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# TRANSFERRING U.S. BILATERAL SAFEGUARDS TO THE INTERNATIONAL ATOMIC ENERGY AGENCY: THE "UMBRELLA" AGREEMENTS*

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The United States as a leading nation in atomic resources and skill has for a long time championed the establishment of internationally administered controls to assure the peaceful utilization of nuclear power. Only for the lack of a generally acceptable agreement on such controls and in view of the early difficulties besetting the establishment of the International Atomic Energy Agency (IAEA)[1] and its safeguards system did American policy makers decide to give the green light to the conclusion of a series of U.S. bilateral accords with other nations.[2] While most of these agreements gave the United States certain safeguards rights to assure that the nuclear assistance provided would be used exclusively for peaceful purposes, at the same time, they envisaged the possible transfer

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1. For information and background material on the establishment of the IAEA, see Bechhoefer & Stein, *Atoms for Peace*, 55 MICH. L. REV. 747 (1957); Gorove, *Humanizing the Atom: Establishment of the International Atomic Energy Agency*, 3 N.Y.L.F. 245 (1957); Stoessinger, *Atoms for Peace: The International Atomic Energy Agency*, in ORGANIZING PEACE FOR THE NUCLEAR AGE 117 (1959).

2. Discussion and evaluation of the safeguards' procedures embodied in U.S. bilateral agreements with other nations may be found in Gorove, *Controls Over Atoms-for-Peace: U.S. Bilateral Agreements with Other Nations*, 4 COLUM. J. OF TRANSNAT'L L. 181 (1966); Seaborg, *Existing Arrangements for International Control of Warlike Material: The United States Program of Bilateral Safeguards*, 2 DISARMAMENT & ARMS CONTROL 442 (Autumn 1964).

of U.S. safeguards functions to the international agency.[3] However, the latter expectation failed to materialize for many years and it was not until some time after the policy recommendations of a special advisory committee were made public in what is known as the "Smyth Report"[4] that the first transfer arrangement between the United States, Japan and the IAEA was actually concluded in 1963.[5] This trilateral accord regarding the application of IAEA safeguards to the United States-Japan Cooperation Agreement[6] has now been followed by many similar agreements involving, for instance, such third countries as Argentina,[7] Austria,[8] Israel,[9] the Philippines,[10] the Republics of China,[11] South Africa[12] and Viet-Nam.[13] Others are likely to be concluded when the respective bilaterals come up for renewal, since the United States is expected to throw its full weight of persuasion into the balance to have its bilateral safeguards functions administered by the Agency.[14]

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3. For details, see Gorove, *Controls Over Atoms-for-Peace: U.S. Bilateral Agreements with Other Nations*, 4 COLUM. J. TRANSNAT'L L. 181, 200-3 (1966). Similar transfer provisions were included in the bilateral cooperation agreements included by the United Kingdom and Canada. See Gorove, *Controls Over Atoms-for-Peace Under Canadian Bilateral Agreements With Other Nations*, 42 DENVER L. CENTER J. 41 at 47 (1965); Gorove, *Safeguarding Atoms-for-Peace: U.K. Bilateral Agreements With Other Nations*, 68 W. Va. L. J. 263 at 271 (1966).

4. REPORT OF THE ADVISORY COMMITTEE ON UNITED STATES POLICY TOWARD THE INTERNATIONAL ATOMIC ENERGY AGENCY IN HEARING BEFORE THE JOINT COMMITTEE ON ATOMIC ENERGY, 86th Cong., 2d Sess. (1962).

5. Agreement between the IAEA, Japan and the United States, Sept. 23, 1963 (hereinafter cited as "Japan"), [1963] 2 U.S.T. 1265, T.I.A.S. No. 5429 (effective Nov. 1, 1963).

6. Agreement of June 16, 1958, as amended on October 9, 1958 and August 7, 1965, [1958] U.S.T. 1383, T.I.A.S. No. 4133; [1958] U.S.T. 70, T.I.A.S. No. 4172; [1964] 1 U.S.T. 282, T.I.A.S. No. 5553.

7. Agreement between the IAEA, Argentina and the United States, December 2, 1964, [1966] 1 U.S.T. 583, T.I.A.S. No. 6004 (effective March 1, 1966).

8. Agreement between the IAEA, Austria and the United States, June 15 and July 28, 1964, [1965] 2 U.S.T. 1836, T.I.A.S. No. 5914 (effective December 13, 1965).

9. Agreement between the IAEA, Israel and the United States, June 18, 1965, [1966] 1 U.S.T. 750, T.I.A.S. No. 6027 (effective June 15, 1966).

10. Agreement between the IAEA, the Philippines and the United States, June 15 and September 18, 1964, [1966] 2 U.S.T. 1271, T.I.A.S. No. 5879 (effective Sept. 24, 1965).

11. Agreement between the IAEA, the Republic of China and the United States, Sept. 21, 1964, [1966] 2 U.S.T. 1616, T.I.A.S. No. 5882 (effective Oct. 29, 1965).

12. Agreement between the IAEA, South Africa and the United States, Feb. 26, 1965, [1966] 2 U.S.T. 1281, T.I.A.S. No. 5880 (effective Oct. 8, 1965).

13. Agreement between the IAEA, Viet-Nam and the United States, Sept. 18 and Nov. 25, 1964, [1965] 2 U.S.T. 1629, T.I.A.S. No. 5884 (effective Oct. 25, 1965). See also: Agreement between the IAEA, Portugal and the United States, Feb. 24, 1965, [1965] 2 U.S.T. 1846, T.I.A.S. No. 5915 (effective Dec. 15, 1965); Agreement between the IAEA, Thailand and the United States, Sept. 30, 1964, [1965] 2 U.S.T. 1164, T.I.A.S. No. 5861 (effective Sept. 10, 1965).

14. It should be pointed out, however, that such a policy is not necessarily and immediately effective, as indicated by the renewal of several United States bilateral agreements without an actual transfer of the safeguards functions to the IAEA. See, for instance, United

The trilateral transfer agreements clearly represent a change in U.S. policy from the former, somewhat lukewarm, attitude to a more positive and forceful policy of support for the safeguards system of the IAEA. They represent a victory for those forces in and outside of the Administration which have advocated a greater safeguards role for the IAEA in preference to bilateral controls. An analysis and assessment of the various provisions embodied in these agreements seem timely and should also provide some insight into the workings of the IAEA control system.

## BACKGROUND

The transfer of United States bilateral safeguards functions to the IAEA is made possible under the general authorization provided in the Agency's Statute. Under article III. A. 5. of the Statute, the IAEA is empowered to apply certain safeguards measures to assure that the assistance made available by it or at its request or under its supervision or control is not used in such a way as to further any military purpose. Such safeguards are to be applied not only in regard to the Agency's own activities, including those in which it participates as an intermediary, but also, on request, to bilateral or multilateral arrangements.[15]

Where two or more states request the IAEA to administer the safeguards provisions of an agreement between them, the Agency will apply those provisions provided they are consistent with its own safeguards procedures. In such a case, the administration of safeguards by the Agency is governed by an agreement between the Agency and the states concerned.[16] The first example of such an accord was the already noted tri-

States agreements with: Switzerland, Dec. 30, 1965, T.I.A.S. No. 6059 (entered into force Aug. 8, 1966); Turkey, May 11, 1966 [1966] 1 U.S.T. 827, T.I.A.S. No. 6040 (entered into force July 5, 1966).

15. In the course of the deliberations leading up to the signing of the Statute, the United States stated its willingness to accept the application of the Agency's safeguards on its own bilateral agreements, but the Soviet Union declined to do the same in respect to its own bilateral agreements. As a result, Thailand's compromise amendment was adopted, according to which the Agency would apply safeguards to such arrangements "on request" only. See Gorove, *Humanizing the Atom: Establishment of the International Atomic Energy Agency*, 3 N.Y.L.F. 245, 255 (1957).

16. IAEA docs. INFCIRC/26, para. 4 (1961); INFCIRC/66, para. 4 (1965). The former document is known as the "Safeguards Document" containing the principles and procedures governing the safeguards system as approved by the Agency's Board of Governors on January 31, 1961. The latter instrument embodies the revised Safeguards Document, as approved by the Board on September 28, 1965. The trilateral agreements under discussion follow the procedures set forth in the Safeguards Document. However, they leave the door open for any modification or revision that may subsequently be agreed upon by the parties. Japan, art. VII, § 22 and art. VIII, § 24; see also art. VII, § 24 and art. VIII, § 25 of each of the other trilateral accords involving Argentina, Austria, China, Israel, the Philippines, South Africa and Viet-Nam (hereinafter identified briefly as "the other trilateral" agreements or accords). More recent trilateral accords will—no doubt—follow the procedures set forth in the revised document.

lateral agreement between the IAEA, Japan and the United States, for the administration of Agency safeguards on nuclear materials, devices and equipment supplied by the United States to Japan under the bilateral agreement for cooperation between those two states.[17] The agreement was the first of its kind and it was therefore not envisaged that the language and contents of its various provisions would necessarily constitute a precedent for similar agreements in the future. However, most of its provisions were closely paralleled by the subsequent U.S. trilateral accords. The agreement may be regarded as a "breakthrough" in the international control of the peaceful uses of atomic energy since it not only represented the largest transfer of safeguards to the Agency up to that time but also because, for the first time, safeguards were applied to equipment, devices and materials not supplied directly or indirectly by the Agency itself. While, in the past, the exact scope as well as the method of applying safeguards to particular facilities were known when the arrangement was being considered and the safeguards provisions were approved separately by the Agency, in this case safeguards were to be applied to all transfers, past and future. Hence the term "umbrella" has been used to describe this type of accord.

## OBJECTIVES AND SCOPE

The general purpose of the trilateral agreements under discussion is to provide for the orderly transfer to the IAEA of certain safeguards functions previously exercised by the United States under its bilateral agreements with other nations. For the accomplishment of this end, the United States agrees to the suspension of its bilateral safeguards rights with respect to any equipment, devices and materials listed in the inventory provided for in the annex to the relevant trilateral accord.[18] On its part, the Agency pledges to apply safeguards to equipment, devices and materials for which it has established safeguards procedures while they are listed in the inventory in order to ensure that they will not be used

17. The Japanese agreement was concluded for a period of four years, subject to termination by mutual consent or by any party upon six months' notice to the other parties. Unless the agreement is renewed or replaced by another, the U.S. safeguards rights suspended under it will again apply in accordance with the bilateral cooperation accord.

Similar provisions have been incorporated in the other trilateral agreements which have been concluded for periods from about two to ten years. Art. VIII, § 26 of the Japanese and art. VIII, § 27 of each of the other trilateral accords.

18. Japan, art. I, § 5. See also art. I, § 5 of each of the other trilateral accords which additionally provides that no other rights and obligations of the United States and the recipient nation between each other are to be affected by the respective trilateral agreement. It may also be pointed out that the term "devices" is taken from the original bilateral agreement between Japan and the United States and is retained throughout this inquiry, even though the other trilateral accords use the phrase "facilities" instead. For an explanation of the changed terminology, see note 19 below.

in such a way as to further any military purpose.[19] Both the United States and the nation receiving assistance undertake to facilitate the application of such safeguards and to cooperate with the Agency and each other to that end,[20] and both specifically pledge not to use the designated items in such a way as to further any military purpose. In case of the recipient (cooperating) country, the designated items include any equipment, devices or materials listed in the inventory which are subject to the respective cooperation agreement and for which the Agency has established safeguards procedures.[21] In case of the United States, the designated items include any special fissionable material produced in or by use of the aforementioned equipment, devices and materials which has been received by the United States and which is listed in the inventory.[22]

Not all of the designated items are necessarily subject to Agency safeguards. Thus there need be no application of safeguards to nuclear materials in the state whenever the total amount of peaceful nuclear (PN) material of that type, including that listed in the relevant inventory, falls below a certain minimum so as to be negligible from the viewpoint of potential military utilization.[23] For similar reasons, reactors specified by the recipient state and determined by the Agency to have a maximum

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19. Art. I, § 3 of the Japanese and each of the other trilateral accords. It may be of interest to note that since neither the IAEA Statute nor the Safeguards Document mention "devices," a term frequently encountered in the U.S. bilateral agreements, the application of safeguards by the Agency to "devices" seemed—strictly speaking—*ultra vires*. It could, of course, be argued that the term is covered under "equipment" or other (non-nuclear) materials or even perhaps "facilities." At any rate, the trilateral accords concluded after the Japanese agreement provide for the application of Agency safeguards to "materials, equipment and facilities" and for the simultaneous suspension of U.S. bilateral safeguards rights to "equipment, devices and materials" with respect to "materials, equipment and facilities" listed in the inventory. While these latter agreements have been adjusted so as to be more in line with the Agency's statutory language, it is somewhat unfortunate that the title of article I in each of these agreements—by what appears to be an oversight—still refers to the "Use of Materials, Devices and Facilities for Peaceful Purposes" even though—for the sake of congruity—the term "Equipment" should have been substituted for "Devices" in the title. The latter contention is also borne out by the Spanish version of the very same title in the Argentinian trilateral agreement (note 7 above) which correctly refers to "equipo" (equipment) instead of "aparatos" (devices). It is hoped that future U.S. agreements will eliminate the discrepancy.

20. Art. I, § 4 of the Japanese and each of the other trilateral accords.

21. Art. I, § 1 of the Japanese and each of the other trilateral agreements.

22. Art. I, § 2 of the Japanese and each of the other trilateral agreements.

23. In the case of natural uranium or depleted uranium with a U-235 content of 0.5 per cent or greater, this minimum is 10 metric tons. For depleted uranium with a U-235 content of less than 0.5 per cent, and in the case of thorium, it is 20 metric tons. In regard to special fissionable material (plutonium, U-233 or fully enriched uranium or its equivalent in the case of partially enriched uranium), the minimum is 200 grams. Art. I, § 3(a) of the Japanese and each of the other trilateral accords.

calculated power for continuous operation of less than three megawatts are exempted from safeguards, provided that the total power of such reactors does not exceed 6 thermal megawatts. Also, Agency safeguards are not applied to mines, mining equipment or ore-processing plants. However, safeguards are to be attached to designated items used or processed in such facilities if such items are otherwise subject to Agency safeguards.[24]

## APPLICATION OF IAEA SAFEGUARDS

To be able to carry out its assumed safeguards functions, the Agency must be apprised of all those items to which safeguards are to be attached and which are to be included initially[25] and then from time to time in the inventory.[26]

### (a) *Transfer Between Bilateral Partners*

Since the inventory is an integral part of the trilateral accord and has to be maintained on a current basis by the Agency,[27] it befalls upon the United States and the recipient nation jointly to notify the Agency of any transfer from the United States to the receiving state, as well as of any transfer from such state to the United States of any designated items to be included in the inventory.[28] Such items are to be listed in the inventory

24. Art. I, § 3(b) and (c) of the Japanese and each of the other trilateral agreements. See also Annex A to the Japanese and Annex to the other trilateral accords.

25. Unlike the other trilateral accords, the Japanese agreement does not identify the initial inventory clearly as such. Art. II, § 6 of the Japanese and each of the other trilateral agreements.

26. The inventory is to consist of at least the following items: equipment, devices and materials transferred to the recipient state, fissionable materials produced in the receiving country; and produced fissionable materials transferred to the United States. In addition to the specific equipment, devices and materials listed in the inventory and with the exception of special fissionable materials produced in the recipient state, the following are also to be considered as part of the inventory: any nuclear material utilized in, recovered from, or produced as a result of, the use of any listed materials, equipment or devices; and any equipment or device while it is using, fabricating or processing any of the listed materials. Japan, Annex A. For essentially similar provisions, see the Annex of each of the other trilateral accords.

27. The inventory is to be communicated by the Agency to the recipient state and the United States every three months and also within two weeks of the receipt of a special request therefor from one of the governments. Annex A of the Japanese and Annex of each of the other trilateral agreements.

28. The notification by the two governments is normally to be sent to the Agency not more than two weeks after the designated items have arrived in the recipient country, except that shipments of natural uranium, depleted uranium or thorium in quantities not exceeding one ton are not subject to the two week notification requirement but must be reported to the Agency at quarterly intervals. The "notification is to include the type, form and quantity of the material or the type and capacity of the equipment and devices involved, the date of shipment and the date of receipt, an identification of the recipient, and any other relevant information." In addition, under the trilateral accords concluded after the Japanese agreement, the two governments are also obligated to give the Agency as much

unless, within 30 days of the receipt of notice, the Agency notifies the two governments that it is unable to apply safeguards thereto.[29]

Since it is precisely the special fissionable materials recovered or produced as by-products which are the elements most readily susceptible to diversion from peaceful to military use, the trilateral agreements require that the recipient country routinely report to the Agency any such material it produces in or by use of any of the designated items listed in the inventory. While such special fissionable material is to be included in the inventory only upon receipt by the Agency of the relevant report, any material so produced is subject to Agency safeguards from the time it is produced and is to remain under IAEA safeguards even after its transfer to the United States.[30]

(b) *Return to the United States*

Both the United States and the nation receiving assistance must jointly notify the Agency of the return to the United States of any of the items designated in the inventory.[31] When the United States notifies the Agency of its receipt thereof, such items (excluding special fissionable materials) are to be deleted from the inventory.[32]

(c) *Transfer Beyond Jurisdiction of Bilateral Partners*

In case any of the items designated in the inventory are transferred to a recipient which is not under the jurisdiction of either the cooperating nation or the United States, the two countries must jointly notify the Agency of the transfer.[33] Such items are to be deleted from the inventory, provided that they will remain under Agency safeguards or under some

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advance notice as possible of the transfer of large quantities of nuclear materials or major equipment or facilities, and to furnish the Agency at its request with design information pertinent to safeguards and relating to the facilities listed in the relevant inventory. Art. II, § 7 of the Japanese and each of the other trilateral agreements.

29. Japan, art. II, § 6. In an identically numbered provision, the other trilateral agreements make it clear that the communicated items must normally be included in the inventory within 30 days of the notification, and upon inclusion they become subject to Agency safeguards.

30. The Agency may verify the calculations of the amounts of produced materials, and appropriate adjustments in the inventory will be made by agreement of the parties concerned. The trilateral accords concluded after the Japanese agreement additionally stipulate that pending final agreement of the parties, the Agency's calculations will govern. Art. II, § 8 of the Japanese and each of the other trilateral agreements.

31. Art. II, § 9 of the Japanese and each of the other trilateral accords. In § 11 of the same article, the latter agreements also specify that the notifications by the two governments must be sent to the Agency at least two weeks before a designated item is returned.

32. Art II, § 9 of the Japanese and each of the other trilateral accords.

33. Art II, § 10 of the Japanese and each of the other trilateral agreements. In section 11 of the same article the latter accords also specify that the notification by the two governments must be sent to the Agency at least two weeks before a designated item is transferred.

other safeguards, generally consistent with Agency safeguards and acceptable to the two states.[34]

(d) *Transfer Under Suspension of Safeguards*

The trilateral agreements under discussion make special provision for certain situations in which nuclear materials under Agency safeguards may have to be transferred to another place solely for the purpose of processing, reprocessing or testing. Such provision seems to have been necessary inasmuch as international transfer under Agency safeguards as well as the attachment of safeguards to the processing or testing facilities could, on occasion, cause difficulties to the transferring state by restricting its access to such facilities. Under the prescribed procedure Agency safeguards are suspended on the transferred nuclear material provided that there is placed under Agency safeguards—at a time to be agreed upon and with allowance for processing losses—at least an equal amount of the same type of material ("substituted material") which is not otherwise subject to safeguards, or so long as the quantity of transferred material does not exceed a certain amount.[35] The transfer may be to any other state or group of states or to an international organization under an agreement approved by the Agency and within the scope of the relevant agreement for cooperation. Under a special arrangement approved by the Agency, it may also be to a facility within the cooperating nation or the United States to which safeguards are not applied.[36]

Safeguards suspended in pursuance of the foregoing procedure will remain suspended for as long as the substituted material remains subject to Agency safeguards or as long as the quantities of the materials for which no substitution was made do not exceed the specified amount.[37]

(e) *Safeguards Procedures*

In applying safeguards to the items designated in the inventory, the Agency basically follows the procedures set forth in the Safeguards

34. The trilateral agreements concluded after the Japanese accord additionally provide that in case of special fissionable materials, such other safeguards must also be acceptable to the Agency. Art. II, § 10 of the Japanese and each of the other trilateral accords.

35. The amounts not to be exceeded are the following: (i) In the case of natural uranium or depleted uranium with a uranium-235 content of 0.5 per cent or greater—10 metric tons; (ii) In the case of depleted uranium with a uranium-235 content of less than 0.5 per cent—20 metric tons; (iii) In the case of thorium—20 metric tons; (iv) In the case of special fissionable material: plutonium, uranium-233 or fully enriched uranium or its equivalent in the case of partially enriched uranium—1000 grams. Art. II, § 11 of the Japanese and art. II, § 12 of each of the other trilateral agreements.

36. In case of special fissionable materials transferred from Japan to the United States, the Agency is required to give the necessary approval to allow the suspension of safeguards within the United States. However, unlike the other trilateral accords, the Japanese agreement does not provide for transfer to a facility within Japan. Compare Art. II, §§ 11 and 15 of the Japanese and art. II, § 12 of the other trilateral agreements.

37. Art. II, § 12 of the Japanese and art. II, § 13 of the other trilateral accords.

Document.[38] More specifically, the Agency is given the responsibility and authority to review the design of facilities (including equipment and devices) listed in the inventory with a view to satisfying itself that it could effectively apply safeguards and that the facility will not further any military purpose. For the same reason the Agency must be advised by the recipient state of any proposed substantial change in the respective design.[39]

Apart from the examination of relevant designs, the Agency is also charged and empowered to require from both the United States and the cooperating state the maintenance of operating records for nuclear facilities, as well as accounting records of material and equipment, to which Agency safeguards are applied and which are under the respective jurisdiction of the two governments.[40] Similarly, the Agency is also authorized to require from the two states the submission of routine operating and accounting reports involving data drawn from corresponding records, as well as the submission of special reports in cases involving, for instance, an actual or potential loss (above normal operating loss), destruction or damage of any of the items safeguarded by the Agency.[41]

Finally, the Agency is given authority to conduct routine and special inspections (on-the-spot examination, audit, verification, testing, etc.) of the safeguarded items in order to ascertain compliance with the trilateral agreement. Routine inspections may be made with a maximum frequency as determined by the Agency in accord with the Safeguards Document, whereas a special inspection may be carried out if an examination of a report indicates the need for such or in the event of unforeseen circumstances requiring immediate action.[42]

The required inspections are performed by designated[43] Agency inspectors[44] who are granted access[45] at all times to all places and data and

38. In the case of the Japanese agreement, the safeguards procedures are briefly summarized in its Annex B with appropriate reference to the Safeguards Document, whereas in case of the other, trilateral accords provision is made (art. II, § 14) for the blanket application of that Document's safeguards procedures with the exception of the already discussed notification requirements regarding transfers.

39. Japan, Annex B, para. 1; Safeguards Document, para. 42.

40. Japan, Annex B, para. 2; Safeguards Document, para. 45.

41. Japan, Annex B, para. 3; Safeguards Document, paras. 47-53, 62.

42. Japan, Annex B, paras. 4 and 5; Safeguards Document, paras. 54-59. For further details regarding frequency of routine inspection, see Safeguards Document, paras. 63-65.

43. The procedure relating to the designation of Agency inspectors is governed by the Agency's *Inspectors Document*. See IAEA doc. GC (V)/INF/39 (1961), Annex, paras. 1-3 (hereinafter cited as "Inspectors Document").

44. The inspectors performing functions consequent upon the trilateral agreement as well as the Agency property used by them are accorded certain privileges and immunities by the cooperating state under the Agreement on the Privileges and Immunities of the Agency, 374 U.N.T.S. 147, and by the United States under International Organizations Immunities Act, 22 U.S.C. § 288 note (1945). However, in the case of a dispute involving an Agency inspector or property, it seems unfortunate that the wording of the trilateral agreements

to any person who by reason of his occupation deals with items under Agency safeguards.[46] Upon request of the inspected state, the inspectors are to be accompanied by that state's representatives, provided that the inspectors are not thereby delayed or otherwise impeded in the exercise of their functions.[47] After the inspection has been carried out, the state concerned is to be informed by the Agency of its results.

In case the state disagrees with the inspectoral report, it may submit a report on the matter to the Agency's Board of Governors and may invoke the procedure for the settlement of disputes.[48]

## ENFORCEMENT

The trilateral agreements under discussion also incorporate certain enforcement procedures and related provisions governing noncompliance, the settlement of disputes and the use of information.

### (a) *Noncompliance*

If the Agency's Board of Governors determines that there has been any noncompliance with the trilateral agreement, it is required to call upon the state concerned to "remedy forthwith" such noncompliance and to make appropriate reports to all IAEA members and to the Security Council and General Assembly of the United Nations.[49]

These bodies can take whatever actions are open to them under the United Nations Charter, including the use of force. In the event of failure to take corrective action within a reasonable time,[50] the Board may directly curtail or suspend the assistance and call for the return of items made available to the recipient state.[51] The return, however, is to be

fails to make it clear as to whether the procedure governing the settlement of disputes under the Agreement on the Privileges and Immunities of the Agency or the machinery envisaged in the trilateral accords should apply. See art. III, §§ 16 and 17 of the Japanese and art. III, §§ 17 and 18 of each of the other trilateral agreements. See also, text preceding notes 53-55 *infra*.

45. IAEA Stat. art. XII. A. 6. Rights of access and inspection as well as the procedure regarding inspectoral visits, including notification, arrival and departure, transport and accommodation, are further spelled out in the Inspectors Document, paras. 4-7, 9-10.

46 Such items include "substituted materials" but exclude nuclear materials in relation to which Agency safeguards are suspended. Art. III, § 15 of the Japanese and art. III, § 16 of the other trilateral accords.

47. IAEA Stat. art. XII. A. 6; Inspectors Document, para. 5.

48. Inspectors Document, paras. 12 and 14. For the procedure relative to the settlement of disputes, see text preceding notes 53-55 *infra*.

49. IAEA Stat. art. XII. C; compare art. II, § 14 of the Japanese and art. II, § 15 of the other trilateral agreements.

50. In such case the Agency is relieved of its safeguards responsibilities so long as the Board determines that the Agency is unable to apply them effectively under the trilateral agreement. Art. II, § 14(a) of the Japanese and art. II, § 15(a) of the other trilateral accords.

51. IAEA Stat. art. XII. C. The wording of the Japanese agreement, unlike that of the other trilateral accords, is not entirely in line with the IAEA Statute inasmuch as under the

affected by the state concerned and the inspectors have no right to remove materials in case of noncompliance. The Agency may also suspend the noncomplying state from the exercise of the privileges and rights of membership.[52]

(b) *Settlement of Disputes*

All the trilateral agreements envisage a special procedure for the settlement of disputes. Thus any dispute with respect to the interpretation or application of the trilateral agreement which is not settled by negotiation or as may otherwise be agreed, is at the request of any party, to be submitted to an arbitral tribunal.[53]

The selection of arbitrators is to take place in the following manner. If the dispute involves only two of the parties, all three parties agreeing that the third is not concerned, the two parties involved are each to designate one arbitrator, and the two arbitrators so named are to appoint a third, who is to be the chairman. If within thirty days of the request for arbitration either party has not designated an arbitrator, either party to the dispute may request the President of the International Court of Justice to appoint an arbitrator. The same procedure applies if, within thirty days of the designation or appointment of the second arbitrator, the third arbitrator has not been appointed. Should the dispute involve all three parties to the agreement, each party is to designate one arbitrator, and the three will by a unanimous decision elect a fourth, who is to be the chairman, plus a fifth arbitrator. If, however, within thirty days of the request for arbitration any party had not designated an arbitrator, any party may request the President of the International Court of Justice to appoint the necessary number of arbitrators. The same procedure applies if, within thirty days of the designation of the three arbitrators, the chairman or the fifth arbitrator had not been appointed.[54]

Both the final as well as the interim decisions and orders of the tribunal, including all rulings concerning its constitution, procedure, jurisdiction and

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former, direct curtailment, suspension of assistance and/or return could be called for only if the state is found to have used the safeguarded items to further any military purpose. The IAEA Statute makes no such limitation but permits these measures in case of any noncompliance. Art. II, § 14(b) of the Japanese and art. II, § 15(b) of each of the other trilateral agreements.

52. The Agency is required to notify the parties of any determination made by the Board in connection with the measures provided for noncompliance. Art. II, § 14 of the Japanese and art. II, § 15 of each of the other trilateral accords.

53. Art. VI, § 20 of the Japanese and art. VI, § 21 of each of the other trilateral agreements.

54. "A majority of the members of the arbitral shall constitute a quorum, and all decisions are to be made by majority vote. The arbitral procedure is to be determined by the tribunal." *Ibid.*

the division of arbitral expenses between the parties are binding on all parties and must be implemented by them.[55]

(c) *Use of Information*

No information obtained under the trilateral agreement, other than summarized information about the respective inventories, may be disclosed by the Agency to any state, organization or person not on its staff, except with the consent of the state to which the information relates.[56] Similarly, the Agency staff may not reveal any industrial secret or other confidential information coming to their knowledge in the course of their official duties except to the Director General of the Agency and such other staff as he may authorze to have such information.[57]

While the trilateral agreements are silent on the question of liability for unauthorized disclosure of information, it appears that both the Agency and its officials may be liable for damages to the owner of such information. In addition, any violation by an official may result in legal action as well as disciplinary measures by the Agency against him, including summary dismissal. Should any dispute arise regarding unauthorized disclosure, any of the parties to the trilateral agreement may invoke the procedure for the settlement of disputes.[58]

## ASSESSMENT

The preceding discussion of the recently concluded trilateral agreements transferring to the IAEA certain safeguards rights and responsibilities previously exercised under U.S. bilateral accords with other nations reflects an important phase in the development of international atomic control procedures. While this phase—for the well-known reasons that divide the world arena today—has been strictly limited to controls over the "peaceful" uses of atomic energy, the gradual unfolding of a wider application of international safeguards from those incorporated in the bilateral agreement to those involving an agency with global responsibilities has been an encouraging sign.

55. Art. VI, § 20 of the Japanese and Art. VI, § 21 of each of the other trilateral accords. The tribunal's authority to issue interim orders pending a final decision does not extend to situations involving the inability of the Agency to apply safeguards or concerning any noncompliance with the trilateral agreement. In such a case, decisions of the Board must, if they so provide, immediately be given effect by the parties, pending the conclusion of any consultation, negotiation or arbitration that may be involved with regard to the dispute. Art. VI, § 21 of the Japanese and art. VI, § 22 of each of the other trilateral accords.

56. The agreements concluded after the Japanese trilateral accord additionally provide that specific details concerning safeguards aspects of the nuclear energy programs of either the cooperating state or the United States may be disseminated to the Agency's Board of Governors and to appropriate Agency staff members as necessary to enable the Agency to fulfill its safeguards responsibilities. Compare art. IV, § 18 of the Japanese and art. IV, § 19 of each of the other trilateral agreements.

57. Safeguards Document, para. 41.

58. See text preceding notes 53-55 above.

Up to the time of conclusion of the Japanese trilateral agreement, the IAEA was not given much of an opportunity to exercise its safeguards functions over and above a relatively few and isolated instances. To be sure, the gestures to place several U.S. reactors under IAEA safeguards in 1962[59] and 1964[60] were of great assistance in providing the Agency with a much needed training ground and experience for the testing and improvement of its safeguards procedures.[61] However, only through the trilateral transfer agreements has the Agency's safeguards role been able to assume new dimensions.

Since the policy objectives of the United States regarding the suspension of bilateral safeguards and their replacement by IAEA controls are to a large measure shared by the United Kingdom and Canada,[62] it seems that one of the major impediments to increased IAEA control responsi-

59. In order to demonstrate to the world that the United States, as a major power, was willing to accept safeguards and did not regard them as a violation of sovereignty, and for the purpose of enabling the Agency to test the workability of its safeguards system, Washington agreed to place four of its own reactors under Agency safeguards in 1962. This "Four-Reactor Agreement" was born in the political atmosphere prevailing under the impending release of the Smyth Report which urged increasing U.S. support to the Agency, particularly to its international safeguards system. Under the terms of the Agreement, the United States pledged that—during the duration of the accord—it would not use the designated facilities and materials in such a way as to further any military purpose. The scope of the control system covered designated reactor facilities, special fissionable material produced therein, nuclear material while it was being processed or used therein, and nuclear material while it was intermixed with nuclear material to which Agency safeguards were applied. Art. I, § 1 and art. II, § 3 of the Agreement between the IAEA and the United States for the Application of Agency Safeguards to Four United States Reactor Facilities, March 30, 1962, [1962] 1 U.S.T. 415, T.I.A.S. No. 5002 (effective June 1, 1962).

60. Only two years after the conclusion of the Four-Reactor Agreement of 1962, the United States also agreed to place one of its largest nuclear facilities, the Yankee Power Reactor at Rowe, Massachusetts, under Agency safeguards. In this case, the U.S. pledge of nonuse in the furtherance of military purpose and the scope of the safeguards are similar to those in the Four-Reactor Agreement of 1962. See art. I, §§ 1 and 2 of the Agreement between the IAEA and the United States for the Application of Safeguards to United States Reactor Facilities, June 15, 1964, [1964] 2 U.S.T. 1456, T.I.A.S. No. 5621 (effective Aug. 1, 1964).

61. The decision to open a big nuclear facility to IAEA inspection increased significantly U.S. contribution to the international development of atomic energy for peaceful purposes, since it enabled the Agency to acquire practical knowledge in the application of safeguards and carrying out of inspections in relation to reactors of 100 or more thermal megawatts. The American decision was also motivated by the hope that it would beneficially influence other nations, particularly the Soviet Union, to follow the U.S. example by opening their atomic civilian power plants for international inspection. While the latter expectation has not materialized so far, at the time it appeared rational to assume that Moscow could have far less objection to inspection of reactors destined for peaceful purposes than to the kinds of arms and nuclear test inspections that would be required under a disarmament agreement.

62. A few trilateral transfer agreements have also been concluded by the United Kingdom and Canada with the Agency and countries with which they have safeguards agreements, including Japan. IAEA doc. 6C(IX)/299 at 40-1 (1965).

bilities has now been removed and further that the Agency's safeguards functions will continue to receive added impetus from the expected conclusion of many more transfer agreements. Whether or not such increased operations and the prestige they are likely to generate will be sufficient to overcome the antagonism of some bilateral partners, regional organizations (like Euratom[63] and the European Nuclear Energy Agency of the Organization for Economic Cooperation and Development[64]) and their members, and thereby lead to the eventual transfer to the IAEA not only of all the remaining bilateral but also of the regional control machineries, is difficult to predict with absolute certainty at this time. There appears little doubt, however, that the greatest boost to the IAEA safeguards system could come from a nonproliferation treaty if it provided for agency inspection of some or all transnational transfers of nuclear materials and of some or all nuclear power plants in nonnuclear-weapon states to assure peaceful uses.[65]

63. According to Euratom, close cooperation between the community and the IAEA has been hampered by certain IAEA countries which have charged Euratom with indulging in activities of a military nature. See Gorove, "The First Multinational Atomic Inspection and Control System at Work: Euratom's Experience," 18 STAN. L. REV. 160, at 167 (1965).

64. See Gorove, *The Inspection and Control System of the European Nuclear Energy Agency*, 7 VA. J. INT. L. 68, 99 (1967).

65. See Gorove, *Maintaining Order Through On-Site Inspection: Focus on the IAEA*, 18 W. RES. L. REV. 1525, 1546 (1967). The United States and the Soviet Union have agreed on all the terms of a nonproliferation treaty with the exception of the provision dealing with inspection and controls. After protracted negotiations hope still persists that an acceptable compromise can be found between Moscow's insistence on inspection of all nonnuclear-weapon states by the IAEA and the views of Euratom countries that inspection in their territories be continued by the Community. For a brief statement of the terms recently agreed upon by five of the six Euratom countries and of the reported Soviet opposition to these terms, see N.Y. Times, Nov. 1, 1967, p. 15, col. 1.