The Nuclear Nonproliferation Treaty

and

Peaceful Nuclear Energy

Testimony by

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Mr. Chairman, members of the committee, it is an honor to testify before you on what nations' rights to develop "peaceful nuclear energy" are under the Nuclear Nonproliferation Treaty (NPT). The key point I want to make today is that the Iranian government is wrong when it claims that the NPT guarantees it a right to make nuclear fuel. Just because a nuclear activity or material can be used for peaceful purposes does not mean that any member of the NPT has an unconditional right to pursue or acquire it especially when the activity or material in question might bring it within days of having a bomb.

In making this argument, I side with President Bush who, in his February 11, 2004 speech on nuclear nonproliferation, complained that states like Iran have "cynically manipulated" the Nuclear Nonproliferation Treaty to acquire all they need to acquire nuclear weapons under the guise of developing peaceful nuclear energy. UN Secretary-General Kofi Annan made the same point at the NPT Review Conference last May, when he warned against subverting the NPT's purpose by reading into it an unqualified guarantee for all to acquire the most dangerous forms of nuclear energy.

Their view, as well as that of legal authorities, diplomatic historians, and officials closely involved in the negotiation and ratification of the NPT, is that the treaty neither recognizes nor protects such a *per se* right, but rather affirms a right to peaceful nuclear energy that is logically and legally qualified in at least three respects.[1]

Noncompliance

First, by definition and by the explicit proscription of Article IV of the NPT, no nonweapons state that is a member of the NPT can enjoy the right to develop, produce or research peaceful nuclear energy if they use it "to manufacture or otherwise acquire nuclear weapons." Instead, states that exercise their right to peaceful nuclear energy must do so "in conformity" with the NPT's prohibitions in Articles I and II against acquiring or sharing nuclear weapons and related technology or materials.

Our government has emphasized this point in making its case for reporting Iran's nuclear misbehavior to the UN. Iran, U.S. officials insist, is making a bomb with technology and materials that Tehran claims it is developing for the purpose of generating civilian nuclear energy. Iran's covert bomb making activities are a clear violation of Article II of the NPT, and, therefore, Iran is in noncompliance with its NPT obligations and should be reported to the UN. Some are persuaded by this argument. Others, including Russia and China, are not.

Fortunately, U.S. officials have made another argument that enjoys much broader support. Iran, they point out, has violated its International Atomic Energy Agency (IAEA) nuclear safeguards obligations. These violations serve as grounds for action under Article 12 c. of the IAEA's Charter Statute. Article 12 c. provides that in cases in

1. The thoughts expressed here rely heavily on the substantive historical and legal analyses of Albert Wohlstetter, Arthur Steiner, Eldon V.C.Greenberg, and Paul Lettow.

which the IAEA Board of Governors finds a member to be in noncompliance, the Board shall report the noncompliance to the United Nations Security Council (UNSC). [2]

It is this argument that the U.S. and its friends are relying on to move the IAEA Board of Governors in its upcoming meeting March 6 formally to report Iran's noncompliance to the UNSC.[3] As you noted in your invitation to testify before this committee, some have questioned if failing such a finding of noncompliance, any NPT member's right to develop, research or produce peaceful nuclear energy can or should be restricted. If Iran declared its enrichment and reprocessing activities as it should have, would we have any grounds to find Tehran in noncompliance failing some "proof" that it was developing or acquired nuclear weapons? The position of the U.S. State Department's Legal Division—along with the Foreign Ministry of Iran—is that the answer is no.

Why Merely Declaring Nuclear Activities Is Not Enough

Although this State Department legal interpretation may be soothing to nuclear fuel making states like Japan, Germany, the Netherlands, Brazil, and South Africa, it ultimately turns the NPT on its head. Certainly, if we are serious about using the treaty to prevent states from getting within days of acquiring an arsenal, it is too narrow a reading.[4] One begins to appreciate how untenable this constricted interpretation of the NPT is when one examines the much sounder position the U.S. State Department simultaneously maintains regarding the limits on what nuclear technology NPT member states should supply to others. Speaking from a cleared text before the NPT Review Conference last May, the U.S. representative to these talks explained:

> Parties are not compelled by Article IV to engage in nuclear cooperation with any given state -- or to provide any particular form of nuclear assistance to any other state. The NPT does not require any specific sharing of nuclear technology between particular States Party, nor does it oblige technology-possessors to share any specific materials or

2. Article 12 c. of the IAEA Statute also provides that "In the event of failure of the recipient State or States to remedy forthwith any non-compliance," the Board may further "direct curtailment or suspension of assistance being provided by the Agency or by a member, and call for the return of materials and equipment made available to the recipient member or group of members" The Statute also authorizes the Board to suspend any non-complying member from enjoying the rights and privileges of IAEA membership.

3 . Some contend that because the NPT's Article III stipulates that IAEA safeguards "shall be followed," a determination by any NPT member of noncompliance of IAEA safeguards by any other state should serve as sufficient grounds for finding that state in noncompliance with the NPT, without a finding of a majority of the IAEA Board of Governors. This position, though, has not yet been tested.

4. See, Albert Wohlstetter, "Spreading the Bomb without Quite Breaking the Rules," *Foreign Policy* , (25, Winter 1976-77).

> technology with non-possessors. Indeed, to conform both to the overall objective of the NPT -- strengthening security by halting nuclear proliferation -- and to any Article I and III obligations, supplier states must consider whether certain types of assistance, or assistance to certain countries, are consistent with the nonproliferation purposes and obligations of the NPT, other international obligations, and their own national requirements. They should withhold assistance if they believe that a specific form of cooperation would encourage or facilitate proliferation, or if they believe that a state is pursuing a nuclear weapons program in violation of Article II, is not in full compliance with its safeguards obligations, or is in violation of Article I. [5]

Here, the State Department correctly argues that the NPT's call on parties "to facilitate … the fullest possible exchange" of technology for the peaceful uses of nuclear energy should in no way be viewed a being a requirement to supply any specific nuclear technology to any specific member and that, instead, just the opposite applies . History clearly backs this position. In fact, two separate proposals during the NPT's final negotiation, one by Spain and another by Mexico, to amend the treaty's text to *require* the nuclear weapons states to provide non-weapons state members with "the entire technology of reactors and fuels" were rejected. The UK representative noted that these were "too sweeping".[6]

The question is why. A technical as well an historical answer is available in the record of the Eighteen Nations Disarmament Committee (ENDC) talks in Geneva in which key negotiations relating to the NPT were conducted. Here in 1966, the Swedish representative, Mrs. Myrdal, warned:

> To prohibit just the final act of 'manufacture' would seem to come late in these long chains of decisions. On the other hand, already to probe the preliminary thinking of politicians and the laboratory research of scientists obviously is as difficult, as it would be considered an undesirable intervention. Could a middle link be found on which the prohibitory regulation should most definitely be focused? . . . [M]ust not regulations about effective controls be linked with certain definitive and uncontestable steps, such as actual purchases of nuclear reactors, fuel elements and so on

5. USUN Press Release #101 (05) May 19, 2005, Statement by Christopher Ford, Principal Deputy Assistant Secretary of State, Bureau of Verification and Compliance, on Article IV, in the Third Committee of the 2005 Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons, May 19, 2005.

6. See Arthur Steiner, "Article IV and the 'Straightforward Bargain'," PAN Heuristics Paper 78-832-08, in Wohlstetter, et al., *Towards a New Consensus on Nuclear Technology*, Vol. II (Supporting Papers), ACDA Report no. PH-78-04-832-33 (Marina del Rey, Calif.: Pan Heuristics, 1978). pp. 1-8.

> from abroad, and/or the establishment within a country of such installations as plutonium separation [reprocessing] plants and the like? These problems are so important that no effort should be spared in order to establish our positions as exactly as possible. I trust that we all agree that no 'loopholes' should be left for misunderstandings or contradictory interpretations.[7]

Although, Mrs. Mydral's questions were never fully answered by the Committee, they clearly were raised and were among the key reasons why the Spanish and Mexican proposed amendments were subsequently rejected. More important, these observations suggest why the NPT can hardly recognize a per se right among any non-weapons state member to develop "the entire technology of reactors and fuels" without running afoul of the treaty's clear Article II stricture against manufacturing or otherwise acquiring nuclear weapons.

Most diplomats have tried to extricate themselves from the dilemma that many civilian nuclear activities can bring nations to the very edge of bomb making by simply contending that all declared civilian nuclear facilities or materials – whether they be reactors, enrichment or reprocessing plants or weapons usable nuclear fuels – are "peaceful" and protected by the NPT once they are placed under IAEA inspections. This view, which is quite popular today, however, is, as will be explained below, an incomplete understanding of NPT's actual provisions and intent.

Safeguards

This brings us to the second qualification on a nonweapons state's "inalienable" right to peaceful nuclear energy, which is that it must involve nuclear materials or activities that can be safeguarded. As Article IV stipulates, the right to peaceful nuclear energy will be exercised "in conformity" with Articles I and II. Article II's prohibition against nonweapons states acquiring or manufacturing nuclear weapons, though, is to be verified by adherence to Article III, which requires nonweapons states to "accept" and "follow" IAEA safeguards on all their key nuclear activities and materials. It is for this reason that the NPT Review Conference in l995 determined that the right to peaceful nuclear energy is qualified not only by Articles I and II, but by Article III as well.

It would be comforting to think that whatever nuclear programs the IAEA inspects are actually safeguarded against being used to make bombs. Recent experience with Iran, however, suggests that this view is unwarranted. First, the IAEA's cannot always find covert nuclear activities. In Iran's case, the IAEA missed an entire "peaceful" uranium enrichment program for nearly 20 years. Second, certain nuclear activities, such as

7. Speech by Mrs. Myrdal (Sweden) in Plenary Session 243 on 24 Feb. 1966 in *Further Documents on Disarmament: Ninth Session of the Eighteen-Nation Committee on Disarmament,* 27 January to 10 May 1966, Cmnd. 3120 (1966) (U.K.) at 81-82 cited in the May 2005 unpublished history of the NPT and Article IV by Paul Lettow.

nuclear fuel making, can bring states, such as Iran, so close to acquiring nuclear weapons, inspections could hardly provide sufficient warning to other states to prevent Iran from completing a military diversion to make bombs.

In fact, both of these caveats are addressed in the NPT. Under Article III, the purpose of safeguards is explicitly specified as being to verify "fulfillment of … obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons." Monitoring procedures authorized by the IAEA that fail to meet these objectives, then, may be inspections but they are not safeguards and, as such, the activities and materials subject to such monitoring ought not to be presumed to be peaceful and, therefore, protected under the NPT.

What sorts of nuclear activities and materials are likely to fail to admit to being monitored in a manner that would meet the NPT defined purpose of safeguards, i.e., of preventing diversions and verifying states' pledges not to make bombs? Two sorts at least: Nuclear activities of a clearly uncooperative nonweapons state, such as Iran or North Korea; and nuclear processes and materials that can be converted to make bombs so quickly that reliably preventing their diversion with inspections is improbable in the extreme. Here, any nuclear fuel making activity involving direct nuclear use materials, such as highly enriched uranium, separated plutonium, or mixed oxide fuels, would have to be included. Also, the enrichment of uranium, especially enrichment involving the use of centrifuge systems, a process that can turn from the production of lightly enriched uranium to making bomb-grade fuel overnight, would have to be included as well. Finally, any large reactor that requires either significant quantities of fresh lightly enriched fuel or generates plutonium-laden spent fuel would also be too risky in any nonweapons state in which one was uncertain if it had a covert enrichment or reprocessing program — programs which could be ramped up with the quick seizure of these materials.[8]

8. On these points, see Thomas B. Cochran, "Adequacy of IAEA's Safeguards for Achieving Timely Detection," presented at a conference "After Iran: Safeguarding Peaceful Nuclear Energy," sponsored by the Nonproliferation Policy Education Center and King's College London October 2-3, 2005, available at http://www.npec-web.org/Frameset.asp?PageType=Single&PDFFile=Paper050930CochranAdequacyofTime&PDFFolder=Essays; Edwin S. Lyman, "Can Nuclear Fuel Production in Iran and Elsewhere Be Safeguarded Against Diversion?" paper presented at a conference "After Iran: Safeguarding Peaceful Nuclear Energy," sponsored by the Nonproliferation Policy Education Center and King's College London October 2-3, 2005, available at http://www.npec-web.org/Frameset.asp?PageType=Single&PDFFile=Paper050928LymanFuelSafeguardDiv&PDFFolder=Essays; and Victor Gilinsky, *A Fresh Assessment of the Proliferation Dangers of Light Water Reactors,* October 22, 2004, available at http://www.npec-web.org/Frameset.asp?PageType=Single&PDFFile=Report041022%20LWR&PDFFolder=Reports.

Benefits

A third condition on one's exercise of the right to peaceful nuclear energy is implicit in the NPT's preamble language extolling the "benefits" of peaceful nuclear energy. That condition is that the nuclear activity in question actually be one that can produce some economically measurable advantage.[9] This is a much softer point than the two previously discussed conditions, but it too is significant. Certainly, one of the persistent and reasonable complaints that U.S. officials have made about Iran's construction of its large power reactor at Bushehr and of its nuclear fuel making facilities is that neither make any economic sense. Certainly, no private bank would finance such programs on their own merits. This one of the key reasons why Iran's claims that its nuclear activities are "peaceful" have rightly raised so many doubts. Any nation's development of civilian nuclear energy, then, comes under suspicion the more uneconomical it is or becomes.[10]

Implications

The first and most obvious implication of backing this set of tougher, sounder views of the NPT and peaceful nuclear energy is that promoting them will upset nonweapons states, such as Japan, the Netherlands, Germany, South Africa, and Brazil, whose nuclear fuel making activities the U.S. has already blessed. For them, such a reading of the nuclear rules will be seen as a step backwards. Joining in their likely protest against such a reading will be those states, such as Australia and Canada, which are now contemplating nuclear fuel making, as well as a large number of developing nations which will object to any further restrictions on potential nuclear activities.

One partial response to their objections would be to argue that with time, we have come to learn more about the limits of IAEA inspections and the increased ease that countries now have in making nuclear arms. Certainly, there is no good reason to make our past

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9. See Eldon V.C. Greenberg, *The NPT and Plutonium: Application of NPT Prohibitions to 'Civilian' Nuclear Equipment, Technology and Materials Associated with Reprocessing and Plutonium Use* (Washington, DC: The Nuclear Control Institute, 1993), available at http://www.npec-web.org/Essays/Article930507%20Greenberg%20-%20The%20NPT%20and%20Plutonium%20-%20May%207%20%201993.pdf. [DELETED DEAD HYPERLINK.]

10. As the French government explained in the lead up to the NPT Review Conference of 2005, the economic rationality of a nuclear activity is directly relevant to the achievement of the NPT's nonproliferation objectives. See *Strengthening the Nuclear Non-Proliferation Regime*, Working paper submitted by the French Republic to the Preparatory Committee for the 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, NPT/CONF.2005/PC.III/WP.22, May 4, 2004, available at http://www.iaea.org/NewsCenter/Focus/FuelCycle/france_npt2004.pdf.

mistakes hereditary by grandfathering dangerous nuclear activities in such nonweapons states.

Persuading these countries that their right to develop peaceful nuclear energy does not necessarily entitle them to pursue any specific nuclear activity, though, will not be easy. As with encouraging other states to open their nuclear facilities to routine IAEA safeguards and to adopt the Additional Protocol, the example that the nuclear weapons state members of the NPT set will be important. Certainly, if the U.S and other nuclear weapons states are unwilling to subject their own civilian nuclear activities to some of the same conditions that a sound reading of the NPT requires, the chances that these conditions will be sustained by others will be much lower.

In this regard, the U.S. and other nuclear weapons states under the NPT would do well to avoid expanding their net nuclear fuel making capacity unless there is a clear market economic imperative to do so. Here, the recently proposed Global Nuclear Energy Partnership needs to be approached with caution. Funding research and development of potentially useful nuclear technologies is difficult in principle to argue against. However, using taxpayer or ratepayer monies to fund the construction of "engineering demonstration" plants that lead to the production of electricity that is placed on the commercial grid is something that ought to be resisted at all costs lest our example become a world-wide model. Finally, any thought that the U.S. and others, such as Russia, can bribe or induce other states not to make their own nuclear fuel, while publicly insisting that these states still have the right to make such fuel, ultimately is both inconsistent and untenable.