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REQUEST FOR THE INCLUSION IN THE AGENDA FOR THE
GENERAL CONFERENCE'S THIRTY-EIGHTH REGULAR SESSION
OF A SUPPLEMENTARY ITEM ENTITLED

"DESIGNATION OF MEMBERS OF THE BOARD OF GOVERNORS"

Explanatory memorandum submitted by the Philippines

Pursuant to a request made by the Philippines, the record of the discussion in the Board of Governors on 9 June 1994 under the item "Designation of members to serve on the Board in 1994-1995" is reproduced in the Attachment.

ATTACHMENT

Record of the discussion in the Board of Governors on 9 June 1994
under the item
"Designation of members to serve on the Board in 1994-1995"
(GOV/OR.843)

DESIGNATION OF MEMBERS TO SERVE ON THE BOARD IN 1994-1995 (GOV/2728)

1. The CHAIRMAN, recalling that under Article VI.B of the Statute, the Board of Governors was required to designate those whom it wished to serve as Board members for the following year under Article VI.A.1 not less than 60 days before each regular session of the General Conference, said that there would be no further opportunity to comply with that provision. Consultations had therefore been held with all Board members early in May 1994 and subsequently, and no objections had been raised to designation of the following 13 Member States, listed in alphabetical order in accordance with an earlier decision of the Board: Argentina, Australia, Canada, China, Egypt, Finland, France, Germany, India, Japan, Russian Federation, United Kingdom of Great Britain and Northern Ireland, and the United States of America.

2. He accordingly took it that the Board was now in a position to approve that list of members to serve for one year beginning with the first session of the Board after the next regular session of the General Conference to be held in September.

3. Mr. ARCILLA (Philippines), raising a matter of procedure, said that Article VI.A.1 of the Statute quite clearly defined two categories of designated members: first, the ten members most advanced in the technology of atomic energy including the production of source materials, and second, the member most advanced in the technology of atomic energy including the production of source materials in each of eight specified areas in which none of the aforesaid ten was located. Since the list read out by the Chairman did not indicate to which category each proposed designated member belonged, he wished to know which of the countries read out were the ten most advanced and which represented the areas where the aforementioned ten were not located.

4. Mr. HÖGBERG (Sweden) said that his delegation saw no need for a procedural debate. The issue raised by the Governor from the Philippines was indeed a most delicate and difficult one. However, the present system had worked quite well and was sufficiently transparent. If the Board considered that the matter should be discussed, it would best be dealt with by the Informal Working Group established to review all aspects of Article VI of the Statute as a Whole, since it was related to other important matters relevant to representation on the Board and fell within the mandate of that group. Sweden supported the nominations read out by the Chairman.

5. Mr. ARCILLA (Philippines) said that the matter he had raised was no longer just procedure but also a substantive issue, as the Governor from Sweden had just acknowledged. Accordingly, it was incumbent upon the Board to address it with due consideration. To have the matter constantly referred to as the "practice" or "tradition" of the Board was quite unacceptable. There was nothing sacred about the practice, which was both legally defective and a blatant contradiction of the Board's advocacy of transparency in the discharge of its responsibilities. Many of the so-called practices of the Agency were in fact out-moded, anachronistic, undemocratic and lacking in transparency. Board members were well aware that the current trend in United Nations organizations, including the Security Council, was towards democratization and transparency in decision making. The Agency, charged as it was with the very heavy responsibility of preventing nuclear proliferation, which could in the end spell the demise of modern civilization, should not continue to lag behind. The question raised by his delegation, which concerned compliance or non-compliance with a provision of the Statute, had not been answered and, since it was clearly a legal question, he requested that the legal adviser of the Agency be invited to give his expert opinion on the matter.

6. Mr. TALIANI (Italy) recalled that the same issue had been raised by a previous Governor from the Philippines, and the general feeling had always been that the Board was not the appropriate place to discuss it. The Informal Working Group on the Revision of Article VI was a more appropriate forum. The issue was not a substantive one, because there appeared to be no objection to the proposed designations. It was simply a case

of one Governor having an interest in a specific point, which was not of great interest to many other Governors. The Board should therefore refer the matter to the Informal Working Group on Article VI and proceed to the designation without further delay.

7. The CHAIRMAN said that he could not respond to the request from the Governor from the Philippines because he was following the decision taken by the Board on 4 July 1958 and recorded in GOV/OR.88, that the list should be presented in alphabetical order and not subdivided in the manner suggested by the Governor from the Philippines. The Chairman was not at liberty to act contrary to a decision of the Board.

8. The question as to whether the practice pursued by the Board since 1958 was consistent with the Statute was not one on which the legal adviser could reasonably be expected to give an off-the-cuff opinion but it would certainly be relayed to him. At all events it seemed to be generally presumed that the practice followed by the Board since 1958 was in accordance with its Statute.

9. Mr. ARCILLA (Philippines) said that there seemed to be a lack of appreciation of the seriousness with which the Philippine delegation approached its work and its responsibility in the Board, and in particular the seriousness with which it regarded the present issue, which concerned the implementation of certain provisions of the Statute. That was a legal issue, hence his request that the legal adviser be asked to give an expert opinion. The question was a very simple one which would not require extensive research, namely, whether, by following the Chairman's proposal, the Board would be in compliance with Article VI.A.1. His delegation would be remiss in its duty, if it did not at the very least seek a clarification on such a vital issue. Furthermore, it had no wish to be a party to the perpetuation of a practice by the Board on a matter of great significance which was faulty at best. Unless the Chairman, or some other member of the Board, could give a satisfactory reason for denying his delegation's request, which was the legitimate right of a member of the Board representing a sovereign State, he would insist that the legal adviser be asked to join the meeting forthwith.

10. The DIRECTOR GENERAL said that he fully endorsed the Chairman's opinion that it was unwise to ask for off-the-cuff legal advice on a matter which the

requesting Governor regarded as very serious, in view of the bad experience with such snap judgements in the past. If a legal analysis was requested by the Board, the Secretariat would of course provide it, but it would take time. He also endorsed the Chairman's view that the procedure pursued by the Board was in line with the Statute. The Board was the highest interpreter of the Statute of the organization and, if it had since 1958 consistently followed an interpretation of the Article in question, it was highly unlikely that the Secretariat's legal adviser would say that it was an erroneous or unacceptable interpretation. An organization's highest organs did interpret the Statute, which was a living document, and it was extremely doubtful whether a legal expert would question a practice of such long standing. A theoretical enquiry could be conducted, of course, but it would be unlikely to reach a different conclusion.

11. Mr. STOIBER (United States of America) said that his delegation was in favour of the General Conference being informed of the Board's designation of members, as read out by the Chairman, to serve on the Board from the end of the thirty-eighth to the end of the thirty-ninth regular sessions. Such action was not only in line with the Board's consistent practice over many years, but also reflected the Board's proper exercise of its responsibility to designate members under Article VI.A.1 of the Statute. It was an approach which had worked well over the years, enabling the Board to function extremely effectively in guiding the vital work of the Agency. It had therefore been somewhat surprising to receive the three-page non-paper, dated 7 June 1994, which asserted that the Board's consistent practice was highly irregular and suggested that its designation procedures were not in full compliance with statutory obligations. The United States delegation strongly disagreed with those assertions and agreed rather with Sweden and Italy that the Board was not the place to enter into a protracted debate over the interpretation of Article VI of the Statute. That was a question which the Informal Working Group could undertake, if Board members felt that that would be a profitable use of its time.

12. The current formula for designating Board members under Article VI.A was not only highly regular but represented a carefully balanced compromise of the various interests represented in the Agency's membership. It had worked well over the years through a

process of informal consultations such as the Chairman had conducted in the past few weeks, and should be continued in its present form.

13. Mr. BAER (Switzerland) said that the Governor from the Philippines had raised a most interesting question regarding the designation of Board members. It had to be recognized that the ways of the Board in that respect appeared somewhat impenetrable, and greater transparency was undoubtedly needed.

14. The concept of "most advanced members" in Article VI.A.1 was necessarily a function of time. No law of nature prescribed that the relative state of advancement of national nuclear programmes should remain constant from one year to the next, and in fact there were many examples to the contrary. The question raised by the Governor from the Philippines certainly provided food for thought and merited further careful study. The existing mandate of the Informal Working Group on Article VI should allow it to tackle the issue. If not, its mandate should be broadened to permit such discussion, and it should be requested to consider and to report back to the Board on the issue of designated Board members by the June 1995 Board meeting. In that connection, his delegation would propose that any attempt to improve Article VI.A should avoid wording whose meaning might vary with time.

15. At all events, it had to be said that, notwithstanding the complex wording of Article VI.A.1, the present system had worked satisfactorily hitherto thanks to the collective wisdom of the Board.

16. Mr. ARCILLA (Philippines) said that his delegation had not sought a long debate on the issue but had merely asked a very simple question. It was obvious, however, that the Chairman and some members of the Board were not ready to grant a legitimate request from a delegation represented in the Board, despite it being the practice of the Agency to provide expert opinions when requested, or even without being requested. If in the opinion of the legal adviser the question raised by the Philippine delegation was not a simple one, but required extensive study, it would accept his word. As regarded the Board's practice, it was not correct to say that the Board had been following the practice in question

since 1958, as it was not so many years since the number of designated members had been increased to ten, so the question that he had raised would not have applied in 1958.

17. The Philippine delegation shared the view expressed by the Governor from Switzerland that the matter should be given serious consideration, but had reservations about referring it to an informal working group, as it deserved more serious treatment than that.

18. In view of the response to its request, his delegation wished to place on record its reservation on such action as might be taken by the Board on that item and totally disassociated itself from any decision which might not satisfy the legal requirements of the Statute.

19. The Philippine delegation also reserved the right to take appropriate steps in the near future with a view to establishing a more proper and legal method of handling that problem which continued to confront the Board year in, year out.

20. The CHAIRMAN said he would submit the question raised by the Philippine delegation to the legal adviser.

21. Mr. LEE (Republic of Korea)* said that his delegation wished to record its strong reservations regarding the current practice of designating members. It believed that the process should be revised to provide greater transparency and reflect the significant developments that had taken place in the nuclear world since the amendment of the Statute in 1973. Those developments had created a pressing need for reform of the Agency, particularly the Board, whose composition did not adequately reflect them.

22. Article VI.A.1 of the Statute provided for the designation of members by the Board in two different categories. As had been rightly pointed out by the Governor from the Philippines, the proposed list did not show which members were being proposed in which category. A clear-cut distinction needed to be made between the two categories for the Board to be acting in full compliance with the provisions of the Statute. The Board had the obligation and responsibility to ensure that the Statute was scrupulously observed in all

* Member States not members of the Board of Governors are indicated by an asterisk.

aspects of the Agency's activities, including some long-established practices. Article VI.A.1 was unclear, and the process by which designations were made required elaboration. He would like to know, for example, on what basis the Republic of Korea had been excluded from the list of members most advanced in the technology of atomic energy. Although his country had not had a single nuclear power plant in operation 15 years previously, it now ranked as the tenth largest in the world in terms of both nuclear power plants in operation and total electricity generated with nuclear energy. It had also ranked fifth in terms of the share of nuclear power in electricity production in 1992. By the year 2001 it would have a total of 18 nuclear power plants in operation. The current and future performance of the Republic of Korea in the field of peaceful uses of nuclear energy fully justified its claim to be designated for membership of the Board in the first category as being one of the members most advanced in the technology of atomic energy.

23. In a changing world it was vital for an important international organization like the Agency to maintain full effectiveness in dealing with issues related to the peaceful uses of nuclear energy. It needed to look ahead to the crucial role that it would have to play in the 21st century in discharging its responsibilities and meeting the expectations of the international community. Finally, it needed the courage to admit reality, recognize certain practices as obsolete and undertake the necessary reforms going beyond narrow vested interests. His delegation would continue to pursue the issue to ensure that its legitimate claim was duly recognized.

24. Mr. UMAR (Nigeria) fully endorsed the proposal by the Swiss delegation for a careful review of the issues raised by the Governor from the Philippines. He believed that June 1995 would be an appropriate time for the Board to consider the matter and urged all Governors to participate in a spirit of co-operation. Subject to those comments, his delegation was ready to accept the present designations.

25. The CHAIRMAN took it that, in the light of the statements that had been made and recorded, the Board approved the list of designated members to serve on the Board in 1994-95 which he had read out.

26. It was so agreed.

27. Mr. ROUX (South Africa)* explained that he had requested to speak after the decision was taken as he wished to lay emphasis on the underlying principle rather than the procedure involved. The time was long overdue for the proper implementation of the provisions of Article VI of the Statute. In other areas, such as safeguards, great emphasis was placed by the Board on transparency. He therefore wondered why the same principle could not be applied to the whole of the Statute including Article VI. At the moment the Board was not adhering strictly to the very Statute of which it was the guardian. He did not feel that the matter could appropriately be referred to the Informal Working Group on the Revision of Article VI, as the present issue concerned solely adherence to the Statute as it stood. Perhaps the time had come for the General Conference to give attention to the matter and ensure that the Statute was implemented correctly with full transparency.

28. The CHAIRMAN, summing up, noted that the argument was not one of revision of Article VI but of the way in which the Board gave effect to the latter. All the same, the Informal Working Group on the Revision of Article VI as a Whole was probably the most appropriate body to investigate the matter. He therefore took it that the Board wished the Working Group to give special attention to the application of rules regarding designation of Board members under Article VI.A.1, taking into account the present discussion, and invited the Working Group to submit its views in time for the consultations the following year on the designations for 1995-96.

29. It was so agreed.

30. Mr. ARCILLA (Philippines) said that, while not objecting to the proposal, his delegation reserved the right, as mentioned, to take other steps that might be necessary at a later date.