EURATOM'S ABILITY TO INTERVENE IN URANIUM SUPPLY CONTRACTS BETWEEN EUROPEAN UNION NUCLEAR UTILITIES AND AUSTRALIAN PRODUCERS

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This paper discusses the increasing global demand for uranium, Australia's place in the international market and the nation's opportunity to supply the European Union with uranium. It examines the ability of the European Atomic Energy Community ("Euratom") to intervene in uranium supply contracts between European Union nuclear utilities and Australian uranium producers.

1. INTRODUCTION

The Australian Minister for Industry, Tourism and Resources has recently stressed, "Even though Australia has 40 per cent of the world's uranium, we only have about 20 per cent of the world's uranium market. Now, we need to address that as a country …".[1]

This paper examines the increasing global demand for uranium, Australia's place in the international market and the nation's opportunity to supply the European Union ("EU") with uranium. The paper provides an overview of the operation of the supply provisions of the *European Atomic Energy Community Treaty on the Supply of Nuclear Fuels*[2] ("Euratom Treaty"), the powers of the Euratom Supply Agency and the supply policy which controls EU nuclear power utilities in the procurement of uranium from Australia. It analyses the restrictions which the European Atomic Energy Community ("Euratom") is able to impose on EU utilities. Clearly the Australian uranium industry is of great importance to the EU and its Member States' nuclear utilities. The question of whether Australian uranium producers need to be concerned about Euratom's powers to conclude and intervene in supply agreements is addressed. The Euratom Supply Agency policy is primarily aimed at nuclear utilities, however, it also indirectly affects Australian producers of uranium as it potentially limits the amount they can export to the EU. In addition, the ability of the Australian Government to intervene in proposed supply contracts to nuclear utilities in EU countries is discussed. The effect of the Euratom Treaty and the Euratom Supply Agency's policy and rules is that EU utilities may be restricted in how much uranium they can purchase from Australian producers. Finally, the conclusion highlights that Euratom has considerable discretion to alter supply policy and thus intervene in supply contracts, but that policy is continually being adapted to accommodate demand for uranium and ensure sustainable supplies.

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1 The Hon Ian MacFarlane MP, Australian Minister for Industry, Tourism and Resources, ABC Television, 16 February 2005.

2 Euratom Treaty on Supply of Nuclear Fuels, Euratom Supply Agency, <http://europa.eu.int/comm/euratom/> at 12 June 2006.

2. BACKGROUND

2.1 Global demand for uranium

The world's approximately 440 nuclear reactors provide 16% of the world's electricity and consume about 80,000 tonnes of uranium oxide concentrate per year.[3] In 2003 the world's uranium production (36,042 tU) provided approximately 54% of world reactor requirements, with the rest supplied by secondary sources, mostly from inventories and decommissioned weapons-grade uranium.[4] The OECD Nuclear Energy Agency have predicted that known uranium production capabilities (including existing, committed, planned and prospective production centres) are not able to satisfy the projected future global uranium requirements even at low demand scenarios.[5] In addition, secondary sources are predicted to decline in importance from after 2020 and utilities will increasingly source their requirements from producers. As a result world uranium prices are forecast to rise in at least the short term.

Natural uranium production in 2005, compared to 2004

	Production in 2005 (Tonnes uranium)	Share in 2005 (%)	Production in 2004 (Tonnes uranium)	Change over 2004 (%)
Canada	11 628	27.9	11 597	0.3
Australia	9 516	22.8	9 010	5.6
Kazakhstan	4 329	10.4	3 719	16.4
Russia	3 325	8.0	3 200	3.9
Namibia	3 148	7.5	3 038	3.6
Niger	3 093	7.4	3 282	-5.8
Uzbekistan	2 300	5.5	2 050	12.2
US	1 020	2.4	862	18.4
Ukraine	800	1.9	1 000	-20.0
South Africa	674	1.6	755	-10.7
Others	1 888	4.5	1 962	-3.8
Total	**41 722**	**100.0**	**40 475**	**3.1**

Source: Euratom Supply Agency Annual Report 2005.

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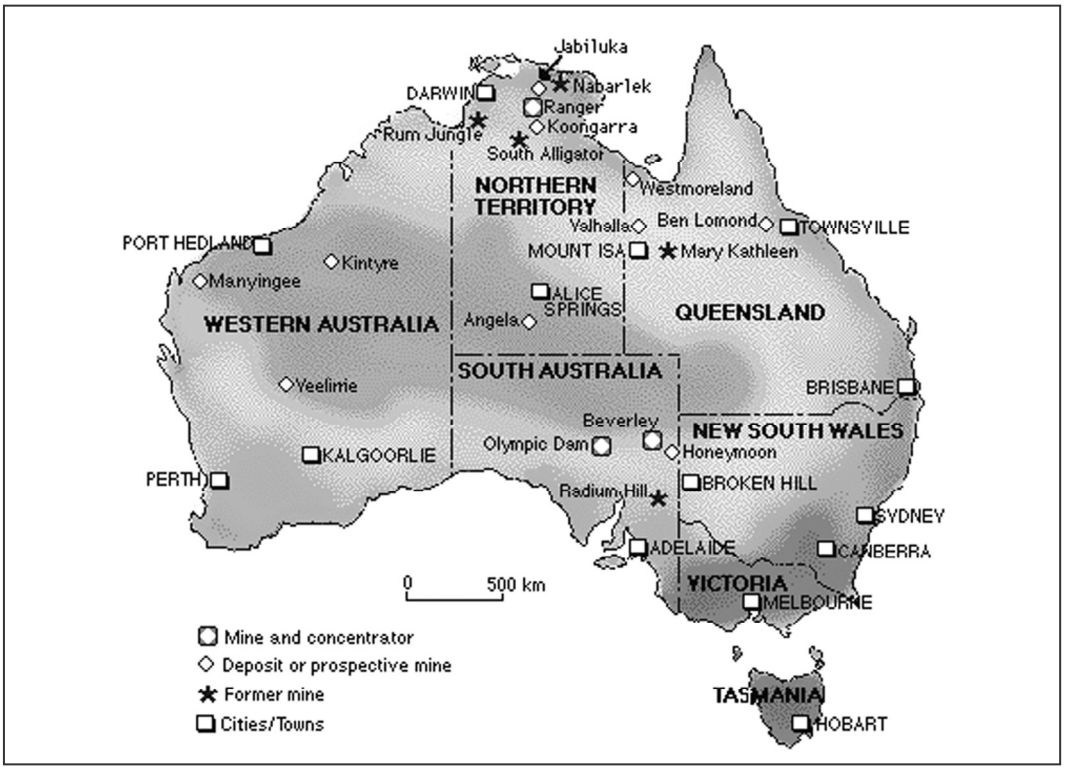
3 References throughout this article to "uranium" encompass uranium in its various forms from mining and milling, where uranium ore is treated with acid to separate the uranium metal from the waste rock. The uranium is dried into a powder or uranium oxide concentrate (U3O8) which is often referred to as "yellowcake", which is exported from Australia. At the refining and conversion stage U3O8 is chemically refined to remove impurities and produce UO3 which is then converted into either UO2 for heavy water reactors or UF6 for light water reactors.

4 OECD Nuclear Energy Agency, *Uranium 2003: Resources, Production and Demand*, OECD 2004 ("Red Book") at 10.

5 *Ibid*., at 11.

Australia is well positioned with the continually growing demand for nuclear power. With its relatively under-developed uranium mining industry, due to the previous Federal Government's "three mines policy"[6] which was overridden on the election of a National/Liberal Party Coalition Government in 1996, the nation appears ready to play a key role in the global nuclear power industry in the future. In response to the substantial increase in uranium prices over the past two years, uranium exploration expenditure in Australia has dramatically increased. In 2006 there have been substantial developments in Australian uranium policy which are starting to open up a less restrictive position to new mining. The Federal government and the Northern Territory government share responsibility for uranium mining in the Northern Territory. The Federal government has also called on the Queensland and Western Australian governments to lift their bans on uranium mining to help boost the national economy.[7] There has been increased political attention on Australia's opportunity to increase uranium exports to AU$1 billion a year.



Source: Uranium Information Centre Limited.

6 The Australian Labor Party changed its nuclear policy to ensure that only uranium from Ranger, Nabarlek (stockpiled) and Olympic Dam could be exported. The application of this policy continued until the Liberal-National Party Coalition government entered power in 1996.

7 The Uranium Information Centre (UIC) reports that the uranium prospects likely to begin production within the next 5-7 years include Southern Cross Resources' Honeymoon ISL project in South Australia with an estimated 3.3kt of resources and if policy is changed in Western Australia, Paladin's Manyingee and Oobagooma ISL projects. In addition, the following projects exist: Yeelirrie owned by BHP Billiton in Western Australia; Koongarra owned by Cogema in the Northern Territory; Kintyre owned by Rio Tinto in Western Australia; and Valhalla and Skal owned by Summit Resources in Queensland.

Australia possesses approximately 40% of the world's reasonably assured uranium resources recoverable at less than US$40/kg, or 29% of such resources at less than US$80/kg.[8] It also holds the largest proven uranium reserves in the world. The total Australian production increased 19% in 2004, after a 10% increase in 2003.[9] In 2003-4 Australia exported 9,099 tonnes of uranium (uranium ore concentrates), earning over $360 million. Increased exports in the short term will be as a result of higher expected production at existing Australian uranium mines.[10] In 2003, the Ranger and Olympic Dam mines were respectively the world's second and third largest uranium producers and overall, Australia was the world's second largest uranium exporter.[11] BHP Billiton is at present considering an expansion of the Olympic Dam mine in South Australia which could more than triple the production of uranium to approximately 15 000 tU/year.

2.2 Australia's Network of Nuclear Safeguards Agreements

All of Australia's uranium is exported for exclusively peaceful purposes, and only to countries and parties with which Australia has a bilateral safeguards Agreement.[12] These Agreements ensure that Australia's nuclear exports remain in exclusively peaceful use, and may only be transferred to a party with a bilateral safeguards Agreement with Australia. Australia currently has 19 bilateral safeguards Agreements covering 36 countries.[13] These safeguards are additional to those under the Non-Proliferation Treaty as they apply specific conditions on "Australian Obligated Nuclear Material".[14] The bilateral Agreement between the Government of Australia and the European Atomic Energy Community (Euratom) concerning Transfers of Nuclear Material from Australia to the European Atomic Energy Community[15] entered into force on 15 January 1982. There is also a confidential Administrative Arrangement, which provides the operational arrangements for the principles committed to by the parties.

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8 OECD NEA, *Uranium 2003: Resources, Production and Demand*.

9 World Nuclear Association, *The Global Nuclear Fuel Market Supply and Demand 2005 – 2030*, The World Nuclear Association, London, 2005 at 104.

10 WMC Resources was acquired by BHP Billiton in June 2005. BHP Billiton now holds the world's largest uranium reserves in a single deposit, the underground Olympic Dam operations in South Australia. Olympic Dam produced 3.7kt of uranium in 2004, 10% of the world production. Energy Resources of Australia (68.4% Rio Tinto) operates the Ranger open-pit mine located near Darwin in the Northern Territory of Australia, producing 11% of world production in 2004; ERA also owns the nearby Jabiluka deposit, the development of which will only proceed if the traditional indigenous owners of Jabiluka approve. Heathgate Resources, a wholly owned subsidiary of General Atomics, operates Beverley uranium mine in South Australia.

11 Australian Safeguards and Non-Proliferation Office Annual Report 2003-2004, <http://www.asno.dfat.gov.au/annual_reports.html> at 12 June 2006, at 111.

12 *Nuclear Non-Proliferation (Safeguards) Act 1987* (Cth).

13 Argentina, Canada, Czech Republic, Egypt, Finland, France, Hungary, Japan, Mexico, Phillipines, Russia, South Korea, Sweden, Switzerland, UK, USA, Taiwan and EURATOM (including the following Member States of the Community: Austria, Belgium, Denmark, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal , Spain and the United Kingdom). In addition, in April 2006, the Australian Government signed a bilateral nuclear safeguards agreement with China, which will enable the export of Australian uranium to China.

14 Australian Safeguards and Non-Proliferation Office Annual Report 2004-2005 <http://www.asno.dfat.gov.au/annual_reports.html> at 12 June 2006.

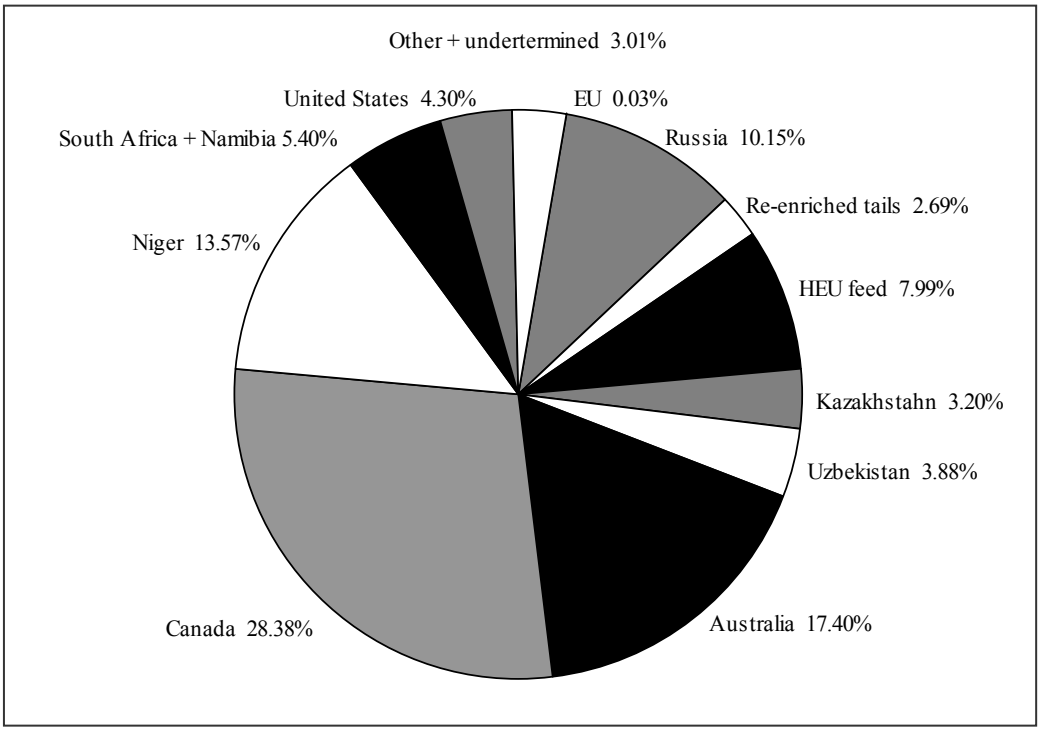
15 Agreement between the Government of Australia and the European Atomic Energy Community, 1982 No. 26, <http://austlii.edu.au/au/other/dfat/treaties/1982/26.html>, 12 June 2006.

Commercial contracts for the export of Australian uranium must include a clause noting that the contract is subject to the relevant bilateral safeguards arrangement. A copy of each new sales contract involving Australian uranium must be submitted to the Australian Department of Industry, Tourism and Resources for their records. At present, there is no formal statutory approval of such contracts required, but the Department will confirm whether the contract is acceptable and consistent with the Seller's Export Permission, based on the Purchaser's compliance with Australia's international nuclear safeguards obligations.

2.3 Uranium exports to European Union

The European Commission continues to encourage the role of nuclear power to assist Europe to address climate change issues. France continues to be the leader in nuclear energy and require large volumes of uranium and by 2010 Finland will have a new operational nuclear energy plant. In 2004 Russia remained the largest supplier of uranium (primarily low enriched uranium) to the EU.[16] Australia currently provides approximately 17% per cent of the EU's uranium. Australia is extremely well positioned to take advantage of the increasing demand for uranium by EU utilities as the nation's large and low cost uranium reserves and its political and economic stability could support significant increases in uranium exports.

Origins of natural uranium delivered to EU utilities in 2005 (% share)



Source: Euratom Supply Agency Annual Report 2005

[16] Euratom Supply Agency Annual Report 2004, at 13.

3. EURATOM TREATY

The Member States of the EU are party to the Treaty which establishes the European Atomic Energy Community (Euratom). The Euratom Treaty's fundamental objectives in relation to the supply of nuclear fuels is to ensure that all users in the Community receive a regular and equitable supply of ores and nuclear fuels.[17] Chapter 6 of the Treaty sets out special provisions governing the supply of nuclear fuels to the EU. The relevant provisions of the Treaty are discussed below. Some provisions of the Treaty have not been actively applied, but this does not mean that they can not be enforced in the future.

4. SUPPLY PROVISIONS OF EURATOM TREATY

The Euratom Treaty establishes a specialised Agency (the Euratom Supply Agency) and outlines its legal powers over purchase of uranium and nuclear fuel services for end use in the EU. The Agency is however, "supervised" by the Commission, in that the Commission possesses a right of veto over the Agency's decisions.[18] The Treaty provides the Agency with the exclusive right to conclude contracts for the supply of uranium from inside and outside the community.[19] In order for utilities to comply with EU legislation, supply contracts (including purchases, sales, exchanges, loans/exchanges and enrichment contracts) must be submitted to the Supply Agency for conclusion. The Agency and the Commission's objective is to ensure the long-term security of supply through diversification of supply sources and the avoidance of excessive dependency on any one supply source.[20]

Parties to sales agreements are permitted to negotiate their contracts themselves but are encouraged to liaise with the Agency prior to finalization of the contract negotiations and informally discuss any uncertainties before submitting the contract. The aim is to achieve a mutual understanding and to avoid a negative formal Agency decision.[21] EU nuclear power utilities[22] are obliged to submit all contracts for the purchase or exchange of uranium and enrichment services to the Agency. In addition, the Rules of the Supply Agency provide that notice must be given to the Agency in the event of cancellation of the contract; and any amendment to a supply contract must require the signature of the Agency.[23] The Agency will "conclude" the contract and, if the Agency believes the terms of the agreement are compliant, become a co-signatory to the contract. Any long term contracts over ten years duration are required to be concluded by the Commission, with the aim of preventing obstruction of free markets.

It is evident that the Agency has a substantial amount of discretion to refuse and approve such contracts if they believe that it does not comply with the objectives of the Treaty and its overall policy. The ability of the Agency to impose conditions in supply contracts was reinforced by the

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17 Euratom Treaty on Supply of Nuclear Fuels, *op.cit*., Article 2 (d).

18 *Ibid*., Article 53.

19 *Ibid*., Article 52.

20 Euratom Supply Agency – Advisory Committee Task Force Report, *Analysis of the Nuclear Fuel Availability at EU Level from a Security of Supply Perspective,* June 2005, at 6.

21 Euratom Agency Annual Report 1997 at 11.

22 There are currently nuclear utilities with operational nuclear power plants in the EU countries - Belgium, Finland, France, Germany, Netherlands, Spain, Sweden and the United Kingdom.

23 Article 5 (h) and (i), Rules of the Supply Agency of the European Atomic Energy Community, Euratom Supply Agency, <http://europa.eu.int/comm/euratom/> at 12 June 2006.

Court of First Instance in the case, *Kernkraftwerke Lippe-Ems GmbH (KLE) v Commission of the European Communities*[24] ("KLE") (discussed later). If the Agency refuses to execute the contract, a party who disagrees with the Agency's response in respect of a supply contract is permitted to refer the matter to the Commission for review and a decision must be handed down within one month.[25] The Commission's decision can in turn be appealed to the Court of First Instance of the European Communities and the European Court of Justice. Pursuant to Articles 151 and 188 of the Euratom Treaty, there is also the avenue of initiating a compensation action against the Commission for damages caused by its institutions or staff. Compensation arguments have been made in two cases, the KLE and *Empresa Nacional de Uranio SA (ENU) v Commission of the European Communities*[26] ("ENU") cases (discussed later), however, in both cases the Court refused to award damages.[27] In KLE it was argued unsuccessfully that as the Euratom Supply Agency had failed to conclude the contract within the stipulated period, Euratom should be obliged to pay compensation or damages to KLE in respect of the higher purchase price and all additional expenditure and costs incurred by KLE in connection with the conclusion of a replacement agreement.

Once a uranium supply contract is concluded between an Australian producer and an EU utility, the Agency refers the relevant information in the contract (such as quantities, delivery schedule and any conditions imposed by Australia) to the Euratom Safeguards Office. Procedures are in place to track the movements of each delivery of uranium. In addition, the Agency intervenes to ensure that the material can be accepted pursuant to the bi-lateral safeguards agreement between Euratom and Australia. The Agency will confirm to the Safeguards Office, before an import is accepted, that a uranium supply contract has been concluded between the parties.[28]

4.1 Intervention on Prices for Supply

Prices are to be determined as a result of balancing supply against demand as provided in Article 60 of the Treaty. In addition the Agency Rules determine the manner in which demand is to be balanced against supply.[29] Prices negotiated between utilities and suppliers which are designed to secure a privileged position for certain users in violation of the principle of equal access in the Treaty are prohibited.[30] If the Agency becomes aware of such pricing practices it is obliged to report this to the Commission. If the Commission were to agree that pricing practices had been used in contract negotiations which were contrary to the equal access principle, it can interfere and set prices in issue at a level "compatible with the principle of equal access".[31] The Euratom

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24 *Kernkraftwerke Lippe-Ems GmbH (KLE) v Commission of the European Communities*, Court of Justice judgment of 22 April 1999. *Kernkraftwerke Lippe-Ems GmbH v Commission of the European Communities*, Court of First Instance judgement of 25 February 1997, <http://www.curia.europa.eu/en/content/juris/index.htm> at 12 June 2006.

25 Euratom Treaty on Supply of Nuclear Fuels, *op.cit*., Article 53.

26 *Empresa Nacional de Uranio SA (ENU) v Commission of the European Communities*, Court of Justice judgment of 11 March 1997. *Empresa Nacional de Uranio SA v Commission of the European Communities*, Court of First Instance judgment of 15 September 1995, <http://www.curia.europa.eu/en/content/juris/index.htm> at 12 June 2006.

27 A Bouquet, *The Euratom provisions on nuclear supply and ownership*, ISNL 2005 Session at 6.

28 *Ibid*., at 13.

29 Euratom Treaty on Supply of Nuclear Fuels, *op.cit*., Article 60.

30 *Ibid*., Article 68.

31 *Ibid*., Articles 67 and 68.

Council also has the power to fix prices, acting unanimously on a proposal from the Commission. If a crisis situation arose, it is possible for Euratom to fix a material price.

4.2 Notification and Agency exemptions

The prior consent of the Agency is required for the conclusion, or renewal of agreements for uranium supply.[32] However, there are some supply agreements that may be exempted by the Commission in complying with these provisions; such as for the import of "small quantities" of ores, source materials or special fissile materials which are normally used in research.[33] A small quantity of uranium is considered not more than one metric ton per transaction or five tons per year.[34] However, the Agency still needs to be notified of every transfer, import or export which would come within this provision.

Contracts relating to the processing, conversion or shaping of ores, source materials or special fissile materials (referred to as "transformation contracts" rather than "supply contacts") are not captured by the Treaty where they meet specified conditions. However, a contract for enrichment is perceived by the Agency as a supply contract captured by the applicable provisions of the Treaty. Some EU Member States disagree with this view. The Agency must be notified of the existence of commitments and as soon as contracts are signed, of the quantities of material involved in the transactions. The Commission is still entitled to intervene and prevent commitments in relation to conversion or shaping if it believes that it cannot be performed efficiently, safely and without the loss of material to the detriment of the Community.[35] There is no case law on what is considered inefficient and unsafe in these circumstances.

Transit material can also be excepted. For example, if the material is temporarily imported into the EU for transformation, there is an explicit exclusion of Euratom ownership, but the relevant Safeguards clauses will need to be in place.[36] This provision has recently been the subject of debate through the case of *Industrias Nucleares do Brasil S.A. and Siemens v UBS AG*.[37] The Agency had traditionally viewed toll enrichment contracts as supply contracts. The German court referred this issue to the Court of Justice of the European Communities for interpretation of Chapters 8 and 6, and of particular relevance was a key issue of whether Article 75 applies to enrichment contracts; and in particular whether the terms 'processing, conversion or shaping' encompass the enrichment of uranium. A judgment is expected to be handed down in 2006.

4.3 Intervention in the case of scarcity or over-supply

The Euratom Treaty supply system permits intervention in the event of scarcity of nuclear supplies and can also be applied in the event of an over-supply crisis,[38] both of which could affect security of supply. The Rules of the Supply Agency determine the manner in which demand is to be balanced against the supply of ores, source materials and special fissile materials. Section 5,

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32 *Ibid*., Section 6, Article 73.
33 *Ibid.*, Article 74.
34 Bouquet, *op.cit*., at 10.
35 Euratom Treaty on Supply of Nuclear Fuels, *op.cit*., Article 75.
36 *Ibid.,* Article 75c.
37 Case C-123/04 and C-124/04, <http://www.curia.europa.eu/en/content/juris/index.htm> at 12 June 2006.
38 Euratom Treaty on Supply of Nuclear Fuels, *op.cit*., Article 76.

Article 72 provides that the Agency may at any time decide to build up emergency stocks, or necessary commercial stocks to facilitate supplies to or normal deliveries by the Community.

5. THE PRINCIPLES OF SUPPLY POLICY

The Supply Agency is entitled to make decisions on supply contracts on a discretionary case-by-case basis. No formal regulation exists. Whilst this provides flexibility to the Agency, it also leads to a lack of certainty for EU utilities and their contracting parties. A "reasonable" limit of maximum dependence on a single source of supply does not provide a certain exact figure or percentage.

5.1 Security of supply

The Agency continues to monitor the supply of natural uranium to the EU, to ensure that EU facilities have diversified sources of supply and do not become over-dependent on any single source. If political, economic, or other unforeseen problems were to arise in a region or country, it is intended that this policy would assist in the continuity of supply. Maintaining good relations with producer countries is essential for the EU.[39]

In the 2002 Annual Report, Euratom explained that security of supply factors include the provision of an uninterrupted service, price stability and sustainability.[40] Security of supply concerns result from the fact that primary production of natural uranium covers only approximately 60% of the global demand, with the remaining percentage provided by inventories and weapons dismantling and from the re-enrichment of tails of depleted uranium from the enrichment process.

The Euratom Supply Agency has previously indicated concern about low inventory holding by its member utilities in a market that was becoming increasingly dependent on secondary supplies. In the 2003 Annual Report, it expressed heightened concern about supply security issues, and established a task force to examine security of supply issues and make recommendations for appropriate actions by different actors in order to prevent problems in the nuclear fuel cycle. However, the Supply Agency is also sensitive to the potential market impacts of its recommendation that utilities bolster their inventories stating that "a sudden rush by all utilities to increase their inventories would just put more pressure on prices".[41]

The Task Force highlighted its concern about future secondary supplies, transportation problems of various origins (regulatory, lack of ports), permanent closure of a mine or a conversion facility, and the difficulties and lead time related to the opening of new mines. Of relevance to supplies of uranium, the Task Force recommended that:

- the industry review their supply chain including the inventory and adjust their policies (purchasing, logistics, inventory , etc) accordingly;
- utilities enter into long-term commercial relationships at reasonable price levels with suppliers in order to secure the viability of their own supplies and make it easier for their suppliers to decide on new investments;

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39 Euratom Supply Agency Annual Report 2005.
40 Euratom Supply Agency Annual Report 2002.
41 Euratom Supply Agency Annual Report 2003, p. 23.

- cooperation between nuclear fuel utilities and the producers be improved.[42]

Interestingly, the Task Force also identified that overregulation and political overburdening and interference could also be considered classes of threat to a secure energy supply, in addition to economic, physical and environmental matters.

5.2 Policy of diversification of sources of supply

In order to ensure a "regular and equitable supply" of nuclear materials the Supply Agency introduced policy in 2000 addressing diversification of sources of supplies. In summary, the aim is to ensure that the EU does not become over-dependent on any single source of supply. "The Agency has a large discretionary margin of judgment in order to avoid the adverse consequences of possible supply disruptions in the long term. Rather than limiting imports at Community level through a quota system, the policy requires each utility, in a pragmatic and flexible manner, to ensure that it maintains a diversified portfolio of contracts. Furthermore the users, while contracting with the suppliers of their choice, are advised to choose primary producers for the majority of their requirements and to enter into long term contracts at equitable prices. Spot contracts are mainly intended to cover requirements that were not anticipated or to build up inventory taking advantage of particularly favourable opportunities."[43] If a uranium supply contract would provide one end user with privileged access to a disproportionate part of limited amounts available, the Agency may choose to reject the contract on the basis of lack of equal access.[44]

The policy provides a guideline as to the amount of material each EU utility can procure, in particular former USSR (also referred to as the Commonwealth of Independent States) ('CIS') material. These amounts are not definite limits or quotas, rather the Supply Agency will apply its policy on a case-by-case basis taking into account the specific facts of each case. The Agency maintains that this method has permitted flexibility in the procurement activities of some utilities in that:

- End-users have been allowed to consume more than one year's "entitlement" in a given year (and to carry forward a negative balance for some years);
- Advance deliveries under long term contracts have been allowed;
- Purchases of CIS uranium when combined with purchases of uranium freshly produced (mined and milled) in the EU have not been counted against the end-users' individual entitlements;
- Deliveries under contracts concluded before the policy was announced, or before the country concerned joined the EU, have been allowed to continue without restriction.
- Very small end-users have been permitted to acquire CIS material in excess of their "entitlement".

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42 Euratom Supply Agency – Advisory Committee Task Force Report, *Analysis of the Nuclear Fuel Availability at EU Level from a Security of Supply Perspective*, June 2005 at 19.

43 Euratom Supply Agency Annual Report 2000.

44 KLE Court of First Instance judgment 25 February 1997, *op.cit*.

As a result of these flexibilities, the Supply Agency has also reportedly accepted deliveries of uranium above the one quarter of requirements. The Supply Agency usually monitors uranium supplies to EU utilities on the basis of individual country of mining origin, however, import limitations for the CIS were applied to the group of countries. The countries of the CIS have lobbied the Agency to alter this policy and in reply the Supply Agency has indicated that this aspect of their policy is being reviewed.

There are reportedly some EU utilities that object to the Agency's policy, arguing that they should be permitted to design their own nuclear fuel procurement strategies and decide on the correct balance between security of supply, diversification and price. This policy has not been formally enshrined in legislation and is applied on a case-by-case basis for each contract where the Agency considers whether to conclude, impose conditions on, or refuse the contract. In addition to the policy being supported by the Green Paper for European Union Energy Policy[45] and the White paper – "An Energy Policy for the European Union",[46] the legality of the Agency's policy and of its enforcement through individual decisions on the conclusion of supply contracts, has been confirmed by the case, *Kernkraftwerke Lippe Ems GmbH v the Commission of the European Communities* ('KLE')[47]

In the KLE matter the Agency refused to conclude a contract whereby British Nuclear Fuels was to supply uranium of CIS origin to a German utility, KLE, as the Agency claimed that the agreement would have resulted in an excessive level of dependence on CIS supplies and the price was too low. On appeal, the European Court of Justice confirmed the decision of the European Court of First Instance, and stated that the Agency had a broad discretion when exercising its powers. The Courts held that the Agency was entitled to refuse to conclude the contract as there was an excessive level of dependence of the CIS uranium and this would jeopardize security of supply; the price was not market-related, and the risk of permitting an utility more than its proportional share of CIS imports would create a privileged position which was prohibited by Article 52 of the Euratom Treaty.

5.3 No EU preference for EU community production

In the ENU case it was claimed that even if prices of uranium imports were cheaper than EU uranium prices, there should be a general EU preference for domestic production. The Court held that this was not a correct interpretation of Article 66 and that the provision was intended to permit an exceptional regime allowing imports in the event of a crisis resulting in detrimental pricing.[48] As highlighted by Bouquet, "the Agency is clearly not allowed to impose preferential purchase of Community production under different conditions, but it would appear that the Court did not exclude the right, without imposing any obligation in this sense, to allow preferential treatment for Community production under equal conditions".[49]

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45 <http://ec.europa.eu/energy/green-paper-energy/index_en.htm> at 12 June 2006.

46 <http://ec.europa.eu/comm/off/white/index_en.htm> at 12 June 2006.

47 *Kernkraftwerke Lippe-Ems GmbH v Commission of the European Communities*, Court of First Instance judgement of 25 February 1997 and *Kernkraftwerke Lippe-Ems GmbH v Commission of the European Communities*, Court of Justice judgment of 22 April 1999, *op.cit*.

48 Bouquet, *opcit.*, at 16.

49 *Ibid.*, at 16.

5.4 Restrictions on certain origins

Origin is important in the uranium market. Origin is intrinsic to safeguards restrictions, several uranium exporting countries impose strict conditions on uranium use for non-proliferation reasons. Origin can also affect trade-ability. For many years, both the United States, and Euratom, had restrictions on CIS origin uranium in their jurisdictions. From late 1992 to mid 2001, two "spot" price levels were published by most price reporters: the "Unrestricted Market price" , which applied to non-CIS origin product, and the "Restricted Market Price" which applied to CIS origin uranium. CIS origin uranium sold at a discount to uranium of other origins because it could not be readily sold, or more accurately, transferred to, US or European consumers. However since late 2001, the US and EU restrictions on the major CIS origins (Kazak and Uzbek) have disappeared, leaving only Russian uranium which faces a US quota. So far, no such policy restriction has affected uranium producers from other countries.

6. EFFECT OF EURATOM POLICY ON AUSTRALIAN PRODUCERS

6.1 Supplies from Australia

"Maintaining the visibility of the EU industry at all stages of the fuel cycle remains an important goal for long-term security of supply. In recent years restrictions on imports of natural uranium have not been deemed necessary."[50] The Agency's policy to maintain diversity of sources for nuclear fuel is not only applicable to Russia and could in theory be applied to restrict utilities in the amount of uranium they procure from Australian producers. The Agency has indicated that it is closely monitoring the effect of sales of large volumes for potential negative effects on stability or long term security of supply to the EU. If the introduction of large inventories (possibly from Australia) on the EU market were to take place to the detriment of the EU's security of supply, the Supply Agency indicated that it will take what it deems appropriate corrective measures.

6.2 Competition law

Despite there being no express policy restrictions on the amount of Australian uranium EU utilities can purchase, if an Australian company was to acquire 50 per cent of the European Market of natural uranium supply then EC competition rules relating to dominant position would be applicable.

6.3 Effect on Australian uranium sales agreements

Any restrictions or conditions imposed on EU nuclear power utilities in their procurement of uranium will indirectly affect Australian uranium producers. Euratom's avoidance of over-dependence on one source of supply policy dictates the amount of uranium an EU utility can purchase from a supplier. Clearly 100% from one source would be overdependence as possibly would 75%. However, whether 50% of an EU utility's material sourced from one supplier, or from one mine, will be perceived by the Supply Agency as "over-dependence" is uncertain. The Supply Agency has indicated that it will determine this on a case-by–case situation.

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50 Euratom Supply Agency Annual Report 2004 at 18.

7. AUSTRALIAN GOVERNMENT POLICY AND INTERVENTION

It is also worth noting that in addition to Euratom being able to impose conditions, the Australian Government also has the ability to intervene in contracts between Australian uranium producers and EU nuclear utilities.

To export uranium from Australia, a permission to export radioactive substances ('Export Permission') must be granted pursuant to the *Customs (Prohibited Exports) Regulations 1958* (Cth). The Export Permission is issued by the Department of Industry, Tourism and Resources ('DITR'). A holder of a Export Permission must comply with any conditions or restrictions specified in the permission. At present the Australian Government has elected to grant Export Permissions to companies for a 10 year period. The granting of the 10 year Export Permission by the DITR to uranium producers meant that it was no longer necessary for Government approval of uranium export contracts on a case-by-case basis. However, it is a requirement that all new export contracts (including amendments) must be provided to the DITR and must include a clause stating that exports are subject to Australia's network of bilateral nuclear safeguards agreements.

7.1 Policy History

In 1984 the Australian Labor Party ('ALP') adopted, and the then ALP Federal government implemented, a "Three Mines Policy", nominating Ranger, Nabarlek and Olympic Dam as the only projects from which exports of uranium would be permitted. Provisional approvals for marketing from other prospective uranium mines were cancelled. This policy remained in force until the Liberal-National Party Coalition government came to power in 1996. However, at present there are still only three Australian mines in operation, Ranger, Olympic Dam and Beverley. Two other Australian mines (Honeymoon and Jabiluka) have received Federal government approvals in recent years, and may start production in the future, depending on a number of issues. The current Federal government maintains strict environmental and safeguards controls over uranium mining, milling and exports but has abandoned the commercial controls imposed on the activities of uranium producers by the previous ALP government. Although the current Coalition government has no such restrictive policy, the ALP is currently debating whether it may impose a "no new mines" policy if it returns to power.

7.2 Marketing

The Commonwealth Government has been involved in the commercial regulation of the uranium industry since the Fraser Government's 1977 "*Uranium - Australia's Decision*" policy announcement. The conditions imposed on the export of Australian uranium are enforced by the Minister's export control powers under the *Customs (Prohibited Exports) Regulations 1958* (Cth) which prohibits all uranium exports unless a Permission is obtained. Until May 2002, Export Permissions had to be requested individually for each shipment. Export Permissions were granted at the Minister's unfettered discretion. An informal aspect of the regulation was the Government's discouragement of exports too far in advance of contract delivery dates. Two years forward shipment was the tacit limit. Between 1989 and 1996 (under the previous ALP Federal government), another condition applied: before granting approval, the Minister needed to be satisfied that the contracts contained fair and reasonable prices in the relevant market and were in line with prices being received for sales of comparable quantities in the same market under comparable contract conditions.

Prior to 1989, there existed an earlier regime (1979-1989) known as "Uranium Determinations", under which the Government specified minimum export prices (the floor price). The impact of

government interference in uranium contracts was a major impediment to the growth of the uranium industry even before Labor's election to office in 1983. The ALP embraced the Fraser floor price rules (until 1989) as a means of restricting expansion at Australia's uranium mines.

In 1983 the ALP imposed an embargo on sales of uranium to France in response to French nuclear weapons testing in the Pacific. The embargo was lifted, as a Federal Budget measure, in 1986, but reimposed in response to internal ALP party pressure in 1988. The 1994 ALP platform declared that new contracts for sales to France would be prohibited until France entered into a Comprehensive Test Ban Treaty ('CTBT').On entering power in March 1996, the new Coalition government endorsed this policy. The CTBT was eventually signed by France in late 1996, once France's series of eight underground tests (announced in June 1995) was complete. Energy Resources Australia had a contract to supply 270 tonnes of uranium annually from the Ranger mine to Electricité de France. This contract predated the 1988 embargo reimposition and was exempted from the embargo by the Government in 1989.

At present the Liberal-National Party Coalition is in Government. However, the future depends on party politics. For example, if the ALP were to win the next election, they may decide to reimpose a three mines (or "no new mines") policy and to issue export permits on a shipment by shipment basis, at the Minister's discretion and subject to certain conditions (e.g. "satisfactory" price levels, favoured nation status – eg. embargoes on whichever countries they decide at the time).

8. CONCLUSION

As Australia has the world's largest known uranium resources and significant exploration potential, the further development and export of Australia's uranium resources takes on a strategic importance globally. In principle the EU welcomes uranium from producer nations such as Australia as the EU does not have its own source of supplies. However, Australian producers of uranium need to be mindful of Euratom's ability to conclude and intervene in supply contracts to EU nuclear utilities. The objective of long term security of supply through diversification of supply sources and the avoidance of excessive dependency on any one supply source is pursued by the Agency and the Commission. Excessive dependence on one supplier is to be avoided but the Agency itself does not apply such limitations in a percentage manner, rather a fluid policy. Euratom does possess a considerable amount of discretion in implementing policy and concluding contracts. The Agency can change its policy at any time; and this coupled with the Supply Agency's case-by–case discretionary basis for supplies to utilities arguably lacks certainty and transparency. There have been recommendations through the nuclear industry for Euratom to relax its policy. In addition to these restrictions, Australian producers also need to consider that the Australian Government is able to alter its nuclear policy, elect to intervene in uranium supply contracts and impose conditions and restrictions. In any event, Australian producers can take comfort in the EU view that "Australia must contribute full-scale to the supply of nuclear fuel, asap. There is a real need to close the supply gap which is getting wider and wider. The world needs, critically, more uranium for the period after 2013."51 With the EU moving towards energy security supply problems, the balancing of power may shift; and as a consequence Euratom may be forced to vary its policy to enable EU utilities to depend on larger amounts of Australian uranium.

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51 Peter Tomaszewski, Head of Sector Contracts, Euratom Supply Agency.