

SPECIAL EVENT AT THE 50th GENERAL CONFERENCE

New Framework for the Utilization of Nuclear Energy in the 21st Century: Assurances of Supply and Non-Proliferation

Session 2B: Roles of the Agency

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- Talking Points -

1. Introduction

The original concept for the establishment of an international atomic energy organisation foresaw the receipt, custody and supply of nuclear material and also the acquisition and establishment of facilities, plants and equipment as some of the principal functions of such an organization and embodied these principles in the Statute of the IAEA.

In short, the provisions of the Statute are sufficiently broad to allow the Agency to establish its own stock of nuclear fuel purchased from, or donated by, Member States for supply to another Member State against payment of charges determined by the Board; to facilitate the supply of nuclear fuel from one Member State to another; and also to facilitate, inter alia, enrichment and fuel fabrication services by one Member State to another or to the Agency.

The term nuclear fuel or nuclear material used in this document means source or special fissionable material, as defined in **Article XX** of the IAEA Statute, in the form of either uranium (natural or low enriched) or in the form of complete fuel assemblies, ready for use in power reactors.

2. The Role of the Agency

2.1 General

The relevant provisions of the Statute that form the basis for a mechanism of assurances of supply are spread throughout the Statute and are not immediately apparent. Essentially they are **Articles III, IX, X, XI, XIII and XIV** of the Statute. This document highlights in some detail how they correlate with each other.

Article III of the Statute sets the general stage. Under this Article the Agency is authorised to act as intermediary for the supply of services, materials, equipment or facilities by one Member State to another as well as to perform any operation, including acquiring materials, services and equipment and establishing its own facilities and plants, in order to facilitate the practical application of nuclear energy for peaceful purposes.

More importantly, **Article III.C** determines that the provision of such assistance by the Agency shall not be subject to any political, economic, military, or other conditions which are incompatible with the Statute.

2.2 *Legal Arrangements*

To accommodate the aforementioned mechanism, a number of legal arrangements are needed, with variations, depending on whether title to the material concerned passes through the Agency or whether it passes directly from the Supplier State to the Recipient State. These are:

- an arrangement between the Supplier State and the Agency (Supply Agreement). In this context, elements of national law, such as consent rights, licensing, transport and immunities have to be considered.
- an arrangement between the Recipient State and the Agency (Project Agreement) to include inter alia the issues listed in **Article XI.F** of the Statute (see below). Both the Supply and the Project Agreement can be combined into one tripartite agreement, a so-called Project and Supply Agreement.
- underlying contracts between the actual nuclear fuel supplier company (whether state or industry), the Agency and the recipient company (again whether state or industry). Issues relevant in this context are, for example a guaranteed or stand-by pool of nuclear fuel from which the Agency or the Recipient State can draw and the timeframe for such a stand-by pool, guaranteed transport and storage options, the price and conditions under which the fuel is supplied either with or without a price guarantee by the Supplier State and the extent to which a proposed mechanism of assurances of supply would impact on existing market mechanisms for nuclear trade.

Finally, in case the Agency establishes an actual bank of nuclear fuel, agreements covering safeguards, security, safety and possibly liability for nuclear damage with the State where the fuel is located as well as transit agreements with neighbouring States need to be concluded.

2.3 *Supply of Nuclear Fuel*

Article IX of the Statute deals extensively with the supply of nuclear material in ten sub-articles. Some are particularly noteworthy for the purposes of this discussion.

First, **Article IX.A and B** of the Statute provide that nuclear material made available to the Agency may, at the discretion of the member making it available, be stored either by the member concerned or, with the agreement of the Agency in Agency storage facilities. If the Agency undertakes the storage, **Article IX.H** ensures geographical distribution of the material by providing that storage of such material shall not allow concentration of large amounts of such materials in any one country or region of the world.

Regarding the disposition of the supplied material, three paragraphs under **Article IX** of the Statute are of particular interest. **Paragraph D** of Article IX provides that a Member State shall, at the request of the Agency, deliver without delay to another Member State material it has made available to the Agency. **Paragraph E** provides that the quantities, form and composition of materials made available by a Member State can only be changed with approval of the Board. Thirdly, **Paragraph J** of Article IX provides that the material made available shall be used as determined by the Board of Governors and that no Member State has the right to require that the materials it makes available are kept separately or used only for a project designated by it.

Taken together, these provisions entail a certain degree of commitment by a Member State supplying material to the Agency in that such a State agrees to equal access by all Member States to the material

supplied and in that such a State cannot easily change such a commitment for political or other motifs related to the Recipient State.

2.3.1 Cost for the Supply of Nuclear Fuel

The aforementioned supply of nuclear fuel is not cost-free. **Article XIII** provides for the reimbursement of the Member State providing the materials. Also, according to **Article XIV.E and F** of the Statute, charges for nuclear fuel furnished to a Recipient State have to be levied on a scale that the revenues for the Agency are adequate to meet the expenses and costs incurred. These charges shall be placed in a general fund for use as determined by the Board and the General Conference.

In this context it may be interesting to recall the texts of three agreements which were concluded in 1959 between the Agency and the Governments of the then USSR, the UK and the United States, as reproduced in one of the earliest INFCIRCs by the Agency, INFCIRC/5. Under these agreements, the aforementioned States undertook to make nuclear fuel available “at the lowest international price in effect at the time of delivery”, “at a price and on conditions not less favourable than the most favourable price and conditions which [the country] is offering” and “at published charges applicable to domestic delivery at the time” respectively.

2.4 Release of Nuclear Fuel

The Statute also sets a number of requirements that have to be met in order to make the supplied material available to a Recipient State. In addition, **Article XI.A and C** of the Statute require specific “Agency projects” as a precondition to assist Member States in securing nuclear fuel. The term “Agency projects” as used in the Statute should be understood broadly and as covering all types of assistance granted by the Agency including assistance in the context of assurances of supply.

2.4.1 Release Criteria

As mentioned above, **Article IX.J** provides that material supplied to the Agency shall be used as determined by the Board. This allows for the establishment of criteria for the release of nuclear fuel under an assurance of supply scheme. In establishing such criteria, the Statute sets a number of parameters to be taken into account.

In particular, **Article XI.E** lays down a number of specific criteria for approval of a project and thus releasing the nuclear fuel for use. These release criteria include, inter alia:

- the usefulness of the project including its scientific and technical feasibility;
- the adequacy of plans, funds, and technical personnel to assure the effective execution of the project;
- the adequacy of the proposed health and safety standards for handling and storing the material and for operating the required facilities; and
- such other matters as may be relevant. This precisely allows for the establishment of additional release criteria regarding compliance with non-proliferation obligations and lack of access to normal commercial supply due to political reasons.

To be useful and in order to ensure equal access by all Member States, the release criteria will have to be pre-established and be the same for all States wanting to avail themselves of the assurance of supply mechanism.

In practical terms, the Board could either apply these release criteria each time a request for release of nuclear fuel is received or it could set out the parameters for these criteria and delegate application thereof to Director General. The clear benefit of the latter approach is that it allows for a more factual consideration of the criteria established by the Statute and the Board, thereby avoiding the risk of bringing the political considerations that caused the situation to arise in the first place, into play.

Also, the project approach under the assurances of supply mechanism mentioned above can be dealt with in one of two ways. The first way is to deal with each application for release of nuclear material from this mechanism as a separate project that must be considered *ab initio*. The second way is to consider the whole mechanism of assurances of supply as one single project with each request from a Member State being one element thereunder. The advantage of the second way would be that most of the criteria regarding the project will be pre-applied and only those relating to non-proliferation and disruption of supply for political reasons in the individual case at hand need to be applied by the Board or delegated to the Director General for application.

2.4.2 Project Criteria

In addition to the aforementioned release criteria, **Article XI.F** of the Statute sets out certain project criteria, i.e. certain elements that are mandatory to be included in the agreement between the Agency and the Recipient State referred to above. Some of the noteworthy elements are:

- ensuring that the material is used for peaceful purposes and that safeguards are applied to the material;
- making the necessary security arrangements for the material;
- meeting of the applicable health and safety standards including compliance with the appropriate transport regulations;
- covering patents and copyrights that may arise out of the supply of the material; and
- provision for the settlement of disputes which is normally done by a three-judge arbitral tribunal.

Should the Board delegate to the Director General the discretion of whether a requesting State meets the release criteria, it will also have to delegate to him/her the authority to actually apply the project criteria and to conclude the necessary agreements with the Recipient State, and also the Supplier State, if necessary. This will ensure that also this second stage of the process is carried out in a formal rather than a political manner.

Finally, both the release and the project criteria may be combined with timeframes during which the assurances of supply are guaranteed and with periodic evaluations of compliance with these criteria either by the Board or the Director General.