

The U.S.-Russia Nuclear Cooperation Agreement:

The Case for Conditioning

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The House Committee on Foreign Affairs

Russia, Iran, and Nuclear Weapons: *Implications of
the Proposed US-Russia Agreement*
June 12, 2008 Rayburn House Office Building,
Room 2172 Washington, D.C.

Overview

Mr. Chairman, Ranking Member Ros-Lehtinen, members of the Committee, it's an honor to be asked to testify here today on the implications of formalizing the nuclear cooperation agreement that President Putin and Mr. Bush signed and now is before Congress.

This is not the first civil nuclear cooperation agreement with Moscow. The first was signed in 1973 (*see* Appendix I). It too was designed to promote fast reactor cooperation and to “establish a more stable and long-term basis for cooperation” in the development of peaceful nuclear energy. Because our strategic objectives were so disharmonious in the 1970s and 1980s this diplomatic effort went nowhere. Today, few, if any, even remember that it ever was signed.

With the current agreement, we are unlikely to be so lucky. In 1973, Russia was not proliferating to Iran. Nor was the 1973 nuclear deal sold on how it might increase private U.S. nuclear exports to Russia. Today, Russia is actively engaged in missile, nuclear, and advanced conventional defense cooperation with Iran. If the current nuclear cooperation agreement is implemented without conditions that Russia's cooperation with Iran end, the U.S. will be seen to be endorsing such commerce at the very time Washington is trying to garner international support to sanction and isolate Iran for its nuclear misbehavior. In the politically charged environment of Presidential politics, some might call this appeasement.

Another key premise of the proposed agreement is that it will expand nuclear commerce between our nations. Yet, Russia lacks adequate liability insurance coverage for nuclear accidents and private American nuclear firms have warned the Departments of State, Energy and Defense (*see* Appendix II) that they will not risk their own capital to make commercial sales to Russia until Moscow ratifies the *Convention on Supplementary Compensation for Nuclear Damage* (CSC).¹ To date, Russia has refused to do so. Failing Moscow's ratification of the CSC, the only way the proposed nuclear agreement would lead to more business for U.S. industry is if the Department of Energy takes U.S. taxpayer dollars to pay U.S. firms to do business under government indemnification (*i.e.*, covered, again, with taxpayer funds) in Russia. Instead of making money, the agreement's implementation today would draw on the public treasury.

Bottom line: Without clear conditions on these points, the U.S. risks backing a nuclear deal today that will long be remembered but for reasons we all will wish we could forget.

That said, I doubt Congress will allow this. To date, Congress has been quite clear in spelling out what Russia and the White House must do before a formal nuclear cooperation agreement can be implemented. Last fall, H.R. 1400, which passed overwhelmingly in the House, required that, prior to the approval of any nuclear

¹For more on the *Convention on Supplementary Compensation for Nuclear Damage of 1997*, *see* IAEA, INFCIRC/567, July 22, 1998, at <http://www.iaea.org/Publications/Documents/Infcircs/1998/infcirc567.shtml>.

cooperation agreement with Moscow under section 123 of the Atomic Energy Act, the White House must first certify that no entity under Moscow's control is lending advanced conventional defense assistance to Iran or helping Iran's nuclear program or any of its nuclear capable missile programs. A similar Senate bill, S 970, has 73 co-sponsors including Senators Obama and McCain.

This legislation was designed to keep pressure on the White House to get Moscow to clean up its act. The Administration certainly is no fan of the nuclear and missile cooperation provisions in H.R. 1400. The White House knows that despite whatever progress it may claim it has made with Russia, our intelligence agencies are far from being able to give Moscow a clean bill of health. Indeed, the Administration admits that Russia is still helping Iran make nuclear-capable missiles that could hit Europe and is pleading to Congress to relieve the President from having to certify that Russia has ended this loathsome business.

Proponents of the nuclear cooperative agreement do not focus on these points. Instead, they argue that Congressional rejection of the latest nuclear cooperative agreement would aggravate U.S.-Russian relations and jeopardize whatever limited cooperation we have with Moscow on Iran and other nonproliferation issues. At the same time, they warn, though, that Russia is not all that interested in the deal.

In any case, our government has several options that avoid the dangers the proponents warn against. First, as Ranking Member Ros-Lehtinen and 11 other Republican members of this committee made clear in a letter to President Bush dated June 5, 2008, the White House could chose to withdraw its submission of the agreement.² This would give the next President of the United State additional political leverage to secure more from Moscow before resubmitting it to Congress. Second, if the president should choose not to withdraw the agreement, the leadership of the Senate or House could decide to adjourn before the 90-day requirement for presentment before the legislative branch has been met. This would produce a similar result.

Third, Congress could always condition the agreement such that the agreement would come into force pending a pledge from Moscow to terminate its nuclear, missile and advanced conventional assistance to Iran and to ratify the CSC. Fourth, if this proved too difficult to achieve during this Congressional session, Congress could always let the agreement come into force but subsequently deprive the U.S. government of any funds to implement it until the conditions noted above were met.

Finally, until these conditions are met, none of these options need necessarily come at the cost of continued or even increased nuclear cooperation with Russia. There currently is no advanced nuclear fuel to transfer for testing in Russian reactors or any pending private nuclear sales to Russia. Nor is any likely for several years independent of whether or not a 123 agreement is finalized. As for the transfer of intangible nuclear know-how, this can be accomplished in regard to nuclear safety, nuclear plant design, and even fast reactor

² For the full text of this letter, see <http://www.npec-web.org/US-Russia/20080605-HouseGOP-LetterRussia123.pdf>.

related work, without a 123 agreement, under the Atomic Energy Act's 57b(2) provision.³

Our government, then, has several options beyond merely voting up or down on the proposed agreement. As I make clear in the balance of my written testimony, though, it would be a mistake to bring the proposed agreement into force without additional oversight and conditioning. At a minimum, Congress should scrutinize—against the backdrop of additional intelligence—the classified Nuclear Proliferation Assessment Statement on Russia⁴ that the Administration sent with this agreement. It also should learn more about the liability insurance environment in Russia. If Congress does, I am sure it will only serve to strengthen the agreement and assure its ultimate success.

One final note. This agreement comes on the heels of the India agreement, which required the passage of the Hyde Act. Soon, Congress may be receiving additional nuclear cooperative agreements with a variety of Middle Eastern states. All of these agreements are based on the Atomic Energy Act of 1954, a law that Congress drafted in haste to accommodate President Eisenhower when he was trying to give zero-power research reactors to as many countries as soon possible under his famous Atoms for Peace Program. Because the reactors were small, most assumed the proliferation risks were too. In a desire to beat the Russians to the punch, Congress delegated enormous powers under the act to the Executive to move quickly.

That was over a half century ago. Since then the nuclear systems the U.S. has transferred under the act have grown much larger as has the sensitivity of the nuclear technology and materials it has shared. If Congress knew in 1954 that it was authorizing the transfer of such sensitive nuclear technology and goods, it might not have been so eager to delegate so much of its authority to regulate commerce to the Executive. In any case, it certainly seems appropriate that the Atomic Energy Act be adjusted to reflect these developments. This is a larger undertaking but one that this Committee now should seriously consider.

Russian Assistance to Iran's Nuclear Program

Perhaps no country has contributed so much to Iran's nuclear program as Russia has. There are currently nearly 1,300 Russian nuclear technicians in Iran and that number is about to double.⁵ What each of these nuclear workers may be doing when they are not working on Bushehr is both critical and difficult to know. Even the proponents of the 123 agreement concede that Russia and Iran have been engaged in "sensitive" nuclear

³ For the text of Section 57(b) of the Atomic Energy Act, see <http://www.nrc.gov/reading-rm/doc/collections/nuregs/staff/sr0980/ml022200075-vol1.pdf#pagemode=bookmarks&page=36>.⁴ For the full text of the unclassified version of the Administration's Nuclear Proliferation Assessment Statement on Russia, see <http://www.npec-web.org/US-Russia/>.

⁵ See "Russia, Iran May Set Up JV [Joint Venture] to Operate Bushehr NPP in 3 Months," *RIA Novosti*, February 14, 2008, at <http://en.rian.ru/business/20080214/99244034.html>; and "[Russian] Nuclear Staff in Iran Doubles," *Reuters*, February 19, 2008, at http://www.sptimes.ru/index.php?story_id=25086&action_id=2.

cooperation outside of the Bushehr project. The question is to what extent such cooperation continues despite Russian assurances to terminate it. Although there is little to guide us in the unclassified literature as to what is in play, Congress must be sure that Russian entities are not still helping Iran's plutonium production efforts and aspects of its enriched uranium program.

In this regard, there is still cause for concern. Recently Congressman Dingell, chair of the House Energy and Commerce Committee, formally requested that the Government Accountability Office investigate whether the Administration's Nuclear Proliferation Assessment Statement on Russia was complete or if "there is contradictory information that was omitted which could invalidate, modify, or impair the conclusions or basis for recommendation to approve the 123 agreement."⁶ On what basis did Mr. Dingell launch this investigation? Did he have specific information? This Committee should find out.

As for the Bushehr project, the Bush administration now argues that it serves the cause of nonproliferation by demonstrating that Iran does not need to enrich in order to produce nuclear power. The Clinton administration was more circumspect. It opposed the Bushehr project because of the cover it afforded other illicit nuclear activities in Iran. As already noted, this is still a significant concern. Until last year, the Bush administration opposed Russian completion of Bushehr for this and other reasons as well.

As detailed in a August 2006 House Permanent Select Committee on Intelligence report, the fresh low enriched uranium fuel that the Russians must deliver to Bushehr every 12 to 18 months could be seized and used as feed for Iran centrifuge enrichment plant to make a bomb's worth of weapons uranium—not in roughly a year, as would be the case with natural uranium, but in as little as eight weeks. Similarly, Iran could seize the spent fuel during the first refueling of the reactor some time in 2010 and gain access to 30 crude bombs' worth of near-weapons grade plutonium to make plutonium weapons.⁷

That Russia has pledged to take back the spent fuel a year or so after it is discharged from Bushehr does little to change this threat. Nor does the Administration's decision to stop opposing the project change the project's proliferation risks. Unless we can determine that Iran will not divert fresh or spent fuel from Bushehr to make nuclear weapons fuel at Iran's declared nuclear plants and that Iran has no covert enrichment or reprocessing plants hidden away to process Bushehr's fuel, letting this reactor run is a walk on the wild side. This, among other reasons, is why this Committee included Bushehr among the programs Russia must suspend before the U.S. should proceed to transferring not just

U.S. nuclear know-how, but also U.S. controlled nuclear equipment and goods. It understands that neither the International Atomic Energy Agency nor our own intelligence is certain about what Iran might do.

⁶ For the full text of Chairman Dingell's letter to the Government Accountability Office, see http://energycommerce.house.gov/Press_110/110-ltr.052208.GAO.123.ltr.pdf

⁷ *Recognizing Iran as a Strategic Threat: An Intelligence Challenge for the United States*, staff report of the House Permanent Select Committee on Intelligence, Subcommittee on Intelligence Policy, August 23, 2006, p. 11, at <http://intelligence.house.gov/Media/PDFS/IranReport082206v2.pdf>.

Russia and Iran's Nuclear-Capable Missile Program

This, then, brings us to the issue of Russia's continued assistance to Iran's nuclear-capable missiles. Last week, Ranking Member Ros-Lehtinen and 11 other committee Republicans wrote President Bush that his request to extend the waiver authority under the *Iran, North Korea, and Syria Nonproliferation Act* directly contradicted the Administration's argument that Russia's record regarding Iran's nuclear and missile program is now sufficiently satisfactory to justify moving forward with the nuclear cooperation agreement.⁸

Under the act, NASA cannot make any progress payments for Russia's work on the International Space Station project until and unless our president first certifies that Russia is not assisting Iran's nuclear and missile programs.⁹ Back in 2000, when this law was originally passed it embarrassed the Clinton Administration. In 2005, Bush asked Congress to be relieved of this certification requirement through 2008. Now, he is asking for an additional extension on this certification waiver.

It's pretty clear why. In March of last year, the Director for National Intelligence publicly communicated to Congress that Russia was still assisting Iran's ballistic missile program.¹⁰ This February, Iran launched what it described as a space launch vehicle (SLV) known as Explorer-1. As reported by Ariel Cohen of the Heritage Foundation, this rocket was a version of a 2,000 kilometer-range missile that is based on Russia's single stage SS-4 intermediate-range ballistic missile. As Cohen notes, "The British *Daily Telegraph* reported that the former high ranking members of the Russian military have facilitated a multi-million 2003 missile technology transfer agreement between Iran and North Korea," and that Russia has exported to Iran "production facilities, diagrams and operating instructions so the missile can be built in Iran, as well as liquid propellant (to fuel the rockets)."¹¹ The British paper goes on to detail how "Russian specialists have also been sent to Iran to help development of its Shahab 5 missile project." The Shahab 5 is a system that is designed to be capable of delivering a crude nuclear warhead to nearly any target in Europe. It is precisely the type of missile that the U.S. and NATO are now working to develop missile defenses against.

Indeed, it is news reports like these that the Administration is emphasizing to garner support for building missile defenses in Poland. How proceeding with nuclear

⁸ For the full text of this letter, see footnote 2. ⁹ Carl Behrens and Mary Beth Nikitin, *Extending NASA's Exemption from the Iran, North Korea, and Syria Nonproliferation Act*, report RL34477, Washington, D.C.: Congressional Research Service, May 8, 2008, at: <http://www.npec-web.org/US-Russia/20080508-CRS-NasaRussiaIRNA-RL34477.pdf>. ¹⁰ For the full text of the Office of the Director of National Intelligence's March 2008 letter to the Department of State, see <http://www.npec-web.org/US-Russia/20070301-ODNI-RussiaAssistsIranMissileProgram.pdf>. ¹¹ Ariel Cohen, "The Real World: Iran's Space Rocket Launch," *Middle East Times*, February 9, 2008, at <http://www.heritage.org/Press/Commentary/020808c.cfm>.

cooperation with Russia will help in this effort when Russian assistance continues to flow to Iran's nuclear and long-range missile program is difficult to see.

Nuclear Liability, Commercial Prospects, and Proliferation Woes

If there clearly was urgent profitable business to be had with the finalization of the proposed nuclear agreement with Russia, there at least would be some cause for Congress to weigh the deal's security risks versus its commercial benefits. For the next five to ten years, though, it is difficult to see what business would be lost by either party if finalization was deferred.

A key reason why is that despite years of urging by the U.S. and other governments, Moscow has refused to ratify the *Convention on Supplementary Compensation for Nuclear Damage* (CSC). Without the protection afforded by this treaty, the Contractors International Group on Nuclear Liability (which represents Babcock and Wilcox Company, Bechtel Power Corporation, BWX Technologies, Inc., General Electric Company, and Westinghouse Electric Company LLC) has warned the Administration that:

The various bilateral and multilateral indemnity agreements that have been concluded to date are not considered to provide adequate nuclear liability protection by most large, well capitalized U.S. companies.... No such agreement yet has provided a definitive or comprehensive solution to adequate protection of the public in the event of a large nuclear incident or to the nuclear liability risks facing contractors. The critical deficiency of all prior nuclear indemnity agreements with Russia is their lack of any waiver of sovereign immunity. Without waivers by the Russian Federation of immunity from (1) suit and (2) attachment of and from execution against its property, there essentially would be no way for U.S. contractors to enforce the indemnity agreement. Moreover, as private entities, contractors have no independent standing to enforce an agreement to which only the United States and Russia governments are parties.... While each company must make its own risk determination, most contractors have not been persuaded that this is sufficient for them to put their assets at risk. [For the full text of this letter, *see* Appendix II.].

What all this means is that until Russia ratifies the CSC, there will not be any significant, private U.S. nuclear sales to Russia. Instead, the U.S. Department of Energy is likely to contract with individual U.S., French, and Japanese firms to give Russia nuclear technology in the fields of advanced reactors and plutonium fuels and recycling. With each transfer, the U.S. government (*i.e.*, the U.S. taxpayer) will have to provide these firms with the liability coverage they need. The contracts, moreover, will likely be paid directly out of the U.S. Treasury. Money will be spent but it will not be made.

Imposing an increased financial burden upon U.S. citizens, however, is not the prime downside to such trade. A good number of nuclear experts that my center funds, and

others at the Union of Concerned Scientists, the Natural Resource Defense Council and Council for a Livable World, worry that this government-to-government nuclear cooperation agreement will promote the use of nuclear-weapons usable plutonium fuels.¹² This is something the Ford and Carter Administrations opposed on national security grounds. It has been U.S. policy to do so now for over 30 years. Yet, much of what the Administration and the Russians are talking about cooperating on is fast reactors using recycled plutonium-based fuels. Nor are these experts reassured that under the agreement Congress will be given 15-days notification before any such projects proceed. They understand that 15 days is hardly enough time to assess, much less to block such projects legislatively.

Does this mean that there is nothing that the U.S. and Russia should cooperate on in the nuclear field? Hardly. Safety is a topic that the U.S. has been closely cooperating with Russia on since the Chernobyl disaster of 1987. It will and can continue without a 123 agreement. Similarly, the Executive has authority under the Atomic Energy Act to share nuclear reactor information, including that for fast reactors, with Russia, again without a 123 agreement. With regard to plans for an international nuclear enrichment center, the U.S. can support it too. Russia does not need hardware or fuel from the U.S. but rather financing and contracts, something that does not require a 123. Finally, the U.S. can and will continue to import significant amounts of Russian low enriched uranium to run U.S. civilian power reactors.

All of this should make clear that the U.S. government and Congress have no reason to rush to get this agreement wrong. There certainly is nothing to be lost in demanding more of Russia. Instead, there are significant risks if we refuse to do so.

¹² See, e.g., Ivan Oelrich, "Another Nuclear Trade Deal, This Time with Russia," *Federation of American Scientists' Strategic Security*, May, 2006, 2008, at <http://www.fas.org/blog/ssp/2008/05/another-nuclear-trade-deal-this-time-with-russia.php>.

Appendix I:

*Agreement on Scientific and Technical Cooperation
in the Field of Peaceful Uses of Atomic Energy
between the U.S. and U.S.S.R., June 21, 1973*

No. 13344

**UNITED STATES OF AMERICA
and
UNION OF SOVIET SOCIALIST REPUBLICS**

**Agreement on scientific and technical cooperation in the
field of peaceful uses of atomic energy. Signed at
Washington on 21 June 1973**

Authentic texts: English and Russian.

Registered by the United States of America on 30 May 1974.

**ÉTATS-UNIS D'AMÉRIQUE
et
UNION DES RÉPUBLIQUES SOCIALISTES
SOVIÉTIQUES**

**Accord relatif à la coopération scientifique et technique en
matière d'utilisation pacifique de l'énergie atomique.
Signé à Washington le 21 juin 1973**

Textes authentiques: anglais et russe.

Enregistré par les États-Unis d'Amérique le 30 mai 1974.

AGREEMENT¹ BETWEEN THE UNITED STATES OF AMERICA
AND THE UNION OF SOVIET SOCIALIST REPUBLICS ON
SCIENTIFIC AND TECHNICAL COOPERATION IN THE
FIELD OF PEACEFUL USES OF ATOMIC ENERGY

The United States of America and the Union of Soviet Socialist Republics;
Attaching great importance to the problem of satisfying the rapidly
growing energy demands in both countries as well as in other countries of the
world;

Desiring to combine the efforts of both countries toward the solution of
this problem through the development of highly efficient energy sources;

Recognizing that solutions to this problem may be found in more rapid
development of certain nuclear technologies already under study, such as
controlled thermonuclear fusion and fast breeder reactors, as well as in
additional basic research on the fundamental properties of matter;

Noting with satisfaction the successful results of previous cooperation
between the Parties in the field of peaceful uses of atomic energy;

Wishing to establish a more stable and long-term basis for cooperation in
this field for the benefit of both their peoples and of all mankind;

In accordance with and in further development of the Agreement between
the Government of the United States of America and the Government of the
Union of Soviet Socialist Republics on cooperation in the fields of science and
technology of May 24, 1972;² the Memorandum on Cooperation in the
Peaceful Uses of Atomic Energy of September 28, 1972, between the US Atomic
Energy Commission and the USSR State Committee for the Utilization of
Atomic Energy; and the General Agreement between the United States of
America and the Union of Soviet Socialist Republics on contacts, exchanges
and cooperation of June 19, 1973;³

Have agreed as follows:

Article 1. The Parties will expand and strengthen their cooperation in
research, development and utilization of nuclear energy, having as a primary
objective the development of new energy sources. This cooperation will be
carried out on the basis of mutual benefit, equality and reciprocity.

Article 2. 1. Cooperation will be concentrated in the following three
areas:

a. CONTROLLED THERMONUCLEAR FUSION

The aim of cooperation in this area is the eventual development of
prototype and demonstration-scale thermonuclear reactors. Cooperation may
include theoretical, calculational, experimental and design-construction studies
at all stages up to industrial-scale operations.

¹ Came into force on 21 June 1973 by signature, in accordance with article 7(1).

² United Nations, *Treaty Series*, vol. 852, p. 141.

³ See p. 81 of this volume.

b. FAST BREEDER REACTORS

Cooperation in this area will be directed toward finding solutions to mutually agreed basic and applied problems connected with the design, development, construction and operation of nuclear power plants utilizing fast breeder reactors.

c. RESEARCH ON THE FUNDAMENTAL PROPERTIES OF MATTER

Cooperation in this area will include joint theoretical and experimental studies on mutually agreed subjects, and particularly in high, medium and low energy physics, through utilization of accelerators, data processing equipment and other facilities of the two countries. Cooperation may also be undertaken on the design, planning and construction of joint facilities to be used in this area of research.

2. Further details of cooperation in each of these three areas will be arranged through individual implementing protocols.

3. Other areas of cooperation may be added by mutual agreement.

4. Cooperation under this Agreement shall be in accordance with the laws of the respective countries.

Article 3. 1. Cooperation provided for in the preceding articles may take the following forms:

a. Establishment of working groups of scientists and engineers for design and execution of joint projects;

b. Joint development and construction of experiments, pilot installations and equipment;

c. Joint work by theoretical and experimental scientists in appropriate research centers of the two countries;

d. Organization of joint consultations, seminars and panels;

e. Exchanges of appropriate instrumentation, equipment and construction materials;

f. Exchanges of scientists and specialists; and

g. Exchanges of scientific and technical information, documentation and results of research.

2. Other forms of cooperation may be added by mutual agreement.

Article 4. In furtherance of the aims of this Agreement, the Parties will, as appropriate, encourage, facilitate and monitor the development of cooperation and direct contacts between organizations and institutions of the two countries, including the conclusion, as appropriate, of implementing protocols and contracts for carrying out cooperative activities under this Agreement.

Article 5. 1. For the implementation of this Agreement, there shall be established a US-USSR Joint Committee on Cooperation in the Peaceful Uses of Atomic Energy. Meetings will be convened once a year in the United States and the Soviet Union alternately, unless otherwise mutually agreed.

2. The Joint Committee shall take such action as is necessary for effective implementation of this Agreement including, but not limited to, approval of specific projects and programs of cooperation; designation of appropriate

participating organizations and institutions responsible for carrying out cooperative activities; and making recommendations, as appropriate, to the two Governments.

3. The Executive Agents of this Agreement shall be, for the United States of America, the US Atomic Energy Commission, and for the Union of Soviet Socialist Republics, the USSR State Committee for the Utilization of Atomic Energy. The Executive Agents, on their respective sides, shall be responsible for the operation of the Joint Committee and shall coordinate and supervise the development and implementation of cooperative activities conducted under this Agreement.

Article 6. Nothing in this Agreement shall be interpreted to prejudice other agreements concluded between the Parties.

Article 7. 1. This Agreement shall enter into force upon signature and shall remain in force for ten years. It may be modified or extended by mutual agreement of the Parties.

2. The termination of this Agreement shall not affect the validity of implementing protocols and contracts concluded under this Agreement between interested organizations and institutions of the two countries.

DONE at Washington, this 21st day of June, 1973, in duplicate, in the English and Russian languages, both texts being equally authentic.

For the United States
of America:
[Signed — Signé]¹
President
of the United States of America

For the Union of Soviet
Socialist Republics:
[Signed — Signé]²
General Secretary
of the Central Committee, CPSU

¹ Signed by Richard Nixon — Signé par Richard Nixon.

² Signed by L. I. Brezhnev — Signé par L. I. Brejnev.

Appendix II:

*Letter Sent to the Departments of State, Energy and
Defense on Behalf of the Contractors International Group
on Nuclear Liability (CIGNL), December 18, 2003*

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December 18, 2003

Hon. Richard L. Armitage
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Harry S Truman Building, Room 7220
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2201 C Street, N.W.
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Hon. Kyle E. McSlarrow
Deputy Secretary, S-2
Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

Hon. Paul D. Wolfowitz
Deputy Secretary
Department of Defense
The Pentagon, Room 3E944
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Re: Nuclear Liability – Russian Federation

Dear Sirs:

This letter is being sent on behalf of the Contractors International Group on Nuclear Liability (CIGNL) concerning on-going U.S. Government efforts to obtain liability protection for nuclear-related activities in the Russian Federation. CIGNL whose members have reviewed this letter is an *ad hoc* group of major nuclear suppliers: Babcock & Wilcox Company; Bechtel Power Corporation; BWX Technologies, Inc.; General Electric Company; USEC Inc.; Washington Group International Inc.; and, Westinghouse Electric Company LLC.

CIGNL submits that the U.S. Government should place more emphasis on encouraging the Russian Federation to ratify the Convention on Supplementary Compensation for Nuclear Damage (CSC) and to adopt a comprehensive domestic nuclear liability law covering both civilian and defense nuclear facilities, rather than continuing to use the more than decade old, *ad hoc* “interim” indemnity agreement approach. As President Bush stated when he transmitted the

CSC to the Senate in November 2002, lack of liability protection afforded by treaty obligations has limited the scope of participation by major U.S. companies in the provision of safety assistance to Soviet-designed nuclear power plants, increasing the risk of future accidents in these plants. S. Treaty Doc. 107-21 at III. The President noted that, once widely applied, the CSC will create for suppliers of U.S. nuclear equipment and technology substantially the same legal environment in foreign markets that they now experience domestically under the Price-Anderson Act. *Id.* President Bush further stressed that United States leadership is "...essential in order to bring the Convention into force soon." *Id.* at IV. In furtherance of the President's position, there should be greater efforts by the U.S. Government to encourage Russia to ratify the CSC (and for the U.S. Senate to do so as well).

CIGNL members are concerned about the potential effect of another *ad hoc* bilateral indemnity agreement on Russia's perception of the need to finally adopt the international nuclear liability conventions and a domestic law consistent with the conventions' principles (including channeling of liability to the facility operator, an adequate liability limit, a single competent court, etc.). While the conventions apply only to "civilian" nuclear facilities, a domestic Russian law must cover both civilian and defense facilities (as does the Price-Anderson Act in the United States).

Russia signed the 1963 Vienna Convention on Civil Liability for Nuclear Damage in May 1996, but has not ratified it or signed the 1997 Protocol to Amend the Vienna Convention. The *Duma* has considered several nuclear liability bills over the last decade, but none have reached final passage. This probably is in large measure due to resistance from Minatom, which has appeared to be opposed to increasing opportunities for Western contractors (*e.g.*, to supply instrumentation that could improve the safety and efficiency of Soviet-designed nuclear power plants).

The various bilateral and multilateral indemnity agreements that have been concluded to date are not considered to provide adequate nuclear liability protection by most large, well-capitalized U.S. companies. (Chemical activities present a different level of risks.) No such agreement yet has provided a definitive or comprehensive solution to adequate protection of the public in the event of a large nuclear incident or to the nuclear liability risks facing contractors. The critical deficiency of all prior nuclear indemnity agreements with Russia is their lack of any waiver of sovereign immunity. Without waivers by the Russian Federation of immunity from (1) suit and (2) attachment of and from execution against its property, there essentially would be no way for U.S. contractors to enforce the indemnity agreement. Moreover, as private entities, contractors have no independent standing to enforce an agreement to which only the United States and Russian Governments are parties.

In September 1994, the best assurance about enforcement of indemnity agreements the U.S. Government gave to contractors was as follows: "[...] the precise positions and actions the United States might take in a given case will depend on the actual factual, procedural, political and legal situation that exists at such time." While each company must make its own risk determination, most contractors have not been persuaded that this is sufficient for them to put their assets at risk. Another result of continuing to rely on a Russian Government indemnity is expected

December 18, 2003

Page 3

to be continuing requests by U.S. contractors for at least "backup" indemnification from the U.S. Government under Public Law 85-804.

Additionally, too much emphasis has been placed by the U.S. Government on resisting Russia's insistence that any agreement exclude coverage for premeditated acts of individuals (as is the case in the June 1992 U.S.-Russian Comprehensive Threat Reduction Agreement). Such a provision has been a feature of the 1963 Vienna and 1960 Paris Conventions under which contractors have done work for four decades. The exclusion does not appear unreasonable, as long as it is clear the "individual" refers only to a natural person and there is not right of recourse to the individual's employer (*i.e.*, the doctrine of *respondeat superior* does not apply). In any case, it is more likely an individual would be held criminally liable for intentional acts than be sued for civil damages.

The members of CIGNL urge that the U.S. Government more actively encourage the Russian Federation to ratify the CSC and to adopt a comprehensive domestic nuclear liability law covering both civilian and defense nuclear facilities.

We stand ready to provide additional information if you have any questions.

Very truly yours,

/S/

Omer F. Brown, II
Counsel for CIGNL