

## STEERING THE ATOMS FOR PEACE AND DEVELOPMENT: LEGAL ASPECTS OF THE BOARD OF GOVERNORS OF THE INTERNATIONAL ATOMIC ENERGY AGENCY

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**Abstract:** International Atomic Energy Agency (IAEA) is the leading international organization in the field of nuclear energy and nuclear non-proliferation. This paper examines the most important policy body of the Agency, the Board of Governors (BoG). The legal foundation of the BoG will be discussed in light of its constitutional documents, most notably the Statute of the IAEA and the Rules of Procedure of the BoG. The research question will be approached from the theoretical angle of functionalism. The paper suggests that in fact, the practical role of the BoG is even more important than could be concluded on the basis of the legal documents whence the powers of the BoG derive. Over the years, the normative framework of the IAEA has enabled the BoG to adapt to rapidly changing decision-making environments and political situations. Furthermore, this has made it possible for the BoG to contribute in a relatively effective manner to the development of substantive international nuclear policy and law.

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*“The more important responsibility of this atomic energy agency would be to devise methods whereby this fissionable material would be allocated to serve the peaceful pursuits of mankind.”*

(Dwight D. Eisenhower, 34th President of the United States of America)<sup>1</sup>

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<sup>1</sup> The Atoms for Peace speech held at the 470th Plenary Meeting of the United Nations General Assembly on 8 December 1953. In: *IAEA* [online]. [cit. 2024-02-29]. Available at: <https://www.iaea.org/about/history/atoms-for-peace-speech>.

## 1. INTRODUCTION: THE IAEA AND ITS TOP STEERING BODY THE BOARD OF GOVERNORS

International Atomic Energy Agency (IAEA) is the leading international organization in the field of nuclear energy. The IAEA has a fundamental role in several areas in the nuclear sector ranging from nuclear safety, security and safeguards to technical co-operation and nuclear science and applications. The political powerhouse of this seemingly technical intergovernmental organization is the Board of Governors (BoG), where 35 IAEA Member States – most of them on a rotational basis – exercise the powers vested to this policy organ by the IAEA Statute (the Statute).<sup>2</sup>

The BoG convenes regularly five times a year and it may also have extraordinary meetings. In addition to the IAEA Statute,<sup>3</sup> the key document guiding the work of the BoG is the Provisional Rules of Procedure of the Board of Governors (PRoP).<sup>4</sup> For international organizations, especially in the United Nations (UN) family, the rules of procedure constitute a fundamental basis for their legal structure and the practical operation.<sup>5</sup> Even though the IAEA has been considered to belong to the UN family and UN organizations in Vienna, it indeed holds a distinct status.<sup>6</sup> The relationship of the Agency with the UN is governed by a special agreement.<sup>7</sup>

In substantive terms, the BoG deals with a vast array of topics of nuclear policy, most notably nuclear safety, security, safeguards, peaceful uses of nuclear technology, technical co-operation, and budgetary and administrative matters. Nuclear safeguards and nuclear safety are probably the most visible strands of the IAEA BoG work to the general public.

The IAEA could not effectively function without such a policy body, which can steer the work of the Agency. The BoG can hence be characterized as the top steering body of the IAEA. It brings together the critical mass of member states, which then uses the powers vested in the Board on the basis of the IAEA founding documents, which constitute the framework for the operation of the Agency.

The functioning of this body cannot be adequately analyzed without understanding the role of the Agency's plenary organ, the IAEA General Conference (GC). The IAEA

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<sup>2</sup> The IAEA was founded in 1957 and it currently has 178 Member States (situation as of 19 September 2023). For a concise historical presentation on the Agency, see PILAT, J. F. *The International Atomic Energy Agency: Historical Reflections, Current Challenges and Future Prospects*. Abingdon, Oxon: Routledge, 2023.

<sup>3</sup> Statute of the International Atomic Energy Agency, as amended up to 28 December 1989. The Statute was originally approved on 23 October 1956 by the Conference on the Statute of the International Atomic Energy Agency. It entered into force on 29 July 1957.

<sup>4</sup> Provisional Rules of Procedure of the Board of Governors. As amended up to 23 February 1989. GOV/INF/500/ Rev. 1.

<sup>5</sup> On the role of the rules of procedures within the UN family organizations, see SABE, R. *Rules of Procedure at the UN and at Inter-Governmental Conferences*. Cambridge: Cambridge University Press, 2017.

<sup>6</sup> This makes the IAEA different from other UN organizations, such as United Nations Commission on International Trade Law (UNCITRAL) or United Nations Office on Drugs and Crime (UNODC). The IAEA is hence an autonomous international organization within the UN system. Despite its autonomous nature, it has established strong partnerships with many UN organizations.

<sup>7</sup> INFCIRC/11/Add. 1. The texts of the Agency's agreements with the United Nations.

has two policy-making organs, the GC and the BoG and their respective roles and seamless institutional co-operation are instrumental for the effective Agency to fulfill its mandate. At this stage, it suffices to say that the GC is the Agency's plenary organ, which convenes once a year as a general rule. All the member states of the Agency participate in the GC on an equal footing. The BoG is rather designed to be the operational arm of the IAEA with a more practical role in dealing with policy issues, even with the topics moving at a fast pace. It also has a limited number of member states involved.

## 2. THE RESEARCH QUESTION, ITS SCOPE, THE SOURCES AND THE STRUCTURE

The aim of this paper is to demonstrate whence the BoG derives in legal terms and to illustrate the legal nature of this policy body. The main research question to be answered is: **what is the legal basis of the IAEA Board of Governors and how is it institutionally constructed?**

The approach is not merely limited to the description and analysis of the legal foundations of the BoG. The paper also aims at going beneath the surface of legal foundations and construction of the BoG by examining how the BoG functions in practice on the basis of its founding legal framework. Moreover, and building on the practical functioning of the BoG, an objective of this paper is also to shed light on the interface between the GC and the BoG. Additionally, the paper aims to some extent at illustrating the role of the IAEA Member States in the context of the BoG. This is crucial for understanding how the Board works. These institutional aspects together with the legal basis of the BoG greatly contribute to the operational framework and the functioning of the BoG. Therefore, the research orientation is practical although functionalism is the theoretical thread that follows throughout the presentation.

Regarding the scope of the analysis, it should be noted that I will not be studying how the IAEA generally works on different areas of nuclear energy regulation. Description of the technical work of the IAEA without practically strong ties to the BoG steering hence largely falls beyond the scope of the analysis. The approach to be taken is an institutional one focusing more on the functioning of the BoG and its relations with other key players within the IAEA structure. The international law of international organizations also includes aspects of constitutional law.<sup>8</sup> A substantive angle is much less visible even though sectorial areas of nuclear energy, such as nuclear safety or nuclear safeguards can operate in the presentation as concrete examples of international policy-making, in which the BoG also participates.<sup>9</sup>

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<sup>8</sup> See FASSBENDER, B. *The United Nations Charter as the Constitution of the International Community*. Legal Aspects of International Organizations, Vol. 51. Leiden: Martinus Nijhoff, 2009.

<sup>9</sup> For fundamental elements of substantive nuclear law, see STOIBER, C. – BAER, A. – PELZER, N. – TONHAUSER, W. *Handbook on Nuclear Law*. Vienna: International Atomic Energy Agency, 2003.

Notwithstanding its importance, the BoG has not previously attracted much attention in the legal discipline. This paper aims for its part at helping to bridge this gap. The sources include primary sources, most notably the Statute of the IAEA and the PRoP. The analysis builds largely on these sources and the research method and approach is qualitative. Furthermore, I will be addressing the topic from the angle of secondary sources, namely research literature mainly on the IAEA. In this respect, research on international administrative law has proved particularly useful.

In this presentation I will be arguing that the BoG is by far the most important policy-making organ if one looks at the IAEA from a practical and operational angle. One could *prima facie* find that the GC has this role but this is not the case. However, this does not mean that the GC would not be important, quite the contrary from a *stricto sensu* legal perspective, the GC has a pivotal role in the IAEA decision-making complex. One can therefore not overemphasize the need for well-functioning interplay between the BoG and the GC.

The paper has the following structure: After this scene-setting chapter, I will turn to the theoretical framework, which focuses on functionalism. I will then discuss the legal basis of the BoG in an analytical-descriptive manner and illustrate the most fundamental IAEA documents governing the functioning of the Board. This forms the backbone of this paper in terms of answering to the research question.

This will be followed by a more practice-oriented chapter on the legal and policy role of the BoG with some examination of substantive areas of the IAEA and Board work. It is important to evaluate how the BoG functions in practice within its legal remit. The major methodological choice to have the legal basis in the focus does not erase the importance of its interpretation and practical application in the work of the BoG. This chapter also further describes the roles of the different institutional actors of the BoG.

The next part of the paper deals with the interrelationship between the two key policy bodies of the IAEA, namely the GC and BoG. This tandem is crucial for the functioning of the Agency. It is also essential to tackle this interplay in order to understand the institutional construction of the BoG that has been referred to in the research question. The paper draws to a close with the forward-looking evaluation of future perspectives for the BoG and the concluding remarks.

### 3. FUNCTIONALISM AS A THEORETICAL FRAMEWORK FOR THE IAEA BOG

One of the most familiar theories explaining the functioning of international organizations is functionalism.<sup>10</sup> In brief, functionalism has been broadly considered as international co-operation, which brings mutual benefits to the participating entities, most notably the involved states. The key issue with functionalism is that the

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<sup>10</sup> On functionalism in books and in action, see SCHERMERS, H. G. – BLOKKER, N. M. *International Institutional Law*. 6th ed. Leiden: Brill, Nijhoff, 2018.

member states have delegated power to the international organization to carry out certain well-defined functions. Often this conferral is enshrined in the statute of the organization concerned. Functionalism can be regarded to fit particularly well to such area as nuclear energy co-operation due to its scientific-technical nature. Nuclear energy and the IAEA can hence be a fruitful case for observing international co-operation through the lenses of functionalism. In the case of the IAEA, functionalism can also explain the institutional construction of the BoG and it thus contributes to providing an answer to the research question.

According to Klabbers, the law of international organizations emanates from two contending theories, namely the still dominant functionalism and the emerging constitutionalism. The great merit of functionalism can be found in its feature of allowing international organizations to prosper, whereas constitutionalism offers more possibilities for control.<sup>11</sup> In Klabbers' words "*where functionalisms' Janus-face showed in its propensity to let organizations prosper while suggesting there might be natural limits to what organizations can do, the Janus-face of constitutionalism shows in its insistence on control on the understanding that an organization under control gains legitimacy*".<sup>12</sup>

The IAEA is an interesting target for assessment and further pondering in this sense, because the nuclear field and consequently the domain of work of the IAEA has been widening over the last decades. This evolution can lead to asking the question whether it has also given rise to spill-over effects on the IAEA's work.<sup>13</sup> In this respect, the issue of competences between different levels or rather institutional actors of nuclear governance is important.<sup>14</sup> It should also be borne in mind that although international law distinguishes between the competences of states and the international organizations they create, they both share an institutional identity.<sup>15</sup>

If one looks at the spectrum of nuclear activities since the creation of the IAEA and the Board, we can see a significant increase. Not only does the BoG have to deal with more topics but also a wider range of topics. This is why I will be the approaching the research objective from the perspective of functionalism.

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<sup>11</sup> KLABBERS, J. Contending Approaches to International Organizations: Between Functionalism and Constitutionalism. In: KLABBERS, J. – WALLEND AHL, Å. (eds.). *Research Handbook on the International Organizations*. Cheltenham: Edward Elgar, 2011, p. 4.

<sup>12</sup> *Ibid.*, p. 13.

<sup>13</sup> Traditionally, the concept of spill-over has been used in theories on regional integration. Probably the most famous tome on this topic is HAAS, E. B. *Uniting of Europe: Political, Social and Economic Forces, 1950–1957*. Ann Arbor: UMI Books, 1996. This notion refers generally to the spill-over of co-operation functions from one area of activity to another, not yet covered – at least to the same extent – by the co-operation.

<sup>14</sup> See FYHR, K. Kelsen in the Reactor Hall? The complex Interrelationship of National Law, European Union Law and International Law in the Regulation of nuclear Safety. *Studia Prawa Publicznego*. 2023, Vol. 43, No. 3, pp. 57–88.

<sup>15</sup> QUAYLE, P. The Modern Multilateral Bureaucracy: What is the Role of International Administrative Law at international Organizations? In: QUAYLE, P. *The Role of International Administrative Law at International Organizations*. AIIB Yearbook of International Law, Vol. 3. Leiden: Brill, Nijhoff, 2020, p. 2.

Some decades ago the IAEA faced academic criticism on the lack of autonomy from its member states.<sup>16</sup> This can be identified in the policy bodies, the BoG and the GC, where member states stick to their national prerogatives and hence restrict the room for manoeuvre of the Agency.<sup>17</sup> The predominance of member states still prevails today but in some 20 years the Agency has gained foothold on many nuclear issues, which have traditionally been more within the realm of member states' sovereignty.<sup>18</sup>

#### 4. LEGAL BASIS

In order to answer the research question, it is essential to discuss the legal foundations of the Agency and the BoG. The tool will be the analysis of the legal basis. The IAEA is an international organization created by its member states and the legal basis of the BoG is hence enshrined in the Statute of the Agency. The Statute also sets out the interrelationship between the hierarchically two highest policy bodies of the Agency, namely the BoG and the GC, which usually meets once a year.

Article VI of the Statute sets out the composition of the BoG and provides the rules for the election of Board members in accordance with regional and geographical criteria.<sup>19</sup> Furthermore, the decision-making procedure is stipulated in Paragraph E) of Article VI. Pursuant to Paragraph F) "*The Board of Governors shall have authority to carry out the functions of the Agency in accordance with this Statute, subject to its responsibilities to the General Conference as provided in this Statute.*" This is an important provision because the BoG functions institutionally under the GC authority. Nevertheless, from an operational perspective, the BoG functions very independently given the fact that the GC convenes normally only once a year and is the forum where many of the IAEA decisions are formally made after the preparation of the BoG.

If one descends lower in the norm-hierarchy establishing the regulatory framework for the BoG, one encounters the PRoP. From a legal point of view, the PRoP is a lower level regulation than the Statute and it sets out more detailed rules to the practical functioning of the BoG. Together with the Statute, the PRoP forms the regulatory framework

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<sup>16</sup> BOUSTANY, K. Le Rôle de l'AIEA dans la Gestion du Secteur Nucléaire: Une Appréciation Critique. *Revue Québécoise de Droit International*. 2002, Vol. 15, No. 1, pp. 5–10.

<sup>17</sup> *Ibid.*, p. 9.

<sup>18</sup> For example, nuclear security is one of such areas. For instance, the A/CPPNM brought many rather sensitive areas of nuclear policy to the scope of international regulation and also reinforced the role of the IAEA.

<sup>19</sup> During the negotiations on establishing the IAEA, which were largely conducted in the Washington D.C. Conference in 1956, the most difficult question was related to the composition of the BoG. As Bertrand Goldschmidt, later the representative of France in the BoG from 1958 to 1980, recalls: "*the demands of India and the Soviet Union for very broad geographical representation and the desire to accommodate both the industrialized and the developing countries were not easy to reconcile with a small Board membership in the interest of efficiency*". According to Goldschmidt, this was the first time that phrasing "*equitable geographical distribution*" had been replaced by a list of geographical areas in the statute of a UN agency. GOLDSCHMIDT, B. The Origins of the International Atomic Energy Agency. *IAEA Bulletin*. 1977, Vol. 19-4, p. 17.

for the BoG. Hence, it very much molds the *modus operandi* of this important IAEA policy organ.

Should one analyse these two key legal documents for the functioning of the Agency, it is possible to identify another major difference between the two in addition to the norm-hierarchy. This has to do with their respective scopes. The Statute of the IAEA is naturally a wider legal instrument regarding its scope of application. It sets the legal foundation for the functioning of the IAEA as a whole and includes provisions on all bodies of the Agency. The scope of the PRoP is limited to the functioning of the BoG. As regards to its nature, it is more prescriptive and detail-oriented than the Statute. The Statute is also harder to amend due to the necessary involvement of the GC whereas the BoG can do so by its decision amend its PRoP.<sup>20</sup>

When tackling the Statute and the PRoP in the axis binding vs. non-binding one can detect a difference between the two. It is difficult to claim that the PRoP would be legally binding. The PRoP function as the set of rules, which are instrumental for practical conduct of business in the BoG and this set has been recognized by the IAEA membership. Nonetheless, this does not bring a legally binding status to the PRoP. This is not the case with the Statute, which can be regarded as significantly harder law than the PRoP. It may also be the case that for member states amending the Statute may require domestic steps required by constitutional law. This of course depends on the national constitutional law framework and the specific provisions on amending legal instruments of international law such as statutes of international organizations.

When generally discussing the key provisions in the legal basis of the BoG, it is essential to shed light on the procedure on decision-making in the BoG. Article VI.E of the Statute sets out that the general rule on decision-making is majority of Board members present and voting.<sup>21</sup> However, the IAEA usually strives in its decision-making for achieving consensus. Over the decades, the so-called “Vienna Spirit” – constructive approach in negotiations and pursuit of consensus has been the cornerstone in decision-making in the UN organizations in Vienna. Nonetheless, it is necessary to remind that “Vienna Spirit” has been more and more challenged over the last few years and consequently voting takes place more often.

The Member States of the IAEA naturally are the major players in formulating the work of the Agency. Nevertheless, the Agency could not work without a Secretariat. The Director General of the IAEA (DG) directs the staff of the Secretariat.<sup>22</sup> The DG is

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<sup>20</sup> The rule for amending the Statute has been stipulated in Article XVIII of the Statute and the rule of amending the PRoP has been set out in Rule 59 of the PRoP. The statute can be proposed to be amended by a member state and in order to come into force the amendment has to be approved by the GC by a two-thirds majority after consideration of the observations of the BoG. Furthermore, the amendments have to be accepted by two-thirds of all the member states in accordance with their respective constitutional processes. Regarding amending the PRoP, the rules may be amended by a two-thirds majority decision in the BoG.

<sup>21</sup> Article V.E of the Statute. Probably the most significant area where majority voting is not the general rule is related to the budget, which is decided on by a two-thirds majority of those present and voting. Nonetheless, established practice is to agree on it by consensus.

<sup>22</sup> Rule 9 of the PRoP.



the single main protagonist in the work of the Agency.<sup>23</sup> This does not go without limitations. Pursuant to Rule 8. of the PRoP “*the Director General shall, in accordance with Article VII.B of the Statute, be under the authority of and subject to the control of the Board*”.<sup>24</sup> It is necessary to underscore that the IAEA and the Board is much more than the Secretariat. The BoG consists of IAEA Member States, which form the international nuclear community. The IAEA would not exist without its member states and the IAEA is there for its member states and not *vice versa*.

The Statute empowers the BoG to establish such committees as it deems advisable.<sup>25</sup> Pursuant to Rule 57 of the PRoP, the Board may establish Committees and other Subsidiary Bodies. As a consequence, it has established Technical Assistance and Co-operation Committee (TACC), which deals with the issues related to technical co-operation.<sup>26</sup> In the same vein, the budgetary issues of the Agency are prepared by the Programme and Budget Committee. These are the most significant IAEA Committees. These two Committees discuss and prepare the IAEA topics within the remit for the consideration and decisions of the BoG and the GC.

## 5. ANALYSIS ON THE POLICY AND LEGAL ROLE OF THE BOG

After the description of the legal framework of the BoG, it is useful to turn to the more practical layer of the research question i.e., how the BoG carries out its policy and the legal role. I will next discuss how the BoG and its main actors fulfil these functions under the preconditions of the legal framework. The BoG functions as a forum for agenda-setting, discussion, brokering, and deciding on nuclear issues. The role of the Board will be tackled from this perspective. This means also touching upon some substantive sectors of the IAEA work and demonstrating the impact of the BoG in their evolution.

The Director General has a very important role in the BoG meetings. On behalf of the DG, the Secretariat for example submits reports to the Board. The DG can therefore have a major impact on the agenda-setting and operation of the BoG. The chairperson of the BoG is also influential for steering the agenda of the BoG.<sup>27</sup> It is essential that pursuant to Rule 23 of the PRoP on the functions of the presiding officer “[...] *he shall rule on points of order and, subject to these Rules, have control of the proceedings of the Board and over the maintenance of order at its meetings*”.<sup>28</sup> In fact, this rule grants

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<sup>23</sup> The post of the IAEA Director General is indeed significant. On the rules related to the election of the Director General and the outline of process of the election in 2019, see GUERRA, E. Argentina y la gobernanza nuclear internacional: La elección del Director General del Organismo Internacional de Energía Atómica (OIEA). *Revista Electrónica de Derecho Internacional Contemporáneo*. 2019, Vol. 2, Núm. 2, pp. 44–45.

<sup>24</sup> Rule 8 of the PRoP.

<sup>25</sup> Article VI.I of the Statute.

<sup>26</sup> IAEA technical co-operation programme derives in particular from the objectives of the Agency set out in Article II of the Statute.

<sup>27</sup> The Chairperson of the BoG is the most important officer of the Board and he/she is elected for the term of one year.

<sup>28</sup> Rule 23 of the PRoP.



the chairperson relatively large powers to interpret the PRoP.<sup>29</sup> However, a Member of the Board (i.e., the Governor) may appeal against the ruling of the Chairperson. In accordance with Rule 24 of the PRoP on points of order “*the appeal shall be immediately put to the vote and the presiding officer’s ruling shall stand unless overruled*”.<sup>30</sup> In practice, this means that also the rulings of the chairperson can be challenged and voting can change them. When entering the sometimes obscure territory of interpretation, references can be made to precedents. Nonetheless, they do not have a clear legal status in the BoG. In practical terms, precedents have quite a lot of weight and chairpersons quite often resort to them.<sup>31</sup>

Members of the BoG can similarly bring topics on the agenda of the BoG. In this context, it is useful to make a distinction between the actual Member of the BoG and other Members. The 35 Members of the BoG are in this policy organ on the basis of either permanent seat or their turn in the rotation.<sup>32</sup> Other IAEA Member States, which are not Members of the Board, have the right to participate in the BoG meetings and provide statements during the meetings.<sup>33</sup>

Generally, different BoG meetings have the following thematic focus areas; The March Board has the focus on radiation and nuclear safety issues. The June Board largely tackles nuclear safeguards issues. The September Board is a general Board meeting ahead of the September GC and the short the BoG after the GC is more or less an organizational BoG where new Members take office. The last BoG of the year is centred on technical co-operation and it is preceded by the TACC meeting. It should be noted that the thematic focus areas of different BoG meetings are backed by technical reports of the IAEA Secretariat. These reports pave the way for the discussion on different topics in the BoG. In addition to the regular BoG meetings, this policy-organ can also have extraordinary meetings, which can be convened at the request of the Chair of the BoG, a BoG Member or the IAEA Secretariat. It is worthy of noting that in addition to nuclear energy, safety, security, and safeguards, the Agency is also very active in nuclear applications in the areas of for example agriculture, health, and environmental protection. These aspects are very important for the countries with no nuclear power programmes. Balancing between different interests and expectations of the member states is hence necessary.

It can well be argued that the Agency has become the leading verification body for the commitments stemming from the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). In particular the BoG has the key role because it can refer non-compliance of safeguards obligations to the UN Security Council.<sup>34</sup> The BoG is an instrumental organ in following up the nuclear safeguards’ activities under the IAEA Comprehensive

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<sup>29</sup> The IAEA Office of Legal Affairs functions in providing the Chair with legal support.

<sup>30</sup> Rule 24 of the PRoP.

<sup>31</sup> An example of following the precedents can be found in the custom that budget is not voted on.

<sup>32</sup> IAEA BoG Members are represented by the Governors appointed by the respective IAEA Member State. Usually the Ambassador of the state concerned at the UN organizations in Vienna is the Governor.

<sup>33</sup> The order of the statements in different agenda items of the BoG starts with the statements of geographical groups and other groups, the Members of the BoG and then observers i.e., other IAEA Member States.

<sup>34</sup> LAMM, V. Reflections on the development of international nuclear law. *Nuclear Law Bulletin*. 2017, No. 99, p. 33. The procedure for the referral is set out in Article XII.C of the Statute.

Safeguards Agreements<sup>35</sup> and the Additional Protocol,<sup>36</sup> which are the invaluable legal tools of international nuclear safeguards regime.<sup>37</sup>

The Board also has a role in the development of the international nuclear regulation. The evolution of international nuclear law has been significant all the way from the 1980s and the key drivers for this change have been nuclear accidents.<sup>38</sup> The Chernobyl accident in 1986 led to the swift negotiation and the approval of international conventions on the early notification<sup>39</sup> and early assistance of nuclear accidents.<sup>40</sup> The Chernobyl accident also paved the way for the Convention on Nuclear Safety (CNS)<sup>41</sup> and the later for the Joint Convention on the Safe Management of Radioactive Waste and Spent Fuel (JC).<sup>42</sup> Both these conventions are so-called incentive conventions with international peer reviews at their apex. The development of international nuclear legal framework and the role of the IAEA and in particular the BoG therein can also be regarded as a token for increasing functionalism.

The BoG played a key role in launching the diplomatic conference leading to the achievement of the CNS and the JC. The Group of Experts on the CNS prepared a report to the BoG, which recommended a diplomatic conference to be convened with a view to

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<sup>35</sup> Comprehensive safeguards agreements (CSAs) are nuclear safeguards agreements, which have been concluded by the IAEA with non-nuclear weapons States parties to the NPT and the nuclear weapon-free zone Treaties, namely the Treaties of Tlatelolco, Rarotonga, Bangkok, Pelindaba, and the Treaty on Nuclear Weapon Free Zone in Central Asia. The IAEA has concluded Voluntary Offer Agreements with Nuclear Weapons States of the NPT.

<sup>36</sup> The BoG adopted Model Protocol Additional to the Agreement(s) between State(s) and the International Atomic Energy Agency for the Application of Safeguards as set out in INFCIRC/540. The Additional Protocol enables the use of significantly stronger safeguards verification methods than under a mere CSA for instance.

<sup>37</sup> As Rockwood states, “*the legal framework for IAEA safeguards is likewise multifaceted and consists of a number of elements, including the Statute of the IAEA; the undertakings of States in connection with supply arrangements and other treaties requiring verification; the basic safeguards documents; the safeguards instruments themselves, including safeguards agreements, protocols and subsidiary arrangements; and, finally, the Decisions and Practices of the IAEA Board of Governors*”. (ROCKWOOD, L. *Legal Framework for IAEA Safeguards*. Vienna: International Atomic Energy Agency, 2013, p. 1).

<sup>38</sup> Burns extremely well summarizes the impact of nuclear accidents on the international legal framework for nuclear power: “[t]hree Mile Island was a wake-up call. Chernobyl was the spur to action. Fukushima Daiichi was a cause for reflection. Each of these accidents has influenced the development of nuclear law, though the regime within which the international community operates today is largely the product of the instruments developed after the Chernobyl accident.” (BURNS, S. G. *The Impact of the Major Nuclear Power Plant Accidents on the International Legal Framework for Nuclear Power*. *Nuclear Law Bulletin*. 2018, No. 101, p. 30). Moreover, the change in public perspectives on the accident did not leave the work of the Agency untouched, SALOMON, T. – UDICH, J. *Die Rolle der Internationalen Atomenergie-Organisation (IAEA) bei der Bewältigung nuklearer Unfälle*. *Vereinte Nationen: German Review on the United Nations*. 2011, Jhr. 59, Heft 3, pp. 120–126.

<sup>39</sup> INFCIRC/335 Convention on Early Notification of a Nuclear Accident.

<sup>40</sup> INFCIRC/336 Convention on Assistance in the case of a Nuclear Accident or Radiological Emergency.

<sup>41</sup> INFCIRC/449 Convention on Nuclear Safety. At the outset after the conclusion of the Convention, some disappointed views were expressed. For instance Kamminga came to the conclusion that “[b]ecause the obligations contained in the Convention are so imprecise, the impact of the Convention depends almost entirely on the effectiveness of its review system. Unfortunately, this system is of the most rudimentary type and does not provide for independent verification of compliance”. (KAMMINGA, M. T. *The IAEA Convention on Nuclear Safety*. *International & Comparative Law Quarterly*. 1995, Vol. 44, No. 4, p. 877).

<sup>42</sup> INFCIRC/546 Joint Convention the safety spent fuel management and on the safety of radioactive waste management.

adopting the CNS.<sup>43</sup> In 1995, the BoG endorsed the setting up of a group of experts to draft the JC.<sup>44</sup> It can be concluded that in this way the BoG steered these processes leading to the advent of these significant instruments of international law within the domain of nuclear and radiation safety. In nuclear law, the division between hard nuclear law and soft nuclear law is often discussed.<sup>45</sup> Within the realm of the IAEA, the contribution of the BoG to the instruments of both soft law and hard law nature is very significant.<sup>46</sup> The BoG and the GC meetings also include an on-going process of reviewing the implementation of their underlying legal instruments.<sup>47</sup>

Over the years, the Board's role has been remarkable in strengthening the international law framework of different areas of nuclear policy. This has been the case for example for nuclear liability. Furthermore, the BoG has played a key role also in the international negotiation processes in the field of nuclear safety, such as the Vienna Declaration on Nuclear Safety.<sup>48</sup> The BoG also approves the publication of IAEA safety standards.<sup>49</sup> Moreover, the BoG approves safeguards agreements. In the future, the BoG may be even more important discussing energy policy and climate change mitigation aspects of nuclear energy.

After the turn of the Millennium and especially the terrorist attacks of September 11, 2001, nuclear security has been very high on the IAEA agenda. The most important legal instruments are the Convention on the Physical Protection of Nuclear Materials (CPPNM) and the amendment to the Convention (A/CPPNM).<sup>50</sup>

When discussing the role of the legally binding instruments in the field of international nuclear law one should note that for some time already they have not been perceived as the best possible option in nuclear regulation. Instead of this, states have in an increasing manner resorted to non-legally binding but nevertheless politically-binding normative instruments.<sup>51</sup> As for the compliance, it is interesting to notice that legally binding commitments may not always be complied with, whereas non-binding commitments

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<sup>43</sup> Convention on Nuclear Safety. Legal Series No. 16, 1994, pp. 15–17.

<sup>44</sup> RISOLUTI, P. The Joint Convention on the safety of spent fuel management and on the safety of radioactive waste management: An Instrument to achieve a global Safety. In: SALBU, B. – SKIPPERUD, L. (eds.). *Nuclear Risks in Central Asia*. Dordrecht: Springer, 2008, p. 108.

<sup>45</sup> Fn 39, 57–59.

<sup>46</sup> Global administrative law can be a useful explanatory tool in this respect, see KINGSBURY, B. – CASINI, L. Global Administrative Law Dimensions of International Organizations Law. *International Organizations Law Review*. 2009, Vol. 6, No. 2, pp. 351–352.

<sup>47</sup> STOIBER, C. The review conference mechanism in nuclear law: Issues and opportunities. *Nuclear Law Bulletin*. 2009, Vol. 1, No. 83, p. 12.

<sup>48</sup> The Vienna Declaration on Nuclear Safety includes principles regarding the implementation of the objective of CNS to prevent accidents with radiological consequences and mitigate such consequences should they occur. See Vienna Declaration on Nuclear Safety [online]. [cit. 2024-02-29]. Available at: [https://www.iaea.org/sites/default/files/cns\\_viennadeclaration090215.pdf](https://www.iaea.org/sites/default/files/cns_viennadeclaration090215.pdf).

<sup>49</sup> On guidance and IAEA safety standards, see BURNS, S. G. Milestones in Nuclear Law: A Journey in Nuclear Regulation. In: International Atomic Energy Agency (ed.). *Nuclear Law: the Global Debate*. The Hague: Springer, Asser Press, 2022, p. 58.

<sup>50</sup> INFCIRC/274/Rev 1. The Convention on the Physical Protection of Nuclear Material and INFCIRC/274/Rev 1./Mod 1. Amendment to the Convention on the Physical Protection of Nuclear Material.

<sup>51</sup> Example of these instruments are for instance Codes of Conduct (WETHERALL, A. Normative Rule Making at the IAEA: Codes of Conduct. *Nuclear Law Bulletin*. 2005, Vol. 75, No. 1, p. 73).

are.<sup>52</sup> Soft law can be a particularly appropriate framework for addressing nuclear safety.<sup>53</sup>

In February 2022, the war of aggression of Russia against Ukraine brought an unprecedented need of international nuclear community to respond. In the face of a risk of a severe nuclear accident, a natural international forum for dealing with this topic is the IAEA and especially the BoG. Since the beginning of war, the BoG has adopted several resolutions.<sup>54</sup> The international community has raised serious concerns in the BoG for nuclear safety, security, and safeguards implications of the war and it has also functioned as a useful channel of information flow between the Agency and the member states with regard to i.a., actions taken and the presence of IAEA staff in the Ukrainian nuclear installations.

Another interesting topic in the Statute is the suspension of privileges as stipulated in Article XIX of the Statute. In accordance with paragraph B of this Article: *“A member which has persistently violated the provisions of this Statute or of any agreement entered into by it pursuant to this Statute may be suspended from the exercise of the privileges and rights of membership by the General Conference acting by a two-thirds majority of the members present and voting upon recommendation by the Board of Governors.”*<sup>55</sup>

This provision indeed provides the Board with strong powers to contribute in suspending the privileges of members. In practice, however, this is not an easy task due to the procedure.<sup>56</sup> The BoG also has a central role in recommending new members to be accepted to the Agency. Also, in this case the final say rests with the GC.<sup>57</sup>

## 6. THE INTERRELATIONSHIP BETWEEN THE BOG AND THE GC

As Szasz states, *“all the way from the beginning, the Board was intended to be a small, efficient unit with power to run the Agency with little interference from*

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<sup>52</sup> Ibid., p. 93.

<sup>53</sup> DURAND-POUDRET, E. Towards a new international framework for nuclear safety: Developments from Fukushima to Vienna. *Nuclear Law Bulletin*. 2015, No. 95, Vol. 1, p. 38. Durand-Poudret reflects particularly the international reaction to Fukushima accident in terms of addressing regulatory needs for the international framework of nuclear safety. These reactions partly resulted in Vienna Declaration on Nuclear Safety in 2015.

<sup>54</sup> IAEA Board of Governors Resolutions GOV/2022/17 (adopted on 3 March 2022), GOV/2022/58 (adopted on 15 September 2022) and GOV/2022/71 (adopted on 17 November 2022) on the Safety Security and Safeguards Implications on the Situation in Ukraine. In 2023, also the GC adopted a resolution on nuclear safety, security, and safeguards in Ukraine GC(67)/RES/16 on 28 September 2023.

<sup>55</sup> Statute, Article XIX Suspension of privileges.

<sup>56</sup> South Africa was voted out of the BoG in June 1977 when G-77 asked the Board to review its customary designation of South Africa as the member of the BoG from Africa. South Africa was replaced in the BoG by Egypt. According to Fisher *“worldwide revulsion against apartheid made it politically inevitable that the South African Government would sooner or later lose its seat on the Board”*. (FISCHER, D. *History of the International Atomic Energy Agency: The First Forty Years*. Vienna: International Atomic Energy Agency, 1997, p. 93). It is essential that from a legal point of view, the rights of privileges Article of the Statute was not applied.

<sup>57</sup> Statute, Article IV.

*other organs*".<sup>58</sup> In fact, the negotiating group of the Statute would have vested even more powers to the Board, namely "with complete authority to carry out the functions of and determine the policies of the Agency".<sup>59</sup> The aim was to give a preponderant authority to the BoG.<sup>60</sup> The final text of the Statute, however, granted more powers to the GC vis-à-vis the BoG than envisaged earlier. This was mainly due to the broadening of the group of negotiating states.<sup>61</sup>

Even though the GC is institutional-hierarchically the superior IAEA policy-making organ to the BoG, it is the BoG that plays the central role in the operational work of the IAEA. *De lege lata* it is often the case that the BoG prepares and decides on many decisions to be transmitted to the final, formal approval of the GC. It is clear that the GC represents the collective will of the IAEA membership, but it could not cope with the operational and practical steering of the BoG. In this sense, the legal theory differs from practice. One of the reasons for this is that the GC *grosso modo* only meets once a year.<sup>62</sup>

Nevertheless, one should not underestimate the powers of the GC. In terms of the balance of power of the policy bodies, Article V paragraph D is very relevant. This provision sets out that: "*The General Conference may discuss any questions or any matters within the scope of this Statute or relating to the powers and functions of any organs provided for in this Statute, and may make recommendations to the membership of the Agency or to the Board of Governors or to both on any such questions or matters.*"<sup>63</sup>

This is largely a catch-all Article covering a wide-range of topics. Furthermore, pursuant to Article V paragraph F, the GC shall have the authority to first "*to take decisions on any matter specifically referred to the General Conference for this purpose by the Board*" and second, "*to propose matters for consideration by the Board and request from the Board reports on any matter relating to the functions of the Agency*".<sup>64</sup> This highlights the need for seamless co-operation between the two policy bodies. Yet, one should not overdo the potential of a conflict between the BoG and the GC. After all, the broad membership of the Agency are members of the Board.

In a certain way, the interrelationship between the GC and the Board resembles that of a parliament and government at the national level. Common issues include for example that the GC has the final authority in the decision-making and that the Board Members are appointed by the GC. The Board is not, however, accountable to the GC as a collective body and the GC cannot for example change the Board as a monolithic

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<sup>58</sup> SZASZ, P. C. *The Law and Practices of the International Atomic Energy Agency*. IAEA Legal Series, No. 7. Vienna: International Atomic Energy Agency, 1970, p. 137.

<sup>59</sup> *Ibid.*, 163.

<sup>60</sup> BECHHOEFER, B. G. – STEIN, E. *Atoms for Peace: The New International Atomic Energy Agency*. *Michigan Law Review*. 1957, Vol. 55, No. 6, p. 750.

<sup>61</sup> *Ibid.*, p. 751.

<sup>62</sup> It is enshrined in Article V) 1. of the Statute that: "*A General Conference consisting of representatives of all members shall meet in regular annual session and in such special sessions as shall be convened by the Director General at the request of the Board of Governors or of a majority of members...*" Last time such an extraordinary GC took place in December 2022 when amendments had to be approved to the Agency budget due to the high inflation rate.

<sup>63</sup> Article V.D of the Statute.

<sup>64</sup> Article V.F of the Statute.

entity. Things in common are in fact fewer than the differences. For example, the government vs. opposition setting does not simply exist. Moreover, the GC has not been designed so that it could follow the day to day developments in the Board and be summoned very often and on a regular basis to debate topical nuclear issues. Nonetheless, the power of the GC can be found in its wide representation. It is the voice of all the IAEA Member States.

## 7. FUTURE PERSPECTIVES FOR THE BOG

According to the International Energy Agency (IEA) nuclear power capacity will almost double by 2050 in the net zero emission scenario and consequently annual investments in nuclear power will triple by 2030 in the net zero emission scenario.<sup>65</sup> Together with the IAEA Member States' growing interest in nuclear and the foreseen breakthrough of small modular reactors (SMRs) will also have an impact on the legislative framework on nuclear safety and security. The expanding role of the IAEA in the climate and energy policy aspects,<sup>66</sup> may increase the IAEA work in addition to the more traditional nuclear and radiation safety, nuclear safeguards, and nuclear security. This may also reflect on the agenda of the BoG.

The shift towards fast-paced, more political topics in the Agency can lead to the BoG gaining more weight at the expense of the GC, which is more focused on longer-term and rather cyclical processes and topics. The same goes for the evolution within the IAEA from rather consensus-oriented decision-making towards more voting. This may highlight the role of the BoG in brokering between different interests of its members.

Regarding the number of the members of the BoG it can be concluded that the current amount is still a relatively balanced number. It enables the BoG to still function in an operational and largely flexible way. Moreover, the statutory rules enable member states to rotate and hence participate in the work of the Board as a member on feasible intervals.<sup>67</sup> It would not be good if the number of the members of the BoG was increased. This could backfire on the agility of the Board in the decision-making.

## 8. CONCLUDING REMARKS

It is evident that the BoG is the most important policy organ of the IAEA. Without a functional BoG the organization would not simply have the possibility to carry out its core duties as stipulated in the Statute. The two fundamental legal documents,

<sup>65</sup> International Energy Agency. *Nuclear Power and Secure Energy Transition: From Today's Challenges to Tomorrow's clean Energy Systems*. Vienna: International Atomic Energy Agency, 2022, pp. 35–36 and 49.

<sup>66</sup> IAEA Statement on nuclear power at COP 28. Released in Dubai, United Arab Emirates on 1 December 2023.

<sup>67</sup> However, there is one exception: member states, which do not belong to any geographical groups within the IAEA system are not in practice elected to the Board. For instance, Kazakhstan – one of the biggest uranium producers of the world does not belong to any IAEA regional group.



namely the Statute and the PRoP have proved their mettle even to adjust to quite unforeseen topics to be handled in the BoG. The possibility to convene a BoG meeting has been useful in tackling emerging issues, which need a rapid reaction. In this sense, the BoG can be considered to be also the dynamic arm in the IAEA policy-making toolkit.

Functionalism should be acknowledged as one of the theories of international organizations that also has major explanatory force on the IAEA and the BoG. With the theoretical framework of functionalism and the need of the member states, which have formed the IAEA, to deepen co-operation we can also tackle specifically the nuclear field. This has reflected also on the work of the BoG with a widening agenda. For example, the pursuit of the IAEA and the member states in joining forces to combat climate change can be considered as a token of functionalism in action, i.e., member states achieving mutual benefits in strengthening co-operation in this field through the IAEA. With this evolution, the IAEA will be reinforced and so will be the BoG. So far, the eventuality of the IAEA or more specifically the BoG within the organization acting *ultra vires* has not been an issue.<sup>68</sup> It remains to be seen if the more political topics of the BoG agenda will trigger discussion on constitutionalism and possibly control in the future.

As for the legal architecture regarding the founding documents for the BoG, it can be concluded that they have relatively well endured the test of time and proved rather flexible in tackling emerging new situations. Of course, there is also a possibility to amend these documents and this option has also been utilized. Nevertheless, it is possible to state that there does not seem to be needs for major reforms in this sense even if there was always room for improvement.

The IAEA Member States can participate effectively in the IAEA decision-making process through the policy-making organs of the Agency. It can be argued that two main sources of legitimacy are based on the procedure and the involvement of states.<sup>69</sup> Also the BoG contributes to this legitimacy through the procedure and the involvement of member states. The only visible problem is the lack of involvement of the “arealess states” whose possibilities to be elected to the Board are limited.

All in all, the BoG represents a unique form of international governance of a highly specialized policy sector, i.e., nuclear energy. Although the BoG has its specific role within the IAEA, it would be interesting to compare the BoG and its status and functioning with bodies of other international organizations, such as World Health Organization (WHO). Future comparative research on policy bodies of different international organizations could also bring interesting insights into possible shortcoming and good practices of the bodies.<sup>70</sup>

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<sup>68</sup> On the restrictions of functionalism and *ultra vires* doctrine, see KLABBERS, *Contending Approaches to International Organizations...*, pp. 10–11.

<sup>69</sup> CASINI, L. *Global Administrative Law*. In: DUNOFF, J. L. – POLLACK, M. A. (eds.). *International Legal Theory: Foundations and Frontiers*. Cambridge: Cambridge University Press, 2022, pp. 199–219.

<sup>70</sup> For example, Klabbers analyses the case of the WHO and its organs World Health Assembly and the Executive Board. He suggests that authority is not only laid down in legal instruments, but spreads significantly more than that. KLABBERS, J. *The Normative Gap in International Organizations Law: The Case of the World Health Organization*. *International Organizations Law Review*. 2019, Vol. 16, No. 2, p. 276. This



Nevertheless, the IAEA is a *sui generis* international organization and also the BoG is very special organ in many respects. The BoG is the leading policy body of the Agency deriving its authority from the constitutional documents, most notably the Statute of the IAEA and the PRoP. In addition to the legal-normative rules governing the BoG, practices have also proved important for shaping the practical functioning of this policy-making organ.

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could be particularly interesting also for further examining of the BoG role in the development of soft-law and softer methods of international nuclear governance.