

Amendments to the Convention on the Physical Protection of Nuclear Material

Introduction

- 3.1 The *Amendments to the Convention on the Physical Protection of Nuclear Material* (the Amendments) amend the *Convention on the Physical Protection of Nuclear Material* (the Physical Protection Convention). The Physical Protection Convention is intended to ensure that nuclear material is adequately protected when transported internationally.¹ The Amendments strengthen these objectives and broaden the scope of the Physical Protection Convention to protect nuclear facilities and material in peaceful domestic use, storage and transport.² The Amendments also provide for cooperation between and among States to assist in the detection and recovery of any stolen or smuggled nuclear material, mitigate any radiological consequences of sabotage, and prevent and combat related offences.³

1 National Interest Analysis (NIA), para. 3; International Atomic Energy Agency, viewed 15 August 2006, <www.iaea.org/Publications/Documents/Conventions/cppnm.html>

2 NIA, para. 4; International Atomic Energy Agency, viewed 15 August 2006, <www.iaea.org/Publications/Documents/Conventions/cppnm.html>

3 NIA, paras 4, 5 and 9; International Atomic Energy Agency, viewed 15 August 2006, <www.iaea.org/Publications/Documents/Conventions/cppnm.html>

Background

- 3.2 The Physical Protection Convention is the only legally binding undertaking in the area of physical protection of nuclear material.⁴
- 3.3 The Amendments result from a recognition that:
- ... the convention needed strengthening to change its focus from international to domestic.⁵
- 3.4 Australia played an active role in negotiating the Amendments, forming a core group with States including Canada, the United States, France and the United Kingdom to forward a draft text. Australia also chaired the main committee at the July 2005 diplomatic conference which agreed to the Amendments.⁶
- 3.5 In reaching an agreement on the Amendments, States Parties put aside concerns relating to
- ...the sharing of security information and how we should craft that. One certainly related to concern over the Law of the Sea and transit access for shipping routes. Another related to specific concern about the phrase in the amendment which talked about 'without lawful authority', exactly what that meant and to whom it would apply. Another referred to article 2A and whether or not they should be binding 'shalls' in the convention or whether, as they are now, as far as is 'reasonable and practicable'.⁷

The Amendments

- 3.6 Broadly speaking, the Amendments provide Australia with new obligations relating to nuclear material, including:
- ...establishing a formal national regime to protect nuclear materials and nuclear facilities in domestic use, storage and transport, which is in place already; and the criminalisation of sabotage of a nuclear facility, trafficking, conspiracy – that is,

4 International Atomic Energy Agency, viewed 15 August 2006, <www.iaea.org/Publications/Documents/Conventions/cppnm.html>

5 Mr Andrew Leask, *Transcript of Evidence*, 14 August 2006, p. 16.

6 NIA, para. 7; Mr Andrew Leask, *Transcript of Evidence*, 14 August 2006, p. 17.

7 Mr Andrew Leask, *Transcript of Evidence*, 14 August 2006, p. 16.

organising, directing and commissioning an offence – and damage to the environment.⁸

- 3.7 As a result of the Amendments, the Convention on the Physical Protection of Nuclear Material is now the Convention on the Physical Protection of Nuclear Material and Nuclear Facilities.
- 3.8 The Amendments add ‘nuclear facility’ and ‘sabotage’ to the list of terms defined in Article 1.
- 3.9 New Article 1A states that the purpose of the Physical Protection Convention is:
- ...to achieve and maintain worldwide effective physical protection of nuclear material used for peaceful purposes and of nuclear facilities used for peaceful purposes; to prevent and combat offences relating to such material and facilities worldwide; as well as to facilitate cooperation among States Parties to those ends.
- 3.10 New Article 2A relates to the protection of nuclear material against theft and the rapid recovery of any missing or stolen nuclear material, as well as the protection of nuclear material against sabotage and the mitigation or minimisation of the radiological consequences of any such sabotage. It requires States to establish, implement and maintain an appropriate physical protection regime for nuclear materials and facilities in its jurisdiction. This Article includes a series of fundamental principles to be applied in establishing such protection.⁹
- 3.11 Amended Article 5 strengthens cooperation between States where nuclear material is stolen or sabotaged, or is threatened to be stolen or sabotaged. Among other things, this requires States to inform any other State(s) if it has knowledge of a credible threat of sabotage of nuclear material or a nuclear facility in that other State. Where an act of sabotage involving nuclear material or a nuclear facility has

8 Mr Andrew Leask, *Transcript of Evidence*, 14 August 2006, p. 15.

9 Fundamental Principle A: Responsibility of the State; Fundamental Principle B: Responsibilities during international transport; Fundamental Principle C: Legislative and regulatory framework; Fundamental Principle D: Competent authority; Fundamental Principle E: Responsibility of the license holders; Fundamental Principle F: Security culture; Fundamental Principle G: Threat; Fundamental Principle H: Graded approach; Fundamental Principle I: Defence in depth; Fundamental Principle J: Quality assurances; Fundamental Principle K: Contingency plan; Fundamental Principle L: Confidentiality. See Article 2A for more detail.

occurred in a State, that State is required to inform any other State which is likely to be radiologically affected.

- 3.12 Extended Article 7 adds to the list of offences that States must make punishable under domestic law.¹⁰ This includes new offences for trafficking of nuclear material; the sabotage of nuclear facilities with intent to cause death, injury or damage by exposure to radiation or radioactive substances; acts organising or directing others to commit an offence specified in Article 7; and acts contributing to the commission of other offences specified in Article 7.
- 3.13 New Article 11A provides that none of the offences in Article 7 should be regarded as political offences for the purposes of extradition or mutual legal assistance. This would prevent a State from refusing to extradite or provide mutual legal assistance for an offence under Article 7 on the sole ground that it is characterised as a 'political offence' under the domestic law of the requested State.
- 3.14 New Article 11B ensures that there is no obligation to extradite or to provide mutual legal assistance if the requested State believes that the request either to extradite or provide assistance for an offence under Article 7 has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion.
- 3.15 The Committee heard evidence that new Article 11A was considered necessary because:

There is a general provision in the law of extradition, and you will find it in Australian national law on extradition, that you should not be extradited for political offences; in other words, if you were an Iranian who is being prosecuted for dissent, there is no extradition obligation in Australian law to extradite a person who has been prosecuted for that purpose.

10 Currently the offences include: (a) an act without lawful authority which constitutes the receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material and which causes or is likely to cause death or serious injury to any person or substantial damage to property; (b) a theft or robbery of nuclear material; (c) an embezzlement or fraudulent obtaining of nuclear material; (d) an act constituting a demand for nuclear material by threat or use of force or by any other form of intimidation; (e)(i) a threat to use nuclear material to cause death or serious injury to any person or substantial property damage; (e)(ii) a threat to commit an offence described in sub-paragraph (b) in order to compel a natural or legal person, international organisation or State to do or to refrain from doing any act; (f) an attempt to commit any offence described in paragraphs (a), (b) or (c); and (g) an act which constitutes participation in any offence described in paragraphs (a) to (f).

The purpose of article 11A is to say that if you are doing something with nuclear material that cannot be treated as a political offence. It is not a defence to the extradition.¹¹

Implementation

- 3.16 Changes to the Physical Protection Convention will be implemented in Australia through the Non-Proliferation Legislation Amendment Bill 2006, amendments to the *Nuclear Non-Proliferation (Safeguards) Act 1987* (Cth) and regulations made under the *Nuclear Non-Proliferation (Safeguards) Act 1987* (Cth). Additional regulations will also be made under the *Extradition Act 1988* (Cth) and the *Mutual Assistance in Criminal Matters Act 1987* (Cth) to incorporate obligations under Articles 11A and 11B.¹²
- 3.17 Development of policy to implement these arrangements will be developed by the Australian Safeguards and Non-Proliferation Office (ASNO).¹³

Costs

- 3.18 ASNO will apply the Amendments as part of its existing regulation of physical protection arrangements for nuclear material and nuclear facilities.¹⁴ As a result, the Amendments are not expected to impose any additional costs and will be managed within ASNO's existing resources.¹⁵

Consultation

- 3.19 The Amendments were first listed on the schedule of the Commonwealth-States and Territories Standing Committee on

11 Mr Steven McIntosh, *Transcript of Evidence*, 14 August 2006, p. 16.

12 NIA, paras 12 and 13.

13 NIA, para. 12.

14 NIA, para. 15.

15 NIA, para. 15.

Treaties (SCOT) in 2002. Updates were provided to SCOT through the schedule twice a year.¹⁶

3.20 Relevant Commonwealth agencies were briefed through the Nuclear Agencies Consultative Committee on 4 May 2006.¹⁷

3.21 Commonwealth agencies that will be most affected by the Amendments have been key contributors during negotiations.¹⁸

Conclusion and recommendation

3.22 The Committee recognises the importance of protecting nuclear material, not only in the international domain but also within the domestic jurisdiction of States Parties. The Committee further supports the Amendments as a framework to facilitate the increased cooperation between States in the protection of nuclear materials.

Recommendation 2

The Committee supports the *Amendments to the Convention on the Physical Protection of Nuclear Material* and recommends that binding treaty action be taken.

16 NIA, Consultation Annex, para. 2.

17 NIA, Consultation Annex, para. 3.

18 NIA, Consultation Annex, para. 4.