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U.S. ADDITIONAL PROTOCOL IMPLEMENTATION ACT

APRIL 3, 2006.—Ordered to be printed

Mr. LUGAR, from the Committee on Foreign Relations, submitted the following

REPORT

[To accompany S. 2489]

The Committee on Foreign Relations, having had under consideration an original bill to implement the obligations of the United States under the Protocol Additional to the Agreement Between the United States of America and the International Atomic Energy Agency for the Application of Safeguards in the United States of America, with annexes, signed at Vienna June 12, 1998, reports favorably thereon and recommends that the bill do pass.

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I. PURPOSE

The Protocol Additional to the Agreement Between the United States of America and the International Atomic Energy Agency (IAEA) for the Application of Safeguards in the United States of America (the "Additional Protocol") supplements and amends the verification arrangements set forth in the Agreement Between the United States of America and the International Atomic Energy Agency for the Application of Safeguards in the United States of America of November 18, 1977 (the "Voluntary Offer"), which entered into force, following Senate advice and consent, on December 9, 1980. The United States already allows safeguards to be placed on certain facilities and materials under the Voluntary Offer, an outgrowth of its strong support for the Treaty on the Non-Proliferation of Nuclear Weapons (the "Nuclear Nonproliferation Treaty" or

"NPT"), which mandated safeguards on each non-nuclear-weapon state's declared peaceful nuclear energy facilities.

The Senate gave its advice and consent to ratification of the Additional Protocol on March 31, 2004. The United States has no obligation to accept safeguards on its nuclear materials and sites as a nuclear-weapon state under Article I of the NPT. Likewise, it is not bound to accept an Additional Protocol. Yet, as in the case of the Voluntary Offer, the United States negotiated and signed an Additional Protocol with the IAEA, which incorporates the full text of the Model Additional Protocol that non-nuclear weapon states under Article II of the NPT are being asked to sign, ratify and implement.[1] This underscores the U.S. commitment to combating the spread of nuclear weapons and demonstrates that adherence to the Model Additional Protocol will not place non-nuclear-weapon states at any commercial disadvantage. The United States is the only nuclear-weapon state to accept the entire Model Additional Protocol; however, the U.S. Additional Protocol allows the United States to exclude activities or locations of direct national security significance in the United States (in Article 1.b of the U.S. Additional Protocol) and gives it a right to use managed access to protect information of direct national security significance should inspections be carried out in the United States (in Article 1.c). The Voluntary Offer also contains a national security exclusion.

The Model Additional Protocol was designed to improve the ability of the IAEA to detect clandestine nuclear weapons programs in non-nuclear-weapon states by providing the IAEA with increased information about and expanded access to nuclear fuel-cycle activities and sites. As of March 2006, 75 countries have additional protocols in force.[2] U.S. ratification and implementation of the Additional Protocol is intended to demonstrate to non-nuclear-weapon states that the Additional Protocol will not adversely affect legitimate, transparent and peaceful nuclear energy development and thus could reduce the risk of nuclear proliferation and improve international confidence that non-nuclear-weapon states that are parties to the NPT are not misusing nuclear materials to develop nuclear weapons.

The Additional Protocol contains a number of provisions that require legislation to give them effect within the United States. Enactment of the Additional Protocol's implementing legislation would provide the Executive branch with authority to promulgate regulations that permit IAEA inspectors, accompanied by U.S. representatives, access to certain locations, facilities, activities, sites and information on activities in the United States. Until both the implementing legislation and the regulations are in force, the United States will not ratify the Additional Protocol, despite its having received the Senate's advice and consent to ratification in 2004. That is because it is general U.S. treaty practice to not formally ratify a treaty until the United States is in a position to fulfill the treaty obligations. The implementing legislation will also establish civil and criminal penalties for the failure of U.S. entities identified in Article 2 of the Additional Protocol to keep or provide such infor-

[1] INFCIRC/540, available at http://www.iaea.org/Publications/Documents/Infcircs/1997/infcirc540.pdf.

[2] http://www.iaea.org/OurWork/SV/Safeguards/sir_table.html.

mation under record-keeping requirements promulgated by U.S. agency regulations.

The existing U.S. declaration to the IAEA under the Voluntary Offer will need to be supplemented by additional information, to include:

- U.S. fuel-cycle research and development activities;
- Mining, processing and stockpiling of uranium ore, uranium ore concentrate and other nuclear fuel materials;
- Some nuclear materials currently exempt from the Voluntary Offer;
- Intermediate and high-level nuclear wastes;
- Manufacturing of certain materials and equipment;
- The import and export of specified materials and equipment;
- Applicable site and facility information; and,
- Agreed upon safeguards-related information.

Once the Additional Protocol enters into force, the United States will be required to provide to the IAEA a declaration of nuclear fuel cycle-related activities and, if necessary, to provide complementary access to the IAEA to allow that agency to verify the completeness of the U.S. declaration. The implementing legislation also sets forth procedures for inspections by the IAEA at U.S. locations under the Additional Protocol; these are patterned on the procedures mandated by Congress in 1998 for U.S. implementation of the Chemical Weapons Convention. The legislation also establishes civil and criminal penalties for willfully impeding a complementary access authorized by this Act. Additionally, implementing legislation is necessary in order for the Nuclear Regulatory Commission (NRC) to conduct training and trial inspections at its licensed commercial facilities.

Under the current U.S. safeguards agreement, the IAEA already has the right to inspect certain facilities that the United States has declared to it and are maintained on the U.S. Eligible Facilities List. Under the terms of the Voluntary Offer, the United States provides the IAEA with a list of eligible facilities (about 250) that do not have direct national security significance. These include facilities licensed by the NRC and some license-exempt facilities of the Department of Energy. Such inspection activities, have, since 1993, been "conducted at the request of the United States in order to safeguard fissile material declared excess to our defense needs."[3] The IAEA fully understands that the United States maintains the right to engage in nuclear weapons activities and that there is little, therefore, for the IAEA to discover here. The Additional Protocol will not likely result in additional inspections in the United States, but the United States must prepare for that possibility and ensure protections for itself if the IAEA were to conduct such inspections.

The committee's implementing legislation takes into account the need to protect U.S. national security and to abide by the U.S. Constitution. In its consideration of Additional Protocol implementa-

[3] Committee on Foreign Relations, Report on Additional Protocol, S. Exec. Rpt. 108–12 (2004), p. 111, hereinafter "Report."

tion, the committee has also been guided by the desire to maintain U.S. leadership in the global implementation of IAEA safeguards. The committee finds that it is in the interest of the United States to continue to demonstrate leadership in this area through ratification and appropriate implementation of the U.S. Additional Protocol and to that end has reported favorably its legislation to implement the Additional Protocol.

II. COMMITTEE ACTION

The Additional Protocol was referred to the committee on May 10, 2002.

The committee received testimony on the Additional Protocol at a hearing on January 29, 2004. Witnesses for this hearing were: the Honorable Linton F. Brooks, Administrator, National Nuclear Security Administration; the Honorable Peter Lichtenbaum, Assistant Secretary of Commerce for Export Administration, U.S. Department of Commerce; Ms. Susan F. Burk, Acting Assistant Secretary of State for Non-proliferation, U.S. Department of State; and, Mr. Mark T. Esper, Deputy Assistant Secretary of Defense for Negotiations Policy, U.S. Department of Defense. The committee also requested and received statements from: the Nuclear Energy Institute; the Honorable Ronald F. Lehman, Director of the Center for Global Security Research at Lawrence Livermore National Laboratory and former Director of the Arms Control and Disarmament Agency; and Ambassador Norman A. Wulf, former Special Representative of the President for Nuclear Non-proliferation.

At a business meeting on March 4, 2004, the committee considered a draft resolution of ratification including 2 conditions and 8 understandings. After discussion and debate, the resolution was approved by a vote of 19 in favor and 0 against.

On March 26, 2004, the committee reported favorably its resolution of advice and consent to the full Senate. On March 31, 2004, the Senate gave its advice and consent to ratification of the Additional Protocol by division vote.

On December 9, 2003, Chairman Lugar introduced S. 1987, the Additional Protocol to the U.S.-IAEA Safeguards Agreement Implementation Act, which was referred to the committee. S. 1987 was drafted by the administration and introduced at its request.

Since then, committee staff engaged with executive branch agencies and other Senate committees to craft the implementing legislation the committee now reports to the Senate.

At a business meeting on March 14, 2006, by a voice vote, the committee ordered the bill reported.

III. SUMMARY

The U.S. Additional Protocol Implementation Act ("the Act") consists of six titles that provide authority to implement the Additional Protocol, provide an appropriate process for implementation of IAEA complementary access, ensure protection of U.S. national security and business information, and authorize appropriations to carry out the agreement.

In evaluating the implementing legislation for the Additional Protocol, the committee paid particular attention to past legislation

adopted by Congress to implement the Chemical Weapons Convention (CWC) in the CWC Implementation Act of 1998.[4] Where and when they were appropriate or applicable, the committee included like provisions in its Additional Protocol implementing legislation.

Sections 1, 2 and 3 of the bill set forth the short title, provide definitions and a severability provision. The severability provision states that if any provision of the Act is held invalid, the remainder of the Act shall remain in force. The committee believes that the Additional Protocol and the Act are fully consistent with the U.S. Constitution, but has included this section as a matter of prudence.

Title I provides specific authority for the President to implement and carry out the Act and the Additional Protocol through directing the issuance of necessary regulations (principally by the NRC and the Department of Commerce (DOC)). Title II authorizes complementary access at U.S. locations consistent with the Act, and establishes the terms upon which such access may take place. Title III restricts disclosure under the Freedom of Information Act of information acquired pursuant to the Act or the Additional Protocol. Title IV makes it illegal for entities willfully to fail to report information required by regulations pursuant to the Act and provides for criminal and civil penalties for violations. Title V sets forth congressional notification and presidential determination requirements regarding environmental sampling. Finally, Title VI authorizes the appropriation of funds to carry out the Act.

TITLE I—GENERAL PROVISIONS

Title I authorizes the President to implement and carry out the provisions of the Act and the Additional Protocol. This is to be accomplished through an Executive order designating Agencies to promulgate regulations requiring, inter alia, submission to the United States Government of information specified under Article 2 of the Additional Protocol. This information is necessary for the United States to fulfill its obligation to provide the IAEA with a declaration of its civil nuclear and nuclear-related activities.

TITLE II—COMPLEMENTARY ACCESS

Title II sets forth the terms under which complementary access may occur in the United States. Section 201 of the Act states that the IAEA may not conduct complementary access in the United States without the authorization, in accordance with the Act, of the U. S. Government. It further directs that the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Mine Safety and Health Administration may not participate in complementary access. These agencies are excluded because their employees may detect violations of laws and regulations unrelated to the Additional Protocol. Section 201 further requires the number of U.S. representatives accompanying any IAEA inspectors to be kept to a minimum. Section 202 addresses procedures for complementary access. Section 202(b) sets forth the requirement for the United States Government to provide actual written notice of a complementary access request, as soon as pos-

[4] Chemical Weapons Convention Implementation Act of 1998, 22 USC 6701 note, Division I of Public Law 105–277.

sible, to the owner, operator, occupant or agent in charge of the location to be inspected. The notice must contain the purpose of the access request, the basis for selection of the location, the activities that will be carried out, the time and duration of the access, and the identities of the inspectors. Section 202(b)(4) requires a separate notice each time that complementary access is sought. Section 202(c) requires IAEA and U.S. personnel participating in the complementary access to show their credentials prior to gaining entry to the inspected location.

Section 202(d)(1) states that IAEA inspectors, during complementary access, may generally conduct activities specified under Article 6 of the Additional Protocol for the types of locations being inspected. There are several exceptions. First section 202(d)(1) recognizes that the United States Government has certain rights under the Additional Protocol to limit such access. In addition to its right under Article 1.b of the Protocol to deny the IAEA access to activities with direct national security significance or to locations or information associated with such activities, the United States may, under Article 1.c of the Protocol, manage access in connection with such activities, locations or information. These rights are unilateral and absolute; they are not subject to challenge by or negotiation with the IAEA. Furthermore, Article 7 of the Additional Protocol provides for managed access to other locations, under arrangements with the IAEA, to prevent the dissemination of proliferation sensitive information, to meet safety or physical protection requirements, or to protect proprietary or commercially sensitive information. Second, Section 202(d)(2) lists a series of items that are specifically excluded, from IAEA access. These exceptions, which are directed mainly at protecting business information, may not be enforced, however, if the Additional Protocol requires such disclosure. Section 202(e) requires that all persons participating in complementary access, including U.S. representatives, observe all environmental, health, safety and security regulations applicable for the inspected location.

Section 203 provides the legal framework for IAEA inspectors to gain complementary access to U.S. locations under the Additional Protocol. Section 203(a) sets forth three procedures for gaining such access: in cases in which the consent of the owner, operator, occupant or agent in charge of the locations to be inspected under complementary access has been obtained; in cases in which such consent is not obtained and where an administrative search warrant would then be required; and in cases in which expedited access is required.

The Additional Protocol provides for IAEA complementary access to a U.S.-declared location in the United States in some cases if the IAEA requests so with advance notice of less than two hours in "exceptional circumstances" (Article 4.b (ii)). The committee has included an expedited access procedure in Section 203(a)(2) that makes clear that in such circumstances no warrant or consent would be required to gain entry, "to the extent such access is consistent with the Fourth Amendment."

The remainder of Section 203 addresses the requirements for obtaining an administrative search warrant and what such a warrant must contain. Section 203(b)(1) states that the United States Gov-

ernment shall provide to a judge of the United States (defined in section 2(7) of the Act as a United States district judge, or a United States magistrate judge appointed under the authority of chapter 43 of title 28, United States Code) all appropriate information regarding the basis for selecting a particular location for complementary access. Section 203(b)(2) requires the United States to submit to the judge an affidavit in obtaining administrative search warrants stating, among other things, that the Additional Protocol is in force in the United States, the Protocol's applicability to the location to be inspected, and that the complementary access requested is consistent with the provisions of the Additional Protocol, including Article 4 regarding the purpose of the access and Article 6 regarding its scope. The affidavit must also indicate: "the items, documents, and areas to be searched and seized"; the anticipated time and duration of the inspection; and either that the location to which entry in connection with complementary access is sought was selected because of probable cause that information was not correctly and fully reported as required pursuant to regulations promulgated under the Act, and that the location to be inspected contains evidence of such violation, or that the location was selected pursuant to a reasonable general administrative plan based on specific neutral criteria.

Section 204 makes it unlawful for any person willfully to fail or refuse to permit, or to disrupt, delay, or otherwise impede, a complementary access authorized by this Act or an entry in connection with such access. The committee views this provision as a logical corollary to the rest of this Title, which creates clear obligations that the U.S. Government must satisfy before a complementary access may proceed. A similar offense was created by the CWC Implementation Act.

TITLE III—CONFIDENTIALITY OF INFORMATION

Title III of the implementing legislation exempts from the Freedom of Information Act (FOIA) disclosure of information obtained by the United States Government in implementing the provisions of the Additional Protocol. Thus, information reported to the U.S. Government by entities covered by Article 2 of the Additional Protocol, as required by regulation, is not subject to release under the FOIA.

TITLE IV—ENFORCEMENT

Section 401 of the proposed Act prohibits the willful failure or refusal of any person to maintain records or submit reports to the United States Government as required by regulations issued under Title I of the Act, or to permit access to or copying of such records by the United States Government.

Section 402(a) provides for civil penalties that may be assessed in the event of violations of section 204 or section 401 of the Act. The procedure established by section 402 for assessing a civil penalty includes: notice by an authorized executive agency to the person being penalized; a hearing before an administrative judge, if requested within 15 days after receiving the notice; factors to be taken into account in assessing penalties; review by a U.S. Court of Appeals, if requested within 30 days after a final order is issued;

and, if necessary, civil action in a district court to enforce a final order. In any such civil action, the validity and appropriateness of the final order shall not be subject to review. Civil penalties shall not exceed $25,000 for each violation. Each day during which a violation of section 204 continues shall constitute a separate violation of that statute.

Section 402(b) provides that in addition to, or in lieu of, civil penalties under section 402(a), a person who violates section 204 or section 401 of the Act may be fined under title 18, United States Code, imprisoned for not more than five years, or both.

The prohibitions of Title IV are necessary to implement the Additional Protocol, as the United States is dependent on the reporting it receives and on the cooperation of facility owners or operators to meet its treaty obligations.

TITLE V—ENVIRONMENTAL SAMPLING

In its work on the Additional Protocol and its implementing legislation, the committee has devoted particular attention to the issue of environmental sampling, both location-specific and wide-area, under the complementary access provisions of the Additional Protocol. The committee asked a number of questions, both as a part of its formal record of decision on the Additional Protocol and in meetings with executive branch officials, regarding the use of this sampling technique as a safeguards verification tool. The administration's unclassified answers to the committee's questions for the record, originally provided during consideration of the Additional Protocol itself and published in Executive Report 108–12, were later supplemented by declassified answers to four questions, which are reproduced later in this report.

The committee noted in its report on the Additional Protocol that were any potential national security concerns to arise with regard to the use of environmental sampling in the United States, the national security exclusion would apply. This view was supported by the letter sent on April 30, 2002, by then-U.S. Ambassador to the IAEA Kenneth C. Brill to the Director General of the IAEA, in which the United States stated its interpretation of certain provisions in the Additional Protocol. This letter was incorporated by reference as Understanding (1) of the Senate-approved resolution of ratification. Committee staff also confirmed with the IAEA that it does not dispute with the United States any of the interpretations set forth in the Brill letter.

There are two types of environmental sampling under the Additional Protocol, location-specific and wide-area. Article 6 of the Protocol authorizes the Agency to carry out collection of location-specific environmental samples in any complementary access. Article 5 of the Protocol specifies the locations to which the IAEA may have access in the United States, subject to the managed access provision and the national security exclusion of Article 1 or the managed access provisions of Article 7, and the purposes for such access.

In answer to a committee question for the record, the administration summarized the relevance of location-specific environmental sampling to IAEA inspections:

> The IAEA conducts environmental sampling, inter alia, to characterize the composition of material found in the environment at a location. This measure is employed to detect the presence of undeclared nuclear activities at a location. This data provides information on the history of nuclear material processing activities at the location or of materials that have been received or otherwise deposited at the location. [5]

IAEA inspections in North Korea and Iran have made notable use of location-specific environmental sampling (more commonly known as "swipes") to determine whether country declarations regarding nuclear activities (including possible uranium enrichment or spent fuel reprocessing) were accurate. The very qualities that make such sampling useful in a non-nuclear-weapons state may present a dilemma, however, for a recognized nuclear-weapons state under the NPT. As the administration went on to explain:

> Environmental sampling provides information about the material present at a given location from current and past operations, including the materials' isotopic ratios. It also can be used to determine whether, and to a certain extent how, a facility is processing or enriching uranium, or producing/separating plutonium, other actinides or tritium, or other materials. Furthermore, to varying degrees depending upon the type of sample material, it can be used to determine the approximate date of these activities. If used at locations where relevant environmental signatures are present, it could reveal information of direct national security significance to the United States. It is also essential to the success of the IAEA in its safeguards mission that it is able to detect and discover undeclared activity using such methods in non-nuclear weapon states.[6]

Under the national security exclusion in Article 1 of the Protocol, the United States has the right to exclude from the Article 2 declarations any locations that it determines would result in IAEA access to activities with direct national security significance or to locations or information associated with such activities. Complementary access under Articles 5.a(i), 5.a(ii), 5.a(iii) and 5.b is limited to those locations identified by the United States in its declarations under Article 2. The IAEA could seek access to other locations under Article 5.c, but the United States will invoke the national security exclusion and deny access if it determines that such access would result in access by the IAEA to activities with direct national security significance or to locations or information associated with such activities.

Under Article 9 of the Additional Protocol, the United States shall provide the IAEA with access to locations specified by the IAEA to carry out wide-area environmental sampling, provided that if the United States is unable to provide such access, it shall make every reasonable effort to satisfy IAEA requirements at alternative locations. Article 9 further provides that the IAEA shall not

[5] *See* Appendix, p.14.
[6] Ibid.

seek such access until the use of wide-area environmental sampling and the procedural arrangements therefore have been approved by the IAEA's Board of Governors and only following consultations between the IAEA and the United States. Such arrangements have not been brought before or approved by the Board. The United States has informed the IAEA that even if such arrangements were approved, the United States does not foresee circumstances in which the IAEA would need to propose to conduct wide-area environmental sampling in this country.

With regard to environmental sampling, the Brill letter stated:

> Should the use of wide-area environmental sampling be approved by the IAEA Board of Governors in accordance with Article 9, the United States does not foresee circumstances in which the IAEA would need to propose to conduct wide-area environmental sampling in the United States.
>
> In accordance with the NSE, the United States will not allow location-specific environmental sampling with respect to locations, information, and activities of direct national security significance to the Untied States. In this regard, the United States intends to use the NSE with regard to location-specific environmental sampling at any current or former nuclear weapon production complex site. [7]

The IAEA Board of Governors has not taken a decision to approve the use of wide-area environmental sampling techniques for use in its verification activities, and may not do so for quite some time, if ever, because the technology associated with such sampling has not yet fully developed for use in an accurate and cost-effective manner in those activities. It is highly unlikely, moreover, that sampling of this kind would be used in the United States to detect undeclared nuclear activities. The IAEA does not have the resources to conduct such activities in the United States in connection with its Additional Protocol and, in any case, since the United States is a lawful nuclear weapon state, would not need to do so. Nevertheless, the United States has accepted all of the text of the Additional Protocol, with the only addition being its national security rights in Article 1. Fundamentally then, the committee is faced with the need to balance U.S. national security concerns with its leadership and support for the best IAEA verification techniques possible in non-nuclear weapon states by demonstrating its willingness, under appropriate measures, to incorporate environmental sampling into the U.S. compliance regime under the Additional Protocol.

The committee doubts that the IAEA will ever have reason to use environmental sampling, either location-specific or wide-area sampling, to verify U.S. compliance with its Additional Protocol. The committee notes that the Brill letter states a definitive U.S. position on the use of the national security exclusion in connection with location-specific environmental sampling, and the committee supports that position.

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[7] Report, p. 24.

The Brill letter does not state a definitive U.S. position regarding wide-area sampling. Indeed, the United States has conducted environmental sampling and provided the IAEA with information regarding testing of such sampling in cooperation with the Department of Energy and the National Laboratories for the important purpose of providing assistance to the IAEA to enhance its verification activities and safeguards technologies. In answer to a committee question for the record, the administration noted that "wide-area environmental sampling was tested by the United States in advance of it being proposed as a measure for use by the IAEA."[8] Activities that support the IAEA, such as cooperation with the National Laboratories, are distinctly different from actual use of the same technologies in the United States by the IAEA for safeguards verification under the Additional Protocol.

Title V of the committee's implementing legislation is drafted to meet the requirements of U.S. national security, Congressional oversight, and U.S. leadership on nonproliferation. It does not prevent the use of wide-area or other environmental sampling, but would provide a statutory procedure involving Congress.

Section 501 creates a reporting requirement that not later than 30 days after the IAEA Board of Governors approves wide-area sampling for use as a safeguards tool the President shall notify the appropriate congressional committees of that decision. While it is likely that the committee would know in any case of such a decision, the committee intends, as required by subsection 501(b), that the notification from the President would include a detailed discussion of the measures approved by the Board of Governors and whether they may be used in the United States.

Sections 502 and 503 require reporting and certain certifications to Congress prior to the use in the United States of wide-area or location-specific environmental sampling. Nothing in these sections prevents compliance with a U.S. obligation. The committee was informed during its consideration of the Additional Protocol itself that a National Security Presidential Directive would be issued to guide use of the national security exclusion in connection with the Additional Protocol. Noting the importance of Congressional involvement in such decisions, the committee included sections 502 and 503 for the unlikely circumstance in which the President did not apply the exclusion to environmental sampling. The committee does not intend that this Title should encourage the use of such sampling in the United States or discourage the use of the national security exclusion, as appropriate, to deny the IAEA such access.

IV. Cost Estimate of the Congressional Budget Office

Rule XXVI, paragraph 11(a) of the Standing Rules of the Senate requires that committee reports on bills or joint resolutions contain a cost estimate for such legislation in the fiscal year it is reported and in each of the following 5 years; however, the CBO estimate was not available at the time of publication of this report. The Chairman will seek consent to insert it into the Congressional Record when it is provided to the committee.

[8] *See* Appendix, p. 15.

V. REGULATORY IMPACT

During its consideration of advice and consent to the ratification of the Additional Protocol itself, and in compliance with paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the committee inquired of the executive branch regarding what regulatory changes were envisioned for the Additional Protocol. The administration responded that:

> Draft regulations are being prepared by both NRC and DOC as part of their preparations for implementation. Before the rules can be published, the information collection forms must be approved by OMB and other regulatory requirements must be satisfied, (e.g., the Paperwork Reduction Act). This approval process cannot be performed before the treaty has been ratified and legislation is enacted. DOC's proposed rule must be published in the Federal Register and will request public comments before a final rule is issued. It is expected to take less than a year from assignment of implementing responsibility by the President to NRC and DOC until the new rules are published for implementation. The regulatory changes necessary are those that establish the requirement for entities not identified on the Eligible Facilities List to report information and to provide access to the IAEA at the covered location. The Presidential assignment of responsibilities that follows upon the authority provided to him in the implementing legislation provides NRC and DOC the authority to implement their respective responsibilities.[9]

[9] Report, p. 113.

APPENDIX

DECLASSIFIED ANSWERS TO QUESTIONS FOR THE RECORD

UNITED STATES DEPARTMENT OF STATE,
WASHINGTON, D.C. 20520,
September 7, 2004.

Hon. RICHARD G. LUGAR, *Chairman,*
Committee on Foreign Relations,
U.S. Senate.

DEAR MR. CHAIRMAN. In response to a request from a member of your committee's staff, we are enclosing a copy of unclassified administration responses to several of the committee's questions for the record regarding the U.S.-IAEA Additional Protocol. Classified answers to the same questions were provided to the committee in February 2004. Please allow the Department of State to take this opportunity to express appreciation for the Senate's prompt and favorable consideration of the Protocol.

Please let us know if we can be of further assistance.

Sincerely,

PAUL V. KELLY,
Assistant Secretary Legislative Affairs

Enclosure:
As stated.

UNCLASSIFIED ANSWERS TO QFRS 15-18, DEALING WITH ENVIRONMENTAL SAMPLING

Question (15). Ambassador Brill's letter states that "the United States intends to use the NSE [the 'National Security Exclusion' provided by Article 1.b of the Additional Protocol] with regard to location-specific environmental sampling at any current or former nuclear weapon production complex site." What are the capabilities of such sampling, as used by the IAEA, and why do they make it unwise to permit any and all such sampling at any current or former nuclear weapon production complex sites, as opposed to a case-by-case consideration of requests to permit such sampling? In open form if possible, but in classified form if necessary, could the administration clarify its policy with respect to the use of sampling techniques, to include environmental sampling, to clarify the risks associated with each type of sampling technique for U.S. national security or business proprietary information?

Answer (15). The IAEA conducts environmental sampling, *inter alia,* to characterize the composition of material found in the environment at a location. This measure is employed to detect the presence of undeclared nuclear activities at a location. This data provides information on the history of nuclear material processing activities at the location or of materials that have been received or otherwise deposited at the location.

Environmental sampling provides information about the material present at a given location from current and past operations, including the materials' isotopic ratios. It also can be used to determine whether, and to a certain extent how, a facility is processing or enriching uranium, or producing/separating plutonium, other actinides or tritium, or other materials. Furthermore, to varying degrees depending upon the type of sample material, it can be used to determine the approximate date of these activities. If used at locations where relevant environmental signatures are present, it could reveal information of direct national security significance to the United States. It is also essential to the success of the IAEA in its safeguards mission that it is able to detect and discover undeclared activity using such methods in non-nuclear weapon states.

In accordance with Article I, the United States will prohibit environmental sampling or any other activity by the IAEA wherever necessary. A U.S. decision to invoke the National Security Exclusion is not subject to challenge by the IAEA, nor need the U.S. provide the Agency any explanation for its decision. The administration has already informed the IAEA that the United States intends to use the NSE with regard to location-specific environmental sampling at any current or former nuclear weapon production complex site. Environmental sampling may also be excluded at other locations in accordance with the terms of the National Security Exclusion. In addition, at locations not covered by the National Security Exclusion, the U.S. may invoke the managed access provisions of Article 7 of the Additional Protocol to offer alternatives to the use of environmental sampling. Such alternatives may be offered in order to prevent the dissemination of proliferation sensitive infor-

mation, to meet safety or physical protection requirements, or to protect proprietary or commercially sensitive information.

Question (16). Ambassador Brill's letter states that "the United States does not foresee circumstances in which the IAEA would need to propose to conduct wide-area environmental sampling in the United States" pursuant to Article 9 of the Additional Protocol. Could the administration clarify its understanding of what the impact of this statement is expected to be, since it is not accompanied by any warning that the United States will invoke Article 1.b (the National Security Exclusion) to deny permission to conduct such sampling?

Answer (16). Under Article 9, the United States shall provide the Agency with access to locations specified by the Agency to carry out wide-area environmental sampling, provided that, if the United States is unable to provide such access, it shall make every reasonable effort to satisfy Agency requirements at alternative locations. Article 9 further provides that the Agency shall not seek such access until the use of wide-area environmental sampling and the procedural arrangements therefore have been approved by the Agency's Board of Governors and following consultations between the Agency and the United States. Such arrangements have not been brought before or approved by the Board. The United States has informed the Agency that even if such arrangements were approved, the United States does not foresee circumstances in which the Agency would need to propose to conduct wide-area environmental sampling. If wide-area sampling is eventually approved by the Board of Governors, its use in the United States requires consultations between the IAEA and the United States. Given the requirement for consultation and therefore U.S. agreement, the United States did not feel it necessary to make a direct reference to Article 1.b.

Question (17). When does the administration expect a definitive decision from the IAEA Board of Governors regarding the use of wide-area environmental sampling and the procedural arrangements for its use in the United States pursuant to Article 9 of the Additional Protocol? Is the administration seeking such a decision? For locations co-located with locations that are not of direct national security significance in the United States, yet which do contain information or activities of direct national security significance, what specific procedural arrangements would the United States seek to create regarding the use of wide-area environmental sampling? Would these specific arrangements need to go beyond the right of managed access contained in Article 1.c? Why did the United States not seek a more definitive provision with respect to wide-area environmental sampling during negotiations on the Additional Protocol?

Answer (17). The United States strongly supported including wide-area environmental sampling as a potential measure under the Protocol because wide-area sampling, if it becomes practical, has the potential to detect undeclared nuclear activities throughout a state. However, while wide-area environmental sampling was tested by the United States in advance of it being proposed as a measure for use by the IAEA, the technique has not yet been dem-

onstrated to be technically feasible or cost-effective as a safeguards measure. Neither the IAEA nor the Board of Governors has established a timeline for taking a decision in favor of using wide-area environmental sampling as a safeguards measure under the Additional Protocol. The United States has not pressed for either the Agency or the Board of Governors to take such a decision.

This situation is unlikely to change unless and until sampling and analysis technology improve significantly. If technical improvements and falling costs eventually make wide-area environmental sampling a useful safeguards measure, the Board of Governors will likely consider approving the technique. The United States will decide at that time whether to support the use of the measure, based on its ability to contribute to the effectiveness of safeguards. If wide-area sampling is eventually approved by the Board of Governors, its use in the United States requires consultations between the IAEA and the United States.

The United States legitimately possesses undeclared nuclear activities, many with publicly acknowledged locations, and there is no nonproliferation purpose served by searching for undeclared activities within the United States. Furthermore, the United States has obligations both under its own laws and regulations and in the first article of the Non-Proliferation Treaty to prohibit the release of nuclear weapons information.

The national security exclusion included in Article 1.b and 1.c of the Additional Protocol is sufficient to allow us to prevent disclosure of activities and information of direct national security significance to the United States.

Question (18). Are there any formal or informal understandings with the IAEA with regard to the use of wide-area environmental sampling in the United States? What are the expected capabilities of IAEA wide-area environmental sampling, and what potential risks for U.S. locations result from those capabilities? Has the interagency conducted an analysis of the likely impacts of wide-area environmental sampling for the United States, including any national security implications for U.S. locations? If so, please submit this analysis to the committee.

Answer (18). There are no formal or informal understandings with the IAEA with regard to the use of wide-area environmental sampling in the United States. Because wide-area environmental sampling is not yet a practical technology for safeguards applications, the technologies that might be used by the IAEA and their capabilities are not defined.

The United States does not foresee circumstances in which the IAEA would need to propose to conduct wide-area environmental sampling in the United States. In accordance with the National Security Exclusion, the United States will prohibit environmental sampling by the IAEA wherever necessary.

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