Contextual Syntax of International Instruments Safeguarding Against Nuclear Proliferation

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The Nuclear Non-Proliferation Treaty has provided an important structure for the international transfer of peaceful nuclear technology. A voluntary commitment to the International Atomic Energy Agency safeguards and NPT adherence provide assurances that the civil nuclear technology is used for legitimate peaceful purposes.[1] However, it cannot be unequivocally accepted that "the treaty has enhanced the international security by diminishing regional tensions, pre-empting regional nuclear arms races, and diminishing the role of nuclear weapons as symbols of national prestige".[2] Many unsettled issues within and outside the NPT regime contradict the US viewpoint. These issues include the amendment of Article V1A2 of the IAEA Statute relating to the membership of the Board of Governors from the third world and the continuous pendency without any outcome of the issue of the Israeli attack on the Iraqi nuclear installations. Furthermore these contentious issues include the role of the IAEA Committee on Assurances of Supply (CAS), its apparent failure to achieve the results desired by the International Nuclear Fuel Cycle Evaluation (INFCE) and *a fortiori* the concern shown by certain countries with regard to the degree of compatibility of existing safeguards agreements with the provisions of the Agency Statute.

This paper is concerned with some of the issues relating to the interpretation of safeguards treaties and other international instruments including NPT, with special reference to the Vienna Convention on the Law of Treaties (VCT) and the role of international lawyers. Specific examples of imprecise treatment of international instruments are provided to emphasise the point. There are political and diplomatic overtures to many of the issues raised in this paper. This paper does not cover these questions leaving them to be sorted out by those experts in these fields, and concentrates purely on the legal issues with suggestions in certain areas where there is scope for reform.

The context of the instruments

The basic source of the present IAEA safeguards system is Article XII of the Agency Statute. It applies *inter alia* to any Agency Project Agreement or arrangements "where the Agency is requested by the parties concerned to apply

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1 For the sake of brevity hereinafter NPT will mean the Nuclear Non Proliferation Treaty and IAEA and the Agency will mean International Atomic Energy Agency and VCT will mean Vienna Convention on the Law of Treaties. The author acknowledges and appreciates the views on an earlier draft of this paper given by Prof Riesenfeld of University of California, Hastings College of Law at San Francisco and Emeritus at Berkeley Campus.

2 INFCIRC/280 (Information received from USAA on the tenth anniversary of the NPT).

safeguards". It establishes the basic parameters of the control system. The safeguards system is set forth in a document entitled "The Agency Safeguards System" 1965 (as provisionally extended in 1966 and 1968) referred to as INFCIRC/66. With the signing of the NPT every non-nuclear-weapon party to it must agree to accept IAEA safeguards on all sources of special fissionable material in all peaceful nuclear activities within its territory, under its jurisdiction or carried out under its control anywhere and must conclude agreements to this effect with the IAEA.[3] Furthermore, parties to the NPT are prohibited from transferring "source or special fissionable material" or "equipment" to any non-nuclear-weapons State for peaceful purposes, unless it is subject to IAEA safeguards.[4] The Agency's Board of Directors have, for this purpose, devised a document INFCIRC/153 embodying standard NPT safeguards provisions. According to INFCIRC/153 the object of the IAEA safeguards is to deter the "diversion of significant quantities of nuclear material from peaceful nuclear activities to the manufacture of nuclear weapons or of other nuclear explosive devices or for purposes known" through the timely detection of any such diversion.

Regardless of whether or not the parties are members of the IAEA, the Safeguards Agreements can be made as long as the standard NPT safeguards provisions are adhered to. These basic safeguards requirements are overlapping but similar to the regional treaties establishing OPANOL (Tlatelolco Treaty) and European Atomic Energy Community (Euratom). These safeguards therefore, for their application, require an agreement and IAEA cannot on its own motion apply these controls. The Statute, the safeguards document and the standard safeguard provisions have no meaning unless an Agreement is concluded between the IAEA and a particular country specifically incorporating document 66 or 153.[5]

Application of VCT to the IAEA statute

It may be noted that Article 102 of the UN Charter (which is older than the VCT), requires the registration of every "treaty" and "international agreement" and the implementing regulations adopted by the General Assembly apply to "every treaty or international agreement, whatever its form and descriptive name". Hence it may be necessary to pose the question what is a "treaty". The VCT adds a requirement to the definition of a treaty, that is, the agreement must be "governed by international law". It will be difficult to argue that a constitutional instrument (IAEA Statute) is of a non-binding character. The *travaux preparatoires* of the VCT (which is non-retrospective) confirm the conclusion that non-binding agreements were intended to be excluded from the

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3 Articles III1, III4, of the Non-Proliferation Treaty.

4 Article III2, ibid.

5 For further details on the subject see, Fisher D A V and Szasz P C, *Safeguarding the Atom: A Critical Appraisal*, (1985); Szasz P C, *The Law and Practice of the International Atomic Energy Agency*, (1970) pp 558–559 Fisher D A V, *The Non-Proliferation of Nuclear Weapons* (1970) Edwards, "International Legal Aspects of Safeguards and the Non-Proliferation of Nuclear Weapons", (1984) 33 ICLQ 1; and Kelly P, *Safeguards in Europe* (1985).

Convention on the ground that they are not "governed by international law".[6] Article 5 of the VCT states that "the Convention applies to any treaty which is the constituent instrument of an international organisation and to any treaty adopted within an international organisation without prejudice to any relevant rules of the organisation". Since 1969, authors have emphasised the declaratory nature of the VCT, without doubt on account of the persuasiveness of the VCT which, in turn, stems from its scientific and political authority. Some studies have described the whole VCT as "part and parcel of contemporary international law", others state that the VCT is codificatory "for the most part" or that it "will evolve as a whole into general international law...within the not too distant future". Many authorities qualify the VCT as only "in part declaratory and in part a deliberate exercise in progressive development", and it comes as no surprise that Part V is often cited as the most radical innovation in the Convention".[7] Be that as it may, customary international law has not been fully superseded by the VCT.

The Statute is stated to be a general international agreement or treaty. Particularly because IAEA was not established within the United Nations system by means of a resolution of the General Assembly or the Security Council, it is outside the control of Security Council veto.[8] Although IAEA is not strictly speaking a specialised agency under Article 63 of the UN Charter it has concluded a specialised agency agreement with the United Nations.[9] Furthermore, pursuant to Article 96.2 the UN Charter, the General Assembly has authorised the IAEA and fourteen UN specialised agencies to request advisory opinion of the International Court of Justice.[10] Similar powers are granted to the European Court by the EEC and Euratom treaties.[11] The Statute could be treated as a law making treaty as opposed to a purely contractual treaty and therefore falls within the purview of the VCT. The European Atomic Energy Community (Euratom) was also established by a treaty.[12] Whereas both the European Nuclear Energy Agency (replaced by NEA) now (OECD)NEA and the Inter-American Nuclear Energy Commission (IANEC) were established by resolutions of their parent organisations,[13] the text of the IAEA Statute was

6 Henkin L, Pugh R C, Schachter O, Smit H, *International Law, Cases and Materials*, 2nd ed (1980), p 588. Also see Sinclair, "The Vienna Convention on the Law of Treaties: The consequences of participation and non-participation", (1984) Proc ASIL 270.

7 Villiger, *Customary International Law and Treaties*, (1985) pp 309-310.

8 Szasz, note 5 above, p 71.

9 Zacklin R, *The Amendment of the Constitutive instruments of the United Nations and Specialised Agencies*, (1968), p 3.

10 See Schwebel, "Authorising the Secretary General of the United Nations to Request Advisory Opinions of the International Court of Justice", (1984) 78, AJIL 869.

11 EEC Article 177 and Euratom Article 103. For the difference between these two provisions see Gray, "Advisory Opinions and the European Court of Justice" (1983) 8 Eur Law Rev 24 at 31–32. Cf Szasz, "Enhancing the Advisory Competence of the World Court", in Gross L (ed), *The Future of the International Court of Justice* (1976), Vol II, p 499..

12 (1958) 298 UNTS 167.

13 See Szasz, note 5 above, p 88.

adopted unanimously on 23 October 1956 by the Conference on the Statute in which 81 of the 87 invited states participated.[14] It may however be noted that there is a view that "international agreements conducted between states and other subjects of international law (for example international organisations) and between such other subjects of international law" are not within the scope of the Convention.[15] This view is confirmed by the adoption of the Vienna Convention on Treaties Between States and International Organisations and between International Organisations.[16]

Compatibility of safeguards agreements and the agency statute

A specific issue was raised by Argentina and in this respect in 1983 a document[17] was released by the IAEA Board. Argentina was not satisfied with the Agency's stance on the specific issue relating to the degree of compatibility between the provisions of the safeguards agreements in force and the Statute as regards the statutory legitimacy of non-explosive military applications of the nuclear material subject to the Agency's safeguards system. A question that arose for determination by the board of Governors was the discrepancy in language between the English text of the Statute and the equally authentic French, Russian and Spanish texts. It was conceded in the said document[18] that the English text "does not require that the objective of safeguards under all safeguards agreements must be that specified for project agreements as the term "safeguards" in the second part of Article IIIA5 does not explicitly refer back to the safeguards required in respect of Agency projects". A literal translation into English of the French, Russian and Spanish texts, however, would authorize the Agency... "to extend the application of *these* safeguards..." (i.e. the safeguards referred to in the first part of Article IIIA5). The document then relied upon Article 6 of the VCT which codified the law of interpretation of treaties.[19]

14 Ibid, p 71.

15 Art 3. See, "The Vienna Convention on the Law of Treaties", (1973), p 8. Sinclair I, Oceana 8. Cf Kearney and Dalton, "The Treaty on Treaty", (1970) 64 AJIL 495 at 504-506, Cf Zemanek P (ed), Agreement of International Organisations and Vienna Convention on the Law of Treaties (1971).

16 1986 ILM 543.

17 GOV/INF/(number withheld).

18 Ibid.

19 Ibid. Cf Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals" (1961) 37 BYBIL 72; International Law Commission, Draft Articles on the Law of Treaties, Yb ILC 1966, Vol 2, pp 224–226; Haraszti G, "Some Fundamental Problems of the Law of Treaties"; (1973), p 183. It was laid down by the EEC Court that in the case of divergence of plurilingual versions the provision must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part: Case 30/77, *Regina v Bouchereau*, [1977] 2 CMLR 800; [1977] ECR 1999; CMR 8441. The Tribunal in Arbitration Case (59 1LR 494) for the Agreement on German External Debts in resolving the discrepancy between multilingual treaties, used the "object and purpose" of the treaty (Article 33.4) of the Vienna Convention). Article 33.1 of the VCT stated that in a plurilingual treaty all the authentic texts were to be held equally authoritative, and no special weight could be attached to one text. The Tribunal, however, observed that Article 33.4 of the Vienna Convention (the object and purpose provision) superseded some of the traditional principles of interpretation,

According to VCT the treaties are firstly to be interpreted in accordance with the ordinary meanings and if that fails to clarify an ambiguity, supplementary or extrinsic means of interpretation including the preparatory work on the treaty shall be used.[20] Moreover, relying upon Article 31.3 (b) of VCT it was argued that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation shall be taken into account". It was concluded that using the preparatory material viz a discussion of the preparatory work on Article IIIA5 of the Statute and the Conference on the Statute, the English text of Article IIIA5 reflects the intention of the parties. It was argued on the other hand, by the Argentine delegate that the English text did not refer explicitly to "another class of safeguards" therefore the Board's assertion was premature: and that the VCT could not be relied upon to remove the discrepancy between the English text and the others. Alternatively it was maintained that the use of preparatory work as an aid to interpretation was allowed by the Convention as a last resort.[21]

The second set of issues raised by Argentina and replied by the Board related to the Blue Book.[22] The Board in the document[23] addressed itself to the following questions:

(a) the nature of the basic undertaking under safeguards agreements in connection with NPT;

(b) the position of existing safeguards agreements based on INFCIRC/66/REV 2 after the conclusion of an INFCIRC/153-type safeguards agreement covering all nuclear material in all peaceful nuclear activities of the State concerned; and

(c) provisions to deal with the situation where nuclear material is to be

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such as the precedence of the original text, the lowest "common denominator" or the precedence of the most unambiguous text. In the case, however, the dissenting opinion of Prof Karl Arndt ascertained the true object and purpose of the disputed clause from the original language in which its *travaux preparatoires* were drafted (at 580). Examine the views of Villiger, note 7 above, pp 340-341 on this case. On Article 33 generally, also see Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties", (1970) 11 Harv ILJ 400. The author points out some of the weaknesses of Article 33.

20 See Article 32: Cf Villiger, note 7 above, pp 343-346. It can be assumed (in spite of earlier raising the question) that the Argentine delegate conceded the application of Vienna Convention to the IAEA Statute.

21 See Article 32; "In order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable". The order of priority, it was argued, was literal interpretation, 'object and purpose' interpretation and thereafter the extrinsic material interpretation; consequently the document's conclusion placed disproportionate emphasis on the preparatory work. The Argentine delegate also attacked the arguments of the Board based upon the preparatory work. It seems the Argentine legal advisors had done their homework in the 1977 Beagle Channel Arbitration (1978) 52 ILR 268 and in a Note alleged that the VCT "has codified some of the rules of common law and has even laid down a certain order of priority among them". (at 273); Cf Villiger, note 7 above, p 339.

22 INFCIR/153.

23 In GOV/INF/, above note 17.

transferred from a peaceful nuclear activity—which requires the application of safeguards under Article III of NPT—to a military activity which is not prescribed by NPT (eg Military nuclear propulsion) and which does not require NPT safeguards.

The conditions for the termination of safeguards, the non-application of safeguards and the duration of safeguards are not identical. Three broad categories of agreements with different sets of conditions can therefore be distinguished, that is to say INFCIRC/66/Rev2-type agreements. INFCIRC/153-type agreements, and voluntary-offer agreements.[24] It was stated that during the preparatory work on INFCIRC/153 it was agreed that there was no need to repeat such an undertaking to the Agency in respect of INFCIRC/153-type agreements.

It was concluded by the IAEA that on the question of compatibility between the objective of safeguards in connection with NPT and Statute "the Statute does not require that the objective of safeguards to be applied in the NPT context must be identical with that of Agency Project Agreements". Such Agreements require an undertaking by the member State "that the assistance provided shall not be used in such a way as to further any military purpose"[25] and that the project shall be subject to safeguards designed to ensure that relevant items "are not used in such a way as to further any military purpose".[26] It was finally concluded that the preparatory work on INFCIRC/153, the statutory authority of the Board in "respect of the safeguards and the subsequent practice of the Board over many years constitute conclusive guidance for the position that basic undertaking under INFCIRC/153-type agreements is fully compatible with the Statute".[27] Consequently it was maintained that the nuclear material, equipment and facilities covered by an INFCIRC/66/Rev2-type agreement cannot be legally used for military purposes, not prescribed by NPT, even after the application of safeguards has been suspended on the basis of the provisions of INFCIRC/153. It was maintained *a fortiori* that there is no incompatibility between INFCIRC/153-type agreements or voluntary offer-type agreements and the Statute.

It was, however, argued by the Argentine delegate that Article III1 of the NPT containing the obligations with respect to the safeguards requiring non-nuclear-weapon States to accept safeguards with a certain objective and coverage refers to the Agency safeguards system in the singular, thus suggesting that one system existed rather than three as argued by the Board. An attempt was therefore made by the delegate to argue that the NPT does not state

24 The INFCIRC/66/Rev2-type agreements provide that none of the items subject to the agreement "shall be issued for the manufacture of any nuclear weapon or to further any other military purpose or for the manufacture of any other nuclear explosive device". The obligation of non-nuclear-weapon States not to use nuclear material for the manufacture of any nuclear explosive device forms part of the undertakings of NPT parties under Article II of the NPT.

25 Statute Article X1F4.

26 Statute Article IIIA5.

27 Cf McGinley, "Practice as a Guide to Treaty Interpretation", 1985 Fletcher Forum, 210 at 230. The author argues that the practice "may be the work of expediency rather than principle; it may focus on immediate problems to the detriment of larger purposes".

that singular references include plural. It was further argued by the Argentine delegate that the Board's explanation in GOV/INF/(number withheld) is silent in respect of a fourth type of safeguards agreement under Article 13 of the Treaty for the Prohibition of Nuclear Weapons in Latin America.[28] The Argentine position on the use of the document INFCIRC/153 as a basis for the negotiation of safeguards agreements in connection with the Tlatelolco Treaty was to refuse totally to accept such a basis. Furthermore it was argued that it was necessary to take into account "the nature of the Basic understanding under safeguards agreements" in connection with the Tlatelolco Treaty which was quite different from the undertaking associated with NPT. It was alleged that the IAEA Secretariat also made no comment on the concern expressed by the Argentine delegation before the Board with regard to the possibility of developing and producing radiological weapons using materials subject to Agency safeguards under the sole condition that they did not originate from a project agreement.

The question of incompatibility of the Agency Statute and the Safeguards Agreements remains a burning issue and there is a need for the IAEA to release a comprehensive reply to the Argentine concerns especially after the adoption of the Vienna Convention of 1986. These concerns, as demonstrated above, have a bearing upon the IAEA Statute, the regional treaty as well as the whole object and purpose of the NPT safeguards system. The IAEA's reluctance to present a rejoinder to the Argentine arguments is not improving the situation. It is submitted that the Indian type of Peaceful Nuclear Explosions emanate as a result of such an approach and action is taken by way of devising exclusion clauses after the occurrence of an event as disastrous as the Chernobyl 'melt down'.[29] To avoid further uncertainty IAEA should, it is submitted, request the International Court of Justice to give advice on these issues so that an authoritative pronouncement resolves them. It is gathered that no such request has ever been made by the IAEA since the Agency was authorised to make such a request by the General Assembly.

Forensic syntax of treaties

Since the 1985 Review Conference on NPT in September 1985 failed to bear any fruit, some of the serious issues require special consideration. Some other 'minor' issues requiring attention are the peaceful nuclear explosions, South Africa's nuclear capabilities[30] and an earlier undertaking by South Africa[31] adhering to the spirit of NPT, and more importantly IAEA's omission to take proper care in drafting documents and agreements. Much has been said about the first issue which came in the limelight after India 'went nuclear' by carrying out what was described as a "peaceful nuclear explosion". At that time it exemplified a glaring lacuna in the drafting of bilateral treaties and other

28 "Tlatelolco Treaty" establishes a military denuclearised zone in Latin America. See Cobo, "The Tlatelolco Treaty: An Update", IAEA Bulletin, (1984) Vol 26, No 3, p 25; Rowles, "Nuclear Power and Non-proliferation: The view from Brazil", (1981) 14 Vand J Tr L 711 at 769-778.

29 Ramberg, "Learning from Chernobyl", (1986) Foreign Affairs 304.

30 GC (XXXVIII)/RES/423.

31 INFCIRC/314.

international instruments safeguarding against nuclear proliferation.

The Indian test did not contravene understandings transmitted by the Canadian government and a prevailing consensus on the meaning of the word "peaceful uses".[32] Since that incident the bilateral and multilateral arrangements have by use of different clauses purported to exclude the possibility of nuclear explosions. This paper does not propose to look into the issue of peaceful nuclear explosions in any detail. But an issue may be raised regarding IAEA's neglect in taking adequate care in drafting particularly the trilateral agreements. A specific example may prove the point. The trilateral agreement between the IAEA, the Government of the Federal Republic of Brazil and the Government of the Federal Republic of Germany for the application of safeguards of 26 February 1976[33] contains an Article 2 that reads: "The Government of the Federal Republic of Germany undertake that none of the (following) items shall be used for the manufacture of any nuclear weapon or to further any other military purpose or for the manufacture of any other nuclear explosive device...". The provision relates to an undertaking apparently banning the nuclear explosions by the recipient country. It does not, however, mean what it appears to suggest if the general words "any other nuclear explosive device" are read *ejusdem generis*.

Ejusdem generis

This rule of construction of documents, statutes and treaties results in a more restrictive interpretation of the general words. This syntactical presumptive rule of construction suggests that where a list of two or more specific words, or groups of words, is followed by more general words or groups of words, then the otherwise wide meaning of the general words is restricted to the same class of genus, if any, of the specific words that precede them. This presumption can be rebutted or excluded by either creating a very wide (or no class) of genus of specific words, by the content in which the general words appear, by some extrinsic material or by express exclusion by use of the words like "without limiting the generality" of the general words. If one examines Article 2 in the light of this statement of the *ejusdem generis* rule and its implied rebuttal, the specific words "nuclear weapon" and "military purpose" can be seen to have a common genus namely non-peaceful use. Hence the provision cannot escape

32 Lawrence, "The Nonproliferation Role of the International Atomic Energy Agency, A critical agreement", A Study from Resources for the Future, (1985), p 45. The use of the words "exclusively for peaceful purposes" as contained in the negotiating texts of the Law of the Sea Conference has also lead to controversy. See Treves, "Military Installations, Structures, and Devices on the Seabed", (1980) 74 AJIL 808 at 815-819. For a recent analysis of the "peaceful purposes" ambiguity, see Dore, "International Law and the Preservation of the Ocean Space and Outer Space as Zones of Peace: Progress and Problems", (1985) 15 Cornel Int L J 1; cf Zedalis, "Peaceful Purposes and other Relevant Provisions of the Revised Composite Negotiating Text: A Comparative Analysis of the Existing and the Proposed Military Regimes for the High Seas" (1979) 7 Syracuse J Int L & Comm I; Philip, "The South Pacific Nuclear-Weapon Free Zone, The Law of the Sea, and the ANZUS Alliance: An Exploration of Conflicts, A Step towards World Peace", (1986) 16 Cal W Int L J 138 at 172-173.

33 INFCIRC/237.

being encompassed by the *ejusdem generis* rule with the consequence that the general words "any other nuclear explosive device" degeneralise themselves by getting special meanings "any other nuclear explosive device for non-peaceful or 'offensive' purposes alone". The effect of the existing provision in the agreements, amounts to allowing the recipient country to detonate nuclear explosion for peaceful purposes. It seems that it was this mischief that was to be remedied by Article 2; however the language used in the Agreement may have had the opposite effect.[34] If it is going to be implemented, the Brazilian reprocessing plant agreement, it is submitted, needs revision by addition of the words "without limiting the generality of". Though it is premature, it is hoped that further measures could be taken under the Vienna Convention on Treaties between States and International Organisations and between International Organisations which was adopted on the 20 March 1986.[35]

There are other examples of errors in the drafting of certain agreements whether trilateral or bilateral. These documents may have been drafted by bureaucrats or scientists without the assistance of legal experts in the law of interpretation of international treaties and therefore the end product is not precise enough to exclude all ambiguities.[36] "States as well as international scholars have a basic interest in clarifying the theoretical underpinnings of international legal theory in order that they may better determine whether the substantive legal lines are in fact drawn. A clear boundary, like a good fence, makes good neighbours".[37] Here it may be pointed out that the IAEA's failure to update the 'trigger list' resulted in the clandestine imports of krypton by certain 'near nuclear' countries. Mention may be made of a House of Lords decision, *Fothergill v Monarch Airlines Ltd*,[38] where Lord Wilberforce after

34 The France-Pakistani reprocessing plant agreement with identical clauses went into a legal 'limbo' because the two parties are afraid of admitting its continued legal validity. In the absence of an official notification from either government and in view of the ambiguous status of the notification clause, there was little the IAEA could do when it was alleged that Pakistan was building a reprocessing plant using the solvent extraction technique. See Fischer and Szasz, note 5above, pp 38-39. For a historical account, also see Sybesma-Knol, "The New Law of Treaties: The Codification of the Law of Treaties concluded between States and International Organisations or between two or more International Organisations", (1985) 15 Georgia J of Int & Comp L 425.

35 Ibid.

36 See Merillat H C L, *Legal Advisers and Foreign Affairs*, (1964), pp 3-14. Cf Plender, "In Praise of Ambiguity", (1983) 8 Eur LR 313. It is argued that the European Court will "be pardoned for its use of flexible language". The view should not be treated as final especially relating to the advisory opinions of the Court on interpretations of treaty obligations. Be that as it may, it is opined that international conventions tend to be more loosely drafted than municipal legislation and may sometimes require to be construed more flexibly. Munday, "The Uniform Interpretation of International Conventions", (1978) 27 ICLQ 51 at 57.

37 D'Amato, "Manifest Intent and the Generation by Treaty of Customary Rules of International Law", (1970) 64, AJIL 892 at 902.

38 [1981] AC 251. Cp *Ruling 1/78*, [1978] ECR 2171 (para 14) where the European Court praised the Euratom Treaty observing that it "shows the care taken in the treaty to define in a precise and binding manner the exclusive right exercised by

examining the *travaux preparatoires* concluded that both the French as well as the English texts of the Hague Protocol of 1955 (which amended the Warsaw Convention of 1929) were unsatisfactory.[39]

Contra proferentem rule and greater public knowledge

The rule of interpretation of documents *contra proferentem*, it is submitted, may be applied to the international treaties.[40] It is further submitted that during the negotiations of trilateral agreements if the draft agreement is provided by the IAEA, later on as a consequence of an ambiguity (applying the *contra proferentem* rule), it might be resolved against the Agency (and/or the supplying country) and in favour of the recipient country. The issue of oversight by the IAEA in drafting the precise documents is not confined to a particular area but is of a general nature. It is suggested that all IAEA documents be made available to the public and the observers before they are finalised, so that the readers, researchers, lawyers and other concerned groups are able to scrutinize and help bring them in conformity with the established norms followed by the non-proliferation regime.

Similar initiative should be taken at the domestic level. On the issue of greater public knowledge and freedom of information, ASTEC made positive recommendations that "the Australian Government seek agreement with its bilateral partners to make public the texts of the administrative arrangements in such a way as to avoid adverse implications of physical protection and commercial confidentiality".[41] It is regretted that despite assurances by the Prime Minister on 23 May 1985 in the Australian Parliament (though the Government accepted Recommendation 15 of the Australian Science and Technology Council[42] (ASTEC) which allows to the public the texts of the

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the Community in the field of nuclear supply in both internal and external relations"..

39 Also see Alex, "The Construction of International Conventions by the English Courts", (1983) J Bus L 373. Cf Schruer, "The Interpretation of Treaties by Domestic Courts", (1971) 45 BYIL 255; Sinclair, "Treaty Interpretation in the English Courts", (1963) 12 ICL 508.

40 *Iran v United States, Case A/1*, (1982) 68 ILR 523 at 558; cf *Kingdom of Belgium v Federal Republic of Germany, Young Loan Arbitration*, (1980) 59 ILR 494, where it was laid down (at 549) that the "principle of *contra proferentem*...cannot stand...Whether the *contra proferentem* principle is in fact a generally accepted rule of international law and what the particular conditions are for its application need not, therefore, occupy the Tribunal". The 1982 decision does not specifically refer to the 1980 decision. Since the maxim *generalia specialibus non derogant* (also applied in municipal law) ensures that the later treaty would prevail, (Sinclair, note 15, pp 62, 69) it is submitted that the rules of *contra proferentem* and *ejusdem generis* contained in municipal laws will apply with equal force to the interpretation of international treaties.

41 ASTEC Report supra. The Report seemingly accepts the US Senate criticism recommending greater public knowledge. See Hearing on the US-Australian Agreement on the peaceful uses of nuclear energy, October 1979, 96th Congress, 1st Series, 1979, p 34.

42 Australia's Role in the Nuclear Fuel Cycle, A Report to the Prime Minister by the ASTEC, May 1984, AGPS; see Buttar, The Nuclear Fuel Cycle and the ASTEC Report, (1986) Aust Env & Planning L Jo 3.

Administrative Arrangements made under the treaty obligations) the Department of Resources and Energy has dumped the proposal by putting the ball in the court of other bilateral partners.

Ambiguity of Australian Agreements

Article IX of the Agreement between Government of Australia and Government of French Republic concerning the nuclear transfer between Australia and France reads in paragraph: 1. "Nuclear material subject to the Agreement shall only be reprocessed according to conditions agreed upon in writing between the Parties, as set out in Annex C".[43] Australia has also agreed to "take all appropriate precautions to preserve the confidentiality of commercial and industrial secrets and other confidential information received as a result of the operation of" the agreement. (Article XI.4) Annex C incorporated in the treaty by virtue of Article IX.1, has four Articles. Article 3 says that "the provisions of Article XI.4 of the Agreement shall apply to information included in the Implementing Arrangements referred to in Article 1(A) and 1(B) of this Annex". These Implementing Arrangements relate to the detailed conditions under which the nuclear material subject to the Agreement (NMSA) may be reprocessed. Similar combinations of provisions exist in treaties concerning nuclear transfer between Australia and other States. It is submitted that a question may arise whether Article 3 of the Annex can refer back to the main provision of the treaty and import the effect of confidentiality to an Annex. The second alternative question is whether the words "and other confidential information received as a result of the operation of this Agreement" appearing in Article XI.4 are *ejusdem generis* to the specific words "commercial and industrial secrets". If the answer to the second question is in the affirmative, the net effect of such an interpretation will be to place the non-commercial and non-industrial confidential information, received "as a result of the operation of" the Agreement, outside the scope of Article 3 of Annex C. This argument is in line with the ASTEC's recommendation as the savings in the recommendations are "adverse implications for physical protection and commercial confidentiality". This line of interpretation leads to two conclusions. Firstly it shows that there was an ambiguity in the drafting of the treaty and the Annex C. However, this assumes that the exceptions described above were unintentional. Secondly, it may mean that it is open for a researcher to apply for the copies of those parts of the Administrative/Implementation Arrangements which are of a non-commercial or non-industrial nature. Hence it is submitted that subject to the provisions of Section 33 this may be possible under the Australian Freedom of Information Act 1982 (Cth). However, the possibility of such a course may be imputed to the impreciseness of the drafting of the impugned treaty.

US-China nuclear agreement

Since the Indian claim over its purported right to process United States-supplied fuel at its Tarapur plant the United States Congress has become wary of

43 Agreement between the Government of Australia and the Government of the French Republic concerning nuclear transfers between Australia and France entry into force in September 1981, Australian Treaty Series 1981 No 23.

ambiguously-worded agreements. The Indian explosion of a "peaceful nuclear device" in 1974 made the United States Congress very sensitive to the question of nuclear non-proliferation, resulting in the passing of the Nuclear Non-proliferation Act 1978 which tightened the procedure for United States nuclear cooperation with other countries.[44]

Concern about ambiguously-worded agreements has deepened since the United States-China nuclear power agreement was signed. Initially, concern arose because of the failure of the administration to submit the text of the agreement to Congress even after the completion of a lengthy inter-agency review. Further unease became apparent after the State Department's announcement on 15 June 1984 that the United States "wants to be sure that we have taken all the necessary steps to ensure a full mutual understanding with the Chinese on matters relating to implementation of the agreement".[45] It is also claimed that the actual wording, tailored to satisfy China's concern about its sovereignty, is less explicit than many United States law-makers would like. Instead of United States inspection of Chinese facilities, the agreement called for "visits", and instead of a unilateral Chinese commitment to obtain United States consent for reprocessing of fuel and transfer of nuclear technology, the agreement provided for prior mutual agreement. The formulation of the United States inspection and consent right is also unorthodox and vague. Although the United States law did not require China to make any written statement pledging non-proliferation, it did require the President of the United States to make a determination that China, is not aiding or encouraging nuclear proliferation. In a major report on the US-China nuclear agreement, the Congressional Office of Technology Assessment (OTA) also expressed concerns about the concessions made to China by the White House. The report points out that the agreement "does not state explicitly that US permission (for reprocessing) is required. Instead it states that neither party has any plans to reprocess fuel supplied under the terms of the agreement and makes provision for a two-stage consultation process should the plans of the parties change".[46] As with the provision on

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44 See Schorr, "Testing Statutory Criteria for Foreign Policy: The Nuclear Non-Proliferation Act of 1978 and the Export of Nuclear Fuel to India" (1982) 14 Int Law and Pol 419.

45 *Far Eastern Economic Review*, 28 June 1984.

46 US Congress, OTA, Energy Technology Transfer to China, A Technical Memorandum, OTA-TM-ISC-30 (1985), pp 41-42. Cf Article 5 of the Agreement on retransfer and consent rights" ibid pp 71-73. Also see "Nuclear Energy Cooperation with China", hearing before the Special Sub-committee on US Trade with China of the Committee on Energy and Commerce, House of Representatives 98th Congress, Second Session May 16 1984, Serial No 98-148, and the Statements of Hon Richard T Kennedy, Ambassador-at-large and special advisor to the Secretary of State on Nonproliferation Policy and Nuclear Energy Affairs and Michael J Matheson, Deputy Legal Adviser, Department of State given in a hearing before the US Senate Committee on Foreign Relations, "United States - People's Republic of China Nuclear Agreement", October 9 1985, (1986). The Deputy Legal Adviser advised that the agreement does not provide for IAEA Safeguards which are not required by either the Atomic Energy Act 1954 or the NPT, (at 181). According to him the requirements of Section 123A of the Atomic Energy Act are met by articles 10(2), 8(2) and 5(2) of the Agreement. Regarding

safeguards, ambiguity in the agreement may create problems of interpretation later. In spite of these concerns the controversial agreement got its endorsement in the US Senate in November 1985. Later on December 16 a joint resolution of the House of Representatives and the Senate on the approval and implementation of the Agreement was made creating further qualifications to the Agreement. These concerns were thereafter noted and measures were taken in article 2(b)(i)(c) of the Joint Resolution agreeing that:

> The obligation to consider favourably a request to carry out activities described in Article 5.2 of the Agreement shall not prejudice the decision of the United States to approve or disapprove such a request.[47]

The most vocal critic of the pact former Democrat John Glenn argued that the agreement does not put in writing any standards for verifying the peaceful use of US technology or materials exported to China.[48] Merely because China has finally joined the IAEA and has voluntarily offered to allow safeguards inspections should not be regarded as a sufficient guarantee since China possibly remains one of the two non-NPT nuclear supplying countries.

There is a need for greater involvement of lawyers in the area of non-proliferation and safeguard aspects since in the past the agreements may have been entered into without looking to the possibility of abuses.[49] In the above examples it is clearly demonstrated that the nuclear deals need to be made public at the drafting stage so that the errors could be pointed out and removed by greater involvement of expert advice available to the concerned citizens.

Advisory jurisdiction of international fora

Whereas it is settled law that the international courts will not have jurisdiction on purely hypothetical or general questions, the European Court was required to give an opinion under Article 103 of Euratom Treaty and determine its compatibility with the Convention on the Physical Protection of Nuclear Materials, Facilities and Transport.[50] There was a disagreement between the

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the prior approval on reprocessing as required by Section 123(a)(7) and (8) of the Atomic Energy Act, it is mentioned in the Legal Memorandum by the Executive Branch (at 208) that Article 5(2) "in no way mandates the result of that consideration", nor "undercuts the US prior approval right". The Chairman (at 213) raised the question if the language in the House report regarding the agreements being "unqualified" and "unambiguous" could be given the force of law. Conceding the argument it was asserted by Mr Matheson that the provision is unambiguous and unqualified although while giving the explanation he maintained that the agreement was merely "to agree" on reprocessing within six months. Cf Legal Memorandum of 9 and 20 September 1985 on the legal deficiencies in the agreement (at 267-289). The latter document (at 287) is at variance with the analysis of the Executive Branch claiming that the assertion on article 5(2) of the agreement is based "upon interpretation of 'understandings' *outside the text* and of which there is no public record".

47 Public Law 99-183, 99 Stat 1174, 99th Congress, December 16 1985.

48 Wilkinson, "US-China nuclear deal to go ahead", *The National Times*, November 29 - December 5 1985, p 8.

49 See Buttar, note 42 above at 16.

50 Opinion I/78, *Re the Draft Convention on the Physical Protection of Nuclear Materials, Facilities and Transport*, (1979) 1 CMLR 131.

Council and the Commission on the question whether, in the absence of concurrent participation of the European Community, Belgium could adhere to the Convention.[51] The Ruling enhances the internal competence of the European Community as a result of participation in an international agreement.[52] Be that as it may, using its advisory jurisdiction, a genuine controversy was resolved by placing an interpretation of the Euratom Treaty and a draft Convention. There is obviously a need for such a forum to give rulings on similar matters. The question that may be posed is: whether in exceptional cases such a jurisdiction be bestowed *suo moto* on the international courts.[53] By way of example attention may be drawn, as stated above, to the issues raised by the Argentinian representative in the IAEA. These matters could be of general importance to the human race and by timely determination of the issues, grave threats to the international peace could be averted.

Revision of nuclear safeguards arrangements

The US Nuclear Non-proliferation Act 1978 required the renegotiation of virtually all of the nuclear cooperation agreements between the US and other states to ensure the existence of adequate safeguards on transferred technology and materials. Apart from the US Act of 1978 there is an argument in general international law based upon *jus cogens* to renegotiate the existing treaty obligations to strengthen the safeguards. The basic proposition of *jus cogens* is the existence of certain fundamental legal norms that an individual state may not amend by agreement and hence an act or agreement in violation of a *jus cogens* norm is illegal. *Jus cogens* norms are generally seen as those most fundamental to the international community, and all parties to the VCT accepted the basic concept of *jus cogens* which is incorporated in Article [53] of the convention. Nuclear weapons non-proliferation is undisputedly treated as a moral issue. The importance of non-proliferation to international peace and order, and general international acceptance of the concept of non-proliferation satisfies the criteria of *jus cogens*. Thus non-proliferation serves the international interest in maintaining peace and order, and in doing so, nuclear weapons non-proliferation also satisfies the criteria of a *jus cogens* norm.[54] However, the edifice of the entire argument of nuclear *jus cogens* is built upon the link between the sale of peaceful nuclear technology and the production of nuclear weapons.

If the nuclear *jus cogens* is taken to be an existing norm as part of the

51 Gray, supra 35. Also see Simmonds, "The Evolution of the External Relations Law of the European Economic Community", (1979) 28 ICLQ 644 at 663-664; Convention on the Physical Protection of Nuclear Material Legal Series No 12, IAEA, Vienna 1982. Usher, "International Competence of Euratom", (1979) 4 E L Rev 300.

52 See, ibid, at 307.

53 Cf Chapter II Competence of the Court, Articles 34-38 (especially Article 36.1 & 36.6) of the Statute of the ICJ; and Rosenne S, "Procedure in the International Court", (1983) pp 261-266.

54 Gangl, "The Jus Cogens Dimensions of Nuclear Technology", (1980) 13 Cornel Int L J 63. Also see Sztucki J, *Jus Cogens and the Vienna convention on the Law of Treaties, a Critical Appraisal*, (1974); and Rosenne S, *Breach of Treaty* (1985), pp 62-64.

international law it is submitted that for the purposes of strengthening the safeguards, as a preventive measure, the existing safeguards which form part of the bilateral agreement can be revised. Furthermore the 'content' of *jus cogens* will invalidate a treaty which contemplates an unlawful use of force contrary to the principles of the UN Charter.[55] Treaty obligations must be complied with, yet if the compliance of nuclear supply arrangements are inimical to the world order the obligations need to be terminated or modified.[56]

Although on different considerations, for example, under Article 101.2 of the Euratom Treaty, the Commission was directed to revise its agreement with Canada.[57] There is further agreement to revise Chapter VI of the Euratom Treaty.[58] Furthermore Working Group 3 of INFCE (in Sub-section 4.2.3) stated that if a party to a bilateral agreement wished to seek the renegotiation of non-proliferation conditions it was desirable that subject to certain conditions means be devised to achieve such negotiations equitably. Consequently in 1983 Australia released details of such "revision mechanisms" in IAEA's Committee on Assurance of Supply arguing for the acceptance of a common approach, inter alia, to ensure "the long-term needs of the nuclear fuel programmes of customer countries".

Conclusion

The issues raised above, are matters of grave concern for all those who believe in non-proliferation. The lack of effective controls within or outside the NPT regime may be contributing towards further tensions in the Middle East and Latin America. Positive steps should be taken to help the NPT regime by persuading the 'near nuclear' states to join the regime. The IAEA Statute needs to be made more compatible with the various IAEA documents and other international instruments designed to promote nuclear non-proliferation. Since degree of confusion in international agreements of this type can retract from this effectiveness, states and international agencies should invoke the jurisdiction of the International Court and the European Court in order to obtain a proper interpretation of the relevant treaties whether multilateral or bilateral. The legal lines should be laid with sufficient clarity to minimise mistakes which may lead to military conflicts or possible nuclear escalation. It is hoped that this

55 Sinclair, op cit 121.

56 Szegilongi, "Unilateral Revisions of International Nuclear Supply Arrangements", (1978) 12 Int Lawyer, 857. Problems can also arise with regard to incompatibility of joint defence pacts and nuclear free policies when revision of treaty obligations becomes imperative. Cf Daughton "The Incompatibility of ANZUS and a Nuclear-Free New Zealand", (1986) 26 Virginia J Int L 457. There is a further view that "a truly effective nuclear control system, supported by sanctions, would require that all these diverse elements, from undertaking to safeguards to decision making to sanctions to burden-sharing, be set out in a single, integrated treaty instrument": Szasz, "Sanctions and International Nuclear Controls", (1979) Connecticut L Rev 545 at 580.

57 Cusack, "External Relations of the European Atomic Energy Community in the Fields of Supply and Safeguards, Background and Developments in 1982 and 1983", (1983) 3 Yb Eur Law, 347-369

58 Compare Allen, "Euratom Treaty Chapter VI: New Hope or False Down", (1983) CML Rev 473.

will enable the IAEA better to play its role and to resolve the underlying conflict between the development of peaceful nuclear technology and the increasing availability of the means for producing nuclear weapons.[59]

59 See Greig, "The Interpretation of Treaties and Article IV.2 of the Nuclear Non-Proliferation Treaty", (1978) 6 Aust YBIL 77.

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