

MEMORANDUM OF LAW

Subject: Circular 175: Authority to Conclude a Protocol to
Extend the United States-Morocco Agreement for
Peaceful Nuclear Cooperation

The accompanying Circular 175 Action Memorandum requests the Secretary to approve the conclusion of the proposed Protocol Amending the Agreement for Cooperation Between the Government of the United States of America and the Government of the Kingdom of Morocco Concerning Peaceful Uses of Nuclear Energy. Circular 175 authority to negotiate agreements of this type was granted on December 9, 1977, and confirmed on March 13, 1978, after enactment of the Nuclear Non-Proliferation Act of 1978 (NNPA) (P.L. 95-242).

Statutory authority for negotiating and concluding agreements for peaceful nuclear cooperation is provided by section 123 of the Atomic Energy Act of 1954, as amended (AEA). The AEA and the Nuclear Non-Proliferation Act of 1978 also set forth substantive conditions that must be included in agreements for cooperation, as well as the domestic procedures for Executive Branch coordination and for consulting with Congress prior to entry into force. Currently, nuclear cooperation between the U.S. and Morocco takes place under the conditions established by the AEA, as amended by the NNPA.

The proposed protocol makes only two substantive changes to the U.S.-Morocco Agreement for Cooperation Concerning Peaceful Uses of Nuclear Energy ("the Agreement"), which was signed in 1980 and expires on May 16, 2001.

- * First, the proposed protocol would extend the coverage of the Agreement for an additional period of 20 years with a provision for automatic extensions thereafter in increments of five years each.
- * Second, it would update provisions relating to physical protection of nuclear material, by reference to the

current physical protection standards of the International Atomic Energy Agency. Specifically, Article 1 of the proposed protocol amends article Paragraph 2 of Article 7 of the Agreement by updating its physical protection provisions so as to be consistent with the current IAEA standards contained in its publication, "The Physical Protection of Nuclear Materials," INFCIRC/225/Rev.4, as well as any future revision of the IAEA standards. Article 3 of the protocol eliminates an annex to the Agreement, which listed levels of protection, in order to avoid redundancy with the IAEA publication.

The attachment to this memorandum reviews the conditions of the AEA, which the Agreement continues to meet.

Environmental Review

No further action pursuant to the National Environmental Policy Act or E.O. 12114 is required prior to signing the proposed protocol, its submission to Congress, or its entry into force. The Agreement authorizes nuclear cooperation under certain safeguards and controls, but does not actually provide for the carrying out of any such cooperation or any export or import action. Moreover, existing generic studies have adequately addressed the environmental impact from the kinds of activities authorized under the Agreement.⁷ Finally, agreements for cooperation are excluded from the scope of E.O. 12114, relating to environmental effects abroad, under section 2-5(v) of that order, since such agreements themselves do not "provide" the facilities referred to in the exemption. This exclusion is reflected by the exemption of

⁷ A generic Environmental Impact Statement (EIS) has been prepared concerning the U.S. program of international civil nuclear cooperation, United States Nuclear Power Export Activities -- Final Environmental Statement, ERDA-1542. Research and development activities were analyzed separately in an August 1979 study that concluded that the environmental impact of ongoing and prospective research and development export activities on the global commons or in the U.S. is not such that further environmental review pursuant to the National Environmental Policy Act is required. In addition, a series of more specific studies has been conducted on particular aspects of the cooperation program. Global commons impacts from normal nuclear power plant operations and accidents were considered in: (1) Final Environmental Statement relating to the Manufacture of Floating Nuclear Power Plants by Offshore Power Systems, Part III at 3.3.2.1 and 3.4, NUREG-0502 (December 1978); and (2) Liquid Pathway Generic Study, NUREG-0440 (February 1978). Potential effects of various waste disposal options on the global commons were considered in: (1) Final Environmental Impact Statement on Handling and Storage of Spent Light Water Power Reactor Fuel, NUREG-0575 (August 1979); (2) Environmental Impact Appraisal by the Office of Nuclear Reactor Regulation Relating to the Modification of the Spent Fuel Pools at Salem Nuclear Generating Stations (January 1979); (3) Tables S-3, 10 CFR 51.20; and (4) Department of Energy EIS on "Storage of Foreign Spent Power Reactor Fuel" (1978). See also Final Generic Environmental Statement on Use of Recycle Plutonium in Mixed Oxide Fuel in Light Water Reactors, NUREG-0002 (August 1976).

actions taken pursuant to section 123 of the AEA or section 404(a) of the NNPA from the Unified Procedures that implement this Executive Order. See section 5(h), 44 Fed. Reg. 65660, 61.

Domestic Procedures

In accordance with section 123 a. of the AEA, the Department of State negotiated the proposed protocol with the technical assistance and concurrence of the Department of Energy and circulated it to the NRC for its views.

A draft Nuclear Proliferation Assessment Statement (NPAS) and a classified annex have been prepared and are being circulated as part of the Circular 175 Action Memorandum. On April 1, 1999, the Arms Control and Disarmament Agency ceased to exist pursuant to Title XII of the Foreign Affairs Reform and Restructuring Act of 1998, as enacted in P.L. 101-277. Section 1221 of that Act transferred to the Secretary of State several of the authorities previously exercised by the ACDA Director under section 123 of the AEA. In particular, the Secretary, or his designee, is responsible for preparation and submission to the President of the NPAS. The NPAS is to be accompanied by a classified annex prepared in consultation with the Director of Central Intelligence, summarizing relevant classified information. Submission to the Congress of the NPAS, and any annexes, is necessary to begin the sixty-day period described in section 123 d. of the AEA.

The proposed protocol is an executive agreement subject to statutory procedures for congressional review prior to its entry into force. These procedures are set forth in section 123 of the AEA. If the protocol is authorized by the President, it will be signed and submitted to the Congress for review for 90 continuous session days (sections 123 b. and d.). This period includes the 30-day period required for consultation with the House Foreign Affairs and Senate Foreign Relations committees concerning the Agreement's continued consistency with the substantive requirements of section 123 following entry into force of the proposed protocol. See amendments to the AEA adopted in Export Administration Amendments Act, Pub. L. No. 99-64, Title III, §301(a), 99 Stat. 159, 160 (1985). The legislative history to these amendments expressly recognizes that an agreement may be signed before the initiation of this consultation period. H. Conf. Rep. No. 99-180 at 52-53, reprinted in 1985 U.S. Code Cong. & Admin. News 113-14. That procedure has been followed

in all post-1985 agreements. Unless Congress enacts a joint resolution of disapproval within the statutory review period (section 123 d.), the protocol will be brought into force through an exchange of notes.

DOE/GC and NRC/GC have carefully reviewed the proposed protocol, together with the underlying Agreement, and assured us that there are no legal impediments to the conclusion or implementation of the protocol.

For the foregoing reasons, it is my opinion that there is no legal obstacle to the proposed Protocol to the Agreement being approved by the President, signed, and submitted to the Congress.

Edward R. Cummings
Assistant Legal Adviser for
Non-Proliferation Affairs

February __, 2001

Attachment: Review of U.S.-Morocco Agreement for Peaceful
Nuclear Cooperation in Connection with Section 123
of the Atomic Energy Act.

Attachment

Review of U.S.-Morocco Agreement for Cooperation in Connection
with
Section 123 of the Atomic Energy Act

Substantive Conditions

Section 123 of the AEA, as amended by the NNPA, sets forth certain substantive requirements for agreements for cooperation. Sections 402 and 407 of the NNPA set forth supplementary requirements. The provisions contained in the Agreement, and retained under the proposed protocol, satisfy these legal requirements as follows:

-- Safeguards are mandated in perpetuity by article 9 on transferred items and on special nuclear material used in or produced through the use of such items, as required by section 123 a.(1) of the AEA. The Agreement relies primarily on International Atomic Energy Agency (IAEA) safeguards under the safeguards agreement entered into between the Kingdom of Morocco and the IAEA in connection with the Nuclear Non-Proliferation Treaty. "Fall-back" IAEA or U.S. safeguards are provided for in the event the IAEA is not or will not be applying safeguards under the Agreement.

-- Full-scope IAEA safeguards as a condition of cooperation are mandated by article 1, paragraph 3, as required by section 123 a.(2) of the AEA.

-- A guaranty against explosive or military uses of transferred items and special nuclear material used in or produced through the use of such items is set forth in article 8, as required by section 123 a.(3) of the AEA.

-- A U.S. right to the return of transferred items and special nuclear material used in or produced through the use of such items is provided for in article 10, as required by section 123 a.(4) of the AEA. This right is triggered if Morocco should detonate a nuclear explosive device, fail to comply with the agreement for cooperation, or terminate, abrogate, or materially violate an IAEA safeguards agreement.

-- A guaranty that transferred items and special nuclear material used in or produced through the use of such items will not be transferred to unauthorized persons or beyond the

territorial jurisdiction of Morocco without U.S. consent is set forth in article 5, paragraph 2 as required by section 123 a.(5) of the AEA.

-- A guaranty that the physical security of transferred items and special nuclear material used in or produced through the use of such items will be adequately maintained is set forth in article 7, as required by section 123 a.(6) of the AEA. The annex to the agreement establishes minimum levels of protection to serve as a benchmark. Article 1 of the proposed protocol amends article 7 of the Agreement by updating its physical protection provisions so as to be consistent with the current IAEA standards, "The Physical Protection of Nuclear Materials," INFCIRC/225/Rev.4.

-- A guaranty that specified nuclear materials may not be reprocessed, enriched, or altered in form or content without U.S. consent is provided for in article 6, as required by section 123 a.(7) of the AEA. (In view of the prohibition against post-transfer enrichment, the agreement also satisfies section 402(a) of the NNPA, which states the conditions for such enrichment.) As in other agreements for cooperation, irradiation is excluded from the scope of the alteration consent right.

-- A guaranty of a right of prior U.S. approval over facilities for the storage of specified nuclear materials is provided for in article 5, as required by section 123 a.(8) of the AEA.

-- The transfer of sensitive nuclear technology is excluded by article 1, paragraph 4, so section 123 a.(9) of the AEA is inapplicable. Similarly, article 1, paragraph 4 precludes the transfer of sensitive nuclear facilities and major critical components. Thus, section 402(b) of the NNPA is inapplicable.

-- Article 11 of the Agreement states that the parties shall "cooperate in protecting the international environment from radioactive, chemical, and thermal contamination arising from peaceful nuclear activities under this agreement and in the fields of health and safety" thereby satisfying the requirements of section 407 of the NNPA.

For the purpose of implementing rights specified in articles 5, 6, and 7 "produced" special nuclear material is defined in terms of proportionality in the agreed minute.

Thus, if U.S. material is used in a non-U.S. reactor, the special nuclear material produced will be attributed to the U.S. in the proportion of the U.S. material to the total amount of nuclear material used, and similarly for subsequent generations. It has been our consistent view that sections 123 and 127 of the AEA allow this concept of proportionality to be used in determining the reasonable application U.S. consent rights. We are aware of no course of practice or legislative history to the contrary.

Reciprocal U.S. Obligations

Certain provisions of the Agreement are constructed in a reciprocal manner. They establish certain U.S. obligations to provide Morocco with consent rights regarding storage, retransfers, reprocessing, and enrichment. There are also commitments by both parties relating to explosive or military uses of materials subject to the agreement, physical security, and the return of material in certain circumstances.

If any transfers from Morocco to the United States were to occur, the Executive Branch has, and would continue to have, the ability to meet these commitments in the agreement through its own authorities and those of the Nuclear Regulatory Commission (NRC). If any imported nuclear material, equipment, or components are to be held by the Department of Energy, the Executive Branch will be able to implement the proposed undertakings directly. If any imported nuclear material, equipment, or components are to be held in the private sector, the NRC will have the regulatory authority to ensure that such items and, where relevant, the special nuclear material produced or used therein, are not used in a manner inconsistent with the agreement.

The United States can implement its obligations under article 5 concerning retransfers of Moroccan-origin items by using existing statutory authorities governing export licensing. Moreover, under section 161(i) of the AEA and section 201(f) of the Energy Reorganization Act of 1974, the NRC has wide authority to regulate any licensed activity authorized pursuant to the AEA, including standards and restrictions governing the design, location, and operation of facilities, as well as authority to guard against the loss or diversion of any special nuclear material and to prevent any use or disposition thereof that the NRC may determine to be inimical to the common defense and security. Thus, the NRC, for example, can require that no enrichment or reprocessing of

foreign-origin material be conducted in the U.S. without its consent, and the NRC could communicate with the Executive Branch so that consent of the foreign government could be obtained.

In addition to this broad regulatory authority, an NRC license is needed for any person to transfer or receive in interstate commerce, transfer, deliver, acquire, own, use, possess, import or export any source, special nuclear, or byproduct material or production or utilization facility. The NRC could ensure compliance with the U.S. obligations under the proposed agreement by appropriately conditioning licenses.

As a practical matter, since no reprocessing in the licensed sector is currently undertaken within the U.S., we do not anticipate cases where foreign-origin material would be reprocessed in the licensed sector or where separated plutonium or uranium-233 in the licensed sector would require a storage approval.

The ability to track material is critical to the implementation of the U.S. obligations under the Agreement. Under the authority of section 161(o) of the AEA, the NRC has established a detailed tracking system applicable to foreign-origin nuclear material (10 CFR 70.54).

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