

ASSESSING “RIGHTS” UNDER THE NUCLEAR NONPROLIFERATION TREATY

HEARING BEFORE THE SUBCOMMITTEE ON INTERNATIONAL TERRORISM AND NONPROLIFERATION OF THE COMMITTEE ON INTERNATIONAL RELATIONS HOUSE OF REPRESENTATIVES ONE HUNDRED NINTH CONGRESS

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THURSDAY, MARCH 2, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTERNATIONAL TERRORISM
AND NONPROLIFERATION,
COMMITTEE ON INTERNATIONAL RELATIONS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2 p.m. in room 2200, Rayburn House Office Building, Hon. Edward R. Royce (Chairman of the Subcommittee) presiding.

Mr. ROYCE. The hearing of the Subcommittee on International Terrorism and Nonproliferation will come to order.

The Nuclear Nonproliferation Treaty is the foundation of our efforts to check the spread of nuclear weapons. Simply stated, it says that countries apart from the U.S. and four others will not acquire or develop nuclear weapons. Many believe, rightfully so, that the NPT has been very important in stemming nuclear weapons proliferation.

In the 1960s when the treaty was negotiated, there were dire predictions that dozens of countries would soon possess the bomb. Instead, several countries have given up their nuclear weapons programs, and many more with the capability have refrained from developing nuclear weapons at least in part because of what they felt were their commitments to the NPT treaty. While the NPT is not our sole nonproliferation tool, clearly it is a very important one.

Today the most pressing nuclear challenges we face are North Korea and Iran. North Korea pulled out of the NPT and announced that it has nuclear weapons. Iran, while threatening to pull out, has not done so yet; and it claims the right to enrich uranium, a process that it is working at, and it comes with a nuclear weapons option. Iran, with this sensitive aspect of the nuclear fuel cycle, is only a few steps away from having a nuclear weapon with all of the dire consequences that would come with it.

The U.S. and our European partners have rightly rejected Iran's right to develop nuclear fuel, and they point to the fact that the IAEA Board of Governors has found Iran in noncompliance with its safeguards agreement. For nearly 20 years, Iran systematically deceived the inspectors of the IAEA, concealing its nuclear efforts.

A shortcoming of the NPT is countries like Iran have the right, some believe, to develop fissile material so long as it is safeguarded. Iran is aggressively campaigning throughout the world claiming that the U.S. and the EU3 are violating this right, and they are winning some sympathy.

My concern is that over time, maybe not that far in the future, Iran could come clean with the IAEA, win international support, and successfully assert this right to develop its nuclear industry, including producing nuclear fuel. Then Iran could either cheat or withdraw from the treaty to develop nuclear weapons. Either way, Iran becomes a nuclear weapons state, and the NPT will have failed in a critical case.

President Bush, UN Secretary General Kofi Annan and many others concerned with the spread of nuclear weapons, have recognized this shortcoming of the NPT. President Bush has said that the NPT has a loophole which has been exploited by nations such as North Korea and Iran. These regimes are allowed to produce nuclear weapons, and then they can use them to build bombs under the cover of civilian nuclear programs.

During a hearing last year on the NPT review conference, some Members of this Subcommittee, including me, raised this issue of what nuclear activities are permitted under the NPT and under what conditions. While there was to be discussion of the shortcomings at the review conference, not much was done. Today we will have a chance to further this conversation, hearing from some experts who challenge this right to different degrees.

This is more than an academic exercise. The stakes in the showdown with North Korea and Iran could not be higher. Has Iran lost its right to produce nuclear weapons material because of its evasiveness, or is its right dubious in the first place? How might we push back this right?

We need a good understanding of the rules of the game as we confront these countries. I remind Members that this Subcommittee will be dealing with the historic Nuclear-Energy-Sharing agreement that President Bush and Indian Prime Minister Singh finalized today.

This discussion is an assessment of the NPT's fundamental value. While I am a treaty supporter, we need to ask what it is worth if it lends legitimacy and political support to the nuclear weapons aspiration of hostile regimes. The intention today is to shed light on this complex, yet very critical issue.

I will turn to the Ranking Member, Mr. Sherman, for any opening statement he might wish to make.

Mr. SHERMAN. Mr. Chairman, thank you for convening this hearing. It covers the most important legal issue facing us in diplomacy around the world; namely, what technologies are permissible for states to acquire under the nonproliferation treaty's Article IV, the so-called right to develop peaceful nuclear technology.

I believe this is the most important diplomatic issue the United States has with the rest of the world, and that every trade deal, every investment deal, every dispute of any kind that we are involved in, that every decision on who to invite to a Fourth of July party at a U.S. mission should be decided with one thing in mind, and that is will it help us obtain the best possible interpretation of Article IV.

Unfortunately, some in the Bush Administration have taken a position very similar to Iran; namely, that any country, as long as it is compliant with NPT, has the right to develop the full fuel cycle. This means that every country with the possible exception of

nonsignatories to the NPT and with the possible exception of Iran and North Korea that have violated that agreement, has the right to get within an inch of having a nuclear weapon on top of the table, and then they just have to do that last inch under the table. They just need to do the research below the table.

Iran has done us a great service by violating the NPT over the last 20 years. It is these violations that are our best legal basis for demanding action at the IAEA and the Security Council. But it stands to reason under the interpretation that is being pushed forward by some in the Administration that Iran's centrifuges would be entirely legal if only they had reported them.

Now, the recent revelations that Iran is experimenting with high explosives in connection with fissile material, that they are researching how to make uranium hemispheres and other clearly weapons-related research, should wipe out any doubt as to what Iran is up to.

We have achieved, more or less, a referral to the Security Council not because Iran bought centrifuges from AQ Khan, but because Iran failed to report them.

So some in the Bush Administration are taking this relatively permissive view of Article IV and attacking Iran's nuclear program because of Iran's many violations of NPT. But this interpretation has the advantage in dealing with Iran of being consistent with what some in Japan or Germany or Brazil or South Africa are putting forward.

But we should instead adopt a very different interpretation of the NPT, one that does not allow Egypt or Saudi Arabia or other countries in the Western Hemisphere or Asia or Africa, some of them not too friendly to the United States, to exercise a supposed right to the full fuel cycle which would allow them to get within an inch of a nuclear weapon, and then hope that that last inch will not be traversed either openly in a few months where we could not stop it or secretly.

I would venture to say that if we allow a country to control the full fuel cycle, that it will be close enough to a nuclear weapon that the additional steps necessary could easily be concealed, especially if the MEK hasn't infiltrated your country's national security and research apparatus. And, of course, the MEK has only infiltrated one country's national security apparatus.

Also, returning to Iran, we must ask the question of those in the Administration who have this narrow interpretation of Article IV whether Iran's forfeiture of its rights last in perpetuity, or could Iran under our definition just comply with the NPT for a few years, get out of the doghouse, and then control a full fuel cycle.

The State Department needs to argue that countries have something less than a right to a full fuel cycle. In doing so, we would run up an international near consensus of, to some extent, our own fault and our own making.

Our witnesses will put forward a good legal argument for that. The history of deliberations surrounding the NPT's adoption point to a more restrictive interpretation of Article IV. Article IV is subject to Articles I and II that prohibit nuclear weapons proliferation as stated explicitly in the text. And the Article III safeguard re-

quirement should not be ignored. The most sensitive aspects of the fuel cycle cannot, in effect, be safeguarded.

These are very strong legal arguments. We should have been making them loud and clear for the last 20 years. Now is the time to start. President Bush himself called this problem with Article IV a loophole. I support all of the Bush Administration's proposed fixes, strengthening the nuclear supplier group's rules, a more robust proliferation security initiative, even creating an international supply of fuel so that countries do not need to develop their own indigenous capacities. I would point here to those in Iran who disparage Russia as a supplier of fuel, attacking Russia's decision to charge a higher price for the natural gas sold to the Ukraine. This does not make Russia a bad or unreliable supplier of fuel. No one in Iran should denounce Russia for asking today's high prices for petroleum and natural gas. What Russia has done vis-a-vis the Ukraine is simply to ask that the world price be paid. That hardly makes Russia a nonviable supplier of nuclear fuel.

So, Mr. Chairman, I thank you for holding these hearings. I look forward to developing a policy for this country that elevates nuclear proliferation to the very highest level, far outstripping many of the things that our diplomats worry about, and that realizes that we cannot let every country in the world get within an inch of a nuclear weapon and tell Americans that they are safe.

Mr. Chairman, I yield back the balance of my time.

Mr. ROYCE. Thank you.

I want to commend you on your comments on the critical nature of this issue, and also to indicate that our first witness Mr. Sokolski shares the same view, that Iran does not have the right to a full nuclear fuel cycle under the NPT, a view that I don't think we are going to get the State Department to concede, but maybe they will. Part of the hearing today is to look at that view.

We are going to have three witnesses. The first is Henry Sokolski, executive director of the Nonproliferation Policy Education Center, which is a Washington-based nonprofit organization founded back in 1994 to promote a better understanding of strategic weapons proliferation issues.

He served as Deputy for Nonproliferation Policy in the Office of Secretary of Defense and earlier in the Office of Net Assessment during the first Bush Administration. Mr. Sokolski also worked in the U.S. Senate as a nuclear energy assistant and a legislative military aide. He has authored and edited a number of works on proliferation-related issues, including *Best of Intentions: America's Campaign Against Strategic Weapons Proliferation*.

Baker Spring is an F.M. Kirby Research Fellow in National Security Policy at The Heritage Foundation. Mr. Spring examines a range of strategic issues including WMD proliferation and ballistic missile defense. Previously he served as a defense and foreign policy expert in the offices of two U.S. Senators.

Mr. Spring and Mr. Sokolski have appeared before this Subcommittee previously, for which we thank them both.

Eldon Greenberg is a partner in the Washington, D.C., office of the law firm of Garvey Schubert Barer. Mr. Greenberg was Deputy General Counsel of the Agency for International Development and General Counsel of the National Oceanic and Atmospheric Admin-

istration during the Carter Administration. He has worked on non-proliferation issues for more than 30 years, representing arms control and other public interest organizations. He has also taught international negotiation at Georgetown University Law Center since 1986.

We will start with Mr. Sokolski.

We have read your written testimony, and if you summarize your testimony, that would be most effective.

STATEMENT OF MR. HENRY D. SOKOLSKI, EXECUTIVE DIRECTOR, NONPROLIFERATION POLICY EDUCATION CENTER

Mr. SOKOLSKI. Mr. Chairman, Ranking Member and Mr. Berman, first let me say that I have long waited for a hearing of this sort, I think most of my adult life, so you are to be complimented for taking on this rather obnoxious topic.

For what it is worth, Mr. Bush said there was a loophole in the NPT. In the same speech, however, he said there was a cynical manipulation of the treaty. I side with cynical manipulation every time. I don't think there is a loophole in the treaty. I think it is being cynically manipulated. In fact, that is the key point I want to make today, that just because 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 fact, the treaty does not recognize a per se right to any specific nuclear technology, but rather affirms the right to peaceful nuclear energy that is logically and legally qualified on three counts. The first is noncompliance. The interesting question is if Iran declared its enrichment reprocessing activities as it should have, would we have grounds to find Tehran in noncompliance, failing some additional proof it actually had a nuclear weapon or was developing one.

I think you are right, the position of the State legal department and the U.S. Government is that of the Foreign Ministry of Iran, and that is the answer is no. I find this somewhat perverse. The position is soothing, no doubt, to nuclear fuel-making states like Japan, Germany, the Netherlands, Brazil and South Africa, but ultimately I think it turns the NPT on its head.

In fact, two separate proposals during the NPT's final negotiation, one by Spain and Mexico, were made to amend the treaty's text to require that the nuclear weapons states provide non-weapons members with the entire technology of reactors and fuels. Both were rejected. The U.K. representative noted that these were too sweeping. As to why, you can read Mrs. Myrdal, who was the Swedish NPT rep. She said to prohibit "just the final act of manufacture would seem to come too late, and must not regulations about effective controls be linked with certain definitive and uncontested steps, such as the purchase of reactors, fuel elements and so on, and/or the establishment within a country of such installations as plutonium reprocessing plants and the like."

Mrs. Myrdal's observations suggest why the NPT can hardly recognize a per se right among nonweapons state members to develop the entire technology of reactors and fuels without running afoul

of the treaty's clear Article II stricture against such states manufacturing or otherwise acquiring nuclear weapons.

This brings us to the second qualification which has to do with safeguards, the definition and purpose of which is in the treaty itself. It says "to prevent diversions."

It would be comforting to think that whatever the IAEA inspects, it actually safeguards; but we know better. First, the IAEA cannot always find covert nuclear activities, particularly in states like Iran that are noncooperative.

Second, certain nuclear activities—and these are gone into greater detail in the testimony which I ask to be submitted for the record—certain nuclear fuel-making activities simply bring states so close to acquiring nuclear weapons that inspections alone cannot provide sufficient warning to prevent countries from completing a military diversion to make bombs.

Monitoring procedures authorized by the IAEA that fail to meet the actual definition and objective of a safeguard, which is to prevent diversions, may be inspections, but they are not safeguards, and as such the activity and materials subject to such monitoring ought not to be presumed to be peaceful and protected by the NPT.

The third condition which comes from the preamble language extolling the benefits of peaceful nuclear energy is that the nuclear activity in question actually has to be one that can be capable of producing some economically measurable advantage. This is one of the reasons why we have objected so vociferously to Iran's claims that its nuclear activities are peaceful. Any nation's development of civilian nuclear energy then comes under suspicion, the more uneconomical it is or becomes.

Let me just close with what the implications of taking this tougher view might be. First, it is going to upset Japan, the Netherlands, Germany, South Africa and Brazil at a minimum, whose nuclear fuel-making activity the U.S. has already blessed.

One partial response to their objections would be to argue that with time we have come to learn that the limits of the IAEA inspections are real, and that the increased ease that countries have now of making nuclear arms are real as well.

Certainly there is no good reason to make our past mistakes hereditary, which has, I think, been our diplomatic mode in grandfathering dangerous nuclear activities in these nonweapons states. At a minimum, I think you need to start arguing, all right, but no more nuclear fuel-making for some time until we sort out how we are going to proceed.

Persuading these countries that their right to develop peaceful nuclear energy does not necessarily entitle them to pursue specific nuclear activity will be difficult. It would help, however, if some of the criteria and objections that we have applied to others were applied to our own civil nuclear activity. 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. According to the IAEA, we have a surfeit of nuclear fuel-making capacity for the next 10 to 20 years anyway. You want to modernize, fine, but bring down as much as you bring on so that the net amount of nuclear fuel-making is frozen.

The recently proposed Global Nuclear Energy Partnership needs to be approached with particular caution. Funding research and development of potentially useful nuclear technologies is difficult in principle to argue against. However, using tax and ratepayers' money to fund the construction of engineering demonstration plants that lead to the production of electricity that, in turn, is placed on the commercial grid is something that ought to be resisted lest our example become a worldwide 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 strikes me as both inconsistent and untenable.

I think it is important that if the Members of this Committee and this Congress believe these points are sound, that they make clear in legislation, whether it be in resolution or in binding law, what their thoughts are. I think Congress has a constitutional responsibility to say what the law of the land is, just like the Executive. I think we need a second voice.

[The prepared statement of Mr. Sokolski follows:]

PREPARED STATEMENT OF MR. HENRY D. SOKOLSKI, EXECUTIVE DIRECTOR,
NONPROLIFERATION POLICY EDUCATION CENTER

THE NUCLEAR NONPROLIFERATION TREATY AND PEACEFUL NUCLEAR ENERGY

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

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

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 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 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 as 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

²Article 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.

³Some 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.

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

⁵USUN 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.

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 as a 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 uncontested steps, such as actual purchases of nuclear reactors, fuel elements and so on 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. Myrdal'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 1995 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 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

⁶See 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.

⁷Speech 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.

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

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

⁸On 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>.

⁹See 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.]

¹⁰As 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.

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 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.

Mr. ROYCE. Thank you, Mr. Sokolski.
Mr. Spring.

**STATEMENT OF MR. BAKER SPRING, F.M. KIRBY RESEARCH
FELLOW IN NATIONAL SECURITY POLICY, THE HERITAGE
FOUNDATION**

Mr. SPRING. Thank you, Mr. Chairman. I am honored to have the opportunity to testify before your Subcommittee on the Nuclear Nonproliferation Treaty, or NPT, and its provision in granting the right to all parties to the treaty to develop, research, produce and use nuclear energy. This provision is found in Article IV of the treaty.

In my view, there is a natural tension in the NPT between its central purpose of nonproliferation and most particularly those provisions found in Articles I and II, and the right to nuclear energy found in Article IV. Further, I would concede that certain interpretations of the NPT effectively undermine its central purpose of nonproliferation.

On the other hand, I do not regard the language of the NPT as inherently contradictory. I arrive at the latter conclusion for two fundamental reasons, although other lesser reasons exist.

The first reason is that the right to nuclear energy granted by Article IV is a qualified right. Its exercise is permitted only in the context of conformity with Articles I and II, which, as I mentioned earlier, are provisions of the NPT that bar nuclear weapons proliferation.

The second reason the language of the NPT is not inherently contradictory is that the right to nuclear energy is not an entitlement. The mere fact that nonweapon states under the NPT appear to be acting in conformity with its nonproliferation provisions do not impose an obligation on other participating states or the International

Atomic Energy Agency to provide any and all material and technological assistance to that state.

Let us examine the meaning of the rights afforded to nonweapon states by Article IV of the NPT in three of the most pressing cases of nuclear proliferation today. These cases are North Korea, Iran and India. Article IV's language is a minor contributing factor, in my view, in the rise of the nuclear proliferation threat posed by North Korea.

Yes, North Korea has asserted its right to nuclear power under Article IV. Claiming this right, however, has not allowed North Korea to obtain much international assistance for its nuclear power program since it expelled IAEA inspectors and withdrew from the NPT in late 2002 and early 2003.

A primary contributing factor to nuclear proliferation in the case of North Korea is that North Korea has decided to circumvent the NPT and the international nonproliferation regime in its entirety.

Iran is a more disturbing case regarding the negative implications of the language of Article IV for both the international nuclear nonproliferation regime and the integrity of the NPT. Iran has asserted its rights to nuclear power while ostensibly remaining within the NPT, and continues to obtain significant outside assistance for its nuclear program. This comes at a time when there is mounting evidence that Iran is pursuing a clandestine nuclear weapons program, which has resulted in the IAEA decision on February 4 to submit a report on Iran to the United Nations Security Council.

Iran is putting itself in the position to use international assistance to bring itself to the edge of a nuclear weapons capability which could allow it to break out of the NPT and obtain weapons with few additional steps.

Paradoxically, India may raise the most pressing questions regarding the internal weakness of the NPT. This is the case despite the fact that India has never been a party to the NPT. On the surface it appears that the proliferation problems posed by India are similar to those posed by North Korea and are more a matter of circumventing the treaty regime as a whole and less as a result of the internal weaknesses. In reality, the emerging U.S. Policy toward India may transform the existing tension between Articles I and II of the NPT on the one hand and Article IV on the other into a contradiction.

Given India's nonparticipation in the NPT, as well as its nuclear weapons capability, the Bush Administration's policy regarding India runs the risk of turning Article IV's qualified right to nuclear energy into an innate right.

What is the answer to this particular question? In my judgment, it is a two-track policy. The first track constitutes the global nuclear nonproliferation regime defined by the NPT. The second track needs to focus on addressing regional security imbalances that motivate nonweapons states to seek nuclear weapons. The trick is to fashion policies and programs in the second track that will encourage nonweapons states under the treaty that nevertheless seek to possess nuclear weapons, which I refer to as *de facto* weapons states, to join or rejoin the NPT, as well as encourage other non-weapons states now within the regime to stay there.

Specifically I think we can do things in the track two process that ultimately can improve the opportunities to see what happened with regard to countries like Belarus, Kazakhstan, the Ukraine and South Africa to eventually return to the fold. This is not to say this a likely near-term thing, but I think the U.S. policy has to hold out the opportunity for that in the long run. That means addressing the fundamental underlying motivations for obtaining nuclear weapons in specific circumstances and crafting legislation, if I may advise that, that handles these de facto nuclear powers as a class.

I think there are opportunities that we could pursue in that that would have sufficient flexibility that U.S. national security policy, trade policy and energy policy could also be accommodated, but the standards would have to be established for the countries within that class as it related to the totality of U.S. cooperation with those states under the circumstances that are presented, admitting in many cases that they are unique.

Thank you.

[The prepared statement of Mr. Spring follows:]

PREPARED STATEMENT OF MR. BAKER SPRING, F.M. KIRBY RESEARCH FELLOW IN
NATIONAL SECURITY POLICY, THE HERITAGE FOUNDATION

Mr. Chairman, I am honored to have the opportunity to testify before your Subcommittee. The Nuclear Nonproliferation Treaty (NPT) contains a provision granting the right to all parties to the treaty to develop, research, produce, and use nuclear energy. This provision is found in Article IV of the NPT.

The presence of this provision quite properly raises questions about whether the central purpose of the NPT, which is to stop the spread of nuclear weapons beyond the five nuclear powers acknowledged by the treaty (China, France, Great Britain, Russia, and the United States), is undermined. Those who see the NPT as fatally flawed argue that the exercise of this right by a non-weapons state allows it to produce nuclear weapons with little or no chance that outside observers will be given timely warning that the state in question is actually pursuing a weapons capability. Indeed, some will go so far as to argue that the NPT's right regarding nuclear energy is an effective cover for a prohibited nuclear weapons program and requires international assistance to the state in question in ways that promote proliferation activities.

In my view, there is a natural tension in the NPT between its central purpose of nonproliferation, and most particularly those provisions found in Articles I and II, and the right to nuclear energy found in Article IV. Further, I would concede that certain interpretations of the NPT effectively undermine its central purpose of nonproliferation. On the other hand, I do not regard the language of the NPT as inherently contradictory. I arrive at the latter conclusion for two fundamental reasons, although other lesser reasons exist.

Reason No. 1: Article IV is a qualified right

The first reason is that the right to nuclear energy granted by Article IV is a qualified right. Its exercise is permitted only in the context of "conformity with Articles I and II," which, as I mentioned earlier, are the provisions in the NPT that bar nuclear weapons proliferation. I believe that the clear reading of the NPT compels the conclusion that a non-weapons state's right to nuclear energy is subordinate to its obligation not to seek a weapons capability. In short, the nonproliferation purpose of the NPT takes precedence over the right to nuclear energy.

Reason No. 2: Nuclear energy is not an entitlement.

The second reason the language of the NPT is not inherently contradictory is that the right to nuclear energy is not an entitlement. The mere fact that a non-weapons state under the NPT appears to be acting in conformity with its nonproliferation provisions does not impose an obligation on other participating states or the International Atomic Energy Agency (IAEA) to provide any and all material and technological assistance to that state. The NPT allows both would-be supplier states and the IAEA broad discretion regarding what kind of assistance they will provide to a non-weapons state.

Unfortunately, the accumulation of past actions regarding the furnishing of material and technological assistance to non-weapons states reveals movement in the direction of treating such assistance as an entitlement. This slippage, however, is not the result of an inherent problem with the NPT, and the slippage can be reversed through the responsible exercise of discretion in furnishing the assistance the treaty permits. For example, during a February 11, 2004, speech at the National Defense University, President Bush announced that the U.S. supports a policy of refusing to sell "enrichment and reprocessing equipment and technologies to any state that does not already possess full-scale, functioning enrichment and reprocessing plants." The policy announced by President Bush does not violate the rights of non-weapons states under Article IV of the NPT, which reflects the discretion the NPT affords to supplier states.

The Cases of North Korea, Iran, and India

Let us examine the meaning of the rights afforded to non-weapons states by Article IV of the NPT in three of the most pressing cases of nuclear proliferation today. These cases are North Korea, Iran, and India. Specifically, it is necessary to assess the extent to which the proliferation problems raised by these cases reflect inherent flaws in the NPT and the rights it affords to non-weapons states under Article IV.

Article IV's language is a minor contributing factor in the rise of the nuclear proliferation threat posed by North Korea. Yes, North Korea has asserted its right to nuclear power under Article IV. Claiming this right, however, has not allowed North Korea to obtain much international assistance for its nuclear power program since it expelled IAEA inspectors and withdrew from the NPT in late 2002 and early 2003. The primary factor contributing to nuclear proliferation in the case of North Korea is that North Korea has decided to circumvent the NPT and the international nonproliferation regime in its entirety. Specific provisions within the NPT, therefore, are really tangential factors in the problems posed by North Korea. The primary issue regarding North Korea is how the U.S. and other nations respond to North Korea's open circumvention of the NPT and the international nuclear non-proliferation regime.

Iran is a more disturbing case regarding the negative implications of the language of Article IV for both the international nuclear nonproliferation regime and the integrity of the NPT. Iran has asserted its rights to nuclear power while ostensibly remaining within the NPT and continues to obtain significant outside assistance for its nuclear program. This comes at a time when there is mounting evidence that Iran is pursuing a clandestine nuclear weapons program, which resulted in an IAEA decision on February 4 to submit a report on Iran to the United Nations Security Council. Iran is putting itself in position to use international assistance to bring itself to the edge of a weapons capability, which could allow it to break out of the NPT and obtain weapons with few additional steps.

Ensuring the integrity of the NPT, however, is still possible in the case of Iran. Doing so requires two things. First, it requires that other participating states understand that they effectively have been warned about what Iran is doing and that they use what time remains to respond to the Iranian program. Second, it requires that supplier states exercise self-restraint in terms of what assistance they provide Iran in the face of Iranian claims that the NPT entitles it to the assistance it seeks.

Paradoxically, India may raise the most pressing questions regarding the internal weakness of the NPT. This is the case despite the fact that India has never been a party to the NPT. On the surface, it appears that the proliferation problems posed by India are similar to those posed by North Korea and are more a matter of circumventing the treaty regime as a whole and less the result of internal weaknesses. In reality, the emerging U.S. policy toward India may transform the existing tension between Articles I and II of the NPT on the one hand and Article IV on the other into a contradiction.

The problem stems from the fact that the Bush Administration is seeking "to achieve full civil nuclear energy cooperation with India." Given India's nonparticipation in the NPT, as well as its nuclear weapons capability, the Bush Administration's policy regarding India runs the risk of turning Article IV's qualified right to nuclear energy into an innate right. Further, the Bush Administration's policy regarding India risks exacerbating the slippage toward treating nuclear energy assistance as an entitlement because it has made its commitment to full cooperation up front. This leaves no room for discretion regarding what types of nuclear energy assistance the U.S., and by extension other supplier states, may provide to India.

Toward a Two-Track Policy Toward "De Facto" Nuclear Powers

Post-Cold War regional tensions in places like East Asia, the Middle East, and South Asia have made it increasingly clear that the U.S. needs to open a second

track in its overall nuclear nonproliferation policy. The first track constitutes the existing global nuclear nonproliferation regime defined by the NPT. The second track needs to focus on addressing regional security imbalances that motivate non-weapons states to seek nuclear weapons. The trick is to fashion policies and programs in the second track that will encourage non-weapons states under the treaty that nevertheless seek to possess nuclear weapons, which I refer to as *de facto* nuclear weapons states, to join or rejoin the NPT, as well as encourage other non-weapons states now within the regime to stay there.

A core assumption of this two-track approach is that U.S. policy will seek to preserve the right to nuclear energy under Article IV of the NPT as a qualified right of non-weapons states and not let it become, by interpretation and practice, an innate right. The second key assumption is that the U.S. and other supplier states will take advantage of the broad discretion the NPT affords them and act with self-restraint regarding the kinds of nuclear energy assistance they will furnish to non-weapons states under particular circumstances.

While the second track of this two-track policy can involve a variety of security and energy cooperation measures, a clear line must be drawn against allowing the second track to eliminate the possibility that *de facto* nuclear powers will either join or return to the first track. First and foremost, this means refraining from conferring *de jure* nuclear weapons status on any states beyond the existing five powers, for example, by amending the NPT to admit additional states as weapons states to the treaty.

Conclusion

Mr. Chairman, international treaties are neither self-executing nor self-enforcing. As essentially voluntary arrangements, they require the good faith efforts of the participating states to make them work. These limitations pertain to the NPT, as they do to every other treaty. This is why U.S. nuclear nonproliferation policy must go beyond the NPT to include other diplomatic and military options.

The existence of these other options, however, does not necessarily diminish the value of the NPT or require steps inconsistent with the terms of the NPT. The NPT is a treaty that continues to serve U.S. interests. As a result, U.S. policy should seek to preserve the treaty and work against the forces that would seek to dilute it or render it irrelevant.

Mr. ROYCE. Thank you, Mr. Spring.

Mr. Greenberg.

STATEMENT OF MR. ELDON GREENBERG, ATTORNEY AT LAW, GARVEY SCHUBERT BARER

Mr. GREENBERG. Thank you, Mr. Chairman and Members of the Committee. I, too, am very pleased to be here this afternoon to discuss the NPT and more particularly the relationship between its prohibitions in Articles I and II and the rights to participate in the benefits of nuclear energy which are established in Article IV.

My views are not different from Mr. Sokolski's or Mr. Spring's, and I must say the opening statements from you, Mr. Chairman, and from Mr. Sherman are music to my ears. It is great to hear those views expressed by people in your position because they are views that are consonant with arguments that I, on behalf of my client, the Nuclear Control Institute, have been making for almost 20 years.

I am testifying this afternoon in my own behalf, but for the most part the views that I express today are outlined in a paper that I originally wrote in the mid-1980s for one of the early NPT review conferences, and then revised again in 1993 in preparation for the 1995 review conference. The paper discusses the relationship between the NPT and the development of plutonium reprocessing capabilities. A copy of that paper is attached to my testimony, and I request that it be made a part of the record together with my written statement.

Mr. ROYCE. Without objection.

Mr. GREENBERG. My views regarding the operation of the treaty are readily stated. I believe that the rights and obligations that are established under Article IV can't be neatly disentangled from the prohibitions in Articles I and II.

As Mr. Sokolski, Mr. Spring and yourselves have pointed out, Article IV contains express language linking the three provisions. The result, in my judgment, is that it is perfectly legitimate under the NPT to examine such factors as proliferation risk, economic or technical justification, and safeguards effectiveness in determining whether specific or generic types of assistance or activities should be regarded as permissible under the treaty.

The overriding purpose of this treaty is to halt the acquisition of nuclear weapons by nonweapon states. It is fundamentally inconsistent with that purpose to interpret the treaty in such a fashion that it would have the perverse effect of facilitating the acquisition of such weapons, as Mr. Sherman pointed out, by leaving someone just the turn of a screwdriver away from having weapons capability.

In my paper I discuss at length the meaning of Articles I and II and how they relate to Article IV, and I agree with Mr. Spring that there is in the treaty what I call in my paper a dynamic tension between the prohibitions on the one hand intended to protect the world against the proliferation of nuclear weapons and the provisions of Article IV which recognize a right of some sort to participate in the benefits of nuclear energy.

The link between these two sets of provisions is in the language in Article IV, which requires that the right to peaceful nuclear energy be exercised "in conformity with Articles I and II." I read this language as meaning that assistance or activities which are ostensibly peaceful in nature—they may be safeguarded, or they may be declared to be peaceful or civilian—still may be impermissible under the treaty where as a practical matter they are likely to lead to the proliferation of nuclear weapons.

It is possible to read the treaty in a more narrow fashion. It has been alluded to the fact that this Administration has suggested there are other ways that the treaty can be read.

It has sometimes been suggested that Article IV essentially reflects a "straightforward bargain" under which weapon states trade economic benefits to nonweapon states in exchange for enhanced security, and no distinctions can be made among various types of civilian technology. I call that reading the treaty through an exclusively "explosive lens," but I suggest that there is a broader and more compelling reading, and that is to look at the practical implications of particular assistance and particular activities.

Now, that reading is not original with me. It was forcefully advocated in the late 1970s by the great strategic analyst Albert Wohlstetter, who I think was one of Henry's mentors at the University of Chicago, in a report delivered to the Arms Control and Disarmament Agency. I believe it is built implicitly into a number of provisions of U.S. law, including the Nuclear Nonproliferation Act of 1978 and the Nuclear Proliferation Prevention Action of 1994, both of which recognize that there are certain sensitive nuclear technologies, such as those associated with enrichment and reprocessing, which can appropriately be restricted by the United

States consistent with our international obligations, and by the same token restricted by other countries.

In my paper I discuss at length the history of the treaty and the support that I find in that history for what I call a pragmatic reading of this international agreement, and I make three basic points. First, NPT negotiators were intent on establishing a comprehensive, loophole-free treaty, not a treaty that was filled with loopholes, a treaty that did not have loopholes, a treaty that would truly enhance security. It was not a treaty, as they viewed it, that promoted any and all kinds of nuclear development.

Second, I think the negotiators operated on the basis of certain assumptions and expectations regarding the economic merit of particular applications and the effectiveness of safeguards. To the extent that those assumptions or expectations are not valid for particular applications in particular circumstances, then I think the nature of any “bargain” is necessarily drawn into doubt.

Third, and finally, the NPT negotiators themselves recognized that it would be inappropriate to lay down per se rules with respect to acceptable uses, and necessarily this allows for an interpretation of the treaty’s restrictions, rights and obligations which considers practical risks and not just abstract principles, particularly with regard to a case as troubling as Iran.

Adrian Fisher, who was one of the chief U.S. negotiators of the NPT and a dean of Georgetown University Law Center, testified several years after the ratification of the treaty that the NPT “does not require us to do something foolish.”

Another way of putting it is that the NPT must not be read as requiring or sanctioning actions that may increase rather than reduce the risk of proliferation. Thus, in my judgment, implementation of the treaty does come down to quite practical considerations, and a pragmatic rather than a formalistic reading of this agreement is most consistent with its fundamental goal of stemming the proliferation of nuclear weapons and enhancing global security.

Thank you very much.

[The prepared statement of Mr. Greenberg follows:]

PREPARED STATEMENT OF MR. ELDON GREENBERG, ATTORNEY AT LAW, GARVEY SCHUBERT BARER

Good afternoon. My name is Eldon Greenberg, and I am a partner in the Washington, D.C. office of the law firm of Garvey Schubert Barer.¹ I am pleased to be here today to discuss the operation of the Treaty on the Non-Proliferation of Nuclear Weapons (the “NPT” or the “Treaty”) and, more particularly, the relationship between its prohibitions in Articles I and II and the rights to participate in the benefits of nuclear energy established in Article IV. For many years, I have been outside counsel to the Nuclear Control Institute (“NCI”), a public interest organization active on nuclear non-proliferation issues. I am testifying this afternoon in my personal behalf. However, for the most part, the views I express today are outlined in a paper that I originally prepared for NCI in the mid-1980s and revised in 1993, entitled “The NPT and Plutonium: Application of NPT Prohibitions to ‘Civilian’ Nuclear Equipment, Technology and Materials Associated with Reprocessing and Plutonium Use.” A copy of this paper is attached, and I would like to request that this paper, together with my written statement, be made part of the record of this hearing.

My views regarding the operation of the Treaty are readily stated. In essence, I believe that the rights and obligations established under Article IV can’t be neatly

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disentangled from the prohibitions in Articles I and II of the Treaty. Indeed, Article IV contains express language linking the three provisions. The result, in my judgment, is that it is perfectly legitimate to evaluate such factors as proliferation risk, economic or technical justification and safeguards effectiveness in determining whether specific or generic types of assistance or activities should be regarded as permissible under the NPT. The overriding purpose of the Treaty is, after all, to halt the acquisition of nuclear weapons by non-weapon states. It would be fundamentally inconsistent with this purpose to interpret the Treaty in such a fashion that it would have the perverse effect of facilitating the acquisition of such weapons.

As the Committee knows, Article I and II of the Treaty contain broad prohibitions on the conduct of weapon states and non-weapon states alike, (a) forbidding weapon states from transferring nuclear weapons or other explosive devices to, or otherwise facilitating their development in, non-weapon states, and (b) forbidding non-weapon states from receiving, manufacturing or otherwise obtaining such weapons or devices on their own or with the assistance of others. Article IV, for its part, purports to establish broad rights for all parties to the Treaty to participate in the benefits of civil nuclear power and a corresponding obligation on the parties to facilitate such participation. This creates, as explained in my paper, a “dynamic tension” between the Treaty’s restrictions and its injunctions to cooperate.

The link between the two is found in the language of Article IV to the effect that the “inalienable right” of the parties to peaceful nuclear energy must be exercised “in conformity with articles I and II of the Treaty.” I read this language as meaning that assistance or activities which are *ostensibly* peaceful in nature still are impermissible when *as a practical matter* they are likely to lead to the proliferation of nuclear weapons.

With respect to the language of the Treaty, it is possible to read the phrase “in conformity with” as meaning no more than that a weapon state cannot transfer weapons or nuclear explosive devices to a non-weapon state or otherwise assist in their development, while a non-weapon state has a corresponding obligation not to manufacture or otherwise obtain such weapons or devices. It has in fact sometimes been suggested that Article IV essentially reflects a “straightforward bargain,” under which weapon states traded economic benefits to non-weapon states in exchange for enhanced security provided to the weapon states under Articles I and II, and no distinctions can be made among various types of “civilian” nuclear technology. This is to read the Treaty through an exclusively “explosives lens.”

There is, however, a broader and more compelling reading. Such a reading recognizes that particular assistance or activities, notwithstanding their denomination as “peaceful” or “civilian” or the application of international safeguards, may in certain situations be so risky that, even though they do not involve the transfer or acquisition of weapons or explosive devices as such, they can no longer be deemed in conformity with Articles I and II. In short, there may be activities other than final assembly and production of a “bomb” or “warhead” or “nuclear explosive device” which, in particular circumstances, should be deemed impermissible under the Treaty.

This reading is not original with me. It was forcefully advocated by the great strategic analyst Albert Wohlstetter in a report delivered to the Arms Control and Disarmament Agency in 1979. It is built, at least implicitly, into a number of provisions of U.S. non-proliferation law, including the Nuclear Non-Proliferation Act of 1978 (the “NNPA”) and the Nuclear Proliferation Prevention Act of 1994 (the “NPPA”), which recognize that certain, sensitive nuclear technologies, such as those associated with enrichment and reprocessing, can appropriately be restricted.² It makes complete sense in light of the overall purpose of the NPT to halt proliferation. It simply recognizes that, if risks are great, if there is no discernible civilian justification for particular assistance and activities and if the effectiveness of safeguards is uncertain, then such assistance and activities must perforce be questionable under the Treaty. Only in this way can there be any assurance that the NPT’s objectives will be achieved. In short, whatever the “inalienable right[s]” enshrined in Article IV, they cannot be invoked to produce a result which, in the real world, entails unacceptable proliferation risks.

The history of NPT tends to support a case for what I would call a “pragmatic reading” of the Treaty. In particular, the NPT negotiators were intent on estab-

²For example, Section 402(b) of the NPPA prohibits the export of any “major critical component of any uranium enrichment, nuclear fuel reprocessing, or heavy water production facility,” unless an agreement for cooperation expressly provides for such export, while Section 826(a) of the NPPA, which is based on the Glenn and Symington Amendments of the late 1970s, imposes economic and military assistance sanctions on countries supplying and receiving enrichment and reprocessing equipment, materials and technology.

lishing a comprehensive, loophole free agreement primarily aimed at enhancing security, not promoting any and all kinds of nuclear development. In the words of one member of Wohlstetter's review group, the notion that there was any kind of "straightforward bargain," under which non-weapon states would be entitled to any nuclear technology they wanted in exchange for their non-proliferation pledges, is a "dangerous myth." In addition, the negotiators operated on the basis of certain assumptions regarding the economic merit of particular applications and the effectiveness of safeguards. To the extent these assumptions may be not be valid for these applications in particular circumstances, the nature of any "bargain" for nuclear technology is drawn into doubt. Such concerns are particularly applicable to the present day case of Iran, where the application of effective international safeguards is problematic and where the country's motives for acquiring uranium enrichment and plutonium separation technologies are highly suspect. Finally, the NPT negotiators themselves recognized that it would be inappropriate to lay down *per se* rules with respect to acceptable uses. Necessarily, this allows for an interpretation of the Treaty's restrictions, rights and obligations which considers practical risks and not just abstract principles, particularly with regard to as troubling a case as Iran.

Adrian Fisher, one of the chief U.S. negotiators of the NPT, testified several years after the NPT's ratification that the Treaty "does not require us to do something foolish." Another way of putting it is that the NPT must not be read as requiring or sanctioning actions that may increase, rather than reduce, the risk of proliferation. In such circumstances, the distinction between permissible and impermissible activities must come down to quite practical considerations. Activities should not be regarded as acceptable simply because they are labeled as "peaceful" or "civilian." The Treaty should be read through something more than an "explosives lens." Assistance and activities relating to declared "peaceful" and "civilian" programs must not be viewed as permissible, if an evaluation of all the facts and circumstances would indicate that the legitimacy of the assistance or activities is questionable. In my judgment, such a pragmatic, rather than formalistic, reading is most consistent with the Treaty's fundamental goal of stemming proliferation of nuclear weapons and enhancing global security.

Thank you for your consideration. I would be happy to answer any questions the Committee might have.

Mr. ROYCE. Thank you, Mr. Greenberg.

We have four Californians on this side of the dais, and I have a number of questions. In consideration of their schedule, I would go to Mr. Sherman, Mr. Berman and then to Congresswoman Watson, and then we will come back to my questions.

Mr. Sherman.

Mr. SHERMAN. Thank you, Mr. Chairman, for accommodating our schedule.

The 9-11 Commission ultimately ascribes what happened on that day to a lack of imagination. We are four southern Californians. There is no shortage of ability to visualize creatively in our city, and no one would claim that Americans lack creativity, but our failure of imagination stemmed, they said, from an unwillingness to visualize the unpleasant.

We may have already failed or planted seeds of failure in our nonproliferation regime. We in Congress need to start looking at designing civil defense, medical, public education, and even urban planning actions designed to minimize casualties if a nuclear weapon is smuggled into our country.

It is not a popular political slogan to say keep the casualties under 100,000, and I have never seen someone elected to office with the image that his election will provide for only 99,999 casualties. But if we fail to take any action to minimize casualties, then the casualties will be double, triple or quintuple what they otherwise would be, and the testimony we have heard today certainly indicates that we may well fail. Of course, we must do everything possible to succeed.

In interpreting Article IV, it seems clear that if a state is allowed to do something, but they are obviously doing it only for the purpose of developing nuclear weapons in violation of the NPT, that Article IV does not protect such activity. The development of a full fuel cycle might be done by a country because it is the most expeditious way to generate electricity and to generate the fuel necessary to generate the electricity, or it might be done as an effort to get within, as Mr. Greenberg said, a turn of the screwdriver away from having a nuclear weapon.

The obvious way to tell why something is being done is to look at its economics. Perhaps all of you can confirm just briefly that for a developing country to develop a full fuel cycle and to do all of the research necessary to do that is not the most economic way in today's market to get the fuel they need for whatever nuclear reactors they have, and in today's market they can buy the fuel from the United States, Russia, France, the Netherlands, et cetera, more cheaply than they can develop them themselves.

Just put yourself in the position of the electric authority of Brazil or Egypt. You are not involved in national security issues for your country, you just want the cheapest, most reliable electricity. Is there any chance you want to control the full fuel cycle?

Mr. SPRING. I am not an energy economist, so I have not looked at the numbers that would go behind that assessment, but as I understand it, that is effectively true. It is not just in the context of the development of the fuel cycle capability internally versus externally. I think you have to measure that against all of the energy alternatives that would be plausible for a particular country in the circumstances in which they are presented.

Mr. SHERMAN. The one country I didn't mention in my question is Iran, with natural gas, and therefore has very different economics from those countries that have to pay for imported petroleum or other hydrocarbon fuels.

Mr. SPRING. Even then, they have to make what I consider to be plausible projections on what the cost of traditional fuel would be.

Mr. SHERMAN. For purpose of my question, assume a country determines that nuclear power is an important part of their economic plan to provide electricity for their citizens.

Mr. SOKOLSKI. Well, there was a study done by the Nuclear Control Institute that determined that it would be cheaper for Japan to stockpile fresh, lightly enriched uranium than it would be to try to make its own lightly enriched uranium, which suggests that the carrying costs and amortization costs associated with building the plant itself is not worth the candle. That is in the case of Japan, where, I have to tell you, the economic case for nuclear power is kind of like the economic case for very clean subsidized coal. Weaning the government out of subsidizing those energy projects is well worth doing to try to figure out what the real costs are. With that said, the fuel and trying to get it would be——

Mr. SHERMAN. I don't understand your analogy there. Are you saying that clean coal is obviously good or bad?

Mr. SOKOLSKI. It is expensive, and can only be made to work at the higher end with subsidies; and so, too, with nuclear power. And deciphering the real cost of nuclear power would be a project I recommend to the Congressional Budget Office, because we have so

supported it in different ways, such as we have other things, so it is very hard to know what its true economics are.

But with regard to the fuel, for a small country, and even a large country, to build its own fuel-making would be a little like you and I going and saying we want a sandwich and then ordering up a slaughterhouse as a first move. Those are the economics.

Mr. SHERMAN. That is the point I was hoping you would make, and that is assuming a country wants nuclear power, and quite a lot of countries have thought it to be economic, and private companies have thought it to be economic, and whether that is the right economic decision stripped of all governmental incentives is hard to determine. Then if you need nuclear fuel, it is cheaper to order a sandwich than to create a slaughterhouse.

Now, a country that had committed itself to nuclear power might do so in large part because petroleum has tripled in price in just a few years, and might go up even higher, and they might want to control the full fuel cycle because they wonder whether the price of nuclear fuel will go up or be interrupted for political reasons.

So imagine a world in which the nuclear states had agreed by treaty that each of them, or at least several different sources just in case you can't trust one, but most countries that don't trust us have more faith in Russia and vice versa, let us say the nuclear states had agreed that they would provide fuel, taking it back with all appropriate safeguards, that they would provide this fuel even if they had a nonproliferation dispute with the country. So you could not cut off nuclear fuel to a plant in Sudan no matter how obnoxious that government's behavior was toward its own people, and that the price was subject to prearrangement or a formula. In such a world where countries are assured of the supply of nuclear fuel, sandwiches delivered when ordered, then wouldn't it be a violation to try to create the whole fuel cycle when it was so obviously unnecessary to do so for electricity reasons?

Mr. SOKOLSKI. Let me comment on that. This enthusiasm for creating nonmarket solutions to something that finally after 30 years has been solved by the market—

Mr. SHERMAN. If I can interrupt you. If there are only four or five countries that can provide you with nuclear fuel, and if you are intent in engaging in activities obnoxious to all four or five, the market does not protect you from a boycott.

Mr. SOKOLSKI. Maybe it shouldn't. I am not sure that the right to nuclear power also conveys a right to be obnoxious and to violate treaties. It seems to me you are going too far here.

Mr. SHERMAN. So your testimony is we turn to nonnuclear states and say, we are not going to assure you of a supply of nuclear fuel, but we still insist that you not develop the full fuel cycle? That is a tough position.

Mr. SOKOLSKI. Let me finish the thought, because I think the solution is at least as bad as the problem you are describing. The problem you are describing was something that happened in 1970s when there were not four or five, there were one or two suppliers.

Number two, the ability to stockpile fresh fuel in advance obviates the supply concern. People lack imagination. They do not see that you can buy in advance and put it aside next to the reactor.

That is something that no one can take from you, and you have that option.

Finally, I think we have gotten caught up in thinking it is just the fuel-making that is a concern. It can also be the reactor. If you have a covert enrichment or reprocessing line, or we have to worry that you might, then giving you a reactor with fresh fuel that can make spent fuel only compounds the possibility that you will break out. You have to think about not just fuel-making, but the reactor, too.

Mr. SHERMAN. I hope that we would assure countries of fuel from more than one source, not interruptible, fair price; and the stockpiling worries me just a little bit in that this would all be contingent upon when you are done, we take—one of the approved nuclear states takes that fuel from you, whereas if a country had stockpiled a 10- or 20-year supply, I would be more concerned that they could break out using the reactor.

Mr. SOKOLSKI. You can only solve so many problems. It seems to me that you need to be careful that you do not undermine American laws, which have pretty good conditions for the sake of solving a problem that the marketplace right now affords many solutions to without any additional effort.

Mr. ROYCE. Mr. Berman.

Mr. BERMAN. I am curious because the three of you did not articulate in exactly the same way, but in terms of pragmatic policies, it seems like you reached sort of the same conclusions. Do you think the fact that this, quote, "right" is either heavily conditioned or nonexistent as a right, it is more of a privilege, is there a corollary that there is some international obligation to not provide the technologies and products which can help a country create its own fuel cycle? Is there something to say beyond it is not a right, and therefore each country has the discretion to decide without compromising a signatory's right to peaceful nuclear energy that makes for an effective internationally based obligation on countries based on certain conduct or conclusions to not provide?

Mr. GREENBERG. Mr. Berman, I can address that. And by the way, it is a pleasure to be here. As a native Californian, having grown up in Los Angeles, to be before a panel of four Members of Congress from the Los Angeles area makes me feel very much at home.

Mr. BERMAN. Orange County will be happy to consider itself part of the Los Angeles area.

Mr. GREENBERG. I read the treaty, Mr. Berman, as establishing reciprocal sets of rights and duties. So whereas on the one hand I talk about potential violations of the treaty by a country acquiring certain kinds of fuel cycle facilities, I also see the treaty as imposing obligations on suppliers not to provide those facilities and taking steps to ensure that they are not received. I think, frankly, that is reflected in U.S. law. We have several provisions of U.S. law that impose sanctions, including loss of economic assistance and loss of military assistance, for countries that proceed to acquire enrichment or reprocessing technology.

Mr. BERMAN. A lot of countries view those as extraterritorial efforts by the United States to constrain their legal behavior. I am wondering is there an international case to be made that Russia,

by helping to provide the reactor to Belarus, is in itself acting in violation of the NPT?

Mr. SPRING. I think that the latter is more of a judgment call that has to be determined by the circumstances, but there is no doubt that within the treaty itself, within the body of U.S. law, that any state that is supplying critical nuclear energy technologies that would be capable of assisting in a nuclear weapons program to a state that is pursuing that, or that there is substantial evidence that they are pursuing that, is also a violation. So there are clearly obligations that are imposed upon the suppliers.

This is not just a demand control treaty. Or the regime as a whole is not just a demand side regime. It imposes obligations on the supply side, and I think that everybody has to take note of what those obligations are.

Mr. BERMAN. One final question for Mr. Sokolski.

Mr. SOKOLSKI. In your response to Mr. Sherman's questions, were you essentially saying don't jump too quickly to the notion that the way out of this problem is to provide the reactor and the fuel and to take back the fuel in some heavily monitored and safeguarded fashion, that this is the answer to the problem we have now?

Mr. SOKOLSKI. Right. There are various formulations, the latest is the Global Nuclear Energy Partnership, which concocts reactors that have never been run or built or proven, that would promise all kinds of toughness with regard to proliferation resistance that may not, in fact, be true. And processes for separating materials out and all sorts of things have been promised technically by GNEP. But I think what we are dealing with in every case is neutrons and fertile material. As long as that is the case, you have to worry about bombs.

Safeguards, moreover, are only things that work if you can get what is called timely warning of a diversion. Everyone has a different argument, but clearly this much is solid. When you are making nuclear fuel, you have less timely warning. When you are dealing with unreliable countries that are not cooperative, you have to worry that even things that seem to be peaceful and seem to be safeguardable normally can be diverted to facilities that we don't know about and that could exploit what seems to be peaceful. So this is not a technical fix game.

One of my reasons for speaking up about the market is Mr. Sherman spoke about four suppliers. In fact, there are eight suppliers. We want to make sure, therefore, when we are trying to solve problems, we really understand what the problem is and we don't make it worse. So we need to go slow on various technical and even legal kinds of fixes which undo an awful lot of law that currently is in the Nuclear Nonproliferation Act, for example, or that presumes technology and capabilities that we have never seen before.

Mr. SPRING. If I can speak also to the art of the question of timely warning. Some people could establish a very stringent standard that until Iran is caught red-handed producing components that exclusively have a weapons purpose, that is the standard for the application of timely warning. Certainly somebody could make the intellectual argument that that should be the standard.

I believe that there is far more discretion that can be exercised with regard to that.

As far as I am concerned, from my own judgment, I have been warned about Iran. I think we are in timely warning now. The question is will we behave that way. So I am not going to deny somebody that wants to, for lack of a better term, conveniently turn a blind eye to what Iran is doing, but I think it is evident, and I think we can behave in a way, whether we call it that or not, that is consistent with a timely warning circumstance.

Mr. ROYCE. Congresswoman Watson.

Ms. WATSON. Mr. Chairman, I ask permission to submit my opening statement for the record.

[The prepared statement of Ms. Watson follows:]

PREPARED STATEMENT OF THE HONORABLE DIANE E. WATSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Thank you, Congressman Royce for holding this hearing on rights under the Nuclear Nonproliferation Treaty (NPT). The hearing will focus on Article IV of the NPT, which provides that all parties to the NPT have the right to develop research, production and use of nuclear energy for peaceful purposes and also have the right to develop technology for this purpose. The issue is of immediate importance as the line between civilian and military use of nuclear technology becomes increasingly blurred.

The issue is also of immediate importance with respect to Iran's nuclear program. Earlier this week it was reported in the media that the IAEA has concluded in a confidential memorandum that Iran has begun enriching uranium on a very limited scale and is slowly building its enrichment activities.

Last month, the IAEA's Board of Governors agreed to refer Iran to the U.N. Security Council for action based on the upcoming report. Negotiations between Iran and the Europeans have to this point failed in concluding an agreement, which prompted the Security Council referral.

China and Russia have made it clear that they want to head off a nuclear dispute with Iran and avoid sanctions. However, the Russians have now expressed strong skepticism about the negotiations. It appears that we are at a real impasse with respect to Iran. Negotiations with North Korea also do not appear to be making much headway.

I welcome the panel of experts before the subcommittee today. I would be interested in hearing their assessments of the future of negotiations with Iran, the IAEA's chances and capabilities to move Iran back into compliance with the NPT, what posture the U.S. should be taking, and what they view as the key factors to bringing Iran back into compliance.

I would also be interested in your assessment of the future of the NPT. Is there an inherent contradiction in allowing countries to acquire nuclear technology for peaceful purposes and at the same time getting them to agree to never employ the technology for military purposes? How does the rest of the world, particularly the developing world, view the NPT when in point of fact the U.S. has concluded an agreement on nuclear cooperation with India, which never signed the NPT? What kind of signal—good or bad—does this send to the rest of the world?

Finally, how do we manage the inevitable rise of nuclear weapons states in the future? For decades, we had five nuclear weapons states. Now the administration is legitimizing India's civilian nuclear programs, even as it possesses nuclear weapons. Pakistan has nuclear weapons. It is widely reported and assumed that Israel has nuclear weapons. North Korea wants nuclear weapons. To use a mixed metaphor, have we opened up the nuclear genie and are now attempting to put it back in Pandora's box?

Again, Mr. Chairman, thank you. I look forward to the testimony.

Ms. WATSON. I have a few questions.

I am interested in your assessment of the future of the NPT, and is there an inherent contradiction in allowing countries to acquire nuclear technology for peaceful purposes and at the same time getting them to agree to never employ the technology for military purposes?

Let me go on. How does the rest of the world, particularly the developing countries, view the NPT when in point of fact the U.S. has concluded an agreement on nuclear cooperation with India, which never signed the NPT, and what kind of signal, good or bad, does this send to the rest of the world? Can you comment, any one of you, all three of you?

Mr. SPRING. I don't think there is an inherent contradiction in the treaty. I think there is a natural tension, as I referred to it, in the treaty, but it does not necessarily have to be contradictory. You have considerable discretion with regard to what kind of cooperation you as a supplier state, any supplier state, would extend to a recipient state. You don't have to arrive at the conclusion that the recipient state in all circumstances is pursuing some sort of weapons program, but it is a pretty narrow window, particularly when you are engaged in sensitive fuel cycle activities like reprocessing or enrichment.

As it relates to the view in developing countries, I believe there is an attitude that is developing in countries that it is not so much a right under Article IV to nuclear energy, but it is an entitlement, and I am afraid that there has been an accumulation of behavior patterns at the IAEA and among supplier states, as well as among recipients states in the developing world, that say, well, they point to this right and say, we want to have that, that, that and that, and Iran is essentially making that argument, and more or less the supplier community is saying, in many instances, okay, you can get that, that, that and that.

To me an entitlement is not a right, and a right is not an entitlement, and they should be separated. Within that context there is considerable discretion about what, for example, the United States may want to do in its policy with regard to suppliers, even among states that are, without question, good-faith actors with regard to foregoing nuclear weapons.

The United States under President Bush's speech at National Defense Universities was seeking a policy of capping the development of any enrichment and reprocessing facilities beyond those that already exist in the world. That is an embodiment of that kind of discretionary policy.

Let me speak with regard to India.

India represents to me a very disturbing case. I believe that the best approach to addressing the Indian problem is what I call a second track on our broader nuclear nonproliferation policy, and that second track accounts for the fact that a state like India clearly has nuclear weapons, and that we will have to deal with that fact in a practical manner, but that we will not do so in a way that precludes us from ever walking that cat back with regard to India in this case, or others, as we have seen it walked with Belarus, Kazakhstan, Ukraine, South Africa; that we can always hold out that option even if it is clearly nothing in the near term.

What I think is important on India is two things. One is that I would be loathe to accept something that I would describe as a country-specific carve-out for India. This is India, it has unique circumstances, and we can just sort of set it aside because, you know what, it will happen. Everybody in the supplier community will

have their special carve-out case, and first on the list is China vis-a-vis Pakistan.

I would rather have Congress legislate what would be an element of the Atomic Energy Act that would deal with what I call de facto nuclear powers as a class, having flexibility within the standards about what the United States would do with them.

The second thing that concerns me which relates to that directly is that I hope that the Administration will not come here to Congress and essentially say in a carve-out nature, with a very short piece of legislation, accept this, or the entire deal with India goes up in smoke. If Congress is not given the opportunity to legislate creatively in this area, I think the Administration will be gaining something in terms of its immediate agenda with India, perhaps by forcing it into a black-and-white, up-or-down decision, but I think that will be a horrendous opportunity cost with regard to fashioning a broader nonproliferation policy that effectively addresses what is not a case unique to India, but is something we face with regard to other de facto nuclear powers.

Ms. WATSON. I am glad you mentioned that we might want to look at some kind of cap, because I am concerned about how we manage the inevitable rights of nuclear weapons states in the future. For decades we had the five nuclear states. Now the Administration is legitimatizing India's civilian nuclear program, and they have not signed the NPT, and we have Pakistan with nuclear weapons, and it is assumed that North Korea has nuclear weapons. And we let this genie get out of the bottle, how do we put it back in?

What are your views? I just heard you mention, Mr. Spring, that if the Administration comes here with a certain proposal, you would hope at least Congress would have an opportunity to come up with a set of provisions that we could all agree upon.

I understand the President is in India today, so I am very concerned about what does the future hold under NPT. You just mentioned what you would like to see us do. I don't think we do enough oversight, and I am really pleased that the Chair has started that process by calling together this panel today, and I appreciate you coming. But these are concerns that we really have.

It boggles my mind that there was an agreement to sell our ports off to Dubai and we knew nothing about it. So if we had a closer relationship in terms of oversight with the Administration, maybe we could have had input rather than following behind and trying to make laws. So whatever your ideas are about the future of NPT, I would like to hear them.

Mr. GREENBERG. If I can add one thought to what Mr. Spring said.

I am concerned about the notion that you can manage proliferation. I think proliferation is extremely difficult to manage. You are admitting that it is going to occur. I believe, and have believed since the early 1970s, that the way to deal with proliferation is to try to prevent it.

Now, what do we do about the de facto states such as India and Pakistan which have developed a nuclear weapons capability? My judgment is that the proper path is not to reward them. I think the signal of rewarding them by saying that we are going to regularize

relations with respect to nuclear trade tells the members of the NPT who have played by the rules for the past 35 years that they really were kind of foolish. They could have stayed outside the treaty regime, done what they wanted to do, and, at the end of the day, they would be able to have a regularized relationship with the United States and perhaps other nuclear parties under which they would be able to receive the benefits of nuclear power. I think it is the wrong signal at the wrong time.

Mr. SOKOLSKI. Let me just close out with a specific answer to a specific question: What countries have raised objections of what sort?

Ukraine's President announced, maybe he made a mistake in giving up our weapons when he heard about the India deal.

The Brazilians and the South Africans have said, this is outrageous. We have been following the rules. We make nuclear fuel. Why should India get the same level of cooperation we get when we have signed the NPT?

China wants to break rules with regard to the Nuclear Suppliers Group, saying, if you have done it more or less with India as a one-off, we would like to do it as a one-off with regard to Pakistan.

And Japan privately is biting its fingernails. It will not say it publicly, but it sees this as the beginning of the NPT's end.

Now, whether or not the NPT gives countries a natural right is perhaps open to question. Some people say an inalienable right precedes anything that can be granted by a treaty. But we do know this: The NPT does qualify that right pretty explicitly for the people that signed the treaty. You can pretty much be safe on that particular legal barge. You will not drown on it.

It seems to me, getting back finally to the India agreement, yes, you are following. No, you are not told much, but now all eyes turn to you because there is no fuse of any length particular to you reviewing whatever is going to be proposed as a legal change to the Nuclear Nonproliferation Act. You can take as much or as little time as you want. You can amend or not amend as you see fit.

What you do there will perhaps shape how seriously people will view the NPT, because the NPT's rules are being bent for India, and if you can somehow qualify the implementation of this agreement to achieve some goal of the NPT, you will have your say as well. So that is something to think about as this legislation makes its way to you and you have your say.

Mr. ROYCE. Thank you, Congressman.

Many observers refuse to consider amending the NPT. There are two arguments, one that it would be too difficult to achieve any kind of political consensus in doing this; and second, opening up the treaty would result in changes that the nuclear weapons states might not want to see, like defined milestones for disarmament.

If this is the case, then, can the loophole of allowing states to use sensitive enrichment and reprocessing technologies in the civilian fuel cycle be closed in any other way, in your opinion? Are supplier agreements enough to do this? What would be the course of action?

Mr. GREENBERG. Let me address that. One of the reasons that I wrote the paper I did back in the 1980s was because I was pretty convinced that the nonproliferation treaty is a nonamendable treaty. It has a provision which allows amendment, Article VIII, but it

is an extremely difficult process, and the degree of consensus required, including all of the weapons states, is very difficult to achieve. My judgment was it probably wasn't worth trying.

What is worth trying, although it has not been successful so far, is to use the mechanism established under the treaty to try to achieve an agreed interpretation, and that is the mechanism of the every-5-year review conferences. It is a mechanism which brings the treaty parties together and can allow for the development of a consensus in terms of interpretation of the rules under the treaty.

Now, I have to say that in the last two or three review conferences, there has not been a lot of progress in that regard, but I, for one, have not given up hope.

Mr. ROYCE. The Article IV discussion that we are having here today, that was supposed to be raised and in some ways was hinted at, but let us go into the discussion during the conference on Article IV. What was put forward? Where was the problem?

Mr. GREENBERG. I don't know the details of what happened at the last review conference, so I would defer to Mr. Sokolski with respect to that.

Mr. SOKOLSKI. I went up there for about a week, and one speech was given that was spot on, that focused on Article IV, and I cite it in my testimony. There is a Web site you can press a button and see the whole statement. It was by Principal Deputy Assistant Secretary for Verification and Compliance Christopher Ford.

He had attempted, to my knowledge, to get more cleared than what he was able to say. What he was able to say and what was cleared was that the United States at least is under no duty or obligation under Article IV to supply enrichment and reprocessing technologies to anyone.

I think what he wanted to say might have included that countries really don't have a per se right to acquire this from others or to develop it even indigenously, but that was not approved.

The response to his speech, I don't think there was any, if only because what he was arguing was sufficiently narrow and unobjectionable. It was saying that the United States does not feel a duty to give reprocessing and enrichment to anyone under Article IV, and no one objected to that.

Mr. ROYCE. Kofi Annan made a speech on the NPT review to the conference. He said:

"You must come to grips with the Janus-like character of nuclear energy, and the NPT regime will not be sustainable if scores more states develop the most sensitive phases of the fuel cycle and are equipped with the technology to produce nuclear weapons on short notice, and, of course, each individual state which does this only will lead others to feel they must do the same. This will increase all the risks of nuclear accident, of trafficking and terrorist use, and of use by states themselves."

So clearly you and Secretary General, who kicked off the conference, the understanding was that the conference was to accomplish something about the concerns over proliferation of the nuclear fuel-making technology, and yet at the end of the day there were some pretty guarded statements throughout the conference.

Mr. SOKOLSKI. Essentially Mr. El Baradei put forward a proposal which I think is a little impractical, which would simply put a moratorium for 5 years or more on anyone making additional fuel-making plants. There was an amendment to this idea that I think Pierre Goldschmidt suggested, and I did separately, unknowingly to him, which is that there should be no net increase in fuel-making capacity. With this you could modernize your enrichment plants.

The countries that objected to Mr. El Baradei's proposal included not only Iran right off the bat, but Japan, because it has a big reprocessing plant, and then Canada and Australia, because they are thinking they want to do some R&D in this area. And then, of course, the United States objected as well.

I think we need to be more imaginative about the alternative universe if there is not a nuclear time-out. I don't think we grasp how much nuclear technology is going to be in how many hands and what that is going to mean in the way of security.

Mr. ROYCE. Forty states have the industrial infrastructure and scientific capacity, you might say, to build nuclear weapons on relatively short notice. That is an alternative universe.

Mr. SOKOLSKI. When you start putting the proper nouns on those countries' names, your hair gets rather frazzled.

I think we could see within 30 years' time a Middle East that is nuclear-ready like Iran, and it won't just be Iran, and I think we can see a Far East like that, and in a world like that, the kind of miscalculations that occurred in the First World War where one assassin's bullet set into train a good lengthy war that led to another good lengthy war is not only conceivable, but likely; and, of course, this time you are talking about nuclear ammunition.

Mr. SPRING. We at The Heritage Foundation have looked exactly at that world in an abstract region that resembles East Asia in its fundamentals. We have played four iterations of the game, seven nuclear powers of unequal strength, and while it is not statistically significant—the game is a game, not a game—theoretic application—in any event there are nuclear exchanges in two out of the four.

So if you are worried about managing nuclear proliferation, and we have to at some level, even if it is described as I have referred in this track two setting, we have a considerable amount to learn in terms of how to do that.

I think that nuclear 1914 is a little bit of an overstatement. After all, balance of power in Europe if you want to look at it in the broader scheme of things, helped keep a generalized peace in Europe during the 19th century for a considerable period of time.

Mr. ROYCE. For 99 years.

Mr. SPRING. Since I think we are going to have to deal with that at least in certain circumstances and for certain periods of time, we ought to get about learning what the fundamentals are of managing that kind of nuclear game, much as we tried to manage it from the viewpoint of deterrence against the Soviet Union in the Cold War.

Mr. SOKOLSKI. But wouldn't you think more would not be better, and less would make your odds of managing it easier?

Mr. SPRING. Yes. There is absolutely no doubt about that.

Mr. ROYCE. Going to the Bush Administration's proposal that the nuclear suppliers group all concur that they are going to refuse to sell enrichment and reprocessing equipment and technology to any country that does not already possess full-scale functioning enrichment and reprocessing plants, say that could be done, how much of a viable option would that approach be? Would that be enough to fix some of the Article IV problems?

Mr. SOKOLSKI. It would be a start because it would suggest that this is consistent with the NPT, or at least I would hope that they would argue that. I think you need to do more for the simple reason people generally don't buy full-up plants. They buy kibbles and bits. We would have to do more, but that would be a start.

Mr. ROYCE. Let's go to realpolitik for a minute and discuss Russia. Russia is attempting to get Iran to accept this deal that would have Iran abandon its enrichment activities and instead moving its enrichment activities to Russian soil. What do you think, first of all, of this proposed deal, and what would that do to the Article IV debate?

Mr. SOKOLSKI. Well, if I may, one of the disturbing statements made to justify American backing of this deal was that, well, of course, Iran had the right to make nuclear fuel, we are only trying to show that it is in their interest to exercise this right off their soil. I think that is the wrong way to go about this. If you start with that kind of wind-up, essentially Iran says, we have the right, by gosh; you don't mind if we exercise it on our soil because that is our preference. I think that was not an auspicious way to explain the deal.

The second thing is that technically there are concerns. If you cannot know whether or not Iran has a covert enrichment line, how much good does it do to do some enrichment off their soil and send the product to them which could be seized at any point and put into a covert enrichment line?

Not only that, but it doesn't seem right to me that a country that has violated Article III of the NPT should be treated as though it has done nothing wrong and we have to somehow help it do its enrichment off its soil. Somehow there should be a sting, some kind of stigma, before we get to this point. I haven't seen it yet.

Mr. SPRING. I think you would have to have some very stringent standards before I think this would be a deal that would get us out of the current confrontation that we are currently in vis-a-vis Iran's program. I mean, if the Iranian technicians are sitting there at the Russian facility learning everything that goes on, then I am not sure that you are doing yourself any favors.

Another thing is that if what the Iranians are talking about here, we will do this thing in Russia, and, by the way, we are going to continue our own enrichment policy in parallel domestically, and I don't know what that gets you.

I am not here to say there are no opportunities by the general avenue the Russians have offered, but it is going to have to be looked at very closely as to what the details are.

Mr. GREENBERG. I agree with that as well. The devil is always in the details. But the general notion that it is better to enrich in Russia than in Iran is correct. We don't want to discourage them. To the extent that we are going to continue to allow Iran to have

nuclear technology in terms of nuclear power plants, it is going to have to get the fuel from somewhere. We are a darn sight better off if it is getting the fuel from Russia or the United States than if it is seeking indigenous capabilities. So in that sense I think it is progress.

Obviously the details need to be worked out. We don't want to create a situation where, with a wink and a nod, we are essentially acknowledging that Iran can continue to pursue some kind of enrichment capability in its own country.

Mr. ROYCE. I want to thank all of our panelists for making the trip here today. Your time is deeply appreciated. We will get your published statements out to my colleagues so they can reflect on them also. Mr. Sokolski, Mr. Spring, Mr. Greenberg, we appreciate your being here.

The Subcommittee stands adjourned.

[Whereupon, at 3:28 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE RUSS CARNAHAN, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF MISSOURI

Chairman Royce and Ranking Member Sherman, thank you for holding this important hearing on rights under the Nuclear Nonproliferation Treaty [NPT]. With North Korea's withdrawal from the NPT, and Iran progressing with uranium enrichment programs, this hearing is quite timely.

The Nuclear Nonproliferation Treaty should serve as an international regulatory and enforcement mechanism against any attempts to build nuclear weapons. We should utilize every tool available to us contained in the treaty to prevent the development of nuclear weapons. Should the necessary tools not be available to us in the treat, then we should look at other methods necessary to achieve nuclear non-proliferation.

Since, under the NPT, any non-nuclear weapon state can negotiate an agreement with the International Atomic Energy Association, the international community should be able to sufficiently mobilize against any potential threat. However, if, as seems to be the case with Iran, referral to the IAEA does not work, then we need to look at other diplomatic or economic means to prevent nuclear mobilization.

I am looking forward to hearing the testimony of each of the witnesses. In particular, I am interested in hearing what each of you has to say regarding the strength of the NPT and its viability given the current environment.

I thank you each for being here today.

