

December 2009

To Fix the Nuclear Non-proliferation Regime—Avoid State Classification

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Garvey, Jack I. (2009) "To Fix the Nuclear Non-proliferation Regime—Avoid State Classification," *Florida Journal of International Law*. Vol. 21: Iss. 3, Article 2.

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**TO FIX THE NUCLEAR NON-PROLIFERATION REGIME
AVOID STATE CLASSIFICATION**

*Jack I. Garvey**
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I. INTRODUCTION

U.S. nuclear non-proliferation policy is increasingly in disarray. There has never been greater reason for concern, as non-proliferation policy worldwide, reflecting the conflictual role of the world’s leading nuclear power, is increasingly compromised, without coherence, to other objectives – political, strategic, and economic. This has been occurring in a historical context of dramatic increases in the availability

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of nuclear technology and the material that can be used for nuclear weapons development.¹ The context and the compromise are related. It is the very accessibility of nuclear weapons related material and technology, for peaceful use or the production of nuclear weapons, that has been the rationalization for compromising non-proliferation to other interests.

The problem was most evident in the nuclear agreement with India, and the authorizing legislation approved by the U.S. Congress in 2006, the Henry J. Hyde U.S.-India Peaceful Atomic Energy Cooperation Act of 2006 (USIPAECA).² There was significant controversy over the merits of the agreement, and supporters as well as critics agreed that it was out of sync with the non-proliferation legal regime based on the Nuclear Non-Proliferation Treaty.³ The U.S./India Agreement struck the established regime at its core, constituting the first time that a state that developed a nuclear weapons capacity, though not a signatory to the Nuclear Non-Proliferation Treaty, was granted rights for the import/export of nuclear materials and technology that can be used for nuclear weapons.⁴ However, a deeper problem that has become more broadly evident in U.S. non-proliferation policy was not addressed.

In promoting the nuclear agreement with India, the Bush administration did not deny its departure from past proliferation policy.⁵ Indeed, the public relations campaign for approval of the U.S./India Agreement portrayed the deal as doing little damage to the established

1. The Nuclear Option-Problem: Can New Technologies Deliver a Nuclear Future that is Safe and Affordable, 42 ORNL REV. 2, art. 10 (2009).

2. 22 U.S.C. §§ 8001-8008.

3. See Henry Sokolski, *The India Syndrome; U.S. Nonproliferation Policy Melts Down*, WKLY. STANDARD, Aug. 1, 2005.

4. In exchange for submitting to limited scope safeguards and an Additional Protocol, India may import nuclear and non-nuclear material and equipment for use in its civilian nuclear program. Under the deal, India obtained plutonium for its heavy-water reactors and U.S. technology for the building of light-water reactors that will help create a source for enriched uranium, one of the alternative critical fissile materials for nuclear weapons. Kate Heinzelman, *Towards Common Interests and Responsibilities: The U.S.-India Civil Nuclear Deal and the International Nonproliferation Regime*, 33 YALE J. INT'L L. 447, 458 (2008). India's nuclear weapons facilities would not be under surveillance. The civilian plants would be. Secretary of State Rice stated in defending the deal, "[I]magine the alternative: Without this initiative, 81 percent of India's current power reactors – and its future power and breeder reactors – would continue to remain outside of IAEA safeguards. The Indian nuclear power program would remain opaque, a nuclear black box." U.S.-India Atomic Energy Cooperation: Hearing Before the Senate Committee on Foreign Relations, 109th Cong. 3 (2006).

5. The prior administration of President Clinton had, by contrast, "an undifferentiated concern about proliferation." Defense Science Board Chairman William Schneider quoted by Edward Alden and Edward Luce, *A New Friend in Asia*, FIN. TIMES, Aug. 21, 2001.

non-proliferation legal regime, because the deal was between the world's largest democracies.⁶

This political exceptionalism that was advanced to justify the U.S./India deal is, in fact, not exceptional. Political categorization of nuclear recipient states has become a critical characteristic of U.S. non-proliferation policy, resulting in its departure from the non-proliferation regime to which the United States has adhered since the effort to constrain proliferation by international agreement began.⁷ The U.S./India agreement reflects the turn of the trade in nuclear weapons and technology on distinguishing good proliferation from bad, based on political characterization of the receiving state. Under such rationalization, the aim of counter-proliferation policy becomes non-universal, designed to stop proliferation, not to the good, but to the bad.⁸

Prior to this shift, the United States opposed the spread of nuclear weapons related materials and technology despite different degrees of moral or political affinity of the receiving state with the United States.⁹ For most of the nuclear weapons era, the United States declared its opposition, though to varying degree, to acquisition of nuclear weapons related technology and material by states of such diverse political, strategic and economic character as Argentina, Brazil, South Africa, Taiwan, South Korea, and Pakistan and India.¹⁰ Though never estranged from the United States to the degree Iran and North Korea are today, the governments of these states did present a wide range of affinity with the United States, and often dubious "democracy."¹¹

The international agreements, institutions, and national laws developed to constitute the established regime to counter the proliferation of nuclear weapons have included, from their inception, legal rights, and obligations differentiated on the basis of classification of states. But in the development of this regime, such classification always invoked the objective distinction between "nuclear weapons

6. Phillip C. Bleek & Laura S.H. Holgate, *Minimizing Civil Highly Enriched Uranium Stocks by 2015: A Forward-Looking Assessment of U.S. Russian Cooperation*, The National Academic Press, available at http://www.ornl.gov/info/ornlreview/v42_2_09/article10.shtml.

7. William Potter, *A New Look in U.S. NonProliferation Policy*, Monterey Institute of International Studies 2 (2005), available at <http://www.carnegieendowment.org/static/npp/2005conference/presentations/Potter.pdf>.

8. *Id.* at 3.

9. Kenneth Waltz, *The Spread of Nuclear Weapons: More May Be Better*, Adelphi Paper, at No. 171 (1981), available at <http://www.mtholyoke.edu/acad/intrel/waltz1.htm>.

10. William C. Potter, *India and the New Look of U.S. Nonproliferation Policy*, 12 *Nonproliferation Rev.* No. 2, 343, 345 (2005).

11. *Id.*

powers” and “non-nuclear weapons powers.”¹² That distinction became the basis upon which states became aligned into their respective rights and responsibilities under the Nuclear Non-Proliferation Treaty.¹³

Implicit in the claim of exceptionalism upon which the U.S./India deal and similar policy has been promoted are critical assumptions of classification profoundly different from the objective distinction of nuclear and non-nuclear states that was at the foundation of the non-proliferation regime. The assumptions of political classifications that have come to characterize U.S. non-proliferation policy are as uncertain and unstable as the political world they purport to reflect, which is why they have become a key source of the incoherence in U.S. proliferation policy.¹⁴ Being classifications, they assume stasis — while the world changes. Being absolute, — they fail to accommodate the relativity inherent in the tasks of non-proliferation. Most importantly, these classifications are dangerous, because they enhance rather than diminish nuclear risk.

There are serious shortcomings and vulnerabilities in the current non-proliferation regime and its various components, and that it is in serious need of fixing, is widely acknowledged.¹⁵ However, transcending the questions of particular fixes is the pervasive methodological problem of political classification.

This Article is intended to examine this methodology of political classification, to understand its application and its consequences, and why it is counterproductive for achieving non-proliferation. It is here argued that proliferation to India, and other recent initiatives of U.S. nuclear policy, seen in the current historical context of a burgeoning trade in nuclear technology and material, is best understood as indicative, not exceptional, and what it indicates is a policy dynamic of profound distortion at odds with the goals of non-proliferation.

The physical dynamics that will generate our nuclear risk laden future are already in place. Well before the recent surge in nuclear cooperation agreements, starting in the 1950s, the United States and Soviet Union sponsored nuclear projects internationally that increased nuclear weapons risk.¹⁶ Under the “Atoms for Peace” program, the

12. NobelPrize.org, *The Development and Proliferation of Nuclear Weapons*, http://nobelprize.org/educational_games/peace/nuclear_weapons/readmore.html (last visited Nov. 4, 2009).

13. *Treaty on the Non-Proliferation of Nuclear Weapons*, 1 July, 1968, 21 U.S.T. 483.

14. Samina Ahmed, *Nuclear Proliferation in South Asia: U.S. Policy Challenges*, *Foreign Pol. In Focus*, July 1, 2001, available at <http://www.fpiif.org/fpiftxt/366>.

15. See, e.g., Jack I. Garvey, *A New Architecture for the Non-Proliferation of Nuclear Weapons*, 12 J. CONFLICT & SECURITY L. 339 (2007); Heinzelman, *supra* note 4, at 458.

16. Office of the Under Secretary of Defense for Logistics, Technology, and Nuclear Matters: *A Practical Guide*, <http://www.acq.osd.mil/ncbdp/nm/nmbook/chapters/ch1.htm> (last visited Nov. 4, 2009).

United States exported research reactors, along with uranium fuel to more than forty countries, and the Soviet Union, China and other governments did the same, though with smaller export programs.¹⁷ Some such transfers of nuclear material and technology have been tied directly to nuclear weapons development, such as the USSR to North Korea in the 1960s and 1970s, and France to Israel in a secret deal executed in 1957. The deal between Canada and India in the 1950s, under which Canada supplied a research reactor, became the source of the plutonium that was used for the 1974 India nuclear test.¹⁸

Today, such danger of proliferation is dramatically on the rise. The requirements of global energy demand and response to global warming, the ready accessibility of nuclear materials and technology, including the dual use phenomenon whereby the same nuclear technology and materials can be engaged in peaceful uses or weapons development, are gathering for a dramatic increase in proliferation risk.¹⁹ Russia, France, and South Korea are promoting nuclear sales in the ever-volatile Middle East, and in its waning days, the Bush Administration announced a plan to sign a nuclear pact with the United Arab Emirates.²⁰ The United States is also said to be working to achieve nuclear cooperation agreements with Saudi Arabia, Jordan and Bahrain.²¹ Today's nuclear proliferation reality is thus, that more and more states, states that were not nuclear weapons powers when the Nuclear Non-Proliferation Treaty regime was first established, have already developed, or are on their way to developing, a nuclear capacity that is *de facto* nuclear weapons capacity.²²

Counter-proliferation cannot realistically shut down the market in nuclear technology and materials. The practicable task is rather to understand how best to evolve and create non-proliferation infrastructure to contain the impending tsunami of proliferation. The thesis of this Article is that a first principle in reconstructing and managing the necessary regime must be to remove the counter-productive dynamic of political classification that has become so prominent in U.S. proliferation policy.

17. Frank Von Hippel, *A Comprehensive Approach to Elimination of Highly-Enriched-Uranium from all Nuclear-Reactor Fuel Cycles*, 12 SCI. & GLOBAL SEC. 137, 138 (2004).

18. Adnan Gill, *Roots of Nuclear Proliferation*, Pakistan Link, May 6, 2006, available at <http://www.pakistanlink.com/Opinion/2006/May06/26/03.HTM>.

19. Handbook on Preventing the Proliferation of Weapons of Mass Destruction in the Asia-Pacific, Council for Sec. Cooperation in the Asia Pac., available at <http://www.fas.org/nuke/guide/iran/nuke/97-0388.pdf>.

20. Jay Solomon, *U.S. Plans to Sign Nuclear Deal with U.A.E.*, WALL STREET J., Dec. 12, 2008, available at <http://online.wsj.com/article/SB122904102094400097.html>.

21. Mark Fitzpatrick, Op-Ed., *Supplying Nuclear Power to the Middle East – With a Safety Switch*, NATIONAL, Nov. 22, 2008.

22. *Id.*

II. FAILING CATEGORIES; BREAKDOWN OF THE POLITICAL AND TECHNICAL/MATERIAL BARRIERS TO NUCLEAR WEAPONS PROLIFERATION

A. *The Nuclear Non-Proliferation Treaty and the Foundational Distinction Between Nuclear and Non-nuclear States*

Distinction between nuclear weapons states and non-nuclear weapons states was the foundation of the non-proliferation regime, in that it was the basis of the so-called “grand bargain” of the Nuclear Nonproliferation Treaty.²³ The grand bargain was that the nuclear weapons states would provide the non-nuclear weapons states with assistance in the development of peaceful uses of atomic energy and commit to the objective of nuclear disarmament, in exchange for the commitments of non-nuclear states to the requirements of non-proliferation of nuclear weapons.²⁴

From the beginning of the legal regime of non-proliferation, there were exceptions and contradictions that undermined even this ostensibly objective categorization. Most prominent was the reality that certain states of strategic consequence were not signatories to the Non-Proliferation Treaty. Both covertly and overtly, these states rejected the foundational distinction, and developed nuclear weapons capacity outside the arrangements established under the Treaty.²⁵ The list of proliferating non-signatories, we now know, included Israel, India, Pakistan, and for a time, South Africa.²⁶ We also now know that even signatories to the Nuclear Non-Proliferation treaty, at various times since the coming into force of the Treaty, have worked assiduously, both in secret and occasionally in open defiance, to convert their status from non-nuclear weapons states to nuclear weapons states.²⁷ Libya, Iraq, Iran, and North Korea all engaged in deception to develop nuclear weapons, though signatories to the Non-Proliferation Treaty. North Korea even sought advantage by publicly declaring its activity as garnering legitimacy from the Treaty, claiming that its weapons

23. Jack I. Garvey, *A New Architecture for the Non-Proliferation of Nuclear Weapons*, 12 J. CONFLICT & SEC. L. 339, 342 (2007).

24. See Arts. 2, 4 and 6, Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 13.

25. *RPT-US drafts UN Resolution Urging Nuclear Disarmament*, REUTERS, Sept. 11, 2009, available at <http://www.reuters.com/article/latestCrisis/idUSB731605>.

26. *Non-Proliferation Treaty Explained*, BBC NEWS, Sept. 20, 2004, available at <http://news.bbc.co.uk/2/hi/europe/2645379.stm>.

27. Sarah Bokari, *The United States Dealing with Nuclear Terrorism: Cooperation for Prevention*, 2 J. SCI. & WORLD AFF. 30, 38 (2006).

development could be justified under the Treaty's provisions for withdrawal.²⁸

The proliferation that has occurred has not simply concerned the acquisition of nuclear materials and technologies by non-nuclear weapons states. Some of the most significant proliferation events have concerned the action or inaction of principal members of the nuclear weapons club. The Governments of Russia, China, Israel, Pakistan, and even Canada, have all been named as witting or unwitting proliferators.²⁹ The demise of the Soviet Union, with its tens of thousands of nuclear weapons dispersed through the former constituent parts, now independent states with widely varying levels of nuclear responsible behavior, has also presented an enormous proliferation challenge.³⁰ This risk was addressed to a significant but inadequate extent by the Lugar/Nunn program, with many of these weapons and with weapons grade material having gone unaccounted.³¹

So it has been inaccurate to conceive and implement counter-proliferation based on the categorization distinguishing nuclear weapons states from non-nuclear weapons states. Equally problematic has been the implicit assumption that non-proliferation could be accomplished through a Treaty that prohibited the transfer of nuclear material from one grouping to the other. Proliferation policy has been haunted by substantial exceptionalism, well before the recent U.S./India nuclear deal. The categories have never held firm. The fact that proliferation has occurred, not only outside the Treaty, but inside, by nuclear weapons states and non-nuclear weapons states, indicates that even the foundational classification, far more "objective" than the political classifications that have come to dominate U.S. counter-proliferation policy, has not served very well for achieving meaningful constraints on proliferation.

28. X(1) protects the sovereign right of every state to withdraw from the treaty, spelling out the circumstances and standards for withdrawal. *Statement of DPRK Government on its withdrawal from NPT*, Korean News Service, available at <http://www.kcnaco.jp/item/2003/200301/news01/11.htm>. Article X provides in pertinent part: "Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country." Treaty on the Non-Proliferation of Nuclear Weapons, art. X, *supra* note 13.

29. Fitzpatrick, *supra* note 21.

30. Radiological Dispersion Weapons: Health, Social, and Environmental Effects, IPPNW, available at <http://www.ipnw.org/ResourceLibrary/RadiologicalWeapon.pdf>.

31. David E. Hoffman, *Victories Come Slowly in Cleanup of Soviet Bloc Nuclear Materials*, WASH. POST, Aug. 30, 2007.

information on how to build a nuclear weapon readily available, even on the Internet.³⁶ It is now, for the most part, the material, the weapons-grade fissile material, enriched uranium or reprocessed plutonium, which has become the practicable focus for counter-proliferation efforts at the international level, most notably through the International Atomic Energy Agency (IAEA),³⁷ and other principal mechanisms of the multi-layered counter-proliferation regime such as the Nuclear Suppliers Group (NSG).³⁸

With nuclear power now much more widely seen as a desirable alternative fuel, this last significant barrier, the material barrier, is already being penetrated on a substantial scale.³⁹ Though some weapons grade material has been repatriated, as of November 2008, 46 countries were known to possess weapons-usable uranium.⁴⁰ Moreover, any “peaceful” nuclear program that operates with a full fuel cycle can be converted without technical barrier, to the production of weapons grade fissile material.⁴¹ Even without direct importation of weapons grade material, therefore, the material barrier, as well as the technical, is breaking down.

III. THE ILLUSION OF EXCEPTIONALISM

A. *Bilateral Nuclear Agreements in the Future of Proliferation*

The U.S./India agreement is instructive as to the future of proliferation risk not, as its proponents would have it, because the deal

36. GRAHAM ALLISON, *NUCLEAR TERRORISM: THE ULTIMATE PREVENTABLE CATASTROPHE*, 93 (2004).

37. *Id.* at 95. See also Comm. on Sci. & Tech. for Countering Terrorism, Nat’l Research Council of the Nat’l Academies, *Making the Nation Safer: The Role of Science and Technology in Countering Terrorism* 40 (2002).

38. Current participating governments include Argentina, Australia, Austria, Belarus, Belgium, Brazil, Bulgaria, Canada, China, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Kazakhstan, Republic of Korea, Latvia, Lithuania, Luxembourg, Malta, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, and the United States. Nuclear Suppliers Group, www.nuclearsuppliersgroup.org (last visited Nov. 4, 2009).

39. Ilan Lipper & Jon Stone, *Nuclear Energy & Society*, available at <http://www.umich.edu/~gs265/society/nuclear.htm>.

40. Fitzpatrick, *supra* note 21.

41. Babur Habib et al., *Stemming the Spread of Enrichment Technology*, Woodrow Wilson School of Public Affairs, 5 (2005).

is exceptional.⁴² India, currently the world's fifth largest energy consumer, is simply exemplary.⁴³ India presents a more extreme case for nuclear power development because of its size. But it is typical of a developing economy.⁴⁴ What must be understood, is that U.S./India deal is most instructive, not as exceptional, but as the first wave of what is becoming a sea change in nuclear risk.

The USIPAECA equips India with the ability to boost its nuclear sector by allowing U.S. companies to sell India equipment, nuclear fuel and reactors.⁴⁵ The perceived benefit to the United States is the profit in the deal, and the benefit to the world community at large is the transfer of energy consumption by India from highly polluting forms, such as coal, to nuclear power.⁴⁶

42. R. Nicholas Burns, Under Sec'y of State for Political Affairs, U.S. Dep't of State, U.S.-India Civil Nuclear Agreement at the Foreign Press Center Briefing (Mar. 22, 2006), available at <http://2002-2009-fpc.state.gov/63542.htm>.

43. Remarks by President George W. Bush in Signing of H.R. 5682—*The U.S.-India Peaceful Atomic Energy Cooperation Act*, PR Newswire (Dec. 18, 2008).

44. India, currently the world's fifth largest energy consumer, is projected to surpass Japan and Russia to take third place in consumption by 2030. "Coal accounts for more than half of the country's energy consumption and the poor quality of Indian coal, coupled with the lack of infrastructure to clean it poses a significant environmental threat." Further, oil imports account for a third of India's energy use. India now imports around sixty-five percent of its petroleum. Its contribution to global warming and other environmental degradation is only going to be compounded as India continues to fuel its phenomenal growth upon coal, oil, and natural gas. So nuclear becomes more and more an attractive alternative fuel, as it does for many other countries, though to a lesser degree, but for similar reasons. Carin Zissis, *India's Energy Crunch*, Council on Foreign Relations, Oct. 23, 2007, available at http://www.cfr.org/publication/12200/indias_energy_crunch.html (last visited Oct. 12, 2009).

45. Henry J. Hyde, United States-India Peaceful Atomic Energy Cooperation Act of 2006, H.R. 5682, 109th Cong. § 101 (2006). See also *Congress Authorizes the President to Waive Restrictions on Nuclear Exports to India*, 120 HARV. L. REV. 2020, 2022 (2007).

46. In a joint press released issued by President Bush and Prime Minister Singh, the two leaders noted the significance of civilian nuclear energy for meeting growing global energy demands in a cleaner and more efficient manner, and further discussed India's plans to develop its civilian nuclear energy. Joint Statement Between President George W. Bush and Prime Minister Manmohan Singh, July 18, 2005. India, for its part, clearly has declared its readiness for such a change. As of 2006, India's Planning Commission recommended that India seek at least 20,000 MW of additional nuclear power on a turnkey basis over the next 10 to 12 years, or have the Nuclear Power Corporation of India build nuclear fuel for a similar level of capacity within the next 12-15 years. Maohar Thyagarakj & Raju G.C. Thomas, *The U.S.-India Nuclear Agreement; Balancing Energy Needs and Nonproliferation Goals*, Foreign Policy Research Institute (2006) (citing R. Ramachandran, *Behind the Bargain*, Frontline (India), July 30-Aug. 12, 2005). Tied into the issues of pollution and climate change are the economic factors which argued for India's inclusion in a nuclear cooperation agreement. Climate change predictions indicate that India could lose as much as nine percent of its GDP and experience a significant decline in agricultural productivity by 2100. *Global Warming: Mumbai to Face the Heat*, TIMES INDIA, Feb. 3, 2007. So nuclear counters this impact. From the U.S. perspective, the cooperation agreement also offered promise of economic benefit. In return for guaranteeing a continuous

The interests generating the U.S./India deal, while accentuated by the size of both economies, are certainly not unique in U.S. bi-lateral relations, nor are the stipulated political qualifications.⁴⁷ There is already significant pressure to replicate the U.S./India deal.⁴⁸ Soon after the U.S./India Agreement was announced, Pakistan asked for a similar deal. Commentators in Egypt and elsewhere are also arguing that similar benefits should follow as a matter of equity from their own important political relationships with the United States.⁴⁹

Not only are potential recipient states claiming the equity of similar benefits, but nuclear weapons states are staking their own claims of national interest as similarly justified, though countervailing to non-proliferation. Thus Russia's interest in an enormous trade with Iran, including weapons related trade, has motivated Russia's opposition to sanctions on Iran, and Russia opposed sanctions on India where sale of a \$2.6 billion dollar nuclear reactor would have been jeopardized.⁵⁰ The Europeans have similarly compromised non-proliferation policy in

equipment to India while ensuring that India's civil nuclear facilities are placed under safeguards. Heinzelman, *supra* note 4, at 458. Indeed, the untapped economic potential of India's nuclear marketplace constitutes the core of the partnership. Joseph G. Silver, *The Global Partnership: The Final Blow to the Nuclear Non-Proliferation Regime?*, 21 N.Y. INT'L L. REV. 69, 90 (citing to remarks of Secretary of State Condoleezza Rice: "At its core, our initiative with India is not simply a government-to-government effort . . . (T)he associated bilateral peaceful nuclear cooperation agreement now being negotiated, will permit U.S. companies to enter the lucrative and growing Indian market . . ."). Relatedly of significance, is that the United States is currently "India's largest investment partner, [holding] a 13% share" of India's total foreign investments, and thus the incentives to gain a greater share are well situated. U.S. Dep't of State, Background Note: India (Jan. 2007), <http://state.gov/r/pa/ei/bgn/3454.htm>.

47. See, e.g., 22 U.S.C. § 8001(6)(B) (stating the qualification that "the country has a functioning and uninterrupted democratic system of government, has a foreign policy that is congruent to that of the United States, and is working with the United States on key foreign policy initiatives related to nonproliferation."); see also Jonas, *supra* note 34.

48. *Pakistan Seeks US Nuclear Deal*, HINDUSTAN TIMES, Oct. 2, 2008, available at <http://www.hindustantimes.com/StoryPage/Print/341931.aspx>.

49. Egyptian commentators ask, "Why should the U.S. assist India in its nuclear program and not Egypt?" Michael Slackman & Mona El-Naggar, *Mubarak's Son Proposes Nuclear Plan*, INT'L HERALD TRIB., Sept. 20, 2006, at 14. Certainly Egypt's role in the service of critical U.S. strategic objectives in the Middle East is at least equally critical as the role of India in its strategic zone. With what justification can the United States publicly continue to ignore the Egyptian complaint, notwithstanding U.S. interest in maintaining the nuclear security of Israel? More broadly, given the economic and ecological interest infusing the U.S./India deal, why should other technologically advanced NPT signatories, such as Brazil, Egypt, Saudi Arabia, and Japan continue to restrain themselves from similar perceived advantage? Moreover, what is to stop other nuclear weapons nations, including China and Russia, from negotiating their own side agreements with states anxious to benefit from the nuclear materials and technology marketplace, through agreements similar to the U.S./India deal, outside of the structure of the NPT? Jimmy Carter, *India Deal Puts World at Risk*, INT'L HERALD TRIB., Sept. 2008.

50. See Howard Diamond, *Russia, India Move Forward with Deals on Arms*, NUCLEAR PROLIFERATION AND NON-PROLIFERATION REPORT, July 2009.

relations with Iran.⁵¹ Also, the United States, even apart from the deal with India, has not aligned proliferation policy with proliferation risk, after taking into account economic and other strategic interests.⁵² Altogether, the incentives are already apparent and in place for multitudinous global development along the same dangerous lines.

B. Proliferation to “Democratic” States

Given the predictable increase in nuclear weapons related proliferation motivated by such interests, the attempt to create barriers based on the political distinction of states has added a dynamic that only compounds the breakdown of the technical and material barriers between nuclear weapons states and non-nuclear weapons states.⁵³ The non-nuclear weapons states protest that the policies of political choice between recipients of weapons related material and technology cannot be justified.⁵⁴ Ironically, therefore, the classifications meant to stem the most dangerous proliferation, have become the basis for new equity claims for proliferation.

In responding to U.S. charges that Iran is developing a nuclear weapons capacity, the Iranian government targets the inconsistency of U.S. policy attempting to prevent the transfer of enrichment technology to a non-nuclear weapons state party to the Nuclear Non-Proliferation Treaty (Iran), while undertaking nuclear trade with a non-signatory to the Nuclear Non-Proliferation Treaty (India) that has a long-standing and extensive nuclear weapons program.⁵⁵ Iran’s principal negotiator on nuclear matters and Secretary of Iran’s National Security Council has emphasized the disjunction, stating that “India does not accept the NPT and has nuclear weapons. But America has no problem with this and is also concluding a long-term nuclear energy agreement with India.”⁵⁶

51. *Europe and the Mullahs, How the EU subsidizes trade with Iran*, WALL ST. J., Feb. 20, 2007, at A16.

52. The United States lifted sanctions on India and Pakistan so that American farmers could bid on wheat sales to Pakistan. Eric Schmitt, *Senators Back Sale of Wheat to Pakistanis*, N.Y. TIMES, July 10, 1998, at A1. Similarly the recent U.S./India agreement is said to have been motivated by both economic interests, and strategic interests in counterbalancing China’s power in the region. See, e.g., Ashley J. Tellis, *INDIA AS A NEW GLOBAL POWER*, Carnegie Endowment for International Peace, 2005.

53. Jayantha Dhanapala & Daryl Kimball, Carnegie Endowment for Int’l Peace, *A Nonproliferation Disaster* (2008), available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=20292>.

54. Thomas Graham, Jr. et al., *Think Again: U.S.-India Deal*, FOREIGN POL’Y, July 2006, available at http://www.foreignpolicy.com/story/cms.php?story_id=3533&print=1.

55. Simon Tisdall, “Tehran Accuses U.S. of Nuclear Double Standard,” GUARDIAN, July 28, 2005, at 14.

56. See N. Ram, Siddharth Varadarajan & John Cherian, *For the U.S., the Nuclear Issue*

The official response of the United States is to draw the distinction of political classification, arguing that “Comparing India to the North Korean or the Iranian regime is not credible. India is a democracy, transparent and accountable to its people, which works within the international system to promote peace and stability and has a responsible nuclear nonproliferation record.”⁵⁷ The Bush administration also indicated that the U.S./India deal, while exceptional, is open to other nations, depending on their political personality. When signing the U.S./India Nuclear Agreement, President George W. Bush stated that “nations that follow the path to democracy and responsible behavior will find a friend in the United States of America.”⁵⁸

It is clear this is an attitude and approach to non-proliferation that will not simply fade away with the demise of the Bush Administration. It is in fact embodied in U.S. legislation such as the USIPAECA, and such classification has become common in official pronouncements of the United States on non-proliferation policy, not only in regard to the U.S./India deal, but with respect to the prospects for other nuclear cooperation agreements.⁵⁹

Recognizing that the U.S./India deal might lead other nuclear powers outside the NPT to demand equal treatment, the Congress included in the USIPAECA criteria of political classification, along with other non-proliferation criteria.⁶⁰ Declaring that it can be in the interest of the United States to enter into an agreement for nuclear cooperation with a

57. Remarks of Andrew K. Semmel, Deputy Asst. Sec’y, Nuclear Nonproliferation Policy and Negotiations, U.S.-India Civil Nuclear Cooperation Initiative (May 6, 2006). There are also indications that, as a strategic matter, the transfer to India was being justified within U.S. foreign policy circles as one means of counterbalancing the rise of Chinese power. See Robert Blackwill, U.S. ambassador to India during President George W. Bush’s first term, quoted in Hoke, “U.S. and India Getting Closer.” See also Robert Blackwill, “Why is India America’s Natural Ally?” in the National Interest, May 2005, www.inthenationalinterest.com/Articles/May96202005/May2005Blackwill.html. The U.S. government has also made clear that asserting an exceptionalism for India is part of a much broader program of alignment between the two nations based on what President Bush and Prime Minister Singh have declared as shared strategic objectives in the areas of democracy, economic growth, foreign policy towards China, military cooperation, and terrorism. Heinzelman, *supra* note 4, at 455.

58. *Bush Signs U.S.-India Nuclear Bill*, BBC NEWS, Oct. 8, 2008.

59. See, e.g., Presidential Determination No. 2009-7, Proposed Agreement for Cooperation Between the Government of the United States of America and the Government of the United Arab Emirates Concerning Peaceful Uses of Nuclear Energy, 73 Fed. Reg. 70583 (Nov. 14, 2008) (“the performance of the Agreement will promote, and will not constitute an unreasonable risk to the common defense and security.”); and United States-United Arab Emirates Joint Statement, Office of the Spokesman, Nov. 17, 2008 (“The U.A.E. has played a positive role in advancing democratic reforms in the region . . . The United States welcomes U.A.E.’s decision to pursue the development of peaceful nuclear energy.”).

60. Harvard Law Review Association, *Foreign Relations Law – Nuclear Nonproliferation – Congress Authorizes the President to Waive Restrictions on Nuclear Exports* published by UPR Law, Sep 2020, 2022 (2007), <https://www.upr.edu/lawreview/2007/2007-2008/2007-2008-09> discussion of the criteria *infra*.

country that has never been a State Party to the NPT, Congress outlined the key criteria for doing so.⁶¹ Among these criteria is that “the country [must have] a functioning and uninterrupted democratic system of government” and “have a foreign policy [consistent with] that of the United States. . . .”⁶² The clear import of the legislation, therefore, is that the U.S./India deal is the archetypical model for future nuclear cooperation agreements being based on political classification.

Given this critical import of the U.S./India deal, an obvious question is the extent to which the political characterization advanced as the justification for proliferation to “democracy” is reliable. More importantly the question is how the classification, correct or incorrect, relates to nuclear risk. The answer is that the nuclear exceptionalism of the U.S./India deal is grounded in fallacy, fallacy both of fact and logic, and the U.S./India deal contradicts the goal of non-proliferation.⁶³

Any objective view of the history of India over the last quarter century demonstrates profound irony and deception in the assertion that India is a best case for politically based non-proliferation exceptionalism. The political reality of India is that its modern history has involved substantial political instability, profound lack of transparency on national security related matters, and repeatedly, confrontation with Pakistan that is heavily laden with nuclear risk.⁶⁴

61. 22 U.S.C. § 8001(6) (2006).

62. *Id.* § 8001(6)(B).

63. Dennis M. Gormley & Lawrence Scheinman, Center for Nonproliferation Studies, Monterey Institute of International Studies, *Implications of Proposed India-U.S. Civil Nuclear Cooperation* (2005), available at http://www.nti.org/e_research/e3_67a.html.

64. India is a relatively new state, having achieved its independence from Great Britain in 1947 and giving effect to its Constitution in 1950. Although considered the world's largest democracy, the legacies of colonial rule coupled with a diverse set of political, religious and cultural factors has produced significant political instability. India's more recent history is one of spasmodic volatility. On October 31, 1984, then Prime Minister Indira Gandhi was shot dead by her two Sikh bodyguards. It is believed that the two guards were extremists acting in retaliation for the storming of the Sikh Golden Temple by government forces in June 1984. Following the assassination, violence and rioting against Sikhs was widespread in Delhi and throughout India. Then, in December 1992, a similar wave of violence again engulfed much of India, precipitated by a Hindu mob's destruction of the Babri Masjid mosque in Ayodhya. Until the terrorist attack in Mumbai, in November 2008, this event was seen as the most piercing assault ever faced by the Indian State, shaking its basic political identity with an orgy of Hindu-Muslim rioting and tumult, which was perceived as a chilling reminder of the awful circumstances that accompanied the birth of independent India. Political tensions have also erupted to varying degrees between Pakistan and India over the disputed territory of Kashmir. Divided by Pakistan and India in 1947, the entirety of the former state known as Jammu and Kashmir has been claimed by both countries. On December 13, 2001, five gunman attacked India's Parliament in New Delhi. India claimed that the attackers were part of the Kashmiri separatist group Lashkar-e-Taiba, armed and supported by Pakistan. Within weeks and with rhetoric from both sides rising, India deployed half a million troops to the Pakistani border
<https://www.bia.gov/pressroom/2001/12/13/011213a.htm> response, then Pakistani President General Pervez

Indeed, the confrontation with Pakistan, given the status of both states as nuclear weapons powers, may be the most dangerous nuclear confrontation extant on the planet today, and accordingly, a most dangerous field for enhancing nuclear weapons capacity.

The terrorism that struck Mumbai in November 2008, is only the most recent demonstration of that ongoing danger.⁶⁵ That attack immediately provoked threats of nuclear confrontation with Pakistan, when the terrorism was identified as Pakistan-based.⁶⁶ The November attack and its implications were a shocking reminder that the greatest risk involved in proliferation to India, is its bearing on the nuclear weapons tension between Pakistan and India.

Historically, this same nuclear confrontation was the justification for both states to stay outside the legal regime of the Nuclear Non-Proliferation Treaty. Pakistan, in its decision not to sign the NPT, stated that so long as India failed to sign the agreement, Pakistan would not sign.⁶⁷ The tension between India and Pakistan, focused primarily on the disputed territory of Kashmir, has continued in varying degree, but

Musharraf stated “Pakistan has taken all countermeasures. If any war is thrust on Pakistan, Pakistan armed forces are fully prepared to face all consequences with their might.” *All Things Considered: Fears of India-Pakistan Nuclear War Raged in 2002*, NATIONAL PUBLIC RADIO BROADCAST, Dec. 18, 2008. A recent dispute in Kashmir centered on whether to allocate land to a Hindu shrine in Muslim majority Indian administered Kashmir. Nine days of the largest Muslim street protest in years marked reversal of the relative calm that had settled over the region. Nearly half a million Indian soldiers and policemen remain deployed in the Indian-administered part of Jammu and Kashmir, home to about 10 million people. “Indian law grant[s] troops in Kashmir almost total immunity from prosecution, including in cases of civilian deaths . . . Broadcast media [to the region] are censored.” Yaroslav Trofimov, *A New Tack in Kashmir*, WALL ST. J., Dec. 15, 2008. The future of India promises similar political risk. Because of India’s electoral math, the Communist Party of India (Marxist), has considerable influence over Prime Minister Singh’s coalition government. The Communist Party itself leads state governments in three states, West Bengal, Tripura, and Kerela. Further, the meteoric rise of India in the world economy has not addressed those left behind, leading communist insurgencies to erupt in some of the most populous and poorest parts of the country. Prime Minister Singh, noting this rise in violence, has called these Communist insurgents India’s biggest internal security threat. Zisis, *supra* note 44.

65. Though the November 2008, attack in Mumbai was unprecedented in its organization and apparently international dimension, just previously there had been four terrorist attacks in as many months. A group calling itself “the Indian Mujahedeen” claimed responsibility for these attacks, sending messages combining the language of global radical Islam with Indian Muslim grievances, including attacks on Muslims in Ahmedabad in 2002. In addition to the radical Islamist groups blamed for the bombings, there are radical Hindu organizations that have been recently accused of deadly attacks on Christians in several states. Somini Sengupta, *Terrorism’s Impact Grows as Indian Election Nears*, N.Y. TIMES, Sept. 24, 2008, at A6.

66. Commentators have noted that the “familiar specter of Indo-Pakistani war quickly reared its head, recalling the nuclear standoff or 2001-2002, a crisis triggered by the December 13, 2001 assault on the Indian parliament by Pakistan-based militants.” Daniel Markey, *Mumbai: A Battle in the War for Pakistan*, COUNCIL ON FOREIGN RELATIONS, Dec. 12, 2008.

67. *Pakistan Refuses to Sign NPT*, PAKISTAN TIMES, Aug. 27, 2007.

has consistently factored in both states' development of nuclear weapons and trade in nuclear technology and material ancillary to that competition.⁶⁸ Moreover, when they have engaged in conventional conflict, Pakistan and India have repeatedly threatened each other, in official statements, with nuclear retaliation.⁶⁹ Thus even if it were the case that India could be depended upon as "democratic," the degree of nuclear risk presented by proliferation to India is revealed in an entirely different and dangerous dimension considered in relation to confrontation with nuclear-armed Pakistan. The increased access to nuclear material and technology that India achieves under the U.S./India Agreement is likely only to enhance India/Pakistan nuclear tension, as Pakistan perceives the deal as severely increasing nuclear risk for Pakistan.

If there were to be a radical Islamic take-over in Pakistan, a scenario of risk now real enough to be accounted for in U.S. strategic planning, the Pakistan-India confrontation could become as or more dangerous to the region than any scenario involving Iran or North Korea in their respective regions of the world. This is quite besides the danger such take-over would present to U.S. security more generally, a contingency also real enough for the United States already to have engaged in planning for the seizure of Pakistan's nuclear sites.⁷⁰

Indeed, the folly of basing proliferation policy on political affinity with the United States is perhaps best demonstrated by the proliferation history of "democratic" Pakistan. As proliferator, Pakistan has been, so far as we know, without equal. Over decades while Pakistan was considered a staunch ally of the United States, claiming to be a "democracy" when not under military rule, Pakistan was engaged in an extensive and unprecedented clandestine international nuclear weapons related trade.⁷¹ Indeed, in the historical period that includes the dramatic rise of the international terrorist threat and the new high risk capacities of non-state actors, Pakistan was thought to have a responsible record of non-proliferation. Yet only as late as 2005, it was discovered that it was Pakistan, not a listed state sponsor of terror, not a failed state, which

68. Samina Ahmed, *Security Dilemmas of Nuclear-Armed Pakistan*, 21 *THIRD WORLD Q.* 781, 783 (2000).

69. See, e.g., Chidanand Rajghatta, *Pak's Retaliation Threat to U.S. Sucks in India*, *TIMES INDIA*, Nov. 13, 2007 (a 2002 elaboration of Pakistan's nuclear doctrine said its nuclear weapons are aimed only at India and identified four triggers [that] would cause Islamabad to use the weapons. The triggers included: A. If India attacks and conquers a large part of its territory; B. India destroys a large part of either its land or air forces; C. India proceeds to the economic strangulation of Pakistan; [and] D. If India destabilizes Pakistan through domestic subversion.).

70. Adrien Levy & Cathy Scott-Clark, *Bush Handed Blueprint to Seize Pakistan's Nuclear Arsenal*, *GUARDIAN*, Dec. 1, 2007, at 29.

71. Paul K. Kerr & Mary Beth Nikitin, Cong. Res. Service, *Pakistan's Nuclear Weapons: Proliferation and Security Issues* (2009).

generated the greatest international proliferation risk.⁷² It was Pakistan, long secure on the list of U.S. allies, and apparently therefore relatively ignored as to proliferation risk, that enabled the so-called “nuclear “Wal-Mart” of Dr. A.Q. Khan, whereby nuclear material and technical information was transferred to Iran, North Korea and Libya.⁷³ Though the U.S. government attributed responsibility to Khan as a nongovernmental entity, so that no presidential waiver was needed in order to provide military aid to Pakistan, it was by means of Khan’s official position, as the head of Pakistan’s nuclear program, that he gained the access that created the greatest nuclear proliferation operation yet known.⁷⁴

So the true nature of what is at issue, namely nuclear risk and countervailing political, strategic and economic interests, is only camouflaged and confused by evanescent categorizations such as “democracy.” Pakistan and India have both had their periods of more or less democracy.⁷⁵ But both have embodied ongoing significant proliferation risk, which in the case of Pakistan, was fully realized.⁷⁶

The presumptive political category of “stable democracy” not only fails in reference to India and Pakistan, but also as to other relationships involving consistently steadfast alliances of the United States.⁷⁷ Though Israel has long been a known nuclear weapons state, it continues to be the largest recipient of U.S. military aid, aid that relates to nuclear weapons delivery systems, if not the actual nuclear components. Moreover, there is substantial evidence that, despite its long-standing special security relationship with the United States, Israel collaborated with the South African white regime in its nuclear weapons development.⁷⁸

It is not only in relation to states deemed allies that the political categories have proved mistaken and counter-productive. The

72. See, e.g., Luke Baker, ‘Failed State’ Pakistan Raises Nuclear Threat, NAT’L POST, Dec. 28, 2007; Global Futures Assessment Report, U.S. National Intelligence Council and Central Intelligence Agency, 2005.

73. Christopher Clary, *Dr. Khan’s Nuclear Walmart*, Disarmament Dipl., Mar./Apr. 2004, available at <http://www.acronym.org.uk/dd/dd76/76cc.htm>.

74. Leonard Wiess, *Turning a Blind Eye Again? The Khan Network’s History and Lessons for U.S. Policy*, ARMS CONTROL TODAY, Mar. 2005, available at <http://www.armscontrol.org/print/1769>.

75. Paul F. Diehl et al., *Theoretical Specifications of Enduring Rivalries*, THE INDIA-PAKISTAN CONFLICT: AN ENDURING RIVALRY 27, 47 (T.V. Paul ed., 2005).

76. CONGRESSIONAL RESEARCH SERVICE, PAKISTAN’S NUCLEAR WEAPONS: PROLIFERATION AND SECURITY ISSUES 2-3 (June 12, 2009) (Paul K. Kerr & Mary Beth Nikitin).

77. *Assessing the India Deal: Testimony Before the U.S. Comm. on Foreign Relations* (statement of Dr. Ashton B. Carter, Co-Director, Preventive Defense Project, Harvard & Stanford Universities).

78. See, e.g., Chris McGreal, *Brothers in Arms – Israel’s Secret Pact with Pretoria*, GUARDIAN, Feb. 7, 2006, at 10.

prioritization of political categorization in U.S. Non-Proliferation policy also ignores the proliferation impact on other nuclear supplier states, though perhaps not as dramatically as Pakistan's "nuclear Wal-Mart."⁷⁹ Thus the U.S./India Nuclear deal has already been cited by China, a nuclear exporter, and an alleged source of Pakistan's nuclear weapons related technology, as precedent for a similar exceptionalism.⁸⁰ And thus, just as Washington's position on proliferation has changed with the U.S./India deal, so may the position of other countries that presently adhere to the NPT as nuclear or non-nuclear weapons states, especially given the significant economic implications of transfer of nuclear fuel and technology, both for economic value and in a broader bi-lateral trade context as quid pro quo for other import/export advantages, such as in the case of U.S./India, or Russia/Iran.⁸¹

Competitive advantage, playing off the U.S./India deal, will continue to encourage proliferation. Indeed, it cannot be assured that even India, the principal beneficiary of state classification under current U.S. proliferation policy, will restrict transfers of nuclear technology and materials according to the political preference of the U.S. government.⁸² India has already indicated as much by its refusal to join in the Proliferation Security Initiative of the United States.⁸³ Though the PSI now includes more than thirty other states, India has declaimed the PSI as a threat to its sovereignty.⁸⁴ Given the nuclear materials sales interests of other nuclear weapons states besides the United States, such as China and Russia, the bi-lateral format the India/U.S. Agreement exemplifies for proliferation effectively removes any legal barrier to proliferation for other states. Other states may even seek such advantage

79. Peter Brookes, *Nuclear Wal-Mart*, Heritage Foundation, Feb. 9, 2004, <http://www.heritage.org/press/commentary/ed020904a.cfm>.

80. See, e.g., George Perkovich, *Faulty Promises; the U.S.-India Nuclear Deal*, Carnegie Endowment for International Peace Policy Outlook, Sept. 2005, available at <http://www.carnegieendowment.org/files/po21.perkovich.pdf>.

81. Colum Lynch, *U.S. Presses Russia to Halt Trade in Nuclear Technology with Iran*, WASH. POST, Oct. 4, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/03/AR2005100301466.html>.

82. Moeed Yusuf, *The Indo-US Nuclear Deal*, 3 J. SCI. & WORLD AFF., 47, 48 n.2 (2007); see also Jonas, *supra* note 34.

83. The PSI is a set of principles that Member States adopt requiring action for the blocking of dangerous shipments of WMD material in their ports, territory, airspace or on their vessels. The principles are characterized as comporting with established law of the sea and the various jurisdictional standards that were articulated in the Law of the Sea Convention, particularly concerning the jurisdiction of coastal states and flag state jurisdiction on the high seas. See, e.g., Jack I. Garvey, *The International Institutional Imperative for Countering the Spread of Weapons of Mass Destruction: Assessing the Proliferation Security Initiative*, 10 J. CONFLICT & SEC. L. 125 (2005).

84. See generally Mark J. Valencia, *The Proliferation Security Initiative: Making Waves in Asia*, INT'L INST. FOR STRATEGIC STUDS. 376 (2005).

by opting out of the Nuclear Non-Proliferation Treaty regime, as they are legally allowed to do.⁸⁵

C. Proliferation to “Non-Democratic” States

In taking the path of political distinction, U.S. non-proliferation policy is, of course, not just that India can receive nuclear materials and technology because of its status as a “democracy,” but that states such as Iran and North Korea must be excluded because of their estrangement from the United States, and dedicated ideological positions. The most prominent and extreme manifestation of this was President George W. Bush’s categorization of Iraq under Saddam Hussein, and North Korea and Iran as constituting, in his now famous/infamous phrase, an “axis of evil.”⁸⁶

However, what is evident in the public responses of these governments, is that their listing as nuclear pariah states results in severely negative, not positive, consequences for non-proliferation of nuclear weapons. The invasion of Iraq sent the message to others on the “axis of evil” list, that they could expect a similar fate as Saddam Hussein, unless they obtained the necessary strategic and political leverage to restrain the United States. The most attractive option, as it appeared to the governments of North Korea and Iran, was to seek to obtain a nuclear weapons capacity before the United States could strike. The North Korean regime flat out stated this was how it perceived its “axis of evil” classification.⁸⁷ The Iranians, more discreetly, stated as

85. Article X provides in pertinent part: “Each party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country.” Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 13.

86. President George W. Bush, State of the Union Address (Jan. 29, 2002), *available at* <http://transcripts.cnn.com/2002/ALLPOLITICS/01/29/bush.speech.txt/> [hereinafter Presidential Address].

87. For example, the North Korean view was stated by its Committee on Solidarity with World Peoples:

The Iraq war taught the lesson that “nuclear suspicion” suspected development of “WMD” and suspected “sponsorship of terrorism” touted by the U.S. were all aimed to find a pretext for war and one would fall victim to a war when one meekly responds to the IAEA’s inspection for disarmament. Neither strong international public opinion nor (other members of the Security Council’s) opposition to war nor the UN Charter could prevent the U.S. from launching the Iraq war. It is a serious lesson the world has drawn from the Iraqi war that a war can be averted and the sovereignty of the country and the security of the nation can be protected only when a country has a physical deterrent force, a strong military deterrent force capable of decisively repelling any attack to be made by any types of sophisticated weapons.

much.⁸⁸ And there was another major lesson these governments took from their inclusion in the classification of states as bad proliferators - that aggressive pursuit of a nuclear weapons capacity not only was the best strategy to restrain the United States, but also the best strategy to gain net benefits from the United States, its allies, and the international community in general.⁸⁹

The Bush Administration claimed the utility of the negative listings was demonstrated by the dramatic announcement by Libya on December 19, 2003, that it had decided to eliminate all WMD materials, components and programs.⁹⁰ The Bush administration sought to publicly associate the Libyan turn-around on nuclear proliferation and other WMD exclusively to the invasion of Iraq.⁹¹

The facts are that the Libyan turn-around on the issues of proliferation occurred only after a long course of negotiations involving international criminal responsibility and compensation by Libya for the families of the victims of the 1988 bombing of Pan American Flight 103 over Lockerbie, Scotland.⁹² Moreover, there is substantial evidence, by way of reports of officials involved, that Libya was interested in working a deal for removal of its WMD programs and material in exchange for removal of sanctions in the 1990's, well before the invasion of Iraq, and that the Bush Administration did its best to time the WMD deal with Libya to fill the legitimacy void that the failure to

U.S. to Blame for Derailing Process of Denuclearization on Korean Peninsula, KOREAN CENT NEWS AGENCY, May 13, 2003, available at <http://www.kcna.co.jp/item/2003/200305/news05/13.htm#1>.

88. See Kim Murphy, *North Korea Nuclear Deal May Be Inspiration for Iran; Analysts Say Tehran is in Mood to Negotiate. But Hard-Liners Sense the U.S. is Weakened*, L.A. TIMES, Feb. 15, 2007, at A4 (quoting Professor Sadegh Zibakalam, a professor of politics at Tehran University, "This scenario has been at the back of the minds of some Iranian leaders; that if we reach a stage that we would be respected as an equal partner, then we could do real negotiations and reach a deal over our nuclear program.").

89. See *id.* "The hard-liners, perhaps impressed by North Korea's achievement, are now inclined to be more resilient and uncompromising. They say if North Korea could do it, why shouldn't we? Why should we let the United States dictate to us, rather than negotiate with us?"; Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent* (Jan./Feb. 2004), Foreign Affairs, at 146 ("[w]here a state trades in sensitive technologies in exchange for hard currency, economic incentives — including assistance from international financial institutions, direct bilateral aid, and trade incentives — may be more appropriate." The authors are referring to "where a state seeks WMD for their perceived deterrent value.").

90. Eben Kaplan, *How Libya Got Off the List*, COUNCIL ON FOREIGN RELATIONS, Oct. 16, 2007, <http://www.cfr.org/publication/10855/>.

91. See *id.*

92. Martin S. Indyk, *The Iraq War Did Not Force Gadaffi's Hand*, BROOKINGS INST., Mar. 9, 2004, http://www.brookings.edu/opinions/2004/0309middleeast_indyk.aspx; Flynt Leverett, *Why Libya Gave Up on the Bomb*, N.Y. TIMES, Jan. 23, 2004, available at <http://www.ocr.usdoj.gov/cgi-bin/exec/view.cgi?archive=101&num=25869>.

find WMD in Iraq generated.⁹³ Whatever the truth as to motivations within the Bush Administration, it is evident that in the Libyan case, deferral of any non-proliferation deal was probably inevitable given the outrage over the 1988 Lockerbie bombing and the necessary negotiation of a compensation scheme for the families of the victims.⁹⁴

There will always be such other considerations and trade-offs in negotiating non-proliferation with a pariah government, as there has been in the carrot and stick packaging with North Korea, by way of energy supplies and the removal of sanctions, as there may be prospects for a similar deal with Iran.⁹⁵ But these trade-offs concern objective factors that have no necessary connection with “democracy” or “dictatorship” or “theocracy,” and can be addressed independent of political classifications. The denouement with Libya only confirms this. In the series of agreements that constituted the Libyan package, neo-conservative critics, saw a betrayal of President Bush’s “freedom agenda” because the Khadafi regime could not credibly be classified as “democratic,” having besides an abysmal human rights record.⁹⁶ Fortunately for non-proliferation, the focus became one of monitoring, verification, and compliance to eliminate the Libyan nuclear weapons program, and a substantial nuclear weapons risk was removed, not because of, but in spite of, the political classifications.

The North Korean context is similarly revealing. In October 2008, the Bush Administration claimed as its foreign policy swan song, a step in the elimination of North Korea’s capacity to construct nuclear weapons.⁹⁷ It traded the delisting of North Korea as a state sponsor of terrorism and energy assistance for North Korea resuming disablement of nuclear facilities, allowing access by nuclear experts to nuclear facilities, and agreeing to limited verification of nuclear technology

93. See Indyk, *supra* note 92, at 21; Leverett, *supra* note 92, at A23; Robert Suskind, *The Tyrant Who Came in from the Cold*, WASH. MONTHLY, Oct. 2006, at 21, 23.

94. This was the U.S. position communicated to Libya according to Leverett. Leverett, *supra*, note 92, at A23 (former senior director of the National Security Council and State Department Policy Planning Office member). See also Suskind, *supra* note 93. The eventual rapprochement with Khadafi, also involved his regime’s renunciation of terrorism, and assistance against terrorist organizations. See Jonathan B. Schwartz, *Dealing with a “Rogue State”: The Libya Precedent*, 101 AM. J. INT’L L. 553 (2007) (giving a comprehensive recounting of the negotiations).

95. *Bush: U.S. to Lift Key North Korea Sanctions; President Says He Has ‘No Illusions’ Despite Regime’s Nuclear Accounting*, ASSOCIATED PRESS, June 26, 2008, <http://www.msnbc.msn.com/id/25384533/>; see also Jonas, *supra* note 34.

96. See, e.g., Guy Dinmore, *Neo-cons Question Bush’s Democratization Strategy*, FIN. TIMES, May 29, 2006; Vance Serchuk & Thomas Donnelly, *Beware the “Libyan Model,”* National Security Outlook (AEI Online, Washington, D.C.), Mar. 1, 2004, at 6.

97. Bruce Klingner, *North Korea Nuclear Verification: Has the U.S. Blinked?*, HERITAGE FOUNDATION, Oct. 31, 2008, www.heritage.org/Research/asiaandthepacific/wm2120.cfm.

transfers and the uranium program within North Korea.⁹⁸ This deal, as well, reveals the folly of injecting political listing in the task of counter-proliferation. The listing of North Korea as a state sponsor of terrorism occurred on the basis of the bombing of a Korean Airlines flight in 1987,⁹⁹ not proliferation of nuclear weapons, and there was never any demonstration of linkage to nuclear weapons, just as there was never any demonstration of linkage as to Iraq. However, by asserting a tie between the terrorism listing and counter-proliferation,¹⁰⁰ the United States created the quid pro quo that North Korea was later able to demand as the price for not backtracking on a course of denuclearization.¹⁰¹ Moreover North Korea was able to accomplish this without providing information on two critical matters, a covert program of uranium enrichment and prior transfers of nuclear materials or technology to other countries.¹⁰²

The folly of negative state classification is thus well demonstrated by the North Korean negotiations, where the political categorization appropriate to the designation of state-sponsored terrorism was conjoined with counter-proliferation, to the detriment of each of these objectives. The Bush administration allowed removal from the list of state sponsors of terrorism to become a bargaining chip for the North Koreans to be paid to abide by their prior international commitment to dismantle their weapons related nuclear production facilities.¹⁰³ To the extent that North Korea's listing as a state sponsor of terrorism truly served the anti-terrorism mandate of the relevant statutes, that particular

98. U.S.-DPRK Agreement on Denuclearization Verification Measures, Press Release, U.S. Department of State, Oct. 11, 2008.

99. In fact, the terrorism risk presented by North Korea pales in comparison with the nuclear risk. According to the State Department's Country Reports on Terrorism for 2007, North Korea has not actively sponsored terror attacks since 1987, though giving sanctuary to members of the Japanese Red Army. OFFICE OF THE COORDINATOR FOR COUTNERTERRORISM, U.S. DEP'T OF STATE, Country Reports on Terrorism (2008).

100. See, e.g., Presidential Address, *supra* note 86.

Our second goal is to prevent regimes that sponsor terror from threatening America or our friends and allies with weapons of mass destruction. Some of these regimes have been pretty quiet since September the 11th. But we know their true nature. North Korea is a regime arming with missiles and weapons of mass destruction, while starving its citizens.

Id.

101. *North Korea Off U.S. Blacklist After Nuke Inspection Deal*, L.A. TIMES, Oct. 11, 2008, available at <http://articles.latimes.com/2008/oct/11/world/fg-nokorea12> [hereinafter *Blacklist*].

102. *A Nuclear Deal Worth Keeping*, BOSTON GLOBE, Sept. 1, 2008.

103. See *Blacklist*, *supra* note 101.

artificial connection between terrorism and non-proliferation became the deal, and thereby undermined that mandate.¹⁰⁴

There were other negative consequences for counter-proliferation. It was during the “axis of evil” listing of North Korea that it conducted atomic tests, and its nuclear weapons were constructed.¹⁰⁵ North Korea’s axis of evil classification, that relieved it of the communication and pressure necessary to negotiate non-proliferation, helped to make this nuclear weapons development possible. Moreover, during this same period of negative political classification, North Korea was able to sell ballistic missile technology to Syria, Iran, Pakistan, and others, and is suspected of helping Syria to build a nuclear facility presenting sufficient risk for Israel to undertake the political risk of bombing that facility in late 2008.¹⁰⁶

IV. THE CONCEPTUAL DISUTILITY OF STATE CLASSIFICATION IN NON-PROLIFERATION DESIGN

A. The Artificiality of Linkage

Insofar as the U.S. Congress has legislated non-proliferation policy, the USIPAECA authorizing the U.S./India deal is the clearest example of turning proliferation on political classification as well as the objective non-proliferation criteria of safeguards, monitoring, and supervision.¹⁰⁷ However, any question of compatibility of these fundamentally different criteria, the political criteria and the criteria specifically addressing proliferation, was never examined.

The standards that Congress set forth in the USIPAECA for a country to achieve a bilateral nuclear agreement with the United States¹⁰⁸ are: that the country must have demonstrated responsible behavior with respect to the nonproliferation of technology related to

104. *Id.*

105. *North Korea’s Nuclear Program*, N.Y. TIMES, June 16, 2009, available at http://topics.nytimes.com/top/news/international/countriesandterritories/northkorea/nuclear_program/index.html?inline=nyt-classifier.

106. Glenn Kessler & Robin Wright, *Israel, U.S. Shared Data on Suspected Nuclear Site; Bush Was Told of North Korean Presence in Syria, Source Says*, WASH. POST, Sept. 21, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/20/AR2007092002701.html>.

107. 22 U.S.C.A. §§ 8001-8008 (2009).

108. The USIPAECA describes its criteria as applying to countries that “have never been a State Party to the NPT.” 22 U.S.C. §§ 8001-8008. This would apparently exclude North Korea, which withdrew from the NPT, and Iran which has been a party to the NPT, though in violation. Thus only Israel and Pakistan would technically be in a position to benefit from agreements under the statute. The point, though, is that irrespective of its coverage, the statute nevertheless makes clear that U.S. proliferation regulations, 2009 stated criteria.

nuclear weapons and the means to deliver them;¹⁰⁹ that the country must have a functioning and uninterrupted democratic system of government, have a foreign policy consistent with that of the United States, and must work with the United States on key foreign policy initiatives related to nonproliferation;¹¹⁰ and that the cooperation must induce the country to implement improved protections against the proliferation of technology related to nuclear weapons and the means to deliver them and to refrain from actions that would further the development of its nuclear weapons program.¹¹¹ Lastly, it is said, the cooperation must induce the country to give greater political and material support to achievement of the U.S. nonproliferation objectives, including containing states that sponsor terrorism and terrorist groups that seek to acquire nuclear weapons capability or other weapons of mass destruction.¹¹²

Any actual linkage, in the real world, of state sponsorship of terrorism with proliferation risk would be, no doubt, hugely troubling. It is also true, of course, that cooperation in reducing nuclear risk is easier to achieve with friend than foe. But the linkage of proliferation risk and political risk is certainly not inevitable, and should not be artificially drawn where it does not exist. Artificial linkage can only misdirect the enterprise of counter-proliferation. In its worst manifestation, such linkage has led to tragic error on both the political and non-proliferation fronts; the invasion of Iraq under the George W. Bush administration being the outstanding example. Criteria focused on the political character of a state and its foreign policy affinity with the United States can be crucially at odds with the non-proliferation objective. Indeed, the states that pose the greatest political risk are the states with which there is the greatest need to achieve agreement on nuclear safeguards, and more likely than not, such states are not friends, not transparent democracies, and have bad records on proliferation.

Today, North Korea, Syria, and Iran present the most important cases where counter-proliferation should not be misdirected by political classification. There is no factual question that Iran and North Korea have the capacity to pursue peaceful uses of weapons grade material.¹¹³ The governments of both Iran and North Korea have declared both their capacity and intention to do so.¹¹⁴ There is also no question that both Iran and North Korea have the capacity to use the same material to produce nuclear weapons, and to obtain fissile material from sources other than the United States, and that Syria poses the same threat,

109. *Id.* § 8001(6)(A)

110. *Id.* § 8001(6)(B).

111. *Id.* § 8001(6)(C).

112. *Id.* § 8001(6)(D).

113. See, e.g., *Iran Conducts Tests at Bushehr Plant This Week*, REUTERS, Feb. 22, 2009.

<https://scholarship.law.fiu.edu/vol21/iss3/p13> *Iran's Nuclear Power Plants*, FOX NEWS, Sept. 24, 2007.

though relatively immature.¹¹⁵ The challenge is to persuade all these governments to commit to adequate monitoring, verification, and enforcement of non-proliferation safeguards. It is no accident that the Bush administration sought to make its swan song of success a nuclear deal with North Korea; because that's where the greatest counter-proliferation need pertains. That deal, if successfully implemented, would constitute a critical nuclear cooperation agreement. In the long term, apart from the alternative of potentially catastrophic military action, agreement with such governments is the best we can achieve. In other words, the more alien the political context for achieving counter-proliferation, the more important it is to achieve nuclear cooperation agreements, and this is increasingly so as the market for nuclear technology and materials expands. It is precisely because Iran and North Korea are the extreme cases, not conforming to the legislated criteria of democracy and a foreign policy consistent with the United States, that it is most urgent to achieve nuclear cooperation agreements with these states.

This is not to say political classification is irrelevant to other subjects, in other contexts. Such classification is serviceable when it is aligned with, and designed to achieve, the named objective. The “state sponsor of terrorism” classification, used in a number of U.S. statutes,¹¹⁶ is exemplary. That designation depends on the objective criterion of a given government’s record in relation to terrorism, loosely defined as that term may be, but the classification fits the objective.¹¹⁷ By contrast, the parameters of the political classifications that have come to infect non-proliferation are not only vague and fluctuating with changing regime policies, but given the dual use phenomenon, and the likely transformational increase in the market for nuclear technology and material to meet the energy and global warming crises, these categories are not, and cannot be, consistently, meaningfully and helpfully aligned with the counter-proliferation objective. Indeed, the results are the opposite of what is sought to be achieved. The ease with which changes in a government entail more or less “democracy,” and the ease of transition between peaceful uses of nuclear capacity and

115. See *Nuclear Agency Said to be in ‘Stalemate’ with Iran*, N.Y. TIMES, Sept. 7, 2009, at A10; see also Jonas, *supra* note 34.

116. See, e.g., 8 U.S.C. § 1184(c)(4)(F)(i) (referring to denial of nonimmigrant visas to an alien who is a national of a state sponsor of international terrorism); see also 22 U.S.C. § 7205 (limiting export of agricultural commodities, medicine or medical devices to state sponsors of international terrorism).

117. The “state sponsor of international terrorism” standard is met if the Secretary of State determines that the government of a country has “repeatedly provided support for international terrorism.” 22 U.S.C. § 1184(c)(4)(F).

weapons use, make linkage between non-proliferation and political classification not only unwieldy, but counter-productive.

Tying counter-proliferation to political objectives, in contrast, for example, to an economic carrot, imposes political costs.¹¹⁸ The North Korea six power negotiation illustrates the point. As a result of conjoining political and non-proliferation considerations, not only energy assistance, but a political price was paid to move North Korea back towards the path of denuclearization. The delisting by the United States of North Korea as a sponsor of terrorism resulted in the humiliation of the Japanese government, which objected to the disregard of the abduction of Japanese citizens by North Korea.¹¹⁹ North Korea responded that it would ignore Japan at the six power talks.¹²⁰ Thus the linkage of denuclearization and political characterization resulted in damage on both the terrorism and non-proliferation fronts.

A political classification such as “state sponsor of terrorism” is manageable as an absolute, and the offending government, upon lesser or greater evidence, as the case may be, can be sanctioned accordingly.¹²¹ This is not the nature of political classification applied to proliferation. The proliferation phenomenon is relative, not absolute. The fact that technology or material transferred by Nuclear Non-Proliferation Treaty signatories, such as Russia, or Canada, or for that matter, the United States, can become the material and technology of weapons development illustrates the point, as does, perhaps most pointedly, the fact that Iraq was able to build its nuclear weapons program as a state legitimately receiving nuclear technology and material within the framework of the Nuclear Non-Proliferation Treaty.¹²²

118. See Kitre, Orde, *New Sanctions for a New Century: Treasury's Innovative Use of Financial Sanctions*, 30 U. PA. J. INT'L L. 789 (giving an analysis of the use and effect of financial sanctions on terrorist states).

119. The delisting also removed sanctions composed of a long list of trade prohibitions that had been secured through U.N. Security Council resolutions, an embargo on trade in nuclear and missile-related items, heavy conventional arms and “luxury goods” imposed by the Security Council in retaliation for North Korea’s detonation of a nuclear device in October 2006.

120. The North Korean Foreign Ministry responded, “We will neither treat Japan as a party to the talks or deal with it even if it impudently appears in the conference room.” Kwang-Tae Kim, *North Korea to Snub Japan in Nuclear Talks*, S.F. CHRON., Dec. 7, 2008, at A14.

121. U.S. State Department, *Office of the Coordinator of Counterterrorism*, <http://www.state.gov/s/ct/c14151.htm>. Four countries are currently listed as “state sponsors of terrorism”: Iran, Cuba, Syria, and Sudan.

122. See, e.g., *U.N. Officials Seek Mastermind in Charge of Iraq's Nuclear Effort*, N.Y. TIMES, Oct. 1, 1991, at A11, available at <http://www.nytimes.com/1991/10/01/world/un-officials-seek-mastermind-in-charge-of-iraq-s-nuclear-effort.html?scp=48&sq=Iraq+nuclear+weapons+program&sc=nyt>

Moreover, the processes of counter-proliferation are not suited to political categorization. The essential functions of counter-proliferation — notification, monitoring, verification, and enforcement — by their very nature, require judgment calls by the IAEA or other institutional mechanism, if for no other reason than that IAEA depends on evidence limited by the extent to which the target state is willing to allow these functions to proceed.¹²³ Experience has been more or less cooperation from any target state, varying over time, as any of the principal examples, such as Iraq, Iran, North Korea, or Libya demonstrate. And limitations of intelligence may also result in crucial inconsistency between political perception, and the reality of proliferation risk. The invasion of Iraq, based on the claimed presence of WMD, including nuclear, will forever serve as an example of how fatally misleading the linkage of political risk and non-proliferation can be.

B. Engagement of Multilateral Leverage and Interests

There is no doubt non-proliferation depends critically on cooperation of the nuclear weapons states. This was true at the beginning of non-proliferation policy, was foundational to the Nuclear Non-Proliferation Treaty, and is critical today, as evidenced, for example, by the fact that progress in North Korea has depended on the six power talks,¹²⁴ and any progress with Iran has so far depended on the cooperation of Russia, China, and the European Community.¹²⁵ Accordingly, when the United States formulates or pursues non-proliferation policy constrained by its own state classification based political criteria, it runs counter to the multilateral cooperation that the burgeoning market in nuclear materials and technology makes ever more necessary for effective counter-proliferation.

In reference to securing the necessary multilateral action for non-proliferation, an endemic problem with U.S. policy of state classification is that other significant nuclear states will not conform their policy to the U.S. classification, and indeed, regard such unilateral designation by the United States as an affront to their own sovereignty to trade in nuclear materials and technology. Thus governments as diverse as those of Spain, China, and Russia have all declared policies

123. See *The Netherworld of Nonproliferation*, N.Y. TIMES MAG., June 13, 2004, at 49, available at <http://www.nytimes.com/2004/06/13/magazine/the-netherworld-of-nonproliferation.html?scp=13.Sq=I.A.E.A.%20Iraq&st=nyt>.

124. See Remarks by National Security Advisor Stephen Hadley at the Center for Strategic and International Studies, Washington, D.C., Jan. 7, 2009.

125. See, e.g., *EU to Hold New Nuclear Talks with Iran*, GUARDIAN, Apr. 20, 2007, available at <http://www.guardian.com/world/2007/apr/20/iran.eu>.
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contrary to the United States concerning the provision of nuclear materials and technology to Iran.¹²⁶

Furthermore, political classification in U.S. proliferation policy unnecessarily complicates and burdens the non-proliferation objective given the multilateral interests necessarily involved. Again, the North Korean situation is illustrative. The six power parties to securing the dismantling of North Korea's nuclear weapons program all share that objective, but vary widely in their political perceptions and assessments of national interest in relation to North Korea. China strongly supports North Korea in challenging U.S. efforts to sanction North Korea, and has indicated it rejects international intervention in North Korea and clearly has rejected U.S. policy of isolating North Korea.¹²⁷ South Korea looks forward to possible unification with North Korea, and is generally inclined to provide what North Korea demands in the name of South Korea's "sunshine" policy towards North Korea and in order to prevent war.¹²⁸ Japan and Russia have their own complex sets of interests, as illustrated by Japan's focus on the matter of abduction of Japanese citizens by North Korea.¹²⁹ So any political categorization by the United States, such as North Korea's inclusion on the 'axis of evil' listing, in the context of multilateral non-proliferation negotiation, necessarily draws in a multitude of countervailing political and economic interests. These other interests only diffuse the non-proliferation focus, creating additional obstacles to achieving the non-proliferation objective.

Political classification also creates opportunity for the proliferator to force into the discussion other interests, and trade-offs. Thus North Korea came to insist that any retrenchment in its nuclear weapons program include security assurances.¹³⁰ North Korea would in all

126. See, e.g., Neil King Jr., *China-Iran Trade Surge Vexes U.S.*, WALL ST. J., July 27, 2007 (referencing a range of specialty metals and other dual-use items from China to Iran that could aid Tehran's missile and nuclear program); *Russia, Iran 'Agree Nuclear Deal'*, BBC News, Dec. 13, 2007 (referencing Russian support for building nuclear plant in Iran).

127. George Bunn & John B. Rhinelander, *NPT Withdrawal: Time for the Security Council to Step In*, ARMS CONTROL TODAY, May 2005, http://www.armscontrol.org/act/2005_05/Bunn_Rhinelander.

128. See Yang Sung Chul, *Remarks to the Asia Society*, Dec. 4, 2000, available at <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan005966.pdf> (explaining the "sunshine" policy, which was instituted by President Kim Dae-Jung, is officially known as the Policy of Reconciliation and Cooperation toward North Korea. The goal of the sunshine policy is to provide for the military protection of South Korea while working toward a peaceful unification with North Korea).

129. See, e.g., *Japan Rightists Fan Fury Over North Korea Abductions*, N.Y. TIMES, Dec. 17, 2006, available at <http://www.nytimes.com/2006/12/17/world/asia/17japan.html?ref=asia>.

130. See, e.g., *Threats and Responses: The Nuclear Crisis; North Korea Demands U.S. Agree to Nonaggression Pact*, N.Y. TIMES, Oct. 26, 2002, at A8, available at

likelihood have pressed these demands notwithstanding the targeting implicit in the Bush Administration's designation of an "axis of evil." But the implicit threat in that designation importantly helped North Korea gain credibility for its demands, and accordingly enhanced its leverage for the negotiations, with no concomitant benefit to the United States. It is one thing to let the North Korean leadership know, through diplomatic or military channels, that it may be attacked if it persists in the pursuit of nuclear weapons. It is quite another to publicly declare that threat of attack depends on its political classification on a potential hit list.

If instead, counter-proliferation is sought exclusively on the basis of the multilateral interest inhering in the multilateral institutions and procedures of counter-proliferation, counter-proliferation is easier to achieve; because other states can be enlisted to put pressure on the proliferator, without severe risk of sacrificing their other interests. It also renders it more tolerable for the subject government to move towards non-proliferation in reference to its own national and regional constituencies. The Libyan situation is particularly instructive. When press reports noted that the U.S. ships taking away Libya's nuclear materials had publicly displayed those materials on deck, a senior Libyan official is reported to have protested, "Libya was quite unhappy with this dog-and-pony show because it hurts (Libya) domestically (and) in the Arab world. It makes (it) look like unilateral U.S. disarmament of Libya, and Libya wants it recognized as disarmament under the Nuclear Nonproliferation Treaty and IAEA auspices."¹³¹

V. CONCLUSION

Without universal nuclear weapons disarmament, the best nuclear reality we can have for the foreseeable future is enhancement of the many-layered legal regime of institutions and standards, such as presently constituted by a variety of institutional mechanisms and agreements, most importantly the IAEA,¹³² the Nuclear Suppliers Group, and amplification of the constraints such as export controls and

<http://www.nytimes.com/2002/10/26/world/threats-responses-nuclear-crisis-north-korea-demands-us-agree-nonaggression-pact.html>.

131. *Libya Disappointed at Nuclear Show – UN Official*, REUTERS, Mar. 17, 2004.

132. It is the safeguards agreements, developed under the IAEA in conjunction with Article II of the Nuclear Non-Proliferation Treaty, and negotiated with individual states even outside the Treaty, that have provided the only meaningful vehicle to monitor and potentially prevent, along with limitations exercised by way of the Nuclear Suppliers Group. These agreements failed to secure detection of the Iraqi nuclear weapons program in the 1980s, or Libya's program for more than a decade until admitting to a nuclear weapons program in

full scope safeguards that they administer.¹³³ We must depend on the totality of their present and potential efficacy constituting a system of overlapping and mutually reinforcing constraints, designed to secure non-proliferation of nuclear weapons. The announcement of the new U.S. nuclear cooperation agreement with the United Arab Emirates, for example, indicates a determined effort to maximize the legal and practical constraints and assurances available in the existing system.¹³⁴ It is reported, that as conditions for the agreement, the U.A.R. has promised that it will not develop its own fuel, but will purchase nuclear fuel for its reactors from outside suppliers, that it will store nuclear waste externally, and will allow monitoring and snap inspections by the IAEA.¹³⁵

There is much to be done to improve the present regime, to improve its elements of notification, inspection, monitoring, documentation, sampling and enforcement. There are important legal as well as technical opportunities already apparent. Legal development may include new treaty arrangements involving commitments not to acquire nuclear weapons, such as a verifiable Fissile Material (Cut-off) Treaty limiting the production of fissile materials, strengthening the verification and monitoring authority of the IAEA and particularly universalizing adoption of the “additional protocol,” the supplement to a safeguards agreement that gives the IAEA significant additional authority to obtain access to, and information about, nuclear facilities.¹³⁶ There is significant room for improvement in the export control system, particularly establishing linkage between the export control system and the verification system administered by the IAEA. Of course, concerted action by the U.N. Security Council, whether broadly designed such as Security Council Resolution 1540 addressing the potential linkage of terrorism and nuclear capacity, or specifically designed such as targeted “smart” sanctions in the cases of North Korea and Iran, can have an important role.¹³⁷ Such legal and institutional development can be critically advanced by technical development such as improved physical security measures for weapons and fissile materials, and the extraordinary new capacities of nuclear forensics.

133. Nuclear Suppliers Group Home Page, available at <http://www.nuclearsuppliersgroup.org> (last visited Oct. 1, 2009) (explaining The Nuclear Suppliers Group is “a group of nuclear supplier countries which seeks to contribute to the non-proliferation of nuclear weapons through the implementation of Guidelines for nuclear exports and nuclear related exports.” The Group currently includes 46 member countries).

134. Jay Solomon, *U.S. Plans to Sign Nuclear Pack With U.A.E.*, WALL ST. J., Dec. 12, 2008, at A7.

135. *Id.*

136. IAEA: Additional Protocols to Nuclear Safeguards Agreements, http://www.iaea.org/OurWork/SV/Safeguards/sg_protocol.html (last visited Oct. 14, 2009).

137. S.C. Res. 1540 (U.N. Doc. S/RES/1540) (Apr. 28, 2004).

So there is reason for optimism, though difficult, and critically constructive work must be done on multiple fronts. However, the political exceptionalism that has become a hallmark of U.S. non-proliferation policy, as exemplified in the U.S./India agreement, is at bottom malign to such progress. It is at odds with the universalism that is absolutely necessary to a legal regime that can achieve nuclear security for the United States and the world.

In this era of a burgeoning global nuclear market place, when significant economic incentives encourage the proliferation of nuclear material and technology, bilateral political evaluation by the United States undercuts progress on non-proliferation, and only serves as justification for other nuclear suppliers and buyers to make dangerous deals based on their own political rationalizations. Efficacy of the institutions and constraints of the international non-proliferation regime depends upon a common international vision and purpose. Bilateral transfer based on political rationalization is inherently antithetical to strengthening the constraints that can apply to all governments. The government of Russia or China, North Korea, or of any state, to be sure, can formulate its own political justifications to match the claim of “democracy” under which the United States seeks to explain transfer of nuclear materials and technology.

The methodology of political classification in U.S. non-proliferation policy is, at bottom, at odds with the necessary evolution of international nuclear security. It generates a dynamic that undercuts the universalism necessary to strengthening appropriate institutional mechanisms, the standards they employ, and their capacities for monitoring, verification and enforcement. This negative dynamic is very strong and potentially overwhelming, because it draws upon the economic competition among nuclear supplier states, and compounds its strength with equity claims, such as those of Iran, Egypt, even North Korea, governments demanding equal access to nuclear materials and technology as granted India or any other state favored by the United States.

Political grounding of nuclear non-proliferation policy in state classification, as the U.S./India deal demonstrates, is too unstable, too fraught with delusion and fallacious characterization, to serve as the basis for a secure nuclear future. The nuclear market is not just another market to be regulated to improve its function. It is the market where increased risk, is risk of nuclear catastrophe. Change the ground for meeting the vitally important challenge of controlling the burgeoning nuclear market, and the safer the world will be.

