International Atomic Energy Agency
New Framework for the Utilization of Nuclear Energy in the 21th Century: Assurances of Supply and Non-Proliferation
Special Event at the 50th IAEA General Conference 19 – 21 September 2006, Vienna

Session 2.B: Frameworks for Assurances of Supply: Technical and Legal Arrangements

---

Legal Issues Connected with International Assurances of Nuclear Supply: Comments from a State Perspective

Norbert Pelzer, Germany

1. The Challenge

Fighting the proliferation of nuclear weapons is a Sisyphean task: Whenever you think you succeeded in taking the stone to the top of the hill it is rolling back. Ensuring secure and reliable supply of nuclear reactors and of nuclear fuel at competitive market prices worldwide certainly is not a task of such an unceasing character but it nevertheless takes a Hercules to perform. A project which aims at combining both objectives, consequently, is of outstanding importance and magnitude and perhaps requires the help of the joint forces of the Olympian divinities. This Special Event at the 2006 IAEA General Conference is a step to make known and to launch the project internationally and it is meant to trigger an initiating international discussion. It will be my role to look at the project with a lawyer's eye from the point of view of a State.

Our subject is not at all new. The internationalization of the use of nuclear energy was already on the agenda of the short-lived UN Atomic Energy Commission from 1946 to 1952 (Baruch Plan, Gromyko Plan). Later, it was reflected in the 1956 Statutes of the IAEA.[1] Article III A 1, 2, 7 and C provide the legal basis for installing the Agency as the worldwide "broker" of civil nuclear technology and for establishing, e. g., an Agency's nuclear fuel bank. Details of the concept are regulated in the Articles IX, X, XI and XIV of the Statutes. However, it turned out that States did not request the Agency to become an intermediary for securing supply of materials, equipment, or facilities. The respective provisions of the Statutes never became operative. After exactly half a century, there is a new attempt to vitalize this legal framework.

How will States react today? The decision of a State to adhere or not to adhere to an international supply regime is firstly and foremost a political decision. In preparing that decision, *inter alia*, the respective legal framework has to be taken into account and in particular the question has to be answered: Are there any legal hurdles which might block or hamper the project?

---

[1] UNTS vol. 276 no.3988.

2. General Deliberations on the Impact of the New Supply Regime on National Law

The new international supply regime may have an impact on national legislations the extent of which cannot be predicted until there is at least a skeleton of its envisaged structure available. Perhaps the regime will need national ratification and implementation. It is also possible that it will be established in a way which does not need formal transformation into national law.

International supply of nuclear materials and equipment requires mainly regulations on import and export and on international transport. There is no difference to the currently existing situation, and respective national legislations are already in place, which, as the case may be, need to be amended to cope with the international supply regime. There may be other fields of national legislation which will be affected and will need to be amended correspondingly.

In some States there may arise problems of constitutional law. If in a national constitution there is an obligation of the State to guarantee energy supply, it could be questioned whether it is admissible to allow the government to subject its decision on nuclear supply to an international organisation which is setting the conditions for receiving nuclear supply.

While it is premature to elaborate on possible amendments to the national nuclear legislations there is a clearer picture of the interrelationship of the new regime with existing international treaties. Actually, international instruments in force need to be thoroughly considered when establishing the new regime. There might be conflicting concepts and provisions, overlap or other elements adverse to the new supply regime. States cannot easily terminate existing international obligations, and this may not be desirable at all. It follows that the new regime has to be formed in a way which makes it compatible with existing multilateral conventions. However, there may also be cases where existing agreements will have to be adapted to the new regime.

3. The Non-Proliferation Treaty – A Hurdle to an International Supply Regime?

At first glance, it seems to be absurd that the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT)[2] could be among the instruments which could be a hurdle on the way to an international regime that likewise aims at preventing proliferation. Of course, the NPT does not prohibit or hamper the establishment of supplementary non-proliferation regimes. But any additional non-proliferation measure and particularly any “channelling” of the access to the supply of materials and facilities restrict the scope of Article IV NPT which grants States the inalienable right to develop research, production and use of nuclear energy for peaceful purposes. This includes the right to freely decide on how a State secures its nuclear supply. If there is an international supply regime in place, may it be legally or only politically binding, the State has no longer complete discretion how to organize supply. Some States may wish to maintain their freedom in this field and, consequently, will stay away from the international supply framework.

[2] UNTS vol. 729 no. 10485 = IAEA Doc. INFCIRC/140.

4. Other International Instruments and Civil Law Contracts

From the very beginning, the peaceful use of nuclear energy has been based on a comprehensive network of bilateral or multilateral agreements on nuclear cooperation, exchange of information and nuclear supply. An international supply regime will entail reconsideration of those instruments with the view to either terminate or adapt them to the new regime. This is a complex task because in every case there are at least two States involved which might have differing views on how to deal with the matter.

What, however, appears to be even more complex to deal with is the impact which an international supply regime may have on existing civil law contracts on supply and in particular on reprocessing contracts. Those contracts mostly are long-term contracts that form the basis for securing jobs in the country of supply. For internal political reasons, supply States may be reluctant to touch upon the contracts. Moreover, if States direct companies to terminate the contracts and to use the new international supply channels they may be exposed to claims for compensation by the affected companies including their contractors as, e. g., carriers.

5. International Transport and International Nuclear Trade Regulations

The transboundary transfer of nuclear materials and equipment is governed by a comprehensive international regime. Sending and receiving such materials and equipment require getting over high bureaucratic thresholds. States, and also nuclear industry, have an interest that the new regime does not establish additional prerequisites; in particular any duplication of controls should be excluded.

In drafting and negotiating the legal framework of the new supply regime, major emphasis should be given to avoiding overlap and duplication. Transboundary transport and trade should not be made more complicated than they are today, on the contrary, one should aim at simplifying the control mechanisms. This is a goal which probably can be reached without major efforts. The materials will probably physically be concentrated at few places only. This facilitates control, and, moreover, since the IAEA, as the international broker with a monopoly, has general oversight the risk of misuse is becoming lesser.

In this context particularly the following provisions need to be examined regarding their compatibility with the new regime: Provisions in implementation of the NPT including bilateral safeguards agreements[3] and the Guidelines of the Nuclear Suppliers Group;[4] provisions on physical protection;[5] international transport regulations,[6] including Article 27 of the 1997 Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management.[7]

---

[3] Based on IAEA Docs. INFCIRC/153 Corr. (Blue Book), INFCIRC/66 Rev.2, INFCIRC/540 Corr.

[4] Guidelines for Nuclear Transfers (IAEA Doc. INFCIRC/254/Rev.8/Part 1, February 2006); Guidelines for Transfer of Nuclear-Related Dual-Use Equipment (IAEA Doc.INFCIRC/254/Rev. 7/Part 2, February 2006).

[5] 1980 Convention on the Physical Protection of Nuclear Material IAEA Doc. INFCIRC/274/Rev.1); after its entry into force: 2005 Amendment to the Physical Protection Convention (IAEA Doc. GOV/INF/2005/10-GC(49)/INF/6); The Physical Protection of Nuclear Material and Nuclear Facilities, IAEA Doc. INFCIRC/225/Rev. 4 (Corr.).

[6] Subject to examination is the entire set of international instruments on the transportation of dangerous goods which, regarding radioactive substances, are based on IAEA Regulations for the Safe Transport of Radioactive Material, 1996 Edition (Revised) (IAEA Safety Standards Series No. TS-R-1 (ST-1, Rev.), Vienna 2000.

[7] IAEA Doc. INFCIRC/546.

6. Nuclear Safety and Nuclear Liability

Within the *corpus* of nuclear law the provisions on nuclear safety and on nuclear liability enjoy outstanding relevance. States will therefore pay special attention to the question whether the new supply regime will be covered by the existing schemes of safety and liability or whether new approaches have to be developed.

In general, prime responsibility for nuclear safety rests with the holder of the respective licence. This principle is expressly spelt out in Article 9 of the 1994 Convention on Nuclear Safety[8], in Article 21 of the 1997 Joint Convention,[9] and likewise in No. 9 of the non-binding 2004 Code on the Safety of Research Reactors.[10] – Under the international nuclear liability conventions, it is the operator of the nuclear installation who is held liable for nuclear incidents.[11] The question arises: In which way will these generally accepted principles be made applicable to the international supply regime?

In case that the IAEA directly operates a fuel bank or any other nuclear facility, will the Agency be the licence holder and the operator respectively? Will the law of the host State be applicable or will the Agency establish a regime of its own? If, however, the Agency restricts its position to that of an intermediary and leaves the operation of the facilities to national entities, can those entities be made responsible for safety or held liable for nuclear incidents although they are directed by the Agency?

Obviously, these questions can only be answered if the organisational structure of the project is advanced.

7. The Case of the European Union

The European Union (EU) has a legal regime of its own. Insofar it has interests similar to those of States. It will aim at preventing a supply regime which interferes or conflicts with EU rules. There is no need to go into greater detail. One issue needs, however, to be addressed.

In Chapter VI "Supplies" (Articles 52 – 76) of the 1957 Treaty on Establishing a European Atomic Energy Community (EURATOM)[12] the Community establishes a specialized supply regime for its member States, which is designed to ensure "a common supply policy based on the principle of equal access to sources of supply" (Article 52 paragraph 1 of the Treaty). This regime is complemented by the Community's property ownership of all special fissile materials[13] which are subject to the EURATOM safeguards (Article 86 of the Treaty). It includes the exclusive right of the Community to conclude contracts on the supply of ores, source materials and special fissile materials from inside and outside the Community (Article 52 paragraph 2(b)). The Community automatically gains property rights of special fissile materials which are produced in, or imported into, one of the member States.

---

[8] IAEA Doc. INFCIRC/449.
[9] See footnote 7.
[10] See: http://www-ns.iaea.org/downloads/ni/code-rr/code_conduct_March04.pdf .
[11] Article II of the 1997 Vienna Convention on Civil Liability for Nuclear Damage (IAEA Doc. INFCIRC/566 Annex); Article 3 of the 1960/1964/1982 Paris Convention on Third Party Liability in the Field of Nuclear Energy (http://www.nea.fr/html/law/nlparis_conv.html) .
[12] A consolidated version of the Treaty is reproduced in: http://www.ena.lu/mce.cfm .
[13] The EURATOM definition of special fissile materials (Article 197 no. 1) is identical to that of Article XX of the IAEA Statute.

Without any more detailed description of the EURATOM supply provisions it appears that inside the European Communities there is already a regime in place which contains major and important elements which possibly will also be constituents of the envisaged global supply regime. This conclusion calls for close cooperation between the Agency and the EU.

8. Summary

The list of legal problems involved in assuring nuclear supply worldwide and without discrimination is by no means exhaustive. It enumerates only those legal issues which legal advisers to States at first glance will identify to be addressed. Only when establishing and implementing the new regime, we will recognize the full size of legal problems to be solved.

As stated at the beginning, the task before us is of an extraordinary character. There will also be extraordinary legal problems to be solved. Of course, there will be people who will claim that lawyers always exaggerate matters and only provide stumbling stones to forward-looking projects. However, lawyers should rather be asked at an early stage than when it is too late. If States in principle are politically supportive to the concept, the legal problems will be solved. One may be assured that lawyers are able to develop most productive ideas if challenged.