Meeting of the Board of Governors March 2009

Statement by the Legal Adviser

QUESTION

How does the Secretariat qualify in legal terms:

(a) Iran's consistent refusal to grant access to IR-40 in view of its safeguard obligations;
(b) Iran's non-implementation of code 3.1 modified; and
(c) Its refusal to provide design information since December 2007 for the nuclear power plant to be built at Darkhovin.

ISSUE

In considering the legal implications for Iran's obligations under its Safeguards Agreement, there are essentially two issues that should be addressed:

(i) Firstly, its non-implementation of the modified text of Code 3.1. of the Subsidiary Arrangements General Part it agreed to in February 2003 by:

(a) its failure to provide updated design information for the Iran Nuclear Research Reactor (IR-40) at Arak, and

(b) its lack of formal declaration of, and submission of design information for, the facility publicly announced by Iran as planned for construction at Darkhovin.

(ii) Secondly, its continued denial of access by the Agency to carry out design information verification (DIV) at the IR-40.

ANALYSIS

Submission of Design Information

1. The operative treaty obligation is set out in Article 8 read with Article 42 of the Iran's Safeguards Agreement. The latter requires that design information *"be provided as early as possible before nuclear material is introduced into a new facility."* In its letter dated 26 February 2003, Iran agreed to the modified Code 3.1, which provides that preliminary design information for new facilities are to be provided "*as soon as the decision to construct or to authorise construction has been taken, whichever is earlier*". In its letter dated 29 March 2007, Iran indicated that it intends to revert to providing design information in accordance with the old version of Code 3.1, which required design information to be provided not later than 180 days before the introduction of nuclear material into a facility.

2. As the Director General stated in his report to the Board in May 2007 (GOV/2007/22, paras 12–14), the implementation of the provisions of Subsidiary Arrangements can only be amended or suspended with the agreement of both parties to them (see also the Director General's letter to Iran dated 30 March 2007, published in GOV/INF/2007/8). The provisions cannot be amended or suspended unilaterally by the State. Thus, Iran's failure to provide design information in accordance with the modified Code 3.1 as agreed to by Iran in 2003 is inconsistent with Iran's obligations under the Subsidiary Arrangements to its Safeguards Agreement.

3. As regards the planned power plant at Darkhovin, it has been announced in public statements by Iranian officials that the Government of Iran has decided to construct a power plant at that location. Again, contrary to its obligation under the modified Code 3.1 to provide preliminary design information for the new facility "*as soon as the decision to construct or to authorise construction has been taken, whichever is earlier*", Iran has not done so. This, too, is inconsistent with Iran's obligations under the Subsidiary Arrangements to its Safeguards Agreement.

4. While Iran's actions are inconsistent with its obligations under the Subsidiary Arrangements to its Safeguards Agreement, this should be seen in proper context. Given the fact that Article 42 is broadly phrased and that the old version of Code 3.1 had been accepted as complying with the requirements of this Article for some 22 years prior to the Board's decision in 1992 to modify it as indicated above, it is difficult to conclude that providing information in accordance with the earlier formulation in itself constitutes non-compliance with, or a breach of, the Safeguards Agreement as such. It should also be noted that currently more than 60 States with operative SQPs based on the old standard text for SQPs, and 27 States party to the NPT but without a CSA in force, are not yet bound by provisions similar to that in the modified Code 3.1.

Denial of Access for DIV

5. In its letter dated 13 April 2007, Iran, referring to its decision to revert to the old version of Code 3.1, stated that as a consequence of that decision, the scheduling of a DIV for a facility which was in its preliminary construction stage was not justified. This was reported to the Board by the Director General in November 2008(GOV/2008/59, para. 9).

6. As stated in that report, Code 3.1 relates to the timing of the submission by the State of design information to the Agency, and not to the frequency or timing of the Agency's verification of such information. Article 48 of Iran's Safeguards Agreement provides for the verification of design information. DIV is a continuing process, implemented at all facilities under safeguards, and is not dependent on the stage of construction of, or the presence of nuclear material at, a facility. The Agency has, therefore, pursuant to Article 48 of Iran's Safeguards Agreement, a continuous right to verify the design information which has already been provided to it by Iran regarding the IR-40 reactor.

7. Normally, the frequency of DIV depends on safeguards requirements. In the case of IR-40 it also provides an opportunity for the Agency to report, as requested by the Board and the Security Council, on the compliance or otherwise, by Iran with their decisions that Iran should suspend heavy water and reprocessing related activities.

8. Iran's refusal to grant the Agency access to carry out DIV is inconsistent with its obligations under its Safeguards Agreement. Although the construction of the IR-40 reactor is still some years away from completion, this refusal to grant access impedes the Agency's rights under the Safeguards Agreement and adversely impacts the Agency's ability to ensure that no diversion pathways are built into the facility. It also adversely impacts the effective and efficient implementation of verification activities once the construction of the reactor, with large hot cells suitable for reprocessing activities, is completed.

9. The Agency's Statute does not require that Member States of the Agency accept the application of safeguards as a condition of membership. The Agency's authority to implement safeguards in a particular state is executed by separate arrangements, normally through the conclusion of safeguards agreements on the bases of Article III.A.5 of the

Statute, which authorizes the Agency to apply safeguards, inter alia, *"at the request of the parties, to any bilateral or multilateral arrangement"*.

10. Article 19 of Iran's Safeguards Agreement provides that *"if the Board upon examination of the relevant information reported to it by the Director General finds that the Agency is not able to verify that there has been no diversion of nuclear material required to be safeguarded under this Agreement to nuclear weapons or other nuclear explosive devices, it may make the reports provided for in paragraph C of Article XII of the Statute..."* [emphasis added]. It is thus for the Board to consider and determine if any action by a State that is inconsistent with its Safeguards Agreement rises to a level where the Agency cannot verify that there is no diversion, in which case the Board has the option to take the actions set out in Article XII.C of the Statute, e.g. report the matter to the Security Council and General Assembly. The term *"non-compliance"* as used in the Statute has, in respect of safeguards agreements, no defined meaning other than its generic meaning and does not function as a trigger for any obligatory action by the Board. The Board's response may vary to fit the circumstances. The Board has acted accordingly in the past. In deciding on what that response might be, Article 19 of Iran's Safeguards Agreement requires that the Board take account of the degree of assurance provided by the safeguards measures that have been applied and afford Iran every reasonable opportunity to furnish the Board with any necessary reassurance.