>87</sup> Negative security assurances are promises to refrain from attacking particular nations with nuclear weapons.<sup>88</sup> As long as nuclear-weapons states are allowed to maintain nuclear arsenals, the security of non-nuclear-weapons states rests in legally binding negative security assurances.<sup>89</sup> In exchange for the promise not to acquire nuclear weapons, non-nuclear-weapons states reasoned that nuclear-weapons states should promise not to target them with their remaining weapons.<sup>90</sup>

Under paragraph 8, the United States, along with the other NPT nuclear-weapons states, made a formal statement extending negative security guarantees to member states of the NPT.<sup>91</sup> This unilateral declaration, however, is not a uniform and legally binding assurance<sup>92</sup> because nuclear-

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Offensive Arms, Jan. 3, 1993, U.S.-USSR, S. TREATY DOC. NO. 103-1 (1993); Treaty on Conventional Forces in Europe, Nov. 19, 1990, 30 I.L.M. 1 (1991).

<sup>83</sup> See SINGH, *supra* note 24, at 8.

<sup>84</sup> Final Document, *supra* note 5, Annex, dec. 2, paras. 5-8.

<sup>85</sup> It states that "further steps should be considered to assure non-nuclear-weapons States party to the Treaty against the use or threat of use of nuclear weapons." *Id.* para. 8, at 970.

<sup>86</sup> Sanders, *supra* note 38, at 2.

<sup>87</sup> See *id.* For example, the United States could promise to defend Taiwan if it were attacked by China. *Id.*

<sup>88</sup> See *id.*

<sup>89</sup> See *id.* at 8.

<sup>90</sup> See *id.* at 5.

<sup>91</sup> Statement on Security Assurances of the United States of America, Apr. 6, 1995, *reprinted in* 18 DISARMAMENT 224, n.2 (1995) [hereinafter Security Assurances Document].

<sup>92</sup> Sanders, *supra* note 38, at 9.

weapons states have not negotiated a universal instrument to codify nuclear-weapons states' security assurances.<sup>93</sup> Until they do so, NWFZs are the only legal instruments that include legally binding negative security assurances.<sup>94</sup>

The Final Document also requires nuclear-weapons states to support regional NWFZs. It states:

The development of nuclear-weapon-free zones . . . should be encouraged as a matter of priority . . . . The cooperation of all the nuclear-weapon States and their respect and support for relevant protocols is necessary for the maximum effectiveness of such nuclear-weapon-free zones and their relevant protocols.<sup>95</sup>

SEANWFZ, signed in 1995, is the Association of Southeast Asian Nations' ("ASEAN") attempt to isolate Southeast Asia from nuclear threats by supporting non-proliferation and providing an instrument to enforce legally binding security assurances from nuclear-weapons states.<sup>96</sup>

#### IV. HISTORY AND DESCRIPTION OF THE SOUTHEAST ASIAN NUCLEAR-WEAPON-FREE ZONE

SEANWFZ is a NWFZ resulting from decades of cooperation following the formation of ASEAN in 1967.<sup>97</sup> No current ASEAN member state has ever possessed nuclear weapons, and a majority of the member states condemned nuclear weapons even before any concrete proposals for a NWFZ were advanced.<sup>98</sup> Furthermore, all ten of ASEAN's current members signed the NPT.<sup>99</sup>

<sup>93</sup> *Id.* at 8-9.

<sup>94</sup> *Id.* at 14.

<sup>95</sup> Final Document, *supra* note 5, Annex, dec. 2, paras. 6-7.

<sup>96</sup> Carolina G. Hernandez, *Southeast Asia—The Treaty of Bangkok*, in NUCLEAR WEAPONS-FREE ZONES, *supra* note 20, at 81.

<sup>97</sup> Association of Southeast Asian Nations Declaration, Aug. 8, 1967, 6 I.L.M. 1233, 1234 (1967).

<sup>98</sup> SINGH, *supra* note 24, at 27.

<sup>99</sup> *Id.* ASEAN members include Indonesia, Malaysia, the Philippines, Singapore, Thailand, Brunei Darussalam, Vietnam, Myanmar, Laos, and Cambodia. Association of Southeast Asian Nations Declaration, Aug. 8, 1967, 6 I.L.M. 1233 (1967) (Indonesia, Malaysia, the Philippines, and Singapore formed ASEAN in 1967); *Declaration of the Admission of Brunei Darussalam into the Association of Southeast Asian Nations*, Jan. 7, 1984, <http://www.asean.or.id/1219.htm> (last visited Nov. 11, 2002) (Brunei Darussalam joined in 1984); *Declaration on the Admission of the Socialist Republic of Viet Nam into the Association of Southeast Asian Nations*, July 28, 1995, <http://www.asean.or.id/2090.htm> (last visited Nov. 11, 2002) (ASEAN admitted Vietnam in 1995); *Declaration on the Admission of the Union of Myanmar into the Association of Southeast Asian Nations*, Jul. 23, 1997, <http://www.asean.or.id/1829.htm> (last visited on Nov. 11, 2002) (Myanmar (Burma) joined in 1997); *Declaration on the Admission of the*

From its inception, ASEAN members have focused on major security challenges. One of the greatest challenges was deflecting the deployment of nuclear weapons in the region during the Cold War.<sup>100</sup> For example, ASEAN signed the 1971 Kuala Lumpur Declaration, which turned the spotlight on the regional spread of communist insurgencies, internal tensions, and civil strife.<sup>101</sup> The document recognized the threat presented by superpower conflicts and noted the impacts that international conflict could have on economic growth and political stability.<sup>102</sup> Southeast Asian conference participants pledged to channel their political resolve into creating a Southeast Asian Zone of Peace, Freedom, and Neutrality (“ZOPFAN”) without intervention from external powers.<sup>103</sup>

ASEAN’s first summit in 1976 produced two major developments in its regional security relationships:<sup>104</sup> the Bali Declaration<sup>105</sup> and the Treaty of Amity and Cooperation (“TAC”).<sup>106</sup> The Bali Declaration of ASEAN Concord listed the goals and principles of cooperation and included plans for both economic and functional cooperation.<sup>107</sup> The TAC upheld respect for the territorial integrity and national sovereignty of ASEAN member states.<sup>108</sup> It called for non-interference in domestic affairs and peaceful dispute settlement,<sup>109</sup> and it rejected the formation of a military alliance.<sup>110</sup> The TAC put outside powers on notice that ASEAN was not a military alliance.<sup>111</sup>

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*Lao People’s Democratic Republic into the Association of Southeast Asian Nations*, Jul. 23, 1997, <http://www.asean.or.id/1827.htm> (last visited on Nov. 11, 2002) (Laos joined in 1997); *Declaration on the Admission of the Kingdom of Cambodia into the Association of Southeast Asian Nations*, Apr. 30, 1999, <http://www.asean.or.id/703.htm> (last visited Nov. 11, 2002) (Cambodia was admitted into ASEAN in 1999).

<sup>100</sup> See SINGH, *supra* note 24, at 27-28, 32.

<sup>101</sup> See Zone of Peace, Freedom, and Neutrality Declaration (Kuala Lumpur Declaration), Nov. 27, 1971, <http://www.aseansec.org/11823.htm> (last visited June 2, 2002) [hereinafter ZOPFAN Declaration]. This Declaration represents a statement by its signatories of their intention to promote peace, freedom, and neutrality in the region through further dialogue and cooperation. SINGH, *supra* note 24, at 28-30.

<sup>102</sup> ZOPFAN Declaration, *supra* note 101.

<sup>103</sup> *Id.*

<sup>104</sup> Hernandez, *supra* note 96, at 82.

<sup>105</sup> Declaration of ASEAN Concord (Bali Declaration), Feb. 24, 1976, <http://www.aseansec.org/1216.htm> (last visited June 2, 2002).

<sup>106</sup> Treaty of Amity and Co-operation in Southeast Asia, Feb. 24, 1976, reprinted in MICHAEL LEIFER, ASEAN AND THE SECURITY OF SOUTHEAST ASIA 170 (1989), available at <http://www.aseansec.org/11820.htm> (last visited June 2, 2002).

<sup>107</sup> Declaration of ASEAN Concord (Bali Declaration), *supra* note 105.

<sup>108</sup> Treaty of Amity and Co-operation in Southeast Asia, *supra* note 106.

<sup>109</sup> *Id.*

<sup>110</sup> Hernandez, *supra* note 96, at 82.

<sup>111</sup> *Id.*

ASEAN did not form SEANWFZ until 1995, after the NPT Review Conference.<sup>112</sup> However, the idea was first introduced in 1984, between ASEAN's second (1977) and third (1989) summits.<sup>113</sup> Foreign ministers of ASEAN member nations were directed to develop the treaty at the fourth summit in Singapore in 1992,<sup>114</sup> and six members adopted it in 1995 at the fifth summit in Bangkok.<sup>115</sup> Vietnam, Cambodia, Laos, and Myanmar were only non-member observers of ASEAN at the time, but they signed SEANWFZ at the summit to make the treaty comprehensive.<sup>116</sup>

SEANWFZ covers the territory of all ten member states.<sup>117</sup> Territory is defined as the land territory, internal waters, territorial sea, archipelagic waters, the seabed and the sub-soil thereof and the airspace above them.<sup>118</sup> This includes the region's continental shelves and economic exclusive zones ("EEZs").<sup>119</sup> SEANWFZ is a unique NWFZ because it covers parties' EEZs.<sup>120</sup>

The requirements of SEANWFZ are far reaching, including non-proliferation,<sup>121</sup> restrictions on transportation and stationing of nuclear weapons by non-members,<sup>122</sup> and prohibitions on dumping radioactive waste.<sup>123</sup>

Article III states that parties to SEANWFZ must not develop, manufacture, acquire, possess, or have control over nuclear weapons.<sup>124</sup> It also states that parties cannot station, transport, test, or use nuclear weapons anywhere inside or outside the NWFZ.<sup>125</sup> Parties must also prohibit other states from engaging in all of those activities, with the exception of

<sup>112</sup> SEANWFZ, *supra* note 17.

<sup>113</sup> Hernandez, *supra* note 96, at 83.

<sup>114</sup> Singapore Declaration (Jan. 28, 1992), <http://www.aseansec.org/1163.htm> (last visited June 2, 2002).

<sup>115</sup> SEANWFZ, *supra* note 17.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* art. I(a).

<sup>118</sup> *Id.* art. I(b).

<sup>119</sup> *Id.* EEZs are defined under the United Nations Convention on the Law of the Sea. R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 160 (3d ed. 1999) ("The exclusive economic zone (EEZ) is a zone extending up to 200 miles from baseline, within which the coastal State enjoys extensive rights in relation to natural resources and related jurisdictional rights, and third States enjoy the freedoms of navigation, overflight by aircraft and the laying of cables and pipelines.>").

<sup>120</sup> See *infra* Part VI.A.1 for a more extensive discussion of United States concerns regarding coverage of EEZs in SEANWFZ.

<sup>121</sup> SEANWFZ, *supra* note 17, art. III(1)(a), (1)(c), (2)(a), (2)(c), (4).

<sup>122</sup> *Id.* art. III(1)(b), (2)(b).

<sup>123</sup> *Id.* art. III(3).

<sup>124</sup> *Id.* art. III(1)(a).

<sup>125</sup> *Id.* art. III(1)(b)-(c).

transporting nuclear weapons within their territory.<sup>126</sup> Article III(3) further prohibits dumping or discharge of radioactive wastes or materials.<sup>127</sup>

Article VII gives members the choice of whether to allow transit by other nations through methods not governed by the rights of (1) innocent passage, (2) archipelagic sea-lanes passage, or (3) transit passage.<sup>128</sup> While Article III states that parties to the treaty agree not to “station or transport nuclear weapons by any means,”<sup>129</sup> Article VII states that a party “may decide for itself whether to allow visits by foreign ships and aircraft to its ports and airfields, transit of its airspace by foreign aircraft, and navigation by foreign ships through its territorial sea or archipelagic waters and overflight of foreign aircraft above those waters.”<sup>130</sup>

Article IV governs the peaceful use of nuclear energy.<sup>131</sup> Parties must not only follow IAEA safety regulations, but they must also negotiate safeguard agreements to monitor compliance within eighteen months of the Treaty’s entry into force.<sup>132</sup>

Article X creates a verification system for SEANWFZ.<sup>133</sup> In addition to IAEA safeguards,<sup>134</sup> the Treaty provides other mechanisms for policing compliance. Members must submit reports and exchange information.<sup>135</sup> Other countries have access to these reports and can request clarification or fact-finding missions.<sup>136</sup> Non-compliance is subject to IAEA rules and procedures;<sup>137</sup> thereafter members can go to the UN Security Council or General Assembly if a violation threatens international peace and security.<sup>138</sup>

SEANWFZ provides two methods for withdrawing from the agreement: a provision requiring treaty review after ten years,<sup>139</sup> and a procedure for withdrawal.<sup>140</sup> While all other NWFZs are binding on members indefinitely, members of SEANWFZ will review the Treaty’s

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<sup>126</sup> *Id.* art. III(2).

<sup>127</sup> *Id.* art. III(3). A reservation is a “unilateral statement . . . made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State . . . .” Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. II, §1(d), 1155 U.N.T.S. 331, 333, 8 I.L.M. 679, 681.

<sup>128</sup> SEANWFZ, *supra* note 17, art. VII.

<sup>129</sup> *Id.* art. III.

<sup>130</sup> *Id.* art. VII.

<sup>131</sup> *Id.* art. IV.

<sup>132</sup> *Id.* art. IV(2), V.

<sup>133</sup> *Id.* art. X.

<sup>134</sup> *Id.* art. X, V.

<sup>135</sup> *Id.* art. XI.

<sup>136</sup> *Id.* art. X, XI, XII, XIII.

<sup>137</sup> *Id.* art. XIV(3).

<sup>138</sup> *Id.* art. XIV.

<sup>139</sup> *Id.* art. XX.

<sup>140</sup> *Id.* art. XXII.



effectiveness after ten years to determine whether it should remain in force.<sup>141</sup> Parties have a right to withdraw from the Treaty if another party breaches the agreement, but resigning parties must give twelve months notice.<sup>142</sup> While provisions allow parties to review and withdraw from the treaty, parties may not make reservations.<sup>143</sup>

Nuclear-weapons states can support the Treaty through its separate Protocol.<sup>144</sup> Protocol signatories agree not to violate the terms of the Treaty or the Protocol, and to provide negative security assurances to parties of the Treaty.<sup>145</sup> The Protocol to SEANWFZ is unique because it prohibits signatories from using or threatening to use nuclear weapons anywhere within the zone, regardless of whether the target is a SEANWFZ party or not.<sup>146</sup> For example, the United States could not use nuclear weapons against Chinese military targets at sea within the zone if it signed the Protocol to SEANWFZ, even though China is a non-member.

ASEAN members contend that SEANWFZ is a successful model of regional cooperation.<sup>147</sup> Not only does it build upon the ZOPFAN Declaration by setting up a regime to decrease the dangers of nuclear weapons, nuclear testing, and radioactive contamination,<sup>148</sup> but SEANWFZ also contributes to non-proliferation, denuclearization, and disarmament as required under the NPT.<sup>149</sup> Specifically, SEANWFZ is in accord with the Final Document of the Tenth Session of the General Assembly, which encouraged the formation of NWFZs.<sup>150</sup> It provides nuclear-weapons states with the opportunity to heed the call of the 1995 NPT Review Conference to support the formation of NWFZs.<sup>151</sup> Finally, SEANWFZ shows ASEAN's determination to protect the region from environmental pollution caused by radioactive wastes and materials.<sup>152</sup>

Successful implementation of SEANWFZ will promote Southeast Asian security and environmental health, but without support from the United States and other nuclear-weapons states it will be less effective. The Bush Administration's deterrence-based rationale for refusing to sign the

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<sup>141</sup> *Id.* art. XX.

<sup>142</sup> *Id.* art. XXII(2)-(3).

<sup>143</sup> *Id.* art. XVII.

<sup>144</sup> *Id.* Protocol.

<sup>145</sup> *Id.* Protocol, art. I-II.

<sup>146</sup> *Id.* Protocol, art. II.

<sup>147</sup> SINGH, *supra* note 24, at 40.

<sup>148</sup> Hernandez, *supra* note 96, at 86-87.

<sup>149</sup> SINGH, *supra* note 24, at 40.

<sup>150</sup> Final Document, *supra* note 5, Annex, dec. 2, paras. 5-7.

<sup>151</sup> SEANWFZ, *supra* note 17, pmb1.

<sup>152</sup> *Id.*

Protocol to SEANWFZ is misguided because it violates current NPT obligations and promotes the legitimacy of nuclear weapons at a time when conventional deterrence is sufficient to prevent major conflicts.

V. U.S. POLICY OF NUCLEAR DETERRENCE IS COUNTER-PRODUCTIVE BECAUSE IT VIOLATES THE NPT AND BOLSTERS THE LEGITIMACY OF NUCLEAR WEAPONS

The U.S. policy of nuclear deterrence violates the letter and spirit of the NPT.<sup>153</sup> U.S. reliance on deterrence not only discredits the U.S. commitment to the NPT,<sup>154</sup> but it also conveys the message that nuclear weapons are important instruments of power. Instead of protecting U.S. interests, this deterrence posture promotes the acquisition of nuclear arms by other states in order to defend against U.S. nuclear threats and regional insecurities.<sup>155</sup> Furthermore, conventional military deterrence is as effective as nuclear deterrence for the United States.<sup>156</sup>

A. *U.S. Policy of Nuclear Deterrence Violates the Letter and Spirit of the NPT*

U.S. reliance on nuclear deterrence violates three specific NPT commitments.<sup>157</sup> First, it violates Article VI, which requires concrete steps toward disarmament from nuclear-weapons states.<sup>158</sup> Instead of moving toward full disarmament by signing the Protocol, the United States is protecting its right to keep and use nuclear weapons.<sup>159</sup> Second, deterrence-based objections to arms control treaties violate the United States' pledge under the Final Document of the 1995 NPT Review Conference to extend negative security assurances to all members of the NPT.<sup>160</sup> Third, the United States also promised to support the spread of regional NWFZs at the 1995

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<sup>153</sup> For an extended discussion of the illegality of nuclear deterrence, see FRANCIS A. BOYLE, *THE CRIMINALITY OF NUCLEAR DETERRENCE* (2002).

<sup>154</sup> See generally SINGH, *supra* note 24, at 55-58.

<sup>155</sup> BUTLER, *supra* note 2, at 10-11, 34, 44.

<sup>156</sup> See *infra* Part V.C for a discussion of the effectiveness of conventional deterrence.

<sup>157</sup> See generally BOYLE, *supra* note 153. See *supra* Part III for a discussion of the legal relationship between NWFZs and the NPT.

<sup>158</sup> NPT, *supra* note 3, art. VI. See also SINGH, *supra* note 24, at 55-58.

<sup>159</sup> For a discussion of the current Bush Administration's nuclear posture, see Deen, *supra* note 9.

<sup>160</sup> Final Document, *supra* note 5, Annex, dec. 2, para. 8; Security Assurances Document, *supra* note 91; Hernandez, *supra* note 96, at 90.

Review Conference, and that promise was not conditioned upon maintenance of U.S. nuclear deterrence.<sup>161</sup>

Even though U.S. promises were not legally binding, breaking those promises violates the spirit of the NPT because they were made in exchange for international support for indefinite extension of the NPT.<sup>162</sup> Even if the provisions of the Final Document of the 1995 Review Conference are not legally enforceable against the United States, those declarations are the heart of the basic bargain of the NPT.<sup>163</sup> The willingness of the United States to fulfill these pledges will determine the fate of the NPT itself because non-nuclear-weapons states are reaching a threshold of tolerance.<sup>164</sup> Ultimately, the United States' lack of commitment may cause the NPT regime to unravel.<sup>165</sup>

*B. Nuclear Deterrence Is a Counterproductive Strategy Because It Supports the Legitimacy of Nuclear Weapons*

The United States continues to rely on a policy of nuclear deterrence despite the collapse of the bipolar nuclear deadlock of the Cold War.<sup>166</sup> The United States justifies its policy with concerns for a future resurgence of Russian aggression, the risk of acquisition by a hostile "rogue" nation, or the possibility of a nuclear, chemical, or biological strike by a terrorist organization.<sup>167</sup> Nuclear deterrence, however, is ill-suited to resolve these threats; instead it exacerbates underlying tensions and paradoxically promotes a future nuclear catastrophe.<sup>168</sup>

First, nuclear deterrence only aggravates the threats created by Russia's large nuclear arsenal.<sup>169</sup> The emphasis in U.S. policy on nuclear deterrence is counterproductive because it perpetuates the Cold War

<sup>161</sup> Final Document, *supra* note 5, Annex, dec. 2, para. 7.

<sup>162</sup> Jayantha Dhanapala, *The Impact of September 11 on Multilateral Arms Control*, ARMS CONTROL TODAY, Mar. 2002, at 14.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* See *supra* Part III for a discussion of non-nuclear-weapons states' concern that the NPT is discriminatory when it allows a few states to wield nuclear weapons while preventing the rest from acquiring them. North Korea, for example, claims that its recent withdrawal from the NPT was based on fears of a pre-emptive nuclear strike by the United States, and allegations that the United States was using the NPT and the IAEA as a tool to weaken North Korea. U.S. 'Hostile Policy' Blamed; Korea: The North's Ambassador to the U.N. Explains the Nation's Decision to Withdraw From a Nuclear Treaty, BALT. SUN, Jan. 11, 2003, LEXIS, News Group File.

<sup>165</sup> Dhanapala, *supra* note 162, at 14.

<sup>166</sup> JANNE E. NOLAN, AN ELUSIVE CONSENSUS: NUCLEAR WEAPONS AND AMERICAN SECURITY AFTER THE COLD WAR 87 (1999).

<sup>167</sup> *Id.*

<sup>168</sup> See generally *id.* at 87-102.

<sup>169</sup> *Id.* at 91-92.

mentality of distrust and provides Russia with a justification for maintaining a large arsenal.<sup>170</sup> Russia's command and control systems are deteriorating, which increases the risk of accidental or unauthorized launches.<sup>171</sup> Poor economic conditions in post-Soviet states also promote the clandestine trade of nuclear materials to state and non-state actors, facilitating proliferation to parties who may be hostile to the United States.<sup>172</sup> Instead of relying on nuclear deterrence for security, the United States should emphasize steps to reduce the Russian arsenal, which will require concrete reciprocal steps to reduce U.S. reliance on nuclear deterrence.<sup>173</sup>

Second, the United States' policy of nuclear deterrence may not deter aggressive actions by "rogue" leaders.<sup>174</sup> Instead, this policy may give hostile nations justification for seeking nuclear weapons.<sup>175</sup> For the past decade, the United States has implemented a policy of "calculated ambiguity" toward non-nuclear-weapons states,<sup>176</sup> implying a threat of nuclear retaliation to deter a chemical or biological attack by hostile states.<sup>177</sup> One possible ramification of the "calculated ambiguity" policy is that an enemy might test the U.S. commitment to its policy, ultimately forcing the United States to either respond with nuclear weapons or back down.<sup>178</sup> A disproportionate response by the United States might provoke another nuclear-weapons state to deploy its arsenal either to defend the state attacked by the United States or to restore the balance of power.<sup>179</sup> Backing down ultimately exposes the U.S. policy of nuclear deterrence as an idle threat.<sup>180</sup> Either outcome illustrates how U.S. reliance on nuclear deterrence may promote acquisition of nuclear weapons by non-nuclear-weapons states.<sup>181</sup>

Third, nuclear deterrence does not work against terrorists, due to the diffused nature and multi-state membership of terrorist groups.<sup>182</sup> Deterrence requires the ability to identify the aggressor and target the

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<sup>170</sup> *Id.* at 91.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* See generally GRAHAM T. ALLISON ET AL., *AVOIDING NUCLEAR ANARCHY: CONTAINING THE THREAT OF LOOSE RUSSIAN NUCLEAR WEAPONS AND FISSILE MATERIAL 20-48* (1999) (outlining the risk of leakage of nuclear weapons and materials from Russia).

<sup>173</sup> NOLAN, *supra* note 166, at 92.

<sup>174</sup> *Id.* at 2.

<sup>175</sup> *Id.*

<sup>176</sup> BUTLER, *supra* note 2, at 89.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 90.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 90-91.

<sup>181</sup> NOLAN, *supra* note 166, at 92.

<sup>182</sup> *Id.* at 100.

aggressor effectively.<sup>183</sup> Radical groups, however, work clandestinely in urban areas,<sup>184</sup> often without state-backing. U.S. nuclear retaliation against terrorist attacks would be extremely disproportionate because even precision targeting with nuclear weapons would cause grave civilian casualties.<sup>185</sup> Moreover, terrorists who are motivated by deeply held political and ideological beliefs are unlikely to fear a nuclear response because it would deepen the anger of the survivors and further support their mission against the United States.<sup>186</sup> Paradoxically, it is U.S. reliance on such disproportionate means of retaliation that creates incentives for adversaries to challenge it with decentralized organizational structures and terrorist attacks.<sup>187</sup>

The United States cannot deal with the problem of international terrorism without help from other nations.<sup>188</sup> It must support multilateral agreements, such as the NPT, that make it more difficult for terrorist groups to acquire nuclear materials and technologies.<sup>189</sup> No single country can control all of the global exports, monitor all technology transfers, and enforce all international legal obligations.<sup>190</sup> Multilateral agreements like the NPT make it more difficult for terrorists to acquire nuclear weapons, and these regimes are more effective than attempts to contain the threat through military supremacy.<sup>191</sup> The United States recently signed a treaty with ASEAN to promote cooperation against terrorism in Southeast Asia.<sup>192</sup> The United States should also sign the Protocol to SEANWFZ to show support for the main instrument in Southeast Asia designed to prevent nuclear acquisition and use by anyone in the region.

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.* Osama Bin Laden's al-Qaida, for example, has a clandestine network within the United States itself, making it practically impossible to use nuclear weapons in response to attacks by some al-Qaida cells. Gregory Katz, *Terrorism Fight Never Ending for Europe, Israel*, DALLAS MORNING NEWS, Sept. 28, 2001, LEXIS, News Group File.

<sup>185</sup> NOLAN, *supra* note 166, at 99. For example, the United States inflicted massive civilian casualties in Afghanistan using conventional explosives nearly as powerful as tactical nuclear weapons in its fight against al-Qaida. *Keep the Anti-Nuke Torch Burning*, JAPAN TIMES, Aug. 7, 2002, LEXIS, News Group File.

<sup>186</sup> BUTLER, *supra* note 2, at 91.

<sup>187</sup> NOLAN, *supra* note 166, at 2.

<sup>188</sup> Dhanapala, *supra* note 162, at 13; BUTLER, *supra* note 2, at 92.

<sup>189</sup> Dhanapala, *supra* note 162, at 13; BUTLER, *supra* note 2, at 92.

<sup>190</sup> Dhanapala, *supra* note 162, at 13.

<sup>191</sup> *Id.*

<sup>192</sup> United States of America-ASEAN Joint Declaration for Cooperation to Combat International Terrorism, Aug. 1, 2002, <http://www.state.gov/p/eap/rls/ot/12428.htm> (last visited Oct. 7, 2002).

C. *Conventional Military Deterrence Is as Effective as Nuclear Deterrence*

Conventional military deterrence can replace nuclear deterrence, because the gap between U.S. conventional forces and those of other armies in the region is still broad enough that it would be difficult for any opponents to effectively retaliate.<sup>193</sup> The United States' disproportionate military strength was demonstrated during Operation Desert Storm in 1991 and in Kosovo in 1999.<sup>194</sup> Therefore, the United States should take every step possible to facilitate the denuclearization of the Asia-Pacific to cement its regional military superiority and deter regional conflicts.<sup>195</sup>

VI. RECOMMENDATION: THE UNITED STATES SHOULD SUPPORT SEANWFZ

A. *U.S. Concerns with SEANWFZ Are Unfounded*

The Clinton and Bush Administrations refused to sign the Protocol to SEANWFZ due to disagreements over some of its provisions, specifically (1) the inclusion of EEZs within the zone, and the effect that it could have on freedom of navigation for U.S. warships; (2) the possibility of territorial disputes between ASEAN members and China over the boundaries of the zone; and (3) the scope of the negative security assurances in the Protocol.<sup>196</sup>

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<sup>193</sup> Mak Joon Num, *Denuclearization in Northeast and Southeast Asia*, in SOUTHEAST ASIAN PERSPECTIVES ON SECURITY 114, 122 (Derek da Cunha ed. 2000).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> Assistant Secretary of State Winston Lord outlined U.S. objections in testimony to Congress in 1996:

One of the most significant issues preventing us from supporting the treaty at this point is the inclusion of Exclusive Economic Zones (EEZs) and continental shelves in the zone, which raises questions about the consistency of the treaty with high seas freedoms and other principles embodied in UN Convention of the Law of the Sea. Furthermore, continental shelves and EEZs have never been clearly delimited in the South China Sea, which creates uncertainty over the scope of treaty and protocol obligations and could be a source of conflict due to competing territorial claims in the region.

The U.S. has other concerns with the treaty and protocol including the precise nature of the legally binding negative security assurances from protocol parties; ambiguity of language concerning the permissibility of port calls by ships which may carry nuclear weapons . . . .

These concerns are unfounded, and the United States should sign the Protocol to promote Southeast Asian security and uphold its duties under the NPT.

*1. U.S. Concerns Over Freedom of Navigation Are Unfounded*

The United States' main objection to SEANWFZ—that it covers EEZs, which could limit freedom of navigation and prevent port calls by nuclear-armed vessels—is unfounded because (1) SEANWFZ was designed to be consistent with the United Nations Convention on the Law of the Sea (“UNCLOS”), (2) members are unlikely to block passage of United States vessels, because they welcome the American military presence in the region, and (3) signing the protocol would not substantially limit the nuclear deterrence power of the United States, even if SEANWFZ members decided to block passage of its nuclear submarines throughout the zone.<sup>197</sup>

First, SEANWFZ was designed to be consistent with the freedom of navigation provisions under UNCLOS. UNCLOS protects rights to innocent passage,<sup>198</sup> archipelagic sea-lanes passage,<sup>199</sup> and transit passage.<sup>200</sup> State Department officials from the Clinton Administration expressed concerns that Article III and Article VII of SEANWFZ, combined, allow members to prevent free transit of nuclear-armed vessels protected by UNCLOS.<sup>201</sup> However, Article II(2) of SEANWFZ explicitly states:

Nothing in this Treaty shall prejudice the rights or the exercise of these rights by any State under the provisions of the United Nations Convention of the Law of the Sea of 1982, in particular with regard to freedom of the high seas, rights of innocent passage, archipelagic sea lanes passage or transit passage of ships and aircraft . . . .<sup>202</sup>

Moreover, ASEAN's effort to preserve freedom of navigation is further evidenced in Article III(2), which outlines activities that member states must

and Pacific Affairs), LEXIS, News Group File [hereinafter Lord]. This is the first time that the United States has refused to sign a NWFZ protocol. Sinhaseni, *supra* note 44, at 66.

<sup>197</sup> Lord, *supra* note 196. See also GRAHAM, *supra* note 11, at 298.

<sup>198</sup> United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, pt. II, §3, U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261 (entered into force on Nov. 16, 1994) [hereinafter UNCLOS].

<sup>199</sup> See *id.* Part IV, art. 53.

<sup>200</sup> See *id.* Part III, §2.

<sup>201</sup> SINGH, *supra* note 24, at 44.

<sup>202</sup> SEANWFZ, *supra* note 17, art. II(2).

prohibit in their territories, but does not require member states to prohibit transport of nuclear weapons through their territories.<sup>203</sup> Furthermore, Article VII only gives members the right to control navigation “in a manner not governed by the rights of innocent passage, archipelagic sea lanes passage or transit passage.”<sup>204</sup>

Second, SEANWFZ members are unlikely to block passage of United States vessels because the member nations welcome the American military presence in the region.<sup>205</sup> United States military presence in Asia, combined with an array of bilateral alliances with Southeast Asian nations, constitutes the security architecture of Southeast Asia.<sup>206</sup> ASEAN members support the U.S. military presence in the region, because they consider it the best alternative to another state, such as Japan, China, or India providing the same function.<sup>207</sup> These states prefer the U.S. military presence because it can preserve stability in the South China Sea,<sup>208</sup> but it does not have territorial ambitions like other regional powers such as China.<sup>209</sup>

Third, signing the Protocol would not substantially limit U.S. nuclear deterrence, even if SEANWFZ members decided to block passage of U.S. nuclear submarines throughout the zone.<sup>210</sup> U.S. military strategists favor nuclear submarines over land and air-based nuclear delivery devices because submergence allows them to survive a nuclear first-strike from an adversary.<sup>211</sup> Nuclear submarines therefore strengthen nuclear deterrence by practically guaranteeing a response capability after a nuclear attack by an adversary.<sup>212</sup> This function is not diminished if a small delay is added to the response time of nuclear submarines, and delaying a retaliatory launch would not increase the vulnerability of the vessels.<sup>213</sup> At worst, SEANWFZ

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<sup>203</sup> *Id.* art. III(2).

<sup>204</sup> *Id.* art. VII.

<sup>205</sup> Daljit Singh, *Evolution of the Security Dialogue in the Asia-Pacific Region*, in *SOUTHEAST ASIAN PERSPECTIVES ON SECURITY*, *supra* note 193, at 35, 57.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> Renato Cruz De Castro, *Managing “Strategic Unipolarity”: The ASEAN States’ Responses to the Post-Cold War Regional Environment*, in *SOUTHEAST ASIAN PERSPECTIVES ON SECURITY*, *supra* note 193, at 60, 64. This concern drives efforts to keep the United States in the region even though many doubt the likelihood of the United States involving itself militarily in the South China Sea. Mohamed Jawhar bin Hassan, *Disputes in the South China Sea: Approaches for Conflict Management*, in *SOUTHEAST ASIAN PERSPECTIVES ON SECURITY*, *supra* note 193, at 98, 107.

<sup>209</sup> This has proven true regardless of United States pressures for democratization and human rights. De Castro, *supra* note 208, at 74-75.

<sup>210</sup> THE NUCLEAR TURNING POINT: A BLUEPRINT FOR DEEP CUTS AND DE-ALERTING OF NUCLEAR WEAPONS 115-16, 141 (Harold A. Feiveson ed., 1999) [hereinafter THE NUCLEAR TURNING POINT].

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 141; SMOKE, *supra* note 25, at 105.

<sup>213</sup> THE NUCLEAR TURNING POINT, *supra* note 210, at 115-16, 141.



could limit freedom of movement within a narrow area around Southeast Asia, which would only add some time before the submarines could respond to a hostile first-strike.

Finally, SEANWFZ is consistent with United States military policy. U.S. policy is to neither confirm nor deny the presence of nuclear weapons on naval vessels.<sup>214</sup> Therefore, SEANWFZ members have no way of knowing whether the United States is transporting nuclear weapons through the zone.<sup>215</sup> Furthermore, the United States is already drastically reducing the number of nuclear submarines in its fleet and slashing the number of warheads carried by each vessel.<sup>216</sup> If the United States is already willing to substantially reduce the size of its nuclear-armed vessels, then an insignificant restriction on movement within the areas near Southeast Asia will not substantially constrain U.S. nuclear strategy.

## 2. *Recent Developments Between ASEAN and China Have Reduced the Risk of Conflict Over Territorial Delimitation in SEANWFZ*

U.S. officials fear that the inclusion of EEZs in SEANWFZ may cause territorial disputes with China,<sup>217</sup> but recent evidence of China's improving relationship with ASEAN should alleviate that fear. Territorial boundaries are not authoritatively defined in the South China Seas, where a number of parties have competing territorial claims with China.<sup>218</sup> U.S. officials worry that the inclusion of EEZs in SEANWFZ will become a source of conflict between ASEAN members and China.<sup>219</sup> Recent events, however, allay that fear. First, China and ASEAN have recently negotiated a free-trade agreement, exemplifying their budding relationship.<sup>220</sup> Second, China intends to sign the Protocol, and it could become the first nuclear-weapons state to sign it.<sup>221</sup> China sent its notification of intent to sign the Protocol to

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<sup>214</sup> Thakur, *supra* note 20, at 28.

<sup>215</sup> *Id.*

<sup>216</sup> NOLAN, *supra* note 166, at 1; THE NUCLEAR TURNING POINT, *supra* note 210, at 115.

<sup>217</sup> Lord, *supra* note 196; *see also* SINGH, *supra* note 24, at 43 (quoting Winston Lord, the United States Assistant Secretary of State in 1996).

<sup>218</sup> Lord, *supra* note 196; *see also* SINGH, *supra* note 24, at 43 (quoting Winston Lord, the United States Assistant Secretary of State in 1996).

<sup>219</sup> Lord, *supra* note 196; *see also* SINGH, *supra* note 24, at 43 (quoting Winston Lord, the United States Assistant Secretary of State in 1996).

<sup>220</sup> *See China Ready to Work for Talks on Sino-ASEAN Free Trade Area: Zhu*, XINHUA GEN. NEWS SERV., Nov. 6, 2001, LEXIS, News Group File; *Now for the Big One*, STRAITS TIMES (Singapore), Nov. 9, 2001, at 1, LEXIS, News Group File.

<sup>221</sup> *Mutual Trust Between China, ASEAN Serves Regional Peace, Stability: Chinese Premier*, XINHUA GEN. NEWS SERV., Nov. 4, 2002, LEXIS, News Group File; *Now for the Big One*, *supra* note 220; SINGH, *supra* note 24, at 50-51.

SEANWFZ on July 27, 1999 during the Thirty-Second ASEAN Foreign Ministers Meeting.<sup>222</sup> China's willingness to work with ASEAN on the Protocol stems from ASEAN's agreement to modify it by adding a statement that "nothing in the Treaty or Protocol would affect existing territorial boundaries."<sup>223</sup> Instead of heightening tensions between ASEAN members and China, SEANWFZ has actually created an opportunity for regional cooperation.<sup>224</sup>

### 3. *Legally Binding Negative Security Assurances Under SEANWFZ Increase Regional Security Without Weakening Nuclear Deterrence*

The United States objects to the negative security assurances outlined in Article II of the Protocol to SEANWFZ.<sup>225</sup> Specifically, the United States disagrees with Sentence Two, which requires parties "not to use or threaten to use nuclear weapons within the Southeast Asia Nuclear-Weapon-Free-Zone."<sup>226</sup> Though the language of this provision is unclear, the U.S. Department of State interprets this provision to extend to non-member nations within the zone, and believes this extension would cripple the U.S. nuclear deterrence posture in the region.<sup>227</sup>

The United States previously offered negative security assurances to all non-nuclear states as part of the bargain for indefinite extension of the NPT.<sup>228</sup> The Protocol to SEANWFZ would make them legally binding and extend them to all states with forces in the zone.<sup>229</sup> ASEAN is asking the United States to bind itself legally to a promise that it already made.

The Protocol would not measurably weaken nuclear deterrence because there are few situations where the United States would need to use nuclear weapons within the zone. Admiral Dennis Blair, the United States Navy Commander in Chief for the Pacific Command, listed three threats that justify regional readiness: terrorism, North Korean aggression against South

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<sup>222</sup> See SINGH, *supra* note 24, at 50.

<sup>223</sup> *Id.* at 51.

<sup>224</sup> *Id.*

<sup>225</sup> Lord, *supra* note 196; see also SINGH, *supra* note 24, at 43 (quoting Winston Lord, the United States Assistant Secretary of State in 1996).

<sup>226</sup> SEANWFZ, *supra* note 17, Protocol, art. II.

<sup>227</sup> SINGH, *supra* note 24, at 44.

<sup>228</sup> Final Document, *supra* note 5, Annex, dec. 2, para. 8.

<sup>229</sup> Security Assurances Document, *supra* note 91.

Korea, and Chinese aggression against Taiwan.<sup>230</sup> Terrorist cells reside in Southeast Asia, but nuclear deterrence is ill-suited to contain that threat because terrorists are non-state actors.<sup>231</sup> Furthermore, no state in the region actively harbors terrorist groups.<sup>232</sup> Korea and Taiwan are in Northeast Asia beyond the area covered by SEANWFZ.<sup>233</sup> Therefore, the Protocol does not limit U.S. nuclear use in response to North Korean or Chinese aggression.<sup>234</sup>

The United States has a duty under the NPT to support treaties like SEANWFZ and extend legally binding negative security assurances to non-nuclear weapons states.<sup>235</sup> There are no threats to the United States involving weapons of mass destruction in the region covered by the treaty. Therefore, arguments against signing the Protocol based on concerns about nuclear deterrence are unconvincing.

Finally, in the unlikely event that a war started in Southeast Asia, the Protocol protects Southeast Asia from the dangers of nuclear war by preventing nuclear use within the zone, regardless of the target.<sup>236</sup> The damaging regional effects of nuclear use do not decrease when weapons are used against non-members of a treaty, and the Protocol allows ASEAN to insulate itself from conflicts between external powers.<sup>237</sup>

The Bush Administration need not take such a hard line regarding concerns about freedom of navigation and security assurances because ASEAN will cooperate to gain support from nuclear-weapons states.

#### 4. *ASEAN Will Negotiate with the United States to Resolve Disagreements Over the Protocol*

U.S. concerns are unfounded because ASEAN seeks universal membership in SEANWFZ and intends to work with nuclear-weapons states to gain their support. ASEAN agreed that the Protocol would stay open for review when it signed the Treaty in an effort to keep nuclear-weapons states

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<sup>230</sup> *Hearing Before the House Armed Services Comm. on U.S. Pacific Command Posture*, FDCH CONGRESSIONAL TESTIMONY (Mar. 20, 2002) (statement of Admiral Dennis C. Blair, U.S. Navy Commander in Chief, U.S. Pacific Command), LEXIS, News Group File [hereinafter Blair].

<sup>231</sup> See *supra* Part V.B for a discussion about why nuclear deterrence does not work against terrorists.

<sup>232</sup> Blair, *supra* note 230.

<sup>233</sup> SEANWFZ only covers the territory and EEZs of its parties, which are all ASEAN members. SEANWFZ, *supra* note 17, art. I. North Korea and China are not SEANWFZ members. *Id.* art. I.

<sup>234</sup> The negative security assurances in the Protocol to SEANWFZ only limit nuclear use within the zone, not outside of it. SEANWFZ, *supra* note 17, Protocol, art. II.

<sup>235</sup> See *supra* Part III.B for a discussion of the United States duty under the NPT to support the spread of NWFZs and extend legally binding negative security assurances to non-nuclear weapons states.

<sup>236</sup> SEANWFZ, *supra* note 17, Protocol, art. II.

<sup>237</sup> SINGH, *supra* note 24, at 32.

involved in the process.<sup>238</sup> ASEAN's willingness to work with China shows that it is amenable to forming a consensus on the Protocol.<sup>239</sup>

Furthermore, ASEAN leaders are examining other controversial provisions. ASEAN leaders are currently debating whether to amend the Protocol so the negative security assurances do not cover member states' EEZs.<sup>240</sup> ASEAN leaders are also studying the feasibility of drafting policy statements to alleviate United States concerns about security assurances, the outer limits of the zone, transit rights, and other issues.<sup>241</sup> The United States should thus take initiative to work with ASEAN to develop a feasible Protocol for all nuclear-weapons states.

### *B. Advantages of U.S. Signature of the Protocol to SEANWFZ*

The ultimate success of SEANWFZ depends upon the support of nuclear-weapons states, and ASEAN needs U.S. support to preserve the regime. Signing the Protocol will support regional non-proliferation and security in Southeast Asia, and it will fulfill U.S. duties to support NWFZs and provide legally binding negative security assurances under the NPT.

#### *1. U.S. Signature Will Solidify a Regime that Supports Regional Security in Southeast Asia*

By itself, SEANWFZ offers little to no protection beyond the provisions of the NPT that prohibit nuclear acquisition without support from nuclear-weapons states.<sup>242</sup> The region is not truly "nuclear-free" unless nuclear-weapons states agree to uphold the treaty and promise not to station or use nuclear weapons in the zone. Nuclear-weapons states are an essential element of SEANWFZ, because ASEAN members have already agreed not to acquire nuclear weapons under the NPT.<sup>243</sup> SEANWFZ is the product of regional cooperation, and it promotes stability in Southeast Asia by assuring member states that their neighbors will not develop nuclear weapons.<sup>244</sup> The United States should sign the Protocol to SEANWFZ to stabilize Southeast Asian disarmament and support regional security.

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<sup>238</sup> SINGH, *supra* note 24, at 41.

<sup>239</sup> See discussion, *supra* Part VI.A.2.

<sup>240</sup> SINGH, *supra* note 24, at 46.

<sup>241</sup> *Id.* at 46-47.

<sup>242</sup> Thakur, *supra* note 20, at 12.

<sup>243</sup> SINGH, *supra* note 24, at 45.

<sup>244</sup> *Id.* at 40.

2. *The U.S. Should Sign the Protocol to SEANWFZ to Uphold its Duties Under the NPT and Promote Global Non-Proliferation*

The Protocol to SEANWFZ provides the United States with an opportunity to restore its credibility as a leader in the drive for global non-proliferation and disarmament.<sup>245</sup> It serves to fulfill the United States' Article VI requirements under the NPT to take steps toward global nuclear disarmament.<sup>246</sup> Signing the Protocol will extend legally binding security assurances to the ten ASEAN nations<sup>247</sup> and facilitate the spread of NWFZs.<sup>248</sup> Support from the United States for SEANWFZ extends the purposes of the NPT by making the whole southern hemisphere a nuclear-free zone.<sup>249</sup>

## VII. CONCLUSION

The United States has done little to support non-proliferation and disarmament after the indefinite extension of the NPT in 1995. Signing the Protocol to SEANWFZ is a simple and meaningful way to bolster United States non-proliferation credibility and support peace and stability in Southeast Asia.

United States criticisms of the Treaty are unfounded. First, the United States should not reject arms control treaties to maintain its policy of nuclear deterrence. Nuclear deterrence violates the letter and spirit of the NPT and maintains the legitimacy of nuclear weapons. Second, incorporation of EEZs in the zone will not substantially limit U.S. freedom of navigation and nuclear deterrence. Third, SEANWFZ will not cause regional tension over boundaries in the South China Sea because China is already working with ASEAN to sign the Protocol and resolve misunderstandings. Fourth, the negative security assurances in the Protocol will increase regional security without significantly limiting U.S. nuclear deterrence. Finally, ASEAN is willing to negotiate over specific elements of the Protocol in exchange for signature, so the United States has an opportunity to influence the structure of a major NWFZ.

Moreover, signing the Protocol to SEANWFZ will bolster U.S. and world security. It is an opportunity for the United States to meet its duties

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<sup>245</sup> See *supra* Part I for a discussion of the Bush Administration's visible move away from supporting international non-proliferation agreements.

<sup>246</sup> NPT, *supra* note 3, art. VI.

<sup>247</sup> SEANWFZ, *supra* note 17, Protocol, art. II; Final Document, *supra* note 5, Annex, dec. 2, para. 8.

<sup>248</sup> Final Document, *supra* note 5, Annex, dec. 2, para. 7.

<sup>249</sup> SINGH, *supra* note 24, at 53.

under the NPT and support global nonproliferation. Signing the Protocol would also help solidify SEANWFZ, which is an important element of regional security in Southeast Asia. The world will be a safer place when the southern hemisphere is free of nuclear weapons. The United States government should play a leadership role toward realization of that vision.

