SAFEGUARDS NON-COMPLIANCE AND THE UTILITY OF ARBITRATION UNDER SAFEGUARDS AGREEMENTS: A REVIEW OF ARBITRAL MECHANISMS AND REFLECTIONS FOR TODAY

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Abstract

As of the end of 2021, the International Atomic Energy Agency (IAEA) implemented nuclear safeguards across 185 States. The history of the development of safeguards reflects a complex ecosystem of legal, institutional and political factors, perhaps none more important than its foundational documents. To this effect, the IAEA Statute provides the mandate to implement safeguards with "respect to any Agency project, or other arrangement where the Agency is requested by the parties concerned to apply safeguards." Both as a Statutory matter and through authority granted through safeguards agreements, there are provisions Member States and the IAEA can invoke in cases of disputes.

Safeguards agreements concluded on the basis of INFCIRC/66/Rev.2 and INFCIR/153 are regarded as treaties under international law and, similar to other international treaties, there are provisions for the arbitration and settlement of disputes. There are also provisions for measures that can be taken in cases of non-compliance, though this term does not have a specified definition nor is the word used in either document. In its history, arbitral mechanisms have never been invoked, although the IAEA has reported six cases of non-compliance to the United Nations Security Council (UNSC). [1] Due to the fact that arbitral provisions have never been invoked, this paper seeks to explore how this mechanism could be invoked or potentially leveraged in the future.

In assessing the limitations or boundaries of arbitral provisions and the powers to act upon these grey spaces between arbitral or non-compliance scenarios by the IAEA or Member States, how could the IAEA define non-compliance? What procedures are in place for cases of non-compliance and what are their legal and institutional origins? What arbitrary procedures are in place short of declaring a State in non-compliance and for what purposes other than safeguards were those procedures intended?

1. THE STATUTE

The Statute of the IAEA entered into force on 29 July 1957 and provides the IAEA's basic mandate to "establish and administer safeguards designed to ensure that special fissionable and other materials, services, equipment, facilities, and information made available by the Agency or at its request or under its supervision or control are not used in such a way as to further any military purpose; and to apply safeguards, at the request of the parties, to any bilateral or multilateral arrangement, or at the request of the State, to any of the State's activities in the field of atomic energy." [2]

According to Article XII.C of the Statute, the Director General must report cases of non-compliance to the Board of Governors, which should in turn call on the State concerned to remedy any suspected or actual non-compliance. The Board must also report the case to all IAEA Member States, to the UN General Assembly and the UNSC. Should the State fail to remedy the non-compliance, the Board may suspend or terminate assistance provided by the Agency or a Member State and request the withdrawal of any equipment or material made available by the Agency or a Member State in a case of non-compliance. Further, the Board may also choose to suspend the non-compliant Member State from the privileges and rights of membership in accordance with Article XIX.B.

Yet the Statute does not define non-compliance. Since the origins of safeguards implementation, questions have arisen regarding the extent of discretion the Director General has in deciding whether or not to forward an inspector's report to the Board, how severe a violation must be to constitute non-compliance, or separately whether or not dispute mechanisms contained in all IAEA safeguards agreements can be used to resolve alleged violations. [3] In this connection, and particularly because safeguards are implemented based on safeguards agreements rather than the Statute alone, non-compliance and arbitration must be examined with an eye not just on the Statute, but also on the safeguards agreement for the State concerned.

While the mandate to apply safeguards is granted by the Statute, it is not self-executing. In this regard, the IAEA Secretariat developed a number of documents upon which the safeguards ecosystem is based, including: INFCIRC/66/Rev.2 (and previous iterations of that document) upon which item-specific safeguards arrangements are based; and INFCIRC/153, which defines the structure and content of comprehensive safeguards agreements (CSAs), required by the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). INFCIRC/540, or the Model Additional Protocol, is another key document in the nuclear safeguards ecosystem, but is a protocol to a safeguards agreement rather than a standalone agreement.

2. INFCIRC/66/REV.2 AND ITEM-SPECIFIC SAFEGUARDS AGREEMENT

Item-specific safeguards agreements are concluded with the IAEA at the request of a State, usually at the insistence of a supplier State as a condition of supply. Moreover, these agreements cover only the material, equipment and facilities identified in the individual agreements. Parties to such agreements include not just the two States concerned, but also the IAEA.

Unlike INFCIRC/153, which defines the structure and content of CSAs like a template agreement, INFCIRC/66/Rev.2 is a set of procedures that are incorporated into item-specific safeguards agreements, also referred to as INFCIRC/66 type agreements. [4] As such, INFCIRC/66 type agreements do not necessarily adhere to the exact text or numbering of sections in INFCIRC/66/Rev.2 itself.

2.1 Arbitration under Item-Specific Safeguards Agreements

While INFCIRC/66/Rev.2 does not provide specific guidance on the procedures for the settlement of disputes, the language in INFCIRC/66-type agreements on arbitration is consistent from agreement to agreement. Within this agreement, any Party to the agreement may request that a dispute arising from the interpretation or application of the agreement be submitted to an arbitral tribunal. Such a tribunal would consist of an arbitrator for each Party concerned. In cases where all Parties agree that the dispute is limited to two of the three Parties, the third need not select an arbitrator. The arbitrators must unanimously select an additional arbitrator to serve as Chairman and, should the dispute involve all three parties, another additional arbitrator. In other words, should a dispute arise, invoking this provision would result in an arbitral tribunal of between three and five individuals. The designation of these individuals should take place within 30 days; if this does not occur, the President of the International Court of Justice (ICJ) selects the outstanding arbitrators.

2.2 Non-compliance under Item-Specific Safeguards Agreements

INFCIRC/66/Rev.2 contains one paragraph concerning non-compliance, stating that in "the event of any non-compliance by a State with a *safeguards agreement*, the Agency may take the measures set forth in Articles XII.A.7 and XII.C of the Statute." [5] As previously noted, these Articles refer, inter alia, to the Director General's reporting obligations concerning non-compliance, suspension of Agency assistance, calls for the return of supplied technology and suspension of Agency membership.

Though INFCIRC/66/Rev.2 is not a template agreement, INFCIRC/66 type agreements contain fairly consistent language concerning non-compliance. Under these agreements, if the Board of Governors determines non-compliance, the Board should call upon the government concerned to remedy such non-compliance. If the government does not do so, the Agency would be "relieved of its undertaking to apply safeguards" under the agreement until the Board determines that safeguards cannot effectively be applied and the Board my take any of the measures provide for in Article XII.C of the Statute.

Fig. 1: Entities involved in a theoretical compliance case referral of IAEA Member State

3. INFCIRC/153(CORR.) AND COMPREHENSIVE SAFEGUARDS AGREEEMENTS

Three paragraphs (20-22) pertinent to the settlement of disputes resulted from the negotiation of INFCIRC/153, none with significant disagreements during the negotiation process. [6]

3.1 Arbitration under Comprehensive Safeguards Agreements

Paragraph 20 provides that Parties to the agreement should consult about questions which arise from the interpretation or application of the agreement. The paragraph is analogous to paragraph 12 of INCIRC/66/Rev.2 and was adopted during negotiations of INFCIRC/153 without debate.

Paragraph 21 provides the right of the State to request the Board of Governors to consider and discuss questions of interpretation or application of the agreement, and for the State to be invited by the Board to participate in such a discussion. During negotiations, the most important aspect of the paragraph was the right of participation by non-Board members in discussions about disputes in which that State is involved. It was adopted without dissent.

Paragraph 22 provides that disputes not settled by negotiation or other procedure may be referred to an arbitral tribunal, structured as defined in INFCIRC/66-type agreements. As safeguards agreements concluded under INFCIRC/153 are almost all bilateral agreements, the arbitral tribunals outlined in INFCIRC/153 would consist only of three members: one arbitrator from the State concerned, one from the IAEA and a third Chairman selected by the first two. As under INFCIRC/66-type agreements, should the Chairman not be selected within 30 days, the ICJ would select the Chairman. All decisions of the tribunal are legally binding.

2.1 Non-compliance under Item-Specific Safeguards Agreements

Non-compliance under INFCIRC/153 follows the same procedures outlined in the Statute, also referenced in INFCIRC/66-type agreements.

While paragraphs 20-22 related to arbitration were not considered controversial during the negotiation of INFCIRC/153, an important debate still took place during discussions specific to paragraph 22. One major question was whether arbitration should extend to disputes concerning non-compliance with the fundamental undertaking of the agreement, i.e. disputes about possible diversion of nuclear material. Ultimately, the Secretariat's proposal for paragraph 22 was to exclude disputes concerning diversion from the scope of arbitration.

Indeed, the Member States decided the arbitration provision of INFCIRC/153 should not be interpreted such that it would detract from the IAEA's powers of adjudication of non-compliance. To this end, paragraph 22 specifically clarifies that it cannot be invoked to address disputes under in paragraph 19, which outlines the measures available to the Board in relation to verification of non-diversion. Those measures, as with INFCIRC/66 type agreements, include the invocation of the measures in Article XII.C of the Statute.

The decision to exclude potential cases of diversion from the INFCIRC/153 arbitral provisions therefore separate the settlement of disputes from determinations of non-compliance. To reiterate, neither the IAEA nor any State has ever invoked the arbitration provisions of a safeguards agreement. Similarly, the right of the IAEA to conduct a special inspection – useful in cases of potential non-compliance, but not a provision bound to such cases – has become profoundly politicised and has not been invoked since 1993, when such an inspection was refused

by the Democratic People's Republic of Korea (DPRK). [7] INFCIRC/153 differentiates arbitration from non-compliance, but they share a common risk of atrophying from lack of use in cases where such mechanisms could be one mechanism to resolve a potential misunderstanding or disagreement.

The Model Additional Protocol, which is reproduced in INFCIRC/540, provides even more tools to help the IAEA fulfil its right and obligation to apply safeguards, but as a protocol it does not represent a standalone agreement. [8] As such, an additional protocol does not add any further measures or context to how the IAEA deals with arbitration or cases of potential non-compliance.

4. WHAT CONSTITUTES NON-COMPLIANCE?

The IAEA has reported six cases of non-compliance to the United Nations Security Council (UNSC) under Article XII.C of the Statute to date, including: Iraq, Romania, DPRK, Iran, Libya, and Syria. These cases of non-compliance are characterised by differing criteria and circumstances – none of which raised the arbitral mechanisms. This was due to the fact that the Board in each case made the determination, based on the information provided by the Director General, that the Agency was at the time unable to verify that there had been no diversion of *nuclear material* which was required to be safeguarded under the safeguards agreement of the Member State in question.

TABLE 1. CASES OF SAFEGUARDS NON-COMLIANCE REPORTED TO THE UNSC

Member State	Circumstances of Non-Compliance
Iraq	Iraq was found in non-compliance after a clandestine nuclear weapons programme was brought to light, through the operation of secret facilities co-located with declared ones. This discovery was made following Iraq's defeat in the first Gulf War and as such was particularly unusual in the additional authority granted to the IAEA by the UNSC (rather than the Board of Governors) in verifying the disarmament of Iraq.
Romania	Romania, by comparison, requested a special inspection from the IAEA after a change in government in 1992. The new government suspected that the previous regime of Nicolae Ceaușescu had violated Romania's safeguards agreement by failing to declare the reprocessing of small amounts of plutonium in 1985. The case was reported to the UNSC simply for information purposes.
North Korea	The DPRK was reported to the UNSC for non-compliance in 1993, following the results of safeguards inspections conducted in 1992, which revealed discrepancies in DPRK declarations to the IAEA. The IAEA followed the process outlined in the Article XII.C of the Statute.
Iran	Following years of engagement with Iran and debate in the Board of Governors, Director General Mohammed ElBaradei reported Iran to the UNSC for non-compliance in 2006, a step taken at the direction of the Board. While the Iran case followed Article XII.C in principle, it was (and continues to be) also an unusual case due to the long duration and changing levels of cooperation.
Libya	In 2003, it came to light that Libya had conducted undeclared activities, including the development of a uranium enrichment capability and the acquisition of nuclear weapon design and fabrication documents. The discovery was the product of ongoing discussions with Libya by the United States and United Kingdom on the removal of nuclear material and sensitive equipment. The IAEA was informed of these discussions in 2003 at the same time as the US and the UK informed the UN Security Council. In 2004, after several reports to the Board, pursuant to Article

	XII.C, the Board requested the Director General to refer the matter to the UNSC for information purposes.
Syria	The bombing of the Syrian nuclear reactor at Dair Alzour in 2007 by Israel initiated a saga of inspections, requests for inspections (some denied) and reports to the Board about the nature of the installation and inquiries on the undeclared facility. In 2011, the Board requested the Director General to refer Syria to the UNSC for non-compliance pursuant to Article XII.C of the Statute.

There are also other cases where a non-compliance determination was considered by the Board, but a decision to report the State in question was ultimately not taken. However, for the purposes of this paper, other than the fact that a determination of non-compliance with the States' safeguards agreement was considered, there were few other factors in common that would be informative of invoking arbitral mechanisms or generally for the purposes of this paper. Overall, this begs the question as to how the IAEA defines non-compliance and how narrowly (or broadly) should it be defined. The Statute's Article XII.C certainly directs the IAEA on the procedures to be followed in cases of non-compliance, but does not go as far as to define it. Nowhere in INFCIRC/153 does the word "non-compliance" appear, instead referring to measures in relation to verification of non-diversion.

In this thread, one might be tempted to define non-compliance as a case in which "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 the Agreement to nuclear weapons or other nuclear explosive devices" as outlined in paragraph 19 of INFCIRC/153. However, this definition is still too broad in many cases, and could encompass other scenarios which do not arise to the level of diversion. For example, the IAEA would be unlikely to be able to verify non-diversion in State with nuclear facilities in active war zones where it might be unsafe for inspectors to go. In these cases, such verification may be complicated, such as in cases where nuclear facilities are located within territory of one State that has been annexed by another.

In fact, the draft for paragraph 19 submitted by the Secretariat to negotiations of INFCIRC/153 did explicitly mention the issue of compliance, but this reference was removed as a result of intensive consultations with Member States about the content of the provision. The formulation of paragraph 19 therefore affords the Director General and the Board with some discretion as to what should be considered as wilful non-compliance. In this regard, it is perhaps more desirable or potentially by design that non-compliance is not clearly defined. This is due to the fact, as noted above, the cases of non-compliance that have been reported to the UNSC have unfolded in various forms and there is use in keeping the definition broad. To note, there are still other cases where a State was found in violation of its safeguards agreement where there was no referral to UNSC, owing apparently to the swift clarification of anomalies, high level of cooperation from the State concerned or relatively low level of concern among Board Members about the degree of the violation.

It is important to note that in none of these cases would it have been possible to invoke the arbitration provisions of the States' safeguards agreements, as these were all cases where the IAEA was unable to verify that no nuclear material had been diverted. And so, where does that leave the arbitration provision?

5. HOW CAN ARBITRATION BE USED?

Although the arbitration provisions of INFCIRC/153 cannot be invoked in cases of potential diversion (and therefore non-compliance), this should not suggest that arbitration under a safeguards agreement cannot be conducted at all. Given that these mechanisms have never been invoked, a request to invoke arbitration by either a State or the IAEA to trigger the arbitration provision would be profoundly politicised. Even so, the dispute settlement remains an integral part of a safeguards agreement and the question as to the utility of the arbitration mechanism remains. In cases that do not constitute non-compliance, it becomes clearer that certain that issues related to safeguards (which do not concern verification of non-diversion) could necessitate the use of arbitration, which could set a strong precedent for future arbitral dealings. For example, potentially, a prolonged hinderance

of inspectors to a degree that would hamper their abilities to discharge their duties in a State could necessitate the use of arbitration.

This is not to suggest that such action should be taken lightly. Were the IAEA to request arbitration over a potential violation by a State of its safeguards agreement and lose, it could damage reputations and credibility of institutions or governments, additionally dampening the official relationship between the IAEA and the State concerned. By the same token, if a State were to request arbitration against the IAEA and be successful, other States may be incentivised to do so illegitimately, in effect wasting valuable resources, funding and time of multiple Parties involved. Moreover, if the State were to do so and not be successful in its pursuits through arbitration, that State may appear petulant and could lead to concerns or issues in other fora, such as the Board or the General Conference.

For these reasons, the arbitration provisions of INFCIRC/153 should be retained and, if absolutely necessary for the settlement of disputes, used. Yet, as Directors General have done in the past, diplomacy and consultations including through back channels or even closed sessions or intense negotiations – which have been by and large effective to date – should and are likely to be completely exhausted before such steps are taken.

6. CONCLUSIONS

As of July 2022, there are 54 new nuclear power plants under construction globally. With the growing expansion of nuclear industry and globalisation of the supply chain or international exports of advanced reactor technology around the world, questions of arbitration or non-compliance could again be raised. The increased demand on the IAEA to implement safeguards in the face of a rising number of facilities and locations outside facilities may also present future complications or opportunities to open the door to these mechanisms.

First, to address the paragraphs 20-22 of INFCIRC/153 that have never been invoked, an examination of its history demonstrates it has been preferable for the IAEA and Member States to handle cases through direct deliberation or negotiation. As it stands, nuclear non-compliance cases are often heavily politicised, where political sensitivities could take precedent over legal mechanisms made available. Invoking the arbitration provisions of safeguards agreements would be similarly politicised. However, it may or may not still be preferable to consider the arbitral clauses as a ‘flexible option’ for both Member States and the IAEA in certain cases, outside those outlined in paragraph 19.

Second, if the case is referred outside of the IAEA, channels through third-party tribunals outside of the UNSC could be pursued. To date, the UNSC has typically limited its powers to issuing resolutions, and additional exploration of its record in arbitral mechanisms would likely be required. Third, it could be useful to consider how valuable it would or would not be to standardise conceptions of compliance or non-compliance across all Member States. At present, non-compliance appears to be assessed on a ‘scale of severity’ or ‘degree of deception’, gauging what lengths were taken to potentially deceive the international community of ongoing nuclear activities, facilities, materials, or transfers. Thus far, dispute settlement has been administered on a case-by-case basis without the invoking or use of arbitral provisions.

While the flexibility of arbitral mechanisms is favoured in many treaties and agreements for dispute resolution internationally, the political implications of referring a case of non-compliance or dispute settlement often outweigh the benefits of pursuing legal action through paragraphs 20-22 under international nuclear safeguards. Until the modern system of nuclear governance and technical safeguards mechanisms are potentially re-evaluated or additional safeguards agreements and requirements enter into force, it appears that unlikely arbitral mechanisms would be triggered as currently outlined.

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