



What the Commission Report says on:

THE NPT REVIEW CONFERENCE: STRENGTHENING NON-PROLIFERATION

Non-nuclear-weapon states party to the NPT accept an obligation, under Article III of that treaty, not to divert nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices. To enable verification that they are fulfilling that obligation, they are obliged to conclude a safeguards agreement with the IAEA. Safeguards have an essential role, both in deterring diversion through the risk of detection, and through providing timely warning of diversion, to enable the international community to intervene. The credibility of the safeguards system depends on confidence in two respects: verification capability, and the enforcement actions that are taken on verification findings. These issues, and the closely related question of the institutional effectiveness of the IAEA, are the non-proliferation priorities on which the 2010 NPT Review Conference should focus.

Verification. The IAEA's technical skills are increasing – but it cannot be expected to find undeclared nuclear activities unaided. Member states have given the agency vital assistance in development of and training in equipment, detection technologies (such as sensors and satellite imagery) and so on. But more is needed in the area of information-sharing. States have substantial information, including intelligence (“national technical means”) and data on nuclear-related exports (encompassing both items supplied and items denied). So too, from time to time, do industry vendors who may, e.g., receive supply enquiries giving reasonable grounds for suspicion. Detecting undeclared nuclear activities – or providing credible assurance of their absence – requires an active partnership between them and the IAEA and states, and to the extent possible with relevant industry sectors as well.

Additional Protocol. Underpinning the program to strengthen safeguards is the Additional Protocol – a (voluntary) legal instrument complementary to safeguards agreements, introduced in 1997, which

establishes the IAEA's rights to more extensive information (on nuclear-related activity in manufacturing, exports and imports and the like) and wider access rights by inspectors (at nuclear sites, nuclear-related locations, and anywhere in a state to investigate “questions and inconsistencies” arising from information analysis). Of the 62 non-nuclear-weapon state NPT Parties with significant nuclear activities, 45 have an additional protocol in force and eleven have signed an additional protocol or had one approved by the IAEA Board – a total uptake of 90 per cent of such states.

This degree of acceptance demonstrates that the combination of a comprehensive safeguards agreement and an additional protocol represents the contemporary standard for NPT safeguards. It is of serious concern, however, that six non-nuclear-weapon states party to the NPT with significant nuclear activities (Argentina, Brazil, North Korea, Egypt, Syria and Venezuela) have yet to adopt the additional protocol, and that in addition Iran, which applied its additional protocol on a “provisional” basis from December 2003, has suspended cooperation under it since 2005. The Commission believes that, in order to encourage universal take-up of the additional protocol, all states should make acceptance of it by the recipient state a condition of their nuclear exports.

“Weaponisation” activities. An area of major importance concerns the IAEA's rights to investigate the range of possible nuclear activities, other than the acquisition of fissile material, necessary for the manufacture of a nuclear weapon or explosive device. Examples are the conversion of fissile material into metallic form and particular shapes; the development of high-explosive lenses, high-energy electrical components or high-flux neutron generators; implosion testing; and acquisition of certain non-nuclear materials significant in this context such as

The full text of *Eliminating Nuclear Threats: A Practical Agenda for Global Policymakers*, Report of the International Commission on Nuclear Non-proliferation and Disarmament, Co-chairs Gareth Evans and Yoriko Kawaguchi (November 2009), is available at www.icnnd.org

beryllium, polonium, tritium and gallium. Arguments about this arise because many of these activities may be dual-use. On a conservative view, the IAEA can only investigate activities where there is a “nexus” with nuclear material. The question is, what is a sufficient nexus? Since weaponisation activities indicate intended, if not actual, diversion of nuclear material, they are clearly encompassed by the IAEA’s responsibility under the NPT to provide timely warning of diversion. To the extent there may be doubts about the limits of the IAEA’s mandate in this area, these should be addressed by the IAEA and member states and the necessary action taken to resolve them, as next discussed.

“*Additional Protocol Plus*”. Concerns of this kind have led to suggestions that the current form of the additional protocol would benefit from further strengthening as to both reporting and access. On information, the additional protocol provides for amendment of its technical annexes by the IAEA Board of Governors on the advice of an open-ended group of experts. Inclusion of relevant dual-use items is one area that requires attention in this respect, and another is for states to report to the IAEA on export denials as well as export approvals. On further access, the issues include shorter notice periods, and the right to interview specific individuals: regarding the latter point there is a sound argument that this is already provided for in the IAEA’s Statute, but this should be put beyond doubt. At a minimum, the additional protocol’s annexes should be updated along the lines discussed here, and a strengthened version of it should be applied in cases of non-compliance, if necessary mandated by the Security Council.

Recommendations:

All states should accept the application of the Additional Protocol. To encourage universal take-up, acceptance of it should be a condition of all nuclear exports.

The Additional Protocol and its annexes should be updated and strengthened to make clear the IAEA’s right to investigate possible weaponisation activity, adding specific reference to dual-use items, reporting on export denials, shorter notice periods and the right to interview specific individuals.

With safeguards needing to move from a mechanistic to an information-driven system, there should be much more information sharing, in both directions, on the part of both states and the IAEA, with the agency re-evaluating its culture of confidentiality and non-transparency.

Compliance and Enforcement. The NPT is notable for having no executive machinery: in particular, no decision-making mechanism for determining compliance with the treaty. Effectively, this function is entrusted to the IAEA, through the agency’s conclusions regarding compliance with safeguards agreements. The IAEA and its processes bear directly on the effectiveness of the NPT, in that – whether or not this is usually articulated in so many

words – a finding of non-compliance with a comprehensive safeguards agreement amounts inherently to a finding that the state is in violation of Article III of the NPT (creating the obligation to accept safeguards), and also, depending on the evidence, Article II (not to seek or acquire nuclear weapons or explosive devices).

... [In determining compliance] It is important, if that credibility is to be maintained, that the IAEA confine itself essentially to technical criteria, applying them with consistency and credibility, and leaving the political consequences for the Security Council to determine. Issues of standard of proof become relevant here, and the IAEA has not helped itself by in practice setting the bar higher than its own standard safeguards agreements, which provide, for example, that a state may be found in non-compliance if the agency is not able to verify that there have been *no* diversions.

It is for the Security Council to decide on measures to enforce compliance, but so far it has shown itself to be either unable or very reluctant to take strong action. In the case of North Korea, for example, the Security Council was unable to reach a decision, and the matter was referred to the Six-Party Talks. In the case of Iran, key states have been reluctant to apply sanctions or other measures with any real bite. It is entirely appropriate that the Security Council exercise its own judgment in these cases, and be able to refrain from taking punitive action if it thinks there is a better chance of the matter in question being satisfactorily resolved thereby. But it conveys an unfortunate message if the starting assumption among Council members is apparently one of a degree of indifference to at least some kinds of safeguards violations. In this respect it is important, for the future integrity of the system, that the Security Council takes reporting violations and, in particular, failures to respond satisfactorily to requests for information, just as seriously as evidence of physical diversion of nuclear material.

A particular aspect of compliance and enforcement concerns the right given in the NPT for a state party to withdraw from the treaty. The concern is that a state might be withdrawing for the very purpose of diverting in future a civil nuclear program to production of nuclear weapons, and escaping in the process from having its treaty obligations enforced – because of the way current NPT safeguards agreements are drawn they, and the application of IAEA safeguards, lapse if the state in question withdraws from the NPT... Three basic responses have been proposed, all of which the Commission supports.

The first is for the UN Security Council (to which the NPT requires notice of withdrawal be given) to severely discourage such withdrawals by making it clear that withdrawal will be regarded as *prima facie* a threat to international peace and security, with all the punitive consequences that may follow from that under Chapter VII of the UN Charter.

A second response would be a declaration by the NPT Review Conference that a state withdrawing from the NPT is not free to use for non-peaceful purposes nuclear materials, equipment and technology acquired while party to the NPT, and that any such material provided before withdrawal should so far as possible be returned – with this being enforced by the Security Council. The basis for this would be the principle in the international law of treaties that withdrawal does not absolve a party from performing any obligations that accrued prior to a valid exercise of its right to withdraw. There is an international expectation that nuclear material and items acquired by a state while party to the NPT, certainly from another state where there is a peaceful use expectation on the part of the supplier, will be used only for peaceful purposes...

A third response to the withdrawal problem would be for states to make it a condition of nuclear exports that the recipient state agree that, in the event it should withdraw, safeguards shall continue with respect to any nuclear material and equipment provided previously, as well as any material produced by using it.

Recommendations:

In determining compliance, the IAEA should confine itself essentially to technical criteria, applying them with consistency and credibility, and leaving the political consequences for the Security Council to determine.

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Strengthening the IAEA. States must be prepared to take further steps to strengthen the agency's *authority*

when deficiencies are identified. As a corollary of this, the IAEA must be prepared to make full *use* of the authority available to it. An illustration of reluctance to do so is the lack of use of special inspections, available where it considers that information provided by the state is not adequate for the agency to fulfil its responsibilities, a procedure which was last invoked in 1993. On *staffing*, significant expansion of the IAEA skills base is going to require more readiness on the part of national authorities and commercial firms to second their staff, more budgetary support to ensure positions offered are competitive, and more training opportunities through collaborative arrangements with universities and research centres around the world. On *funding*, the IAEA's arrangements, with many governments continuing to insist on zero real growth, must be broken out of the UN agency mould... with a one-off increase to refurbish the agency's Safeguards Analytical Laboratory, and a growing regular budget, estimated as needing to perhaps double by 2020.

Recommendations:

The IAEA should make full use of the authority already available to it, including special inspections, and states should be prepared to strengthen its authority as deficiencies are identified.

If the IAEA is to fully and effectively perform its assigned functions, it should be given, as recommended in 2008 by the Zedillo Commission:

- a) a one-off injection of funds to refurbish the Safeguards Analytical Laboratory;
- b) a significant increase in its regular budget support, without a "zero real growth" constraint, and so as to reduce reliance on extra-budgetary funding for key functions;
- c) sufficient security of future funding to enable medium to long-term planning; and
- d) support from both states and industry in making staff secondments and offering training opportunities.

Consideration should be given to an external review, by the Zedillo Commission or a successor panel, of the IAEA's organizational culture, in particular on questions of transparency and information sharing.

[Section 9, Recs 5-14]