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

As you know, on 30 November we submitted a report on our main impressions of the juridical aspects of the NNPA to you. The delegation intends to compile a more comprehensive juridical "manual". It may be mentioned at this stage that after our discussions the NNPA no longer presents any real juridical problems and that all our questions have been satisfactorily answered.

Although our specific mandate was to obtain clarity on the possible juridical implications of the NNPA, it is our unanimous opinion that it would not be inappropriate to draw your attention to certain impressions that we gained. We are convinced that we would be failing in our duty if we did not convey these impressions to you.

1. As was spelt out clearly in our report of 30 November, the American delegation stated plainly that unless South Africa became a signatory to the Nuclear Non-Proliferation Treaty, no South African application for an export licence for nuclear fuel would be considered. As also appeared from the above-mentioned report, even signature of the Nuclear Non-Proliferation Treaty would not carry an assurance that nuclear fuel would be supplied. Accession to the Nuclear Non-Proliferation Treaty is without a doubt a sine qua non for any future co-operation with the USA in this field. Even if South Africa were to accede to the Nuclear Non-Proliferation Treaty and a new cooperation agreement between the R.S.A. and the U.S.A. were to come into being, no absolute guarantees would ensue from this.

2. This matter was deliberated with Ambassador Sole on two occasions at his request. According to Ambassador Sole, South Africa needed to decide on its priorities on this matter. In this regard, the significance of Valindaba and that of Koeberg would have to be weighed up against one another. The question that arises is whether the secrecy surrounding Valindaba, which to some extent is ensured by non-accession to the Nuclear Non-Proliferation Treaty, should be given greater weight in the long run than the immediate needs of Koeberg. If Koeberg is accorded greater importance than Valindaba, accession to the Nuclear Non-Proliferation Treaty should be seriously considered unless there is some question of alternative suppliers of which we are not aware. We naturally realise that military and strategic considerations are also important here.

3. Ambassador Sole is also of the opinion that if it is decided that there is no alternative to signing the Nuclear Non-Proliferation Treaty, signature would have to be preceded by a particular modus operandi. In the first place, accession should be linked to a proviso to the effect that if, according to Ambassador Sole, the U.S.A. were to refuse to supply nuclear fuel to South Africa, South Africa would denounce the Nuclear Non-Proliferation Treaty. It is acknowledged that a specific proviso of this kind, referring to the actions of a specific country, is unusual. The idea could, however, have merit if the proviso were to determine that if any party to the Nuclear Non-Proliferation Treaty (which would include the U.S.A.) should refuse to supply nuclear fuel to South Africa for peaceful purposes, for example, South Africa could denounce the treaty. We have no comment on the acceptability of such a proviso, both for South Africa and for the member countries of the Nuclear Non-Proliferation Treaty, or on the political implications if we should need to withdraw from the NNPT in future as a result of the operation of the proviso clause. You are probably aware of the fact that in terms of the provisions of the Nuclear Non-Proliferation Treaty it is possible in any case to repudiate the treaty in particular circumstances. The juridical acceptability of a proviso clause as proposed is currently being investigated by the legal department of the Department of Foreign Affairs.

Ambassador Sole also made the point that, as had become apparent during our discussions, the U.S.A. was desperate to make their new policy as reflected by the NNPA acceptable to the international community. Without a single exception the states that currently have cooperation agreements with the U.S.A. criticised the new Act. (As previously stated, we were the thirteenth country to ask for clarification of the Act.)

This concern could possibly be exploited by putting it to the U.S.A. that South Africa would only accede to the Nuclear Non-Proliferation Treaty if further additional benefits would follow for South Africa. Such additional benefits might include modern sophisticated weapons and nuclear equipment, for example. American concern about the possible failure of the NNPA cannot be overemphasised and in this regard we can refer to a few statements from the Senate report on the NNPA (95th Congress First Session Report No. 95 - 467).

Commissioner Kennedy (of the Nuclear Regulatory Commission) stated as follows to the Senate committee concerned:

"I believe that a nation's reputation as a reliable nuclear fuel supplier would probably be enhanced more by ensuring that obligations already undertaken in current fuel supply contracts and agreements for co-operation were strictly adhered to, than by developing complex arrangements which may not in the final analyses prove workable." (p. 114)

The Deputy Director U.S. Arms Control and Disarmament Agency, Spurgeon Keeny Jr., stated:

"Our trading partners must have confidence in our agreements for nuclear export once they have been made. This confidence will not be bolstered by the provision ... for congressional override. ... Lack of confidence may drive recipient nations to alternatives, such as indigenous [sic] enrichment and reprocessing facilities that we are trying to discourage ... However, as presently drafted ... these provisions would, we believe, contribute to uncertainty as to the prospects of dealing with the United States." (p. 116)

Gerald F. Tape (former U.S.A. Governor on the Board of Governors of the IAEA) stated:

"I fear that it will turn potential future customers away from co-operation with the U.S. Such an event will not only be detrimental to U.S. non-proliferation interests but would have many other effects, such as the impact on U.S. industry, loss of exports etc. ... The probability of delay and ultimate veto is too high for most potential customers to accept ... How can a customer be assured that extraneous factors will not influence continuing co-operation? ... Lets [sic] not, in an overly zealous pursuit of non-proliferation goals, "price" the United States out of the non-proliferation market." (pp. 119 - 122)

Other insightful statements were made by George J. Stathakis, Vice-President of General Electric Co., and Francis P. Cotter of Westinghouse Electric Corp. in a letter to the chairman of the Foreign Relations Committee of the Senate:

Stathakis said:

"Today U.S. participation in the international nuclear market is sharply diminishing. The U.S. share has declined in the past 5 years from about 90 percent to

approximately 40 percent today. This is not because our products lack competitiveness. Rather, we are facing a crisis of confidence. Customer nations that have committed themselves to U.S. nuclear technology now see their energy future confused because of changing U.S. nuclear policies, which appear to many of these countries as unfair, arbitrary and inconsistent with past practice. This uncertainty tends to divert customer nations to non-U.S. suppliers who give stronger supply assurances."

"The essential difficulty in reconciling these divergent needs is obvious in the extraordinary complexity, indeed paralyzing dichotomy, of the proposed legislation. For example, under S.897, the executive branch makes the finding of whether an export license would be "inimical to the common defense and security". If the executive branch determines that it is inimical, the NRC may not issue the license. But if the executive branch says it is not inimical and the NRC does not issue the license, the executive branch can issue the license, but in this event the Congress can overrule that decision. This complex relationship between Executive action and Congressional review, which applies to a number of matters under S. 897, would create great uncertainty as to whether a particular license would be issued, and leave user nations with little faith in U.S. supply credibility." (pp. 123 - 124)

Cotter stated the following:

"We have viewed with deep concern the dramatic decline in U.S. nuclear reactor export sales in recent years. Other countries have become strong competitors, and indeed they have now captured the majority of the world market. As a case in point, we have not secured a new export reactor order in the last 18 months.

Several factors have influenced this dramatic shift away from U.S. dominance of the international market, but by far the most decisive has been the uncertainty which has developed as a result of United States non-proliferation and nuclear export policies - an uncertainty which has been produced by a series of unilateral policy shifts and which has created grave doubt world-wide about the reliability of the United States as a nuclear supplier. The result has been a shift to purchases from non-U.S. suppliers. A de facto moratorium on sales of U.S. nuclear reactors abroad, however, unintentional or unintended, is now in effect."

"We would also urge that no deadline be set for renegotiation of new Agreements for Co-operation based on new criteria. It is doubtful that our trading partners will willingly accept such a demeaning deadline. Such a requirement will simply reinforce their view that the United States is not interested in doing business with them. They have been trading with us for years under the terms of existing and valid bilateral agreements. Are we now to demand they renegotiate and accept not only our new and more restrictive demands and conditions, but also do so within an unrealistic deadline which we have set by legislative action?"

"Our summary comments on the bill are:

A. It fails to restore U.S. credibility that we will act reliably as a nuclear supplier:

1. It gives no assurance to a customer state that an export license will be issued even if the customer agrees to our new export conditions and honors its agreement. In addition, it sets up a maze of Presidential exception and Congressional review procedures, which could consume years before arriving at an uncertain outcome on issuance of an export license. No customer will perceive this state of affairs as offering reliability of supply; it will more logically be viewed as running a triple gauntlet of Agreements for Cooperation, subsequent arrangements and individual export licenses.

2. The bill clearly indicates that the Congress expects to exercise the option to impose new export criteria when and as it sees fit, and requires annual action on the subject. While we understand that this is an obvious Congressional prerogative, it is hardly reassuring to a customer state (already doubting U.S. credibility) to have it so specifically emphasized that the nuclear export ground rules can again in the future be unilaterally changed at the direction of the United States.

3. The bill does not reassure a trading partner that the United States will honor existing agreements while undertaking to renegotiate new ones in a traditional diplomatic manner, and without arbitrary deadlines. Our conditions are in fact to be "imposed", not "negotiated". The customer knows full well that other nuclear supplier nations do not impose similar conditions." (pp. 117 - 129)

Without placing too much emphasis on this point, we conclude with a reference to the report on the Conference on Energy and Nuclear Security held in Latin America in April this year. Regarding the NNPA, the report reads as follows:

"Several participants pointed out that the United States has already engaged in counter productive disputes with Latin American nations over nuclear issues (notably with Brazil) and expressed particular concern as to future nuclear disputes arising out of the unilateral nature of U.S. actions likely to be taken under the non-proliferation act of 1978." (p. 33)

The importance of the above lies in the fact that it enables South Africa to plan a strategy with a knowledge of what is happening on the other side of the hill, which, as Wellington said, is a requirement for good strategy.

4. Apart from American concern about the NNPA in general, it was clear that the Americans were also extremely concerned about the possibility that South Africa would not enter into a new cooperation agreement with them. Our deliberately forthright concern over the legal and technical complexities in the NNPA probably contributed to raising the level of concern among the Americans and it was clear that Mr Charles van Doren's "sudden" re-entry into the discussions (after he had left for New York) was aimed at reassuring us that the juridical obstacles that we had been able to identify would be surmountable if South Africa and America could come to a political agreement.

The Americans consequently devoted a great deal of time and energy to convincing us that the "Executive", or at least many important components of the "Executive" (the State Department and the Department of Energy) would be favourably disposed towards a South African application for an export licence for nuclear fuel. Similarly, they repeatedly emphasised the point that if the "Executive", through the President, were favourably disposed to a South African application, it would probably be possible to obtain the consent of Congress. It appears that there has already been "lobbying" on this matter among members of Congress. According to Mr Van Doren, the courts and the NRC are unimportant in the decision making process and South Africa need not be concerned about their role.

If one takes an overall view, it may be concluded that the American "Executive" is extremely anxious to reach an agreement with South Africa and on the other hand greatly concerned about a possible failure to reach an agreement as a result of South Africa's refusal to cooperate on their (the Americans') conditions. If South Africa were to decide to conclude a new cooperation agreement on the Americans' conditions, it is our opinion that this concern could be used in addition to negotiate more than simply the supply of nuclear fuel.

5. As a final point of his scenario, Ambassador Sole mentioned that if South Africa

were to comply with the requirements stipulated by the U.S.A., the American President should give a personal undertaking to the South African Prime Minister that his administration would ensure that, as far as the Administration is concerned, South African licence applications would go through without a hitch. We realise that there will be a new President in six years' time at most, and possibly in two.

6. A factor that counts strongly in South Africa's favour is that the U.S.A. is uneasy about the possibility that South Africa will "go it alone", that we will use alternative markets or even emerge as a possible supplier of not only enriched uranium but possibly also nuclear technology. This is abundantly clear from a published report to the Senate Committee on Governmental Affairs which was compiled in 1977 by the Office of Technology Assessment. In this report a "clandestine nuclear weapons capability" is promised [sic] to South Africa (p. 5); there are references to press reports in which it is contended that South Africa (and Israel) "are at the verge of acquiring or have already acquired nuclear weapons". (p. 11) South Africa is also referred to as a "proposed supplier of enrichment services". (p. 47) It is also asserted that South Africa, if "pushed to the brink of extinction", would probably use nuclear weapons. (p. 58) Here South Africa is mentioned along with countries such as South Korea, Israel and Taiwan. It is categorically stated that countries like South Korea, Chile and South Africa create a dilemma for the U.S.A. on account of their nuclear potential and that "the potential for ... extortion of the United States in this situation is obvious." (p. 65) The fear that South Africa might engage in nuclear collaboration with the above countries is also apparent from the report, in which it is asserted, *inter alia*, that "other countries ... may see some advantage to assisting Taiwan's nuclear programme. A country like South Africa, which possesses the technology and is considered a pariah in the international community anyway, might well see some advantage to co-operation with Taiwan." (p. 109)

The fact that South Africa will look for alternative markets or enter the so-called "grey market" is also mentioned in the report, which refers to the alleged West German-South African collaboration in 1975 in the area of uranium enrichment. (p. 187)

Relating to the fact that South Africa is not a signatory to the Nuclear Non-Proliferation Treaty, this, together with the status of certain other developed countries such as Argentina, Brazil, Chile etc. as non-signatories, is seen as a "serious weakness of the NPT" and it is also argued that "the membership could be expanded if participation were made more attractive, possibly by offering members preferential treatment in the export of nuclear technology or security assurances." (p. 223) These considerations naturally support Ambassador Sole's assertion that possible accession to the Nuclear Non-Proliferation Treaty could mean additional benefits for South Africa.

7. If a decision is not desirable or possible at this moment, or cannot be made public, in our humble opinion the obvious *modus operandi* would be to continue to conduct further discussions with the U.S.A. A model new cooperation agreement under the NNPA was delivered to our Embassy in Washington on the first of December for presentation to the South African delegation. As mentioned in our report of 30 November, we had a great deal of difficulty in acquiring this model and it was only in the late afternoon of the last day of the discussions that we were informed that it would be in order for us to examine the model. This model cooperation agreement affords an ideal opportunity for a South African delegation to hold further talks with the Americans, because not only does this cooperation agreement contain a lot of detail but it also largely illustrates the NNPA and probably also differs considerably from other cooperation agreements. It should be mentioned that we are already in possession of a model cooperation agreement which we obtained through ESKOM. It will be interesting to see how the "ESKOM model" differs from the model that was officially supplied to us. It was our unanimous opinion, based on our discussion with the Americans on this model cooperation agreement, that the model agreement

officially supplied to us now differs considerably from existing new model agreements under the NNPA entered into with other countries. Further discussions of this kind should give the Americans the impression that we have not yet reached a final decision and are still considering all relevant aspects. This could have the further consequence that the Americans will not be intent on restricting other potential suppliers to South Africa, such as France. It is self-evident that if the decision is taken to sign the Nuclear Non-Proliferation Treaty, a new cooperation agreement would have to be negotiated with the U.S.A. without delay since Koeberg has to come on stream by 1982 and, as mentioned in our report of 30 November, the granting of an export licence can be preceded by a time-consuming process.

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PRETORIA

6 December 1978

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