

The NSG Guidelines: Evolution and Challenges

Afsah Qazi

Introduction

The nuclear explosion code-named ‘Smiling Buddha’ conducted on 18th of May 1974 by India had a decisive impact on both regional and international strategic environments leading to increased concerns over nuclear weapons proliferation. The most prominent step taken by the international community to address these concerns was to co-ordinate export rules and mechanisms of the individual supplier states. The aim was to standardize their behavior regarding the nuclear trade so as to curb future instances like that of India. Since it was aimed at regulating the exports of nuclear technology, it is one of the export control regimes which are a part of the non-proliferation regime as a whole.

This group of nuclear supplier states took a formal shape after becoming more integrated, and came to be known as the Nuclear Suppliers Group. NSG is basically a cartel comprising of nuclear supplier states and shaped against the perspective of nuclear proliferation. It has therefore maintained its support for the non-proliferation regime. To date all developments and changes in the NSG have bolstered its status as a non-proliferation mechanism and have had a direct bearing on global efforts towards non-proliferation. However, current initiatives by certain states pose grave challenges to the structure and function of NSG and might result in changes which could have far-reaching consequences for NSG’s existence as an export regulation mechanism and as well as for the attainment of broader non-proliferation objectives.¹ Therefore, this push towards change, the probable outcomes in their final shape and the ways in which these would impact the future of NSG in its regional and international connections is the basic concern that forms the subject of the present paper.

Background and Evolution

The seven established nuclear supplier states, US, Germany, France, UK, Japan, Canada and the Soviet Union were prompted to coordinate their export control policies after India tested its nuclear capability in 1974. For this purpose meetings and negotiations were carried out in London and the first loosely integrated body of seven supplier states was called the London Club. This group of seven states recognized the

fact that Indian nuclear test was not a peaceful explosion as claimed by it, since a nuclear explosion did not amount to peaceful intentions. The common objective of these states was to take steps that would leave no space for other states to get encouraged and follow India's example. Its primary function was similar to that of an export control regime, i.e. to check that nuclear technology exported for peaceful purposes is not diverted for non-peaceful purposes. The group also aimed to ensure that efforts for checking proliferation should not unjustly hinder the international nuclear trade for peaceful purposes.²

In 1977, with the inclusion of eight more members, a total of 15 supplier states agreed to the first set of guidelines which were published by IAEA in 1978 as the Information Circular 254 (INFCIRC/254). For some reasons the period from 1978 to 1990 was of inaction for NSG. Its hibernation ended when the issue of diversion of dual-use equipment for weapons production came to the fore with the reported revelation of Iraq's possession of WMDs. Meetings and negotiations ended up in the formulation of second set of guidelines which were published in 1992 by the IAEA and were incorporated as the Part-II of the original guidelines. Since then the original guidelines are known as the INFCIRC/254-Part I and the latter set is known as the INFCIRC/254-Part II.

The scope of the two sets of guidelines is different from each other. The first set of guidelines governs the export of items especially designed for nuclear use as well as of the technology associated with these items.³ The second set deals with the export of nuclear-related dual-use items, i.e. items which can have both peaceful as well as non-peaceful uses and so can be misused under the cover of peaceful usage.⁴ True to its *raison-d'être*, the group's goals and actions have remained in conformity with the non-proliferation regime and with NPT since its inception. However, a formal commitment to the regime came only with the adoption of the non-proliferation principle in 1994.⁵

The efforts that made NSG evolve into a more efficient structure, trying to make its guidelines for nuclear trade more comprehensive, points towards the cartel's flexibility and ability to adapt to changing situations and emerging challenges. The group has so far strictly followed the consensus principle for affecting and incorporating additions and amendments agreed upon at the yearly plenary. The changes follow a process involving extensive research, review and debate. The consensus principle has helped NSG to reach some of the most crucial decisions thus enabling it to reform itself in a way that reinforces its commitment to non-proliferation principle. However, at places where the consensus rule was by-passed due to the over-arching influence of certain actors, the decisions have had the opposite impact; the non-proliferation principle was

undermined and the deteriorating impulses thus generated within the group persist even today. Any future decisions of the kind would multiply the concerns and doubts regarding NSG's commitment to non-proliferation, and its status as a non-partisan export control regime following a standardized behavior for all states. NSG like every other structure has evolved with time by managing to against itself, in order to meet the growing challenges to nuclear non-proliferation.

NSG: Criteria, Guidelines and their Effectiveness

NSG guidelines expect the member states to strictly follow a criteria based approach while engaging in nuclear trade with other states. The guidelines are equally valid and can be applied to both participants and non-participants, meaning that all states other than members are also encouraged to follow the NSG guidelines if they want to engage in the nuclear trade. There is no legal authority and voluntary adherence to the NSG guidelines is required thus adherence to non-proliferation goals is the most important pre-requisite for having access to nuclear technology. This voluntary adherence by the non-members helps NSG to follow 'cooperation' as the rule and 'restrictions' as the exceptions. As per the fundamental guidelines, nuclear technology for peaceful uses can be exported only to the states which are members of NPT and if not, the recipient states must have comprehensive IAEA safeguards placed over all their existing and future nuclear facilities. These basic criteria show adherence to Articles I, III and IV of NPT and also with IAEA safeguards, as the main source of verification. NSG's close adherence to NPT and IAEA objectives shows that non-proliferation goals are the primary drivers of group's activities and commercial interests are secondary. Therefore, any decisions focusing solely on the commercial aspects would undermine the NPT, IAEA and non-proliferation efforts in addition to challenging NSG's status as an export control mechanism.

In a similar manner, specified criteria have to be met in order to gain membership of NSG. Currently its 48 members consider NPT as the reference point for their actions and are bound to follow the non-proliferation principle in their dealings with states demanding an unhindered access to nuclear technology for peaceful purposes. The five basic criteria include a country's capability to supply goods listed in the NSG guidelines; adherence to the NSG guidelines in relation to these items; implementation of a domestic export control system that is legally binding and is compatible with the NSG rules; membership of the NPT or of a comparable regional agreement such as a nuclear weapons free zone (NWFZ) treaty; and lastly a support for international efforts aimed at non-proliferation of WMDs.⁶ These were the original criteria but a number of others have now been added to the list.

The changes and amendments in NSG guidelines have always followed the recommendations made in NPT review conferences, since articles of the Non-Proliferation Treaty are a main reference point for the activities of the cartel. In this regard the Final Document of the 2000 NPT Review Conference is quite important as it listed 13 steps for gaining membership which were later reaffirmed in the Final Document of the 2010 Review Conference. These steps have been incorporated in the NSG guidelines through publication of IAEA Information Circulars which declared these as corrections in the original/existing guidelines. Important among these are the adherence to Model Additional Protocol meant to overcome the weaknesses in Comprehensive Safeguards Agreement (CSA); enforcement of Voluntary Offer Agreement (VOA)⁷; non-transfer of any items to states without a CSA and an Additional Protocol; information sharing with NSG members and IAEA on Catch-all denials; signing and ratifying the CTBT and pending its entry into force adherence to a unilateral moratorium on nuclear explosive testing; adherence to MTCR and ratification of CPPNM.⁸ These set criteria are now to be followed for allowing the new supplier states to join the group.

The guidelines outlined in INFCIRC-254 parts I and II have been regularly reviewed and updated to adjust them with the changing proliferation challenges and to maintain their effectiveness. When it comes to updating trigger lists, NSG's activities go hand in hand with Zangger Committee. There are many commonalities between the two structures. The Zangger Committee is also an export control mechanism established in almost the same time frame as NSG, which also directs its efforts towards implementing Article III (2) of the NPT. The essential difference between the two structures is that Zangger committee deals particularly with the export of items that are "especially designed or prepared" for nuclear use i.e. EDPs.⁹ It, therefore, does not include the dual-use technology and also does not impact the activities of states which are not NPT members; the NSG on the contrary addresses these two issues. NSG has had substantial changes within its structure and function since its creation and is still evolving with the changing situations as noted earlier. The recommendations related to Article III of NPT given in the 1990 NPT Review Conference have been a major source that led to the revamping of NSG.

NSG's inactivity ended after 1990 because of the changes in world political landscape due to the disintegration of the USSR. NSG was then faced with an 'Eastern question'. Many of the newly independent Central Asian states had nuclear facilities as well as export capabilities. They were no longer bound to the NSG guidelines or any other non-proliferation arrangements to which their predecessor the erstwhile USSR adhered. The issue was too important to be ignored and the Warsaw Plenary of 1992 revolved largely around it.¹⁰ As a first step to cater for the problem, in addition to the

incorporation of nuclear-related dual-use guidelines, the full-scope safeguards agreement with IAEA was made a pre-condition for supply of nuclear technology.

This amendment was endorsed at the 1993 Lucerne meeting of the NSG. This meeting also adopted a procedure for a new state's invitation and joining of the regime. A consensus among NSG members was agreed by the member states as an essential condition in addition to the acceptance by the new state of NSG guidelines in entirety. Adherence to both parts I and II of the guidelines would give the right for full participation but only accepting part I would grant the right to just attend the meetings.¹¹ Next major change was the adoption of non-proliferation principle in 1994. This principle required a supplier to authorize the transfer only after being satisfied that technology/material or equipment would not be used for nuclear weapons proliferation.

The endorsement of full scope safeguards policy by the NPT review and extension conference in 1995; the endorsement of IAEA's 1997 model additional protocol by NSG members at plenary in 2000; and the adoption of Catch-All mechanisms in 2004 (which gave a legal basis to national export controls for regulating the transfers of items not mentioned in the control lists), all pointed towards the strong resolve of international community to synchronize nuclear supply policy with non-proliferation goals and objectives. This resolve is also evident from the fact that at almost all the NSG Plenary meetings, concerns about Iranian and North Korean non-compliance with the non-proliferation treaty were the top-most on the agenda.

Proliferation concerns regarding Iran and North Korea were also major issues at 2005 meeting as a result of which it was agreed that national decisions could suspend transfers to states that were non-compliant with their safeguards agreements. The plenary in 2006, held at Brasilia called for further strengthening of the national export controls including revised guidelines for NSG information sharing. The major development since then has been the one regarding the transfer of Enrichment and Reprocessing facilities (ENR) where the transfer of these technologies has been restricted to those countries which already have them in place. It would mean that no state will be helped to have access to these technologies if it intended to initiate its programs from a scratch. This entire course of changes and developments shows that the NSG has tried hard to retain its effectiveness for ensuring non-proliferation and it provides a clear, criteria-based approach for dealing with all the states in the same manner following a consistent pattern.

The Current Status of the NSG: Threats and Challenges

Despite all the efforts for becoming an adequate structure capable of addressing simultaneously the two dimensional problems associated with nuclear technology, NSG as it exists today remains far from perfect. This is because an ever more dynamic and globalized world has increased the challenges for the group. Non-NSG participants have shown their concerns regarding the lack of transparency in NSG proceedings for quite some time. They also have concerns over not being consulted when setting criteria for technology transfers, and argue that such criteria impose undue restrictions which bar them from the benefits of nuclear technology. NSG on the other hand uses its adherence to non-proliferation goals as a justification for its restrictive guidelines. In order to address concerns regarding transparency, NSG has sent special missions to different countries for promoting openness and greater understanding of its working. Since 1990 it has regularly issued press releases to inform the general public about the issues that are discussed in the meetings and the measures which are adopted by it.¹²

A major challenge is the emergence of the new suppliers as well as of the would-be proliferators whose behavior must be regulated to restrict proliferation. Here, NSG faces a dilemma; if potential nuclear technology exporters are not integrated in the group, they would become individual suppliers not bound by the NSG guidelines and free to act at will, thus weakening NSG's role as an export regulating mechanism. Contrarily, if these states are given an un-conditional admission into the group, control over their export behavior might be exerted but only at the expense of established rules and criteria. This would transform NSG into a pre-dominantly commercialized trading structure having little to do with non-proliferation.

The ongoing debate over the expansion of NSG membership is important because it directly relates to the scope of the group. Unchecked expansion would disengage NSG's present from the past. There is every likelihood that the future goals would be poorly aligned with the original ones (for which it was created); such a situation would make the group's purpose questionable. This would also have a direct bearing on the functioning of the NSG as it would become difficult to follow the consensus rule in face of larger membership since bringing a larger number of members to a common point of agreement would be increasingly problematic. Either side of this dilemma, therefore, would pose a challenge for NSG.

The maturation of Indo-US deal in 2008 has been one of the biggest challenges for the NSG. It has threatened the status of NSG in the most direct manner. The deal was considered a major breakthrough in the relations of the two states and was based on

discrete long term incentives for the two sides. However, it was vehemently debated and criticized at international and regional levels, and also within USA.¹³ The reason for this response was the awareness that the proposed deal was not permissible under the fundamental principles guiding the existing nuclear order. The NSG guidelines did not allow US, a member supplier state to engage in any type of nuclear trade with a non-NPT state. India, which did not adhere to the IAEA comprehensive safeguards agreement and also had not acceded to the Model Additional Protocol (which was made a condition for supply by that time), did not qualify for trading in nuclear technology. It was, therefore understood by all that any efforts to get the deal would be a departure from the existing norms; yet the deal was finalized.

US compromised the existing rules for allowing nuclear technology export to India. Surprisingly NSG played a central but a compliant role in helping the deal to materialize. NSG came into the limelight because it was a matter of usual technology transfer between a member Supplier State (US) and a recipient state aspiring to import technology (India). Therefore NSG was supposed to act and decide according to the guidelines and rules which it followed in other usual cases. But for India things turned out to be otherwise, established rules were bypassed and NSG went an extra mile to facilitate the trade of nuclear technology in violation of the NSG guidelines for the very state which necessitated its creation in the first place. None of NSG criteria were fulfilled. Instead changes were forced in the basic NSG rules and regulations to benefit India. India specific amendment was made in the NSG; IAEA enacted the facility specific safeguards agreement, primarily for India which replaced the CSA. US actions violated. Article I of NPT, and the global consensus on non-proliferation that had lasted for about four decades was thus shattered with a single blow.

NSG granted the waiver by accepting the steps India voluntarily promised to undertake in order to get the deal. These included separation of its civilian nuclear facilities; commitment to sign and adhere to Additional Protocol; support international efforts to limit the spread of ENR technologies; strengthen its domestic export control system; adhere to NSG guidelines; continue moratorium on nuclear testing and last but not the least work towards an FMCT.¹⁴ Unfortunately none of these listed steps have been duly met even after five years. The whole affair has adversely affected the credibility and reliability of the NPT, IAEA and the NSG, all of which are the fundamental constituents of the non-proliferation regime. Additionally, the regional security imperatives were grossly ignored in the process leading to a severe destabilization of the deterrence stability in South Asia. The decisions increased the complexities of regional competition and brought under question NSG's posture as a non-discriminatory mechanism.

North-south dynamic has always been a challenge for the NSG. Nuclear weapons of the important western powers had been legitimized under various nuclear protocols and regimes. NSG guidelines have, therefore, remained directed towards the South. This excessive thrust has conditioned the attitude of most states located in global south, towards the Group. They argue that NSG's behavior towards the non-nuclear weapon states has been discriminatory, based on political cum commercial motives. The countries of the south demand to be integrated as members in the group as a proof for the non-discriminatory nature of the NSG. They emphasize that NSG must address the concerns of the developing states too, and not confine itself to promote the interests of the nuclear weapon states.

Many in the North also see it as a solution i.e. if developing states of the South are granted membership, NSG's standing as a bona-fide non-proliferation component would have greater legitimacy. The same logic is often presented by major actors like US, UK, France, Russia and Australia for supporting Indian demands of NSG membership. However, Indian case is not that simple and the debate over whether existing rules and criteria allow India's membership has already gained momentum.

India falls short of the criteria which have been set for NSG membership. Of the five basic criteria India might be able to meet the first three to some extent, but does not conform to the last two. India is not a member either of NPT or of any other regional weapons free zone treaty and secondly, instead of supporting the international efforts towards non-proliferation, its actions rather undermine them, as evident from its stand regarding the future of both CTBT and FMCT. Of the rest of the 13 updated criteria for membership, already discussed, India has not undertaken to comply with the Articles I, III and VI of the NPT, has denied signing of a voluntary offer agreement (VOA) with the IAEA, and does not adhere to a CSA as well as the Additional Protocol. It also has not committed to unilateral moratorium on nuclear explosive testing and has claimed CTBT to have become a dead issue.¹⁵

India's inclusion would be as big a challenge as its non-inclusion. It has not yet committed to non-proliferation principle which is followed by rest of the members. Having it in the club would make it difficult to follow the time honored consensus principle of NSG. In the face of more pressing demands to transform NSG, majority of states have agreed with the proposition that same criteria must be applied for all states if membership has to be extended and no preferential treatment should be given to India. China, on a similar note proposes that if there exists (or could exist) a possibility of non-NPT states joining the NSG, then it must be extended to all nuclear capable non-NPT states, instead of making it specific to India. China's proposal thus creates an equal ground for Pakistan's entry into group.

The Future

Looking into the future, India's inclusion into the NSG and demands for changing the NSG criteria to give it an exceptional treatment are the foremost challenges faced by NSG. Currently, it is a debate which can apparently end in two possible ways, either India would get a membership or it won't. Both these ends would have repercussions for nuclear proliferation in the world. In both cases NSG would be responsible for global and regional implications of the outcomes. If India gets into the club by getting an exceptional treatment, it would have far-reaching and highly destabilizing influence on both levels. Contrarily, if it does not get the membership, it would in future become a challenge for both NSG and the non-proliferation regimes. The difference is that in the first case the consequences would be both more imminent as well as eminent when compared to the second case, i.e. if India remains out of the group it is not likely to attain the status to directly hinder the normal functioning of the group in the near future. Since the challenges won't be imminent, NSG might have time to devise some suitable strategy to deal effectively with Indian demands.

In case NSG decides to make India its member, results would be similar to those of the Indo-US deal but certainly more pronounced. A selective Indian inclusion would challenge the legal as well as moral authority of the global non-proliferation regime. As for NSG, the cartel would be trapped in an identity dilemma due to disconnect between its original and future goals impacting its *raison-d'être*. The expansion of membership may cause a major disconnect between the NSG and the NPT thereby making the cartel's role questionable as a component of non-proliferation regime.

Most importantly such an action would bring into sharp focus the discriminatory nature of the non-proliferation regime, increasing resentment among other non-NPT states. This would encourage other states to defy the non-proliferation principles with legitimate expectation to get a treatment similar to India. Pakistan, undoubtedly, will have to face the greatest and direct brunt of such a discriminatory action/policy as it had to after the civil nuclear agreement. The implications of India's specific inclusion would be more severe for Pakistan than the previous waiver given to India. Taking advantage of the NSG consensus rule followed in decision making, India as a member would be in a position to permanently block Pakistan's entry in the Group.¹⁶ The inclusion of India, therefore, might perpetuate the asymmetry and inequality between India and Pakistan, creating another permanent source for instability in the region. Moreover, such a step would constitute another show of partiality on part of NSG, threatening its survival as an export control mechanism.

A preferred solution to the problem of India's membership of NSG would be to go by the set protocols. Nuclear Suppliers Group should wait for India to fulfill all the listed criteria before granting it membership.¹⁷ Once India qualifies for the membership, oppositions could be easily ruled out. In the other case, if India's immediate and instant incorporation is imperative the criteria would be compromised leading to serious consequences for NSG. If the two ends have to be met, i.e. including India while avoiding such consequences, the changes to be made must not be India specific. Instead a new set of criteria should be devised and extended to all other states belonging to the same category as India, should they want to gain the NSG membership in future. However, to save the NSG from a likely identity crisis, the commitment to non-proliferation must be placed above all.

Conclusion

This paper has enquired into NSG's evolution since its inception. It also looks into the circumstances that prompted changes in the group and the impact of these changes on NSG's structure and functioning. The research establishes the fact that primary rule governing the group's activities is its commitment to nuclear weapons non-proliferation and the goals of NPT. The commercial aspects related to nuclear trade have always been of secondary importance to the group.

Timely amendments in the NSG guidelines, control lists and the annexes have been made. These periodic changes have kept this export control cartel pertinent to the changing global political environment and the non-proliferation regime. All the changes since 1991 point clearly towards group's capacity to learn and adapt. As the largest and most heterogeneous among the export control mechanism NSG now stands on par with other non-proliferation regimes in its potential to protect against proliferation dangers and trying to counteract them.¹⁸ However, despite NSG members' shared belief in the ideals of non-proliferation, the group's commitment to NPT was seriously shaken by the waiver given to India in 2008.

Whatever NSG ultimately decides for India will have a direct bearing on its own future. Bypassing the criteria for including India would be a reinforcement of discriminatory patterns that would ostracize Pakistan in the complex South Asian security setting. Therefore, greater efforts must be made to stick to the original criteria. If that is not possible in face of the emerging challenges, and if India has to be incorporated in NSG a new set of criteria may be developed or new provisions may be added to the existing criteria list. The new set of NSG criteria must be applicable equally to all states aspiring for membership in future; selective criteria crafted for specific states must not be an option.

Endnotes

- ¹ “Nuclear tipped states divided on India joining NSG,” *The Express Tribune*, March 20, 2013, <http://tribune.com.pk/story/524024/nuclear-tipped-states-divided-on-india-joining-nsg/>
- ¹ Nuclear Suppliers Group (NSG), NTI, <http://www.nti.org/treaties-and-regimes/nuclear-suppliers-group-nsg/>
- ¹ Mostly the items coming under the scope of first and initial set of guidelines, i.e. INFCIRC-254/part 1, are similar to the items present on the trigger list of Zangger Committee.
- ¹ Nuclear Suppliers Group (NSG), Official Website, http://www.nuclearsuppliersgroup.org/A_test/01-eng/09-guide.php?%20button=9
- ¹ “The Nuclear Suppliers Group: Its origins, role and activities,” IAEA Information Circular INFCIRC/539/Rev.5, December 4, 2012, <http://www.iaea.org/Publications/Documents/Infcircs/index.html>
- ¹ Ibid
- ¹ Under this agreement a state undertakes to place all new nuclear facilities located outside the existing military nuclear sites under IAEA safeguards.
- ¹ Pierre Goldschmidt, “NSG membership: A criteria based approach for Non-NPT states,” Carnegie Endowment for International Peace, *Proliferation Analysis*, May 24, 2011, <http://carnegieendowment.org/publications/index.cfm?fa=view&id=44147>
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- ¹ Tadeusz Strulak, “The Nuclear Suppliers Group,” *Non-Proliferation Review*, 1993