

November 30, 1978

**Report on South African-American Talks held in
Washington on 20, 21, and 22 November 1978 in
connection with the "Nuclear Non-Proliferation Act,
1978" (NNPA)**

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REPORT ON SOUTH AFRICAN - AMERICAN TALKS HELD IN WASHINGTON ON 20, 21 AND 22 NOVEMBER 1978 IN CONNECTION WITH THE NUCLEAR NON-PROLIFERATION ACT, 1978 (NNPA)

American delegates present:

Ronald J Bettauer
Assistant Legal Adviser for Nuclear Affairs
Department of State

Peter Brush
Acting Assistant General Counsel for International Development and Defence Programs
Department of Energy

Harry Marshall, Attorney-Adviser
Office of the General Counsel
Arms Control and Disarmament Agency

Carl Stoiber
Assistant General Counsel
Nuclear Regulatory Commission

Joanna Becker, Special Assistant to the Executive Legal Director
Nuclear Regulatory Commission

Michael Guhin, Director, Office of Non-Proliferation and Export Policy, Nuclear Energy & Energy Technology Affairs
Bureau of Oceans, International Environmental and Scientific Affairs
Department of State

Allen Locke, Deputy Director
Office of Nuclear Policy and Operations
Bureau of Politico-Military Affairs
Department of State

Lewis MacFarlane, Acting Director for
Southern African Affairs
Department of State

Marvin Peterson, Senior Policy Assistant
Office of International Programs
Nuclear Regulatory Commission

W Slawson, Assistant-Director
Office of International Nuclear Affairs
Department of Energy

South African delegates present:

Dr G N Barrie
Senior Legal Adviser
Department of Foreign Affairs

Advocate H L Breedt
Legal Adviser
Atomic Energy Board

Mr S W van der Merwe
Deputy Director: External Relations
Atomic Energy Board

Mr C Fuchs
Legal Adviser
ESKOM

Advocate J C Heunis
Legal Adviser
Department of Foreign Affairs

Mr John M Sterban
Council, South African Embassy
Washington

Although the South African delegation went out of their way to avoid any reference to the Nuclear Non-Proliferation Treaty, the American delegation frequently made the point that, in South Africa's case, the signature of the Non-Proliferation Treaty was a prerequisite for any future cooperation with the USA regarding the supply of nuclear material. The American delegation conceded that this fact was not a requirement of the NNPA, but stated that South Africa was regarded as a special case. The reason they gave for this was the state of American domestic politics and current international politics. Even the acceptance of comprehensive safeguards would not in itself satisfy the Americans. According to the American delegation, this fact had already been confirmed at the highest level as an essential prerequisite for obtaining the approval of the American Congress for any further cooperation with South Africa in this field.

The Americans often referred to the Pretoria talks of the preceding June and the joint memorandum formulated there and suggested that the presumption at the time was that future cooperation between the two states on nuclear matters could only take place on the basis of that memorandum. Mr Charles van Doren, a member of the June delegation, who was present at the discussions from time to time, stated clearly that his assumption was that future South African accession to the Nuclear Non-Proliferation Treaty was not excluded.

It was informally established that South Africa was the thirteenth country to hold talks with the Americans specifically on the subject of the interpretation and implications of the NNPA. It is possibly important to point out that the three draftsmen of the NNPA, Messrs Bettauer, Brush and Stoiber, were present at all the discussions and that Mr Bettauer led the discussions.

Some of the most important impressions of the NNPA derived by the delegation were the following:

(1) Extensive provision was made for public participation in the various procedures of the Nuclear Regulatory Commission (NRC). The public were defined as "individuals or groups not otherwise connected to an activity which can influence the government's conduct on a specific issue" - in other words, the general public. The rules and procedures of the NRC give the NRC complete discretion in deciding whether a public hearing would be in the public interest. The actions of the public could therefore undoubtedly affect the eventual issue of licences for the exportation of nuclear material. One of the American delegates went as far as to express the opinion that a member of the public was competent "as of right" to insist on a public hearing. It should also be mentioned that the American courts have a testing right in respect of NRC decisions.

(2) The information on which the NRC decisions in respect of the granting of export licences should be based is derived from the Executive Branch. The latter consists of the Departments of State, Energy, Commerce, Defence and the Arms Control and Disarmament Agency. The NRC cannot take decisions before receiving fully inclusive recommendations from the Executive Branch. It appears that the findings of the Department of State and the American Intelligence Service will be decisive in determining the ultimate recommendation of the Executive Branch. If the recommendation of the latter were to be negative, the NRC would not be empowered to issue a licence.

(3) Congress is empowered to review, overturn or veto any Executive Branch resolution (or Presidential decision) by means of a so-called "concurrent resolution". Further, Congress may impose new and additional export requirements at any time. (A "concurrent resolution" is a like decision adopted by both the Senate and the House of Representatives with an ordinary majority.)

(4) In his annual report to Congress on the NNPA, the President can revise the export requirements and the American export policy as he sees fit and recommend further export requirements. Although this is merely a competency to make recommendations, it is foreseeable that it could have far-reaching consequences which could result, inter alia, in further changes to cooperation agreements. The American delegation took the view that it was unlikely that such changes would materialise in the foreseeable future.

(5) Even the draftsmen of the NNPA agreed with the South African delegation that the Act provides for intricate, cumbersome and potentially time-consuming procedures. As regards future American agreements for nuclear collaboration, control over nuclear exports and the transfer of nuclear technology, a total of 26 special procedures are required. The President is intimately concerned with 12 of these special procedures.

(6) American foreign policy considerations will play a far more important role in politically sensitive export applications such as those by South Africa. Such applications will necessarily be vulnerable and this fact is even reflected in the Act. The Act includes the following clause:

"Potentially controversial requests should be identified as quickly as possible so that any required policy decisions or diplomatic consultations can be initiated in a timely manner."

(7) As we know, the Act provides for all-inclusive safeguards in respect of all peaceful uses of nuclear energy. The Act therefore does not provide that the military

application of nuclear energy, with the exception of nuclear explosions, is prohibited. The American delegation made it clear, however, that attempts would be made when negotiating cooperation agreements to impose an embargo on all military operations.

(8) It was again emphasised that the Act does not impose any impediment on the erection or expansion of enrichment plants. The Act does, however, provide that if enriched fuel is supplied through the agency of an international nuclear fuel authority, the receiving country would have to undertake not to expand existing enrichment plants or to build any new plants. The Americans did, however, provide the assurance that a "fuel bank" of this kind was by no means intended to replace bilateral enrichment agreements and would only serve as a guarantee that nuclear fuel would be available if a supplier was not in a position to meet its commitments. Enrichment in South Africa should therefore not be affected in any respect.

(9) The NNPA makes provision for nuclear exports to be terminated if a recipient were to be guilty of one or more actions spelt out by the Act. According to the Americans, such exports could be discontinued even on the strength of a reasonable supposition that recipient had acted in that way.

The following remarks by the American delegates are revealing:

Van Doren: "On the United States' side there is a determination to make the act work. We do not want to be put outside the export business."

Guhin: "It is easy to lose sight of the basic things. The complexities can wash away. We cannot give you any absolute assurances but it must be assumed possible that your application will be accepted."

The Executive would not have undertaken these discussions if we thought we would not be able to make it with Congress. There are some in Congress that will have problems but circumstances can change."

Bettauer: "The United States wants to get a settlement with South Africa as soon as possible. We want to ensure reliability. In interpreting the act there is a bias in favour of supply." He went on to say that Koeberg and Safari would be treated impartially.

Stoiber: "The 1978 act is a final and firm statement. Congress plays an important role in American foreign policy."

Brush: "On this particular issue Congress desperately wants to support this particular President." This remark was made with reference to the possibility that Congress would be well disposed towards a South African application.

The whole American delegation was ad idem that the Act "is susceptible to a host of interpretations", that many provisions were "window dressing" and even went as far as to point out to the South African delegation that there were 254 "pitfalls" in the Act.

The attitude of the American delegation was therefore that it was abundantly clear that the initiative for further negotiation now lay with the South African Government.

After some initial hesitation, the American delegation undertook to make a specimen cooperation agreement available to the South African delegation for the renegotiation

of existing agreements. This specimen agreement, along with a few obscurities that might still crop up, would afford a golden opportunity to start further negotiations with the USA.

Even if a new co-operation agreement were to be successfully negotiated, it is clear that such an agreement would not incorporate any absolute assurance of supply.

The discussions took place in an extremely friendly and cordial atmosphere and important personal contacts were established. The Americans were extremely helpful throughout.

PELINDABA
30 November 1978

FOR: ATOMIC ENERGY BOARD

[signature]
S W van der Merwe
DEPUTY DIRECTOR: EXTERNAL AFFAIRS

[signature]
Adv. H L Breedt
LEGAL ADVISER

FOR: FOREIGN AFFAIRS

[signature]
Dr G N Barrie
SENIOR LEGAL ADVISER

[signature]
Adv. J C Heunis
LEGAL ADVISER

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