# IRAN'S NUCLEAR PROGRAM AND INTERNATIONAL LAW: FROM CONFRONTATION TO ACCORD

## Chapter 5

Daniel H. Joyner

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*Chapter 5*

# Was Iran in Violation of Its Safeguards Obligations in July 2015? And Did the IAEA Use Proper Standards in Its Assessments of Iran's Compliance?

In Chapter 4, I concluded that Iran was in noncompliance with its safeguards agreement and was in fact in formal violation of its safeguards legal obligations in 2003, but that this violation and its implications for Iran's state responsibility were resolved by 2008. I further concluded that Iran did not violate its safeguards obligations through failure to timely declare new nuclear facilities.

Thus, by 2008, Iran had rectified its safeguards agreement noncompliance and had remedied its violations of its safeguards obligations. At the time of the International Atomic Energy Agency (IAEA) Director General's report on February 22, 2008, therefore, Iran was in full compliance with its safeguards obligations.

In this chapter, I will proceed to consider whether there were any further instances of noncompliance by Iran with its safeguards agreement since 2008 through the remainder of the period of confrontation ending in July 2015, including importantly whether Iran was in continuing noncompliance at the time of the Joint Comprehensive Plan of Action's (JCPOA) conclusion, as the IAEA and some states have maintained. I will also be asking a corollary question, which is

whether the IAEA has used proper standards in its evaluations and assessment of Iran's nuclear program, particularly when it has made determinations concerning Iran's compliance with its safeguards agreement.

I think it will be best to consider the questions presented in this chapter by looking in turn at the discrete matters that have been argued, in some cases by the IAEA and in some cases by other states, to present continuing violations by Iran of its safeguards obligations since 2008. The first such matter regards the question of whether there are undeclared nuclear materials in Iran. The second is the possible military dimensions issue, previously discussed in Chapter 3 in the context of Nuclear Nonproliferation Treaty (NPT) Article II.

## I. UNDECLARED NUCLEAR MATERIALS

In the IAEA Director General's report to the Board of Governors on February 22, 2008—the same report in which the Director General found that all declared nuclear materials in Iran were in exclusively peaceful uses—the following provision was included on the subject of possible undeclared nuclear materials in Iran:

> With regard to its current programme, Iran needs to continue to build confidence about its scope and nature. Confidence in the exclusively peaceful nature of Iran's nuclear programme requires that the Agency be able to provide assurances not only regarding declared nuclear material, but, equally importantly, regarding the absence of undeclared nuclear material and activities in Iran. With the exception of the issue of the alleged studies, which remains outstanding, the Agency has no concrete information about possible current undeclared nuclear material and activities in Iran. Although Iran has provided some additional detailed information about its current activities on an ad hoc basis, the Agency will not be in a position to make progress towards providing credible assurances about the absence of undeclared nuclear

> material and activities in Iran before reaching some clarity about the nature of the alleged studies, and without implementation of the Additional Protocol.

With this language, Director General Mohamed ElBaradei signaled that, while the IAEA was satisfied by that point that all known nuclear material in Iran was in peaceful uses, an even higher level of international confidence in the peaceful nature of Iran's nuclear program could only be achieved if Iran became a party to an Additional Protocol agreement with the IAEA. Only with an Additional Protocol in place, the Director General stressed, would the IAEA have the legal authority to conduct investigations and assessments purposed in providing increased assurance that there were no undeclared nuclear materials in Iran.

Note, however, that at no point in this statement, or in the rest of the report, did the Director General assert that Iran was under a legal obligation to adopt an Additional Protocol and grant the IAEA this additional authority. It has long been settled that the adoption of an Additional Protocol agreement by IAEA member states is purely voluntary and is not required either by the IAEA Statute or by the NPT.[1] Nor did the Director General claim that, even without an Additional Protocol in place, the IAEA had the legal authority or mandate to assess the question of whether undeclared nuclear materials existed in Iran. The Director General's exhortation to Iran was, rather, that it continue to increase confidence regarding the peaceful nature of its nuclear program through adoption of an Additional Protocol, which would give the IAEA the legal authority to undertake investigations and assessments that could increase international confidence in the peaceful nature of all nuclear materials on Iran's territory. This exhortation was, in brief, hortatory, not mandatory.

1. *See* Masahiko Asada, *The Treaty on the Non Proliferation of Nuclear Weapons and the Universalization of the Additional Protocol*, 16 J. Conflict & Security L. 3–34 (2011).

In subsequent years, the IAEA Director General's reports continued without exception to conclude that all declared safeguardable nuclear material in Iran was in exclusively peaceful use. The reports also continued to include in their conclusion paragraphs text which stressed that further confidence in the peaceful nature of Iran's nuclear program could only be achieved through Iran's adoption of an Additional Protocol agreement with the Agency and to note that both the IAEA Board of Governors and the U.N. Security Council had requested that Iran do so.[2]

However, the tone and construction of these concluding paragraphs changed markedly over the succeeding years, becoming more consolidated, terse, and conclusory; such that by the November 16, 2012, report, the relevant text had been updated to state:

> While the Agency continues to verify the non-diversion of declared nuclear material at the nuclear facilities and LOFs declared by Iran under its Safeguards Agreement, as Iran is not providing the necessary cooperation, including by not implementing its Additional Protocol, the Agency is unable to provide credible assurance about the absence of undeclared nuclear material and activities in Iran, and therefore to conclude that all nuclear material in Iran is in peaceful activities.

In this and in subsequent reports, this paragraph was accompanied by the following footnote:

> The Board has confirmed on numerous occasions, since as early as 1992, that paragraph 2 of INFCIRC/153 (Corr.), which corresponds to Article 2 of Iran's Safeguards Agreement, authorizes and requires the Agency to seek to verify both the non-diversion of nuclear material from declared activities (i.e. correctness) and

2. *See, e.g.*, GOV/2009/35 (June 5, 2009).

the absence of undeclared nuclear activities in the State (i.e. completeness) (see, for example, GOV/OR.864, para. 49).

This evolved statement of conclusions reads much less like a hortatory exhortation and much more like an expression of several different yet cumulative standards, by reference to which Iran's compliance with its safeguards agreement is being determined by the IAEA. This reading is supported by the attached footnote, which asserts that the IAEA is both authorized and required pursuant to an INFCIRC/153 comprehensive safeguards agreement (CSA) in force, such as that to which Iran is a party, to not only assess whether declared nuclear material is in peaceful uses within a safeguarded state (i.e., the correctness of a state's declaration) but also to assess whether there are any undeclared nuclear materials within the safeguarded state (i.e., the completeness of the state's declaration). By November 2012, therefore, the IAEA's assessment of Iran's compliance with its *existing* safeguards agreement had been expanded in scope to include three separate criteria:

1. Whether declared nuclear material in Iran is in exclusively peaceful use;
2. Whether there are undeclared nuclear materials in Iran; and
3. Whether all nuclear material in Iran is in exclusively peaceful use.

Thus, between 2008 and 2012 the question of whether undeclared nuclear material existed in Iran had been reconceptualized from an original understanding, expressed by Director General ElBaradei, that this question was not a required part of the IAEA's assessment of Iran's compliance with its safeguards agreement, and could only be confidently assessed if Iran acceded to the Additional Protocol (which it had not done, and was not legally required to do, but could voluntarily do); to an understanding, expressed by Director General Yukiya Amano, that the IAEA already had all of the legal authority it needed to assess this question, on the basis of Iran's existing CSA, and indeed that Iran's existing CSA *required* the IAEA to assess this question.

IAEA Director General reports on Iran continued to express their conclusions regarding Iran's compliance in essentially this same pattern through the remainder of the period of confrontation ending in July 2015. And while neither the IAEA Director General nor the IAEA Board of Governors has explicitly found Iran to be in noncompliance with its safeguards agreement since 2008, the fact that reports to the Board of Governors during this period included all three standards identified above and consistently stated that the IAEA was unable to determine that Iran's nuclear program meets two of these standards (standards 2 and 3), Director General reports on Iran's nuclear program since at least the February 18, 2010, report and continuing through to July 2015 appeared to communicate that the IAEA was withholding its determination that Iran was in full compliance with its safeguards agreement.

It will be recalled that in Chapter 4, I referenced the 2013 Safeguards Implementation Report and explained the different categories of assessment standards employed therein, which were linked to the type(s) of safeguards agreement(s) in force for individual safeguarded states. I noted there that, for a state like Iran with only an INFCIRC/153 CSA in force, the assessment standard used in the report for all states *with the sole exception of Iran* was the standard of whether all declared nuclear materials were in peaceful use within the state. For such states with only a CSA in force, this was the end of the IAEA's inquiry into their compliance with their safeguards agreement. I further noted that in Iran's case, the report very clearly deviated from this normal standard of assessment and instead applied to Iran the standard which the report, by its own terms, explained should only be applied to states that have both a CSA and an Additional Protocol in force. As Iran did not throughout the period of confrontation have an Additional Protocol in force, I explained that this was an erroneous application of assessment standard by the IAEA to Iran and therefore an erroneous conclusion regarding Iran's compliance with its safeguards agreement.

Just to reinforce the validity of my conclusion on this matter, I want to note that it is not only in the 2013 Safeguards

Implementation Report that this categorization of states by safeguards agreement type, and corresponding application of different compliance standards to different states, has been maintained by the IAEA. This understanding of applicable standards for determining compliance has been explained by the IAEA in other documents as well, including in this fact sheet published on the IAEA's website:

> Basically, two sets of measures are carried out in accordance with the type of safeguards agreements in force with a State.
>
> One set relates to verifying State reports of declared nuclear material and activities. These measures—authorized under NPT-type comprehensive safeguards agreements—largely are based on nuclear material accountancy, complemented by containment and surveillance techniques, such as tamper-proof seals and cameras that the IAEA installs at facilities.
>
> Another set adds measures to strengthen the IAEA's inspection capabilities. They include those incorporated in what is known as an "Additional Protocol"—this is a legal document complementing comprehensive safeguards agreements. The measures enable the IAEA not only to verify the non-diversion of declared nuclear material but also to provide assurances as to the absence of undeclared nuclear material and activities in a State.[3]

Again, these sources demonstrate that since at least February 18, 2010, through to the conclusion of the JCPOA in July 2015, the IAEA applied incorrect standards to its compliance assessment of Iran's nuclear program *according to the IAEA's own consistent recitation of those standards*. And that the IAEA thereby reached erroneous conclusions regarding Iran's compliance with its safeguards agreement.

So what are we to make of this? What explains this enigmatically exceptional and erroneous treatment of Iran's case by the IAEA? And is there any legally valid reason why the IAEA would not simply

3. Http://www.iaea.org/Publications/Factsheets/English/sg_overview.html.

determine, as it did for all other states with only a CSA in force, that Iran's nuclear program was definitively in compliance with the terms of its safeguards agreement because, as in these other cases, the IAEA consistently determined that all declared nuclear material in Iran was in peaceful use?

I think that there are both legal and political dimensions to the answers to these questions. Let us first explore the legal dimension. In brief, within the past few years there has been a debate going on in nuclear nonproliferation circles regarding the question of the proper standards of IAEA investigation and assessment, particularly of a state that only has a CSA and not an Additional Protocol in force with the IAEA. One group of commentators—among whom the most prominent is former longtime IAEA official Laura Rockwood—have supported the IAEA's position that the Agency has the legal authority and responsibility to investigate and assess such states' nuclear programs on the basis of standards including both the correctness and completeness of their declaration to the IAEA. I and others, on the other hand, have argued that these commentators make improperly revisionist arguments in support of the IAEA's position and that these revisionist arguments are both legally erroneous and harmful to the IAEA, in that they damage the IAEA's credibility as an independent, objective, technical monitoring, and verification body.[4]

In order to understand and evaluate this debate, we will have to return to the text of the INFCIRC/153 comprehensive safeguards agreement, and in particular to Iran's CSA with the IAEA. It is in the terms of this treaty that we must find both Iran's obligations under the CSA, as well as the IAEA's lawful authority to investigate and assess Iran's compliance with its obligations during the period of confrontation.

4. *See* Pierre Emmanuel Dupont, *Compliance with Treaties in the Context of Nuclear Non-Proliferation: Assessing Claims in the Case of Iran*, 9 J. Conflict & Security L. (2014); *Interpretation of Nuclear Safeguards Commitments: The Role of Subsequent Agreements and Practice*, in Jonathan Black-Branch and Dieter Fleck eds., Nuclear Nonproliferation in International Law, Vol. II, at 36 (2015).

Before commencing that evaluation, I think it is important to remember that the structure of the IAEA's safeguards treaty system is unique and that it poses particular challenges for treaty interpretation. As I have explained previously, the IAEA existed as an international organization prior to the conclusion of the NPT in 1968. The NPT in Article III referenced the IAEA and gave it a prominent role in the safeguards system envisioned under the treaty, but the IAEA and its Statute had already been in existence for more than a decade by the time the NPT was concluded and were in fact not originally constructed with this role primarily in mind. Nevertheless, since the signing of the NPT, the IAEA has fulfilled its role given to it by the NPT and has concluded bilateral treaties with all of the Non-Nuclear Weapon States (NNWS) parties to the NPT willing to do so. There is in fact a complex web of these treaties, ranging from facility- specific safeguards treaties (INFCIRC/66), to voluntary offer agreements, to INFCIRC/153 comprehensive safeguards agreements, to INFCIRC/540 Additional Protocols. Different safeguarded states have different combinations of these treaties in force at any given time. This makes the task of identifying the legal obligations of safeguarded states, and the investigative authority of the IAEA, a very state-specific exercise.

The INFCIRC/153 CSA has been established as the standard, full-scope safeguards framework. Again, however, it is important to understand that while the INFRCIRC/153 template itself was negotiated by all IAEA member states and adopted by the IAEA Board of Governors, the actual treaties concluded between the IAEA and individual safeguarded states are in every case bilateral treaties that are individually negotiated and brought into force in accordance with each respective state's national constitutional processes. The same is true of all Additional Protocol agreements. This gives both a multilateral and a bilateral aspect to the provisions included in any particular CSA.

All of this means that it can be a challenge to apply the rules on treaty interpretation correctly when examining a particular bilateral CSA between a state and the IAEA. It is important, therefore, to be careful, methodical, and rigorous in conducting interpretive analysis

and to hew closely to the rules on treaty interpretation contained in the 1969 Vienna Convention on Law of Treaties (VCLT) Articles 31 and 32.

Let us now turn to an examination of Iran's CSA with the IAEA, which came into force on May 15, 1974, and which is identified as INFCIRC/214. Articles I and II of the treaty provide as follows:

> **Article 1**
> The Government of Iran undertakes, pursuant to paragraph 1 of Article III of the Treaty, to accept safeguards, in accordance with the terms of this Agreement, on all source or special fissionable material in all peaceful nuclear activities within its territory, under its jurisdiction or carried out under its control anywhere, for the exclusive purpose of verifying that such material is not diverted to nuclear weapons or other nuclear explosive devices.
>
> **Article 2**
> The Agency shall have the right and the obligation to ensure that safeguards will be applied, in accordance with the terms of this Agreement, on all source or special fissionable material in all peaceful nuclear activities within the territory of Iran, under its jurisdiction or carried out under its control anywhere, for the exclusive purpose of verifying that such material is not diverted to nuclear weapons or other nuclear explosive devices.

Thus, in Article 1 we find Iran's basic undertakings in the treaty, which include accepting safeguards on all nuclear material within its territory in accordance with the terms of the treaty, which as explained in Chapter 4 includes a range of required declarations to the IAEA concerning the location and amounts of nuclear materials and the facilities related to those materials.

In Article 2 we find provisions regarding the application of safeguards by the IAEA. Article 2 provides that the IAEA is to ensure that safeguards will be applied in accordance with the terms of the treaty, for the exclusive purpose of verifying that nuclear material is not diverted from peaceful to military uses.

I'd like to make a couple of initial textual observations regarding these two paragraphs. First, I think it is important to see these provisions as addressing different, though of course related, subjects. Article 1 describes the safeguarded state's—here Iran's—obligations under the treaty. Article 2 describes the IAEA's authority and obligations under the treaty. These are separate subjects, and the obligations stipulated are addressed to different parties, and there is no reason to assume, or to find implicit, that the rights and obligations of the two parties are coextensive. Rather, both articles stipulate that the rights and obligations of the parties identified within them are to be defined "in accordance with the terms of this Agreement." This means that the scope and meaning of the obligations and rights identified in Articles 1 and 2 of the treaty can only be understood and interpreted in accordance with the specific provisions contained in the balance of the agreement. This is an important observation and is often misunderstood by those who would take Articles 1 and 2 out of their context within the treaty and interpret them standing alone.[5]

In essence, all that these clauses do is make explicit within the treaty text what is already a general principle of treaty interpretation stated in VCLT Article 31, which is that provisions of a treaty must be interpreted in their context within the treaty as a whole, and not in isolation.

The provisions of the treaty that spell out how safeguards are actually to be applied by Iran and by the IAEA begin in Part II of the treaty, the first provision of which is Article 27, which provides: "The purpose of this part of the Agreement is to specify the procedures to be applied in the implementation of the safeguards provisions of Part I." The articles of Part II of the treaty proceed to specify in detail the kinds of nuclear materials and the types of facilities that are subject to safeguards. It then delineates Iran's obligations to provide the IAEA with regular, comprehensive reports concerning all such

5. *See, e.g.*, the contributions of both Andreas Persbo and Christopher Ford to the online roundtable debate entitled "Iran and the Bomb: The Legal Standards of the IAEA," at the *Bulletin of the Atomic Scientists* website, published in November 2012.

material and facilities, including locations, types and amounts of materials, and design information concerning facilities.

Next, Part II specifies the procedures by which IAEA inspections and other material accountancy efforts regarding safeguarded materials and facilities are to be carried out. As I noted in Chapter 4, all of these matters are further subject to additional operational agreement between the parties in subsidiary arrangements.

The provisions in Part II of the CSA are highly technical and complex, but can be accurately and parsimoniously described as follows. Iran is responsible for providing detailed and comprehensive regular reports concerning all safeguardable nuclear materials, and related facilities, within its territory. The IAEA is responsible for examining these reports and undertaking inspections and material accountancy efforts, including due diligence on the sources of these reports, to verify that these reports are accurate. Nowhere in Part II of the treaty is there any mention of the IAEA's authority or responsibility to search for undeclared nuclear materials, or undeclared nuclear facilities, in Iran.

There is a special inspections procedure laid out in Articles 73 and 77 of the CSA. This procedure can be invoked:

> If the Agency considers that information made available by the State, including explanations from the State and information obtained from routine inspections, is not adequate for the Agency to fulfill its responsibilities under the Agreement.

If the IAEA invokes the special inspection procedure, the next step is for the Agency to request that it be granted access by the state to inspect information or locations which have not been previously reported to the IAEA. This is the only procedure in the CSA that even potentially includes inspections by the IAEA of locations not identified in the reports submitted to the IAEA by Iran. It is worth noting that the IAEA has never once invoked the special inspections process in its dealings with Iran.

Having reviewed the rest of the CSA, let us return now to Articles 1 and 2, which, as I noted earlier, explicitly state that the obligations

and rights identified within them are subject in their scope and meaning to definition according to the terms of the treaty, in their entirety. Reading Articles 1 and 2, according to their plain meaning and in their context within the treaty, the following interpretation becomes clear.

Iran is to follow all of its specified obligations of reporting and cooperating with IAEA inspectors delineated in Part II of the treaty. It is through this process, and according to these terms, that Iran "accept[s] safeguards" on all nuclear material within its territory. For its part, the IAEA is to follow the specified procedures for carrying out inspections and accounting for nuclear material, as delineated in Part II of the treaty. It is through this process, and according to these terms, that the IAEA has "the right and the obligation to ensure that safeguards will be applied" to all nuclear material on the territory of Iran.

In other words, the IAEA's right and obligation to apply safeguards within Iran are limited to the terms and the procedures delineated in Part II of the treaty. As observed above, these terms and procedures provide the IAEA with the authority only to verify the correctness of the reports and declarations submitted to it by Iran, with the notable exception of the special inspection process, which the IAEA has not invoked in Iran's case. Thus, the IAEA's rights and obligations under the CSA, as provided in Article 2, are limited to verifying the correctness of Iran's declaration to the IAEA, subject only to the potential exception of the special inspection process.

According to a plain meaning, context-inclusive interpretive analysis, therefore, the IAEA's lawful authority to investigate and to assess Iran's nuclear program pursuant to the only safeguards treaty in effect between the two parties is limited to declared material and facilities and does not extend to undeclared material or facilities, except through the IAEA's potential invocation of the special inspection process laid out in the CSA.[6] And again, the IAEA has not invoked this special inspection process.

6. In support of this conclusion, *see* Pierre-Emmanuel Dupont, *Interpretation of Nuclear Safeguards Commitments: The Role of Subsequent Agreements and Practice*, in Jonathan Black-Branch & Dieter Fleck eds., Nuclear Nonproliferation in International Law, Vol. II (2015).

Having rendered this textual interpretation, according to VCLT Article 32 reference may additionally be had to the *travaux preparatoires* of the treaty in order to confirm this interpretation. But again, as noted above, this is where things get complicated in the context of bilateral safeguards agreements between the IAEA and a safeguarded state. The actual *travaux preparatoires* documents for each bilateral treaty, inclusive of Iran's bilateral CSA with the IAEA, are sketchy at best. While some negotiations between the IAEA and the safeguarded state in each individual case will have been had, records of these negotiations are difficult to find if they exist at all. And most of these negotiations will have been on fairly discrete points, because the templates for the CSA and the Additional Protocol, respectively, are generally followed quite closely for each actual bilateral treaty.

The *travaux preparatoires* for the CSA and Additional Protocol templates, on the other hand, comprise a much richer collection of documents. Although again, the general discussion and negotiation history of the templates themselves, consisting of views expressed by all IAEA states parties, is a bit problematic to take in formal supplantation of the more focused *travaux preparatoires* of the two parties that actually, eventually, signed a CSA or Additional Protocol treaty.

With that word of caution, I do think that there is at least some probative value to be found in the general negotiating history of both the INFCIRC/153 CSA template and the INFCIRC/540 Additional Protocol template for purposes of confirming the textual interpretation I have given of Iran's CSA.

Among the best sources for an accurate and balanced account of the negotiating history of the INFCIRC/153 CSA template is the official history of the first forty years of the IAEA, published by the IAEA itself in 1997 and written by longtime IAEA official David Fischer. Writing specifically concerning the 1970–1971 negotiations leading up to the adoption of the INFCIRC/153 template agreement, Fischer writes in this history:

> The EURATOM delegations succeeded in sustaining the principle, implicit in the NPT, that safeguards should be applied

> only to nuclear material . . . and in limiting the access of inspectors, during routine inspections, to previously agreed "strategic points". In simple language, this meant that IAEA inspectors would normally—i.e. during routine inspections—verify only nuclear material at locations that had been declared by the State and would do so by access that would be limited to pre-defined strategic points in the plant concerned . . .
>
> The EURATOM delegations accepted, however, that there would be no limit on the IAEA's access rights if the Board considered that a "special inspection" was needed, and the State gave its agreement, or if the Board decided that a special inspection was urgent and essential to verify non-diversion.[7]

From another volume published by the IAEA itself in 1970, as the INFCIRC/153 template negotiations were ongoing, and entitled *The Law and Practices of the International Atomic Energy Agency*, we find the following passage written by IAEA legal adviser Paul Szasz expressing a legal understanding of the IAEA's safeguards remit:

> Even more broadly than the Tlatelolco Treaty, the safeguards Under the Non-Proliferation Treaty are to relate to all peaceful nuclear activities within the territory of each non-nuclear-weapon State, or otherwise "under its jurisdiction, or carried out under its control anywhere". Again the Agency under its present system will only be able to control those activities that are reported to it—and thus both unregistered items and those officially declared to be used for a non-weapon military purpose will escape its scrutiny; unlike the Latin American instrument, the Non-Proliferation Treaty does not provide for special inspections to be carried out on the basis of accusations.[8]

7. History of the International Atomic Energy Agency: The First Forty Years, 256 (1997).

8. *Id.* at 549.

Yet another publication by the IAEA, this one a 1998 monograph entitled "The Evolution of IAEA Safeguards," observes the following:

> Since most governments were unwilling to give the IAEA a free hand to scout for undeclared plants or stocks, the 1970–1971 safeguards focused almost exclusively on verifying that there was no diversion of nuclear material that the governments concerned had declared and placed under safeguards. The possibility that undeclared plants might exist was, of course, recognized by the architects of the 1970–1971 system, but it was tacitly assumed that if such plants were built they would be detected by means other than IAEA safeguards. In practice, accounting for nuclear material in declared nuclear operations thus became the main task of IAEA safeguards.[9]

From these and other excerpts from authoritative sources of the negotiating history of the INFCIRC/153 template, support can be drawn for the textual interpretation I have given above, which is that the IAEA's legal authority under a CSA is limited to investigation and assessment of declared nuclear materials and related facilities, with the sole exception of the special inspections process detailed in the CSA text.

I generally do not like to rely on statements by individual state officials from negotiating parties to a treaty when considering the treaty's *travaux preparatoires*. Such statements are simply too easy to cherry-pick in order to provide selective support for one's interpretive view. However, since the United States is one of the chief state supporters of the IAEA's recent view that it has the general legal authority to investigate and assess not only declared but also undeclared nuclear materials and facilities within a state with only a CSA in force, it does seem fair and perhaps probative to include here the following exchange between William Foster, head of the U.S. delegation to the negotiation of the NPT, and Senator Claiborne Pell, from

9. IAEA, The Evolution of IAEA Safeguards 14 (Vienna: International Atomic Energy Agency 1998).

Foster's 1968 testimony about the NPT and IAEA safeguards to the Senate Foreign Relations Committee:

> SENATOR PELL: "Another question: Will the International Atomic Energy Agency inspection be restricted only to the declared peaceful nuclear facilities or will they also apply to the undeclared or clandestine facilities? How will they be sought out? . . ."
>
> MR. FOSTER: "The IAEA inspection would only be as to declared. If there were undeclared, if they were found, this would be a breach of the treaty."
>
> SENATOR PELL: "But under the treaty there is no provision for searching out the clandestine?"
>
> MR. FOSTER: "No sir."
>
> SENATOR PELL: "Just as there is no sanction?"
>
> MR. FOSTER: "But there would be great alertness on the part of many, including ourselves, on that latter point, Senator."[10]

While these materials concerning the *travaux preparatoires* of the INFCIRC/153 template are useful in confirming the correctness of the textual interpretation I have given, in a sense the *travaux preparatoires* and other official statements concerning the negotiation of the INFCIRC/540 model Additional Protocol agreement, which occurred more than two decades following the adoption of the INFCIRC/153 CSA template, are actually even more useful for understanding the correct interpretation of agreements following the INFCIRC/153 template than are documents originating from the time of the negotiation of INFCIRC/153 itself. This sounds counterintuitive, I know. But recall that in Chapter 4 I explained that negotiations leading to the adoption of the model Additional Protocol agreement began shortly after the 1990–1991 Gulf War and were purposed explicitly

10. Testimony of William Foster, Hearings on Nonproliferation Treaty before the Committee on Foreign Relations of the Senate, 90th Cong., 2nd Sess., 52 (1968); S. Exec. Rep. No. 9, 90th Cong., 2nd Sess., 5 (1968).

in supplementing the authority that IAEA inspectors were given under the original INFCIRC/153 CSA template—authority which had been seen to be inadequate through the Agency's experience in Iraq. Negotiations on a new Additional Protocol at this time were thus directly related to the understanding existing at the time concerning the proper legal scope of the INFCIRC/153, and particularly its limits—limits that the new Additional Protocol was to expand. In a formal treaty interpretation methodology sense, therefore, I think it is useful and accurate to view the model Additional Protocol and its *travaux preparatoires*, as representing interpretive aids separately satisfying all three subcategories described in VCLT Article 31(3), which states:

> There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.

The question of how the new Additional Protocol would relate, in a legal sense, to the INFCIRC/153 CSA framework, and what additional powers the Additional Protocol would give to IAEA inspectors, were subjects that were debated thoroughly during the mid-1990s negotiations leading up to the adoption of the Additional Protocol template in 1997. Regarding the INFCIRC/153 system generally and the eventual recognition during this time of the necessity of an Additional Protocol to increase the investigative authority of the IAEA, David Fischer writes the following in his official history of the IAEA:

> It will be recalled that in verifying compliance with comprehensive safeguards agreements IAEA inspectors had essentially

> confined their focus, during routine inspections, to the nuclear material at locations that had been declared by the State . . . The IAEA's inspectors would verify the State's reports on its stocks of nuclear material and changes in those stocks . . . chiefly by access limited to a number of pre-defined strategic points in the plant concerned. The 1971 system was thus largely one of auditing the State's nuclear material accounts, and it had worked well in regard to locations and nuclear material that had been reported to the IAEA. The IAEA's experience in Iraq and the DPRK had shown, however, that it was essential that the Agency should go beyond auditing the State's nuclear accounts. The Agency must be able to assure itself that the State's declarations were also complete—that the State had reported all its nuclear material . . . In 1995, the Board authorized the Secretariat to put into effect those elements of the "Programme 93+2" that did not require additional legal authority. In May 1997, the Board approved a protocol, to be added to existing comprehensive safeguards agreements, which will provide the legal authority for several safeguards measures that go beyond the existing system, for instance, access by the IAEA to more information about a State's nuclear activities, more intensive inspections, including access beyond previously agreed "strategic points" in a safeguarded plant, access to any installation within the perimeter of a nuclear site, and access to plants engaged in nuclear related activities such as those manufacturing components of enrichment plants . . . [t]he Board approved the protocol on 15 May 1997.[11]

Similarly, a three-volume review of the negotiating history of the model Additional Protocol, published in 2010 by Brookhaven National Laboratory, makes the following observation concerning debates held during the negotiations on whether the model Additional Protocol in fact provided additional legal authority to

11. History of the International Atomic Energy Agency: The First Forty Years 296–299 (1997).

IAEA inspectors, as compared to that which was provided for in the INFCIRC/153 CSA template:

> Although the issue of whether additional legal authority was needed for many of the proposed measures for strengthening safeguards was fundamental to many of the decisions of the Board and Committee 24, it received relatively little debate in either forum. Both the Secretariat and the member states either wanted new explicit authority or seemed prepared to proceed on the basis of an assumption of the need for additional legal authority. This would, thereby, avoid a lengthy and possibly contentious and inconclusive debate as to which measures did and which did not require additional legal authority. Although suggestions arose that would have permitted States to use different mechanisms for providing the IAEA with the necessary authorities, a consensus emerged, and is reflected in the Model Additional Protocol, that a single instrument was best. This would achieve uniformity and avoid any risk of different interpretations arising.
>
> Although some Board actions during the period from 1991–1997 suggest that the Agency might have the legal authority to apply protocol measures in states with comprehensive safeguards agreements that have not concluded a protocol, the fact of the Additional Protocol, itself, suggests otherwise politically, if not also legally. As a result, obtaining universal adherence to Additional Protocols is the best, perhaps, the only way, to provide the Agency everywhere with the authorities contained in the Model Additional Protocol.[12]

Hans Blix, who was the Director General of the IAEA from 1981 to 1997, throughout the entirety of the period of negotiations leading to the adoption of the model Additional Protocol, has written the

12. Michael Rosenthal et al., *Review of the Negotiation of the Model Protocol Additional to the Agreement(s) between State(s) and the International Atomic Energy Agency for the Application of Safeguards*, Brookhaven National Laboratory, Volume II, pg. 11(BNL-90962-2010).

following, contrasting the CSA system with that of the Additional Protocol system:

> Agency inspection was in principle confined to declared nuclear material in declared installations. The correctness and consistency of declarations could and should be verified by the Agency—but not their completeness. The Agency had no access to satellite imagery and inspectors could not roam the territory of states at random in search of possible clandestine installations. Through the Security Council mandated inspections in Iraq in 1991 these deficiencies were glaringly demonstrated . . . The discovery prompted the agency to embark on a program to upgrade and strengthen the safeguards system. It took some time. In 1997 the General Conference of the IAEA adopted a model Additional Protocol to the existing—insufficient—model safeguards agreement. The growing—but slow—acceptance of the Additional Protocol is now considerably sharpening the eyes and ears of the watchdog.[13]

13. Hans Blix, Introduction, in Olav Njølstad ed., Nuclear Proliferation and International Order. Challenges to the Non-Proliferation Treaty, at 5 (Abingdon: Routledge 2011). A 2013 study by the U.S. Government Accountability Office explains the matter clearly: "The safeguards program has evolved over the past two decades as IAEA has made several efforts to strengthen its effectiveness and efficiency. Starting in the early 1990s, in response to the 1991 discovery of a clandestine nuclear weapons program in Iraq, IAEA made a radical departure from its past practice of generally verifying only the peaceful use of a country's declared nuclear material at declared facilities; at that time, IAEA expanded its safeguards efforts to detect potentially undeclared nuclear activities as well. Specifically, through its Department of Safeguards, the agency began exercising its existing authority under safeguards agreements with individual countries to obtain additional information about their nuclear and nuclear-related activities. However, IAEA recognized that these additional measures were not adequate. As a result, in 1997 the Board of Governors approved what it called the 'Model Additional Protocol' (Additional Protocol)—which, when ratified or otherwise brought into force by a country, requires that country to provide the agency with a broader range of information on its nuclear and nuclear-related activities. It also gives the agency's inspectors access to an expanded range of declared activities and locations, including buildings at nuclear sites, and locations where undeclared activities may be suspected." *Nuclear Nonproliferation: The IAEA Has*

Similarly, Mohamed ElBaradei, who was the head of the IAEA's Office of Legal Affairs from 1984 to 1993, during the period leading up to and immediately following the first Gulf War, before becoming the Director General of the IAEA from 1997 to 2009, has written the following of the period immediately following the first Gulf War and the revelations concerning Iraq's secret nuclear weapons program:

> Back in Vienna, at the IAEA Secretariat, we had begun work on the concept of a Model Additional Protocol to make the Agency's in-country verification authority more robust and explicit . . . Finally, on May 13, 1997, the Model Additional Protocol was adopted by the IAEA Board of Governors. It was a breakthrough legal instrument that would strengthen the effectiveness of the NPT safeguards system. So what had changed? In countries that accepted the Additional Protocol, IAEA inspectors had more freedom on the ground, with more access to information and sites, and could now search more effectively for undeclared nuclear material and facilities. In the past, the IAEA could theoretically invoke the right to look for undeclared material and facilities through a "special inspection" mechanism. But special inspections were arduous to invoke and had almost never been used. The Additional Protocol enabled greater access as a routine matter . . . For countries that had only a safeguards agreement in place, the IAEA was expected to provide assurance that declared nuclear material and facilities had not been diverted for non-peaceful purposes. But for those that brought an Additional Protocol into force, the IAEA could provide, in addition, the equally important assurance about the absence of *undeclared* nuclear material and facilities.[14]

*Made Progress in Implementing Critical Programs but Continues to Face Challenges*, May 2013, 9 (GAO-13-139).

14. Mohamed ElBaradei, The Age of Deception: Nuclear Diplomacy in Treacherous Times 27, 29–30 (2011).

Again, the point of looking at these reviews of the *travaux preparatoires* of the model Additional Protocol and other high-level IAEA officials' statements of understanding concerning the differences between the model Additional Protocol and the INFCIRC/153 CSA is to shed light upon the proper legal interpretation of the INFCIRC/153 CSA itself, and by extension upon the proper legal interpretation of Iran's CSA with the IAEA.

As these materials make clear, from the inception of the INFCIRC/153 template in 1972, and continuing through the negotiation of the INFCIRC/540 model Additional Protocol in the mid-1990s, it was generally understood both by states parties and by the IAEA itself that the INFCIRC/153 CSA system was properly understood as granting the IAEA the legal authority to investigate and assess nuclear materials and related facilities that were declared to the IAEA by a safeguarded state, with the sole exception of the special inspections process laid out in the CSA, through which the IAEA could request access to undeclared locations. It is further clear from these materials that the primary *raison d'être* of the model Additional Protocol was precisely to grant additional legal authority to IAEA inspectors, so that they could with increased ability and confidence investigate and assess the possibility of the existence of undeclared nuclear materials and related facilities within a safeguarded state that had entered into an Additional Protocol with the IAEA.

All of these materials, then, related to both the INFCIRC/153 and INFCIRC/540 templates and their negotiating histories, support my textual interpretation of Iran's CSA above. The implications of this interpretation of Iran's CSA with the IAEA are, as stated previously, that since at least 2010 the IAEA has been applying incorrect standards to its compliance assessment of Iran's nuclear program and that the IAEA has thereby reached erroneous conclusions regarding Iran's compliance with its safeguards agreement and has improperly withheld its determination that Iran in fact has been and continues to be in compliance with its safeguards agreement obligations.

Before proceeding I want to briefly address the concept of evolutive treaty interpretation. This is a term that I think is often

misunderstood. It can be briefly stated as the idea that the meaning of treaty terms should be understood to be capable of evolution or change over time, in order to continually reflect the intent of the parties to the treaty.[15] The concept of evolutive treaty interpretation is sometimes misunderstood to constitute a theory or method of treaty interpretation separate from, or at least parallel to, the normal rules of treaty interpretation contained in the VCLT. It has been suggested to me on multiple occasions, as I have given talks on the subjects of this book in different fora, that the theory of evolutive treaty interpretation should be taken into account as a theory by which a changed meaning—i.e., one which justifies the IAEA's approach to undeclared materials in Iran—may be attached to the terms of Iran's CSA, as compared to that originally intended by its parties, or that which can be divined through application of the normal VCLT rules. The problem with this argument is that it seeks for a distinction in treaty interpretation methodology where there is none.

Evolutive treaty interpretation is best understood not as a separate methodology to that contained in VCLT Articles 31 and 32, but rather as a description of the end result of the disciplined application of those very methods. As Eirik Bjorge has explained:

> [I]t could legitimately be interjected, except for the oblique mention in [VCLT] Article 31(4), the general rule of interpretation does not mention "intention" at all!
>
> This is true. But the general rule of interpretation fails to mention, amongst the means of interpretation, "the intention of the parties" for the same reason that a cake recipe would normally fail to mention, amongst the ingredients, "cake". Like the various ingredients that go into a cake, "all the elements of the general rule of interpretation", as the Tribunal in *Rhine Chlorides*

15. *See, e.g.*, Sondre Torp Helmersen, *Evolutive Treaty Interpretation: Legality, Semantics and Distinctions*, 6 European J. Legal Studies 127–148 (Spring/Summer 2013).

> put it, "provide the basis for establishing the common will and intention of the parties" . . .
>
> On the correct reading of the approach set out in Articles 31–33 of the Vienna Convention, the treaty interpreter reconstructs the meaning of an intention of the parties; the means of interpretation are the objective means which guide the treaty interpreter to the establishment of what the law of treaties calls the intention of the parties.[16]

As anyone who has ever read VCLT Articles 31 and 32 knows, Article 31(3) (a) and (b) are explicitly designed to instruct the interpreter to identify and take into account in interpretation the objective indicia of changing intention on the part of the parties to the treaty, i.e., through either their subsequent practice or subsequent agreement. The VCLT rules, then, provide a methodology which, when applied correctly, give proper place in the treaty interpretation exercise to the evolving intentions of the parties. And it is therefore improper to consider as a separate exercise, pursuant to a misguided understanding of the theory of evolutive treaty interpretation, indicia of the changing intent of parties to a treaty derived from less sound sources—for example, evidence of the action of unrepresentative organs of international organizations.

So, having employed the rules on treaty interpretation found in the VCLT to interpret Iran's CSA, and having applied this interpretation to the question of the IAEA's authority to investigate and assess undeclared nuclear facilities and materials in Iran, I will now proceed to consider and to critique the legal arguments of those commentators that have attempted to provide legal support for the IAEA's more expansive claims relative to its investigative and assessment authority under a CSA, which it has made in the context of its assessments of Iran's nuclear program. I referred to these arguments previously as

16. *Introducing the Evolutionary Interpretation of Treaties*, EJIL:TALK!, Dec. 15, 2014. The author here introduces his 2014 monograph on the subject.

being improperly revisionist in character and as having for their chief public apologist former longtime IAEA legal adviser Laura Rockwood.

Rockwood retired from her position as head safeguards legal adviser in the IAEA's Office of Legal Affairs in 2013, having worked in that office since 1985. In that position, she was responsible for all legal aspects of the negotiation, interpretation, and implementation of IAEA safeguards. In August 2014, Rockwood published an article in *Arms Control Today* in which she reiterated points she had made in previous publications and in verbal addresses while still in the employ of the IAEA, but with a focus and thorough explication of her views on the question of the legal authority of IAEA inspectors under the INFCIRC/153 CSA framework.[17] It seems fair to infer that these were also her views when she acted as the head safeguards lawyer for the IAEA—the post from which she had retired less than a year earlier—and that these views would have been reflected in her legal advice to the various organs within the IAEA, including the Director General's office, during her time in that position.

Rockwood's article provides a robust defense of the idea that IAEA inspectors have the legal authority, pursuant to an INFCIRC/153 CSA alone, to fully investigate and assess the question of whether there are undeclared nuclear materials or facilities within a safeguarded state. Her argument in the article is explicitly revisionist, in that she recognizes explicitly that the view of the law she is expounding runs counter to the conventional understanding of the correct interpretation of the INFCIRC/153 CSA held at least up until 1991—almost two decades after the INFCIRC/153 template was adopted. As she writes:

> The state-level concept has its roots in efforts by the IAEA and its member states to strengthen safeguards in the aftermath of the discovery in 1991 of a clandestine nuclear weapons program

17. *The IAEA's State Level Concept and the Law of Unintended Consequences*, 44 Arms Control Today (Sept. 2014). *See also* George Bunn, *Inspection for Clandestine Nuclear Activities: Does the Nuclear Nonproliferation Treaty Provide Legal Authority for the International Atomic Energy Agency's Proposals for Reform?*, 57 Nuclear Law Bulletin (June 1996).

> in Iraq. This discovery triggered a reassessment of the then-conventional, ill-founded belief that the IAEA's legal authority under comprehensive safeguards agreements pursuant to the nuclear Nonproliferation Treaty (NPT) was limited to verifying nuclear material and facilities declared by the state

She proceeds to argue that this conventional interpretation, which had subsisted for nineteen years among both states and IAEA officials, was in fact mistaken all along and that:

> Between 1991 and 1993, the IAEA Board and General Conference made a number of decisions reaffirming the agency's right and obligation to ensure that, in a state with a comprehensive safeguards agreement, no nuclear material, whether declared or undeclared, is diverted to nuclear weapons or other nuclear explosive devices. In other words, the objective of IAEA inspections under such agreements is verification of not just the nondiversion of declared nuclear material (the correctness of state declarations), but also the absence of undeclared nuclear material and activities (the completeness of state declarations).

In response to the fairly obvious rebuttal that, if the IAEA in fact has the authority to investigate for correctness and completeness under a CSA alone, then the adoption by the IAEA of the Additional Protocol was purposeless, Rockwood offers the following analysis:

> Some states question the need for an additional protocol if the IAEA already has the right to verify completeness of a state's declarations under a comprehensive safeguards agreement. The answer is straightforward: the IAEA's right and obligation to verify correctness and completeness derive from the comprehensive safeguards agreement, but in such an agreement, there are limited tools for doing so, such as special inspections. An additional protocol secures for the IAEA broader access to information and locations on a more routine, predictable, and reliable

basis. This permits the IAEA to detect indications of undeclared nuclear material and activities earlier and more effectively than it otherwise would.

I have already provided above my own legal analysis of the question of the scope of IAEA legal authority under a CSA. Clearly, Rockwood and I disagree on this question. In addition to her argument being explicitly revisionist of the original understanding of the interpretation of the CSA, held by both states and the IAEA itself for the first almost two decades of CSA treatymaking on the basis of the INFCIRC/153 template, I would note that she never offers in her *Arms Control Today* article a detailed textual analysis of the CSA itself, inclusive of a holistic consideration of its terms, to support her interpretation. In my opinion this fact is fatally problematic for her analysis and conclusions for a number of reasons.

Firstly and most basically, this means that her method of interpretive analysis does not follow the rules on treaty interpretation provided for in VCLT Article 31 and 32. I have attempted above to provide an analysis which does closely follow the rules of treaty interpretation in reaching my conclusions and have done so on the primary basis of a textual analysis of the provisions of the CSA, taken in their entirety. I think that this textual analysis is the key to understanding the correct interpretation of the treaty.

Secondly, reading through her article, it's clear that instead of relying on the actual text of the CSA, Rockwood rather relies primarily on decisions of the IAEA Board of Governors as interpretive authority for understanding the terms of the CSA. Rockwood's implicit belief that the IAEA Board of Governors in particular has the legal authority to unilaterally interpret bilateral treaties to which the IAEA itself is only one party (e.g., Iran's CSA with the IAEA) is, however, itself erroneous as a matter of law. As with any international organization, the international legal personality and legal competences of the IAEA are a product of its constituting documents (the IAEA Statute), other authorities specifically given to it by states (e.g. CSAs and Additional Protocols), and its practice as accepted generally by

states.[18] There is no provision in either the IAEA Statute or in the INFCIRC/153 or INFCIRC/540 templates that accords to the IAEA Board of Governors or to the IAEA General Conference the power to authoritatively interpret either the IAEA Statute or bilateral safeguards agreements concluded between states and the IAEA. Quite the contrary, Article XVII of the IAEA Statute and Article 22 of the INFCIRC/153 template explicitly provide for outside arbitration or adjudication in the event of a dispute concerning the interpretation or application of the respective treaties. There is further no general principle of international organizational law that would allow for a sub-organ of an international organization, like the IAEA Board of Governors, to authoritatively interpret either the organization's constitutive instrument, or treaties to which the organization is a party. This is particularly true if, as in the case of the IAEA Board of Governors, the sub-organ in question comprises only 35 states party to the organization, out of a total organizational membership of 162 states.

The International Court of Justice has, in fact, recently had the opportunity to consider this question in the *Australia v. Japan Whaling* case, handed down on March 31, 2014. In this case, Australia argued that the court should accord interpretive weight to resolutions of the International Whaling Commission, which had asserted a restrictive interpretive view of provisions of the 1946 International Convention for the Regulation of Whaling. The International Whaling Commission (IWC) had been created by the Convention as a supervisory body and had been given certain specific roles under the Convention's terms. However, nowhere in those terms was there a grant of power to the IWC to authoritatively interpret the Convention. And even though the IWC itself comprised one representative from every state party to the Convention, nevertheless the Court found no general authority in the IWC to interpret the Convention. In fact, the Court concluded

18. *See Reparation for injuries suffered in the service of the Nations*, Advisory Opinion, [1949] ICJ Rep 174, ICGJ 232 (ICJ 1949), 11th April 1949, International Court of Justice.

that even resolutions adopted by the IWC on a nonconsensual yet supermajority basis were not capable of standing as authoritative interpretations of the Convention. As the Court stated:

> [T]he Court is of the view that Australia and New Zealand overstate the legal significance of the recommendatory resolutions and Guidelines on which they rely. First, many IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as subsequent agreement to an interpretation of Article VIII, nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of [VCLT 31(3)(a) and (b)].[19]

If a sub-organ of an international organization which formally represents all of the member states of that organization cannot authoritatively interpret the organization's constitutive instrument without consensus, then certainly a sub-organ of an international organization representing only 35 out of the total 162 states party to the organization cannot authoritatively interpret the organization's constitutive instrument and *a fortiori* cannot authoritatively interpret bilateral treaties to which the organization is only one of the two contracting parties. Rockwood's reliance on the decisions of the IAEA Board of Governors as authoritative sources of treaty interpretation for the CSA between the IAEA and Iran appears to be a prime example of precisely the sort of misunderstood application of the theory of evolutive treaty interpretation that I discussed previously.

Thirdly, Rockwood's failure to provide a full textual analysis of the CSA, I think, gives rise to her argument distinguishing between the authority that the CSA gives to IAEA inspectors on the one hand and the "tools" that the CSA gives to IAEA inspectors on the other.

19. Judgement on the merits, Mar. 31, 2014, ¶83.

A proper textual analysis of the CSA demonstrates that this is a false dichotomy that finds no basis in the text of the treaty itself. As I have explained through my analysis above, the authority of the IAEA to investigate and assess under the CSA is explicitly defined by reference to the procedures outlined in Part II of the CSA. Hence, the procedural tools outlined in the CSA are coextensive and codefinitional with the IAEA's authority under the CSA. No distinction between the two is warranted according to the text of the treaty.[20]

Finally, Rockwood's failure to interpret the CSA on the primary basis of the treaty text itself obscures the manifestly absurd and unreasonable implications—to reference VCLT Article 32—to which her interpretation, if correct, would give rise. Arguing that under the CSA alone the IAEA has the authority to investigate and assess the question of undeclared material and facilities within a safeguarded state would have the following such implications.

First, it would mean that the IAEA would have the authority under the CSA alone to demand access to sites not covered in the safeguarded state's declaration, potentially anywhere within the territory of the state, inclusive of both civilian and military sites. And since the CSA's terms are silent as to the procedures that would need to be followed for these off-declaration inspections, the IAEA would assumedly have unlimited discretion in choosing sites, and specific areas within them, as well as unlimited discretion in determining how many times a site must be visited, and how many times and how persons connected with the sites must be interviewed, in order for the IAEA to satisfy its suspicions regarding the existence of undeclared nuclear material within the state.

Second, it would mean that until the IAEA was satisfied that no undeclared nuclear materials or facilities exist within the state—i.e., until the state proves the negative—the IAEA would have full

20. Pierre-Emmanuel Dupont agrees with my conclusion on this point in his chapter *Interpretation of Nuclear Safeguards Commitments: The Role of Subsequent Agreements and Practice*, in Jonathan Black-Branch & Dieter Fleck eds., Nuclear Nonproliferation in International Law, Vol. II, at 36 (2015).

discretion to withhold its determination that the state is in compliance with its safeguards obligations. No state on earth would agree to this kind of *carte blanche* authority for an international organization to inspect both civilian and military sites on its territory at the organization's complete discretion, or for the organization to exercise its authority in such a subjective and unstandardized manner. This implication of Rockwood's interpretive argument can only be described as a manifestly absurd and unreasonable interpretive result.

Third, Rockwood herself notes another implication of her argument, i.e., that if indeed the IAEA has the legal authority to investigate and assess undeclared materials and facilities on the basis of a CSA alone, there would have been no need for the adoption of the Additional Protocol as a supplement to the CSA. Rockwood at this point tries to explain away this implication with her erroneous "authority vs. tools" distinction referenced above. Notwithstanding her attempts to demur, however, this is in fact yet another inescapable implication of Rockwood's argument. If all of the legal authority that the IAEA needed to investigate both the correctness and completeness of a state's declaration was already contained within the terms of the CSA, there would indeed have been no need or purpose for the post-1991 efforts to negotiate an Additional Protocol, the *raison d'être* of which as we have seen above, and has been explained in many *travaux preparatoires* sources, was to supplement the legal authority of IAEA inspectors to search for undeclared material and facilities.

In fact, taking Rockwood's argument to its logical extension, if the IAEA indeed had all of the legal authority it needed in the CSA alone, then it follows that when the IAEA does enter into an Additional Protocol treaty with a state, it is in fact taking an action *diminishing* its legal authority. This is because the Additional Protocol text *does* provide for procedural limitations on inspections purposed in verifying the absence of undeclared materials and facilities, whereas the CSA text does not. So if Rockwood's interpretation is correct, not only would the Additional Protocol be purposeless, it would also, if entered into by the IAEA, *decrease* the IAEA's authority to investigate and assess undeclared nuclear materials and facilities in a state that

already has a CSA in force with the Agency. Surely this is yet a further manifestly absurd and unreasonable interpretive conclusion.[21]

Finally, returning to the explicitly revisionist nature of Rockwood's analysis, were she to be correct in her analysis, and in light of the quotes I have provided above from IAEA Directors General and other IAEA officials expressing the conventional understanding of the IAEA's authority under the CSA that Rockwood rejects, one would have to conclude that between 1972 and 2009 the IAEA possessed legal authorities under the INFCIRC/153 CSA that IAEA officials outside of the Safeguards Branch of the Office of Legal Affairs, up to and including all of the Directors General prior to Director General Amano, were unaware of. The manifest absurdity of this proposition seems self-evident.

To conclude this section's analysis, I return to the questions that began it, i.e., why did the IAEA apply incorrect standards to its

21. In a 2015 book chapter, co-authored with Larry Johnson, Rockwood supplements her arguments in her 2014 *Arms Control Today* article by *inter alia* arguing that passages in NPT Review Conference Final Documents provide evidence of subsequent agreement and subsequent practice in support of her interpretation of the INFCIRC/153 CSA. The problem with this line of argumentation is that while the *travaux preparatoires* of the INFCIRC/153 template may be relevant for purposes of interpretation of a particular state's CSA with the IAEA, as I have noted above, subsequent agreement or practice of all of the parties to the NPT—meaning agreement or practice subsequent to the point at which the particular CSA came into force between the state and the IAEA—is not relevant to the interpretation of that particular bilateral treaty, in this case Iran's CSA with the IAEA. Only subsequent practice or agreement of the parties to the bilateral CSA itself, establishing an agreed interpretation, are relevant under VCLT Article 31(3). Iran has on multiple occasions formally expressed its conflicting views with those of the IAEA on the interpretation of its CSA. Thus, the two parties to the specific bilateral treaty in question in this case (INFCIRC/214) have not manifest subsequent agreement, or practice demonstrating an agreement, on its interpretation. Pierre-Emmanuel Dupont agrees with my conclusion on this point in his chapter *Interpretation of Nuclear Safeguards Commitments: The Role of Subsequent Agreements and Practice*, in Jonathan Black-Branch & Dieter Fleck eds., Nuclear Nonproliferation in International Law, Vol. II, at 32–33 (2015). *See* Rockwood & Johnson's chapter in the same volume: *Verification of Correctness and Completeness in the Implementation of IAEA Safeguards: The Law and Practice*, in Jonathan Black-Branch & Dieter Fleck eds., Nuclear Nonproliferation in International Law, Vol. II (2015).

assessment of Iran's nuclear program during the period of confrontation ending in July 2015, particularly on the subject of undeclared nuclear materials and facilities? And why did the IAEA improperly withhold its determination that since 2008 has been in full compliance with its safeguards agreement with the IAEA? I noted that there are both legal and political aspects to the answers to these questions.

I have attempted to demonstrate in this section that, with regard to the legal dimension to these questions, the answer appears to be that, particularly since Director General Amano's assumption of office in 2009, IAEA officials have based their assessments and determinations concerning Iran's safeguard compliance on incorrect understandings of the scope of the IAEA's legal authority to investigate and assess pursuant to an INFCIRC/153 CSA.

## II. PMD

In addition to concerns regarding undeclared nuclear material and facilities on the territory of Iran, the IAEA also consistently expressed concerns in its reports on Iran during the period of confrontation, regarding allegations that had been made, and evidences proffered in support of them, to the effect that Iran maintained at least some elements of a nuclear weapons research and development program on its territory in the past. I discussed these concerns, often referred to as the possible military dimensions (PMD) issue, in Chapter 1 and again in Chapter 3 in the context of my examination of NPT Article II. It will be recalled that I concluded that examination by finding that Iran had not violated NPT Article II through any nuclear weaponization activity, even taking these contested allegations *arguendo* as correct.

I'd like to turn attention now to the question of whether Iran violated its safeguards agreement obligations with regard to this issue and to the corollary question of on what legal basis the IAEA maintained its scrutiny, investigations, and assessments of PMD-related

activity inside Iran during the period of confrontation ending with the adoption of the JCPOA in July 2015.[22]

This section is, frankly, going to be a lot shorter than the undeclared materials section. That's because there's really no serious controversy about whether issues of nuclear weaponization not including nuclear materials are covered by a safeguards agreement with the IAEA or whether the IAEA has the legal authority on the basis of its Statue and/or according to the terms of an INFCIRC/153 CSA, or even an INFCIRC/540 Additional Protocol, to investigate and assess nuclear weaponization issues not involving nuclear material within a safeguarded state. Weaponization-related activities not involving nuclear materials are absolutely not covered under safeguards agreements, and the IAEA absolutely does not have the legal authority to investigate or to assess this question.

One will look in vain for even the slightest hint that the drafters of the IAEA Statute, or the CSA and Additional Protocol templates, intended for the IAEA to be a nuclear weapons inspection Agency. The IAEA was created to be, and has always been maintained as, a nuclear materials accounting Agency. The question of whether the IAEA should be looking for and assessing declared or undeclared nuclear materials and facilities within a safeguarded state is therefore a serious legal question, with colorable legal arguments on both sides. But the idea that the IAEA should be in the business of investigating nuclear weapons programs not involving nuclear material, and assessing whether such programs have existed or do currently exist within a safeguarded state, has never been seriously argued on the basis of the IAEA's Statute or safeguards agreements. The IAEA has neither the legal authority nor, importantly, the independent technical resources necessary to conduct such investigations and assessments.

22. The IAEA's consideration of the PMD issue in fact formally came to a close with the Board of Governors' acceptance of the Director General's December 2, 2015 final report on the PMD issue (GOV/2015/68).

In 1991, the U.N. Security Council in Resolution 687 assigned the IAEA the task of uncovering and dismantling Iraq's clandestine nuclear weapons program. Pursuant to this assignment, the IAEA Director General created the IAEA Iraq Action Team, comprising nuclear weapons specialists, mostly seconded from member states, which carried out that task admirably over the next several years. Eventually, the Action Team was renamed as the Iraq Nuclear Verification Office within the IAEA, and it has assumed an ongoing monitoring role. But to be clear, the IAEA Iraq Action Team was not created on the basis of legal authority the IAEA itself possessed under its Statute or any safeguards agreement. It was created, rather, at the request of the U.N. Security Council and on the basis of the Security Council's legal authority under the U.N. Charter.

So again, the IAEA simply has no legal authority of its own to investigate or to assess nuclear weaponization activities within a safeguarded state. Mohamed Shaker, the author of the authoritative treaties on the *travaux preparatoires* of the NPT, has written the following regarding IAEA safeguards:

> The verification is restricted to the prevention of diversion of nuclear material from peaceful uses to nuclear weapons or other nuclear explosive devices. It follows that the NPT safeguards are not intended to verify noncompliance with the basic obligations in Articles I & II of the NPT relating to non-transfer and non-reception of nuclear weapons or other nuclear explosive devices. If a nuclear-weapon State were to transfer a nuclear weapon to any State Party to the NPT, it would obviously be a violation of the Treaty. However, no provisions are provided for in the NPT to guard against such a violation. Moreover, the NPT safeguards as in INFCIRC/153 are not intended to detect hidden nuclear weapons or clandestine production of such weapons.[23]

23. Mohamed Shaker, *The Evolving International Regime of Nuclear Non-Proliferation*, 321 Recueil des Cours 9–202, at 60 (2006).

As with the issue of undeclared nuclear material discussed above, in the early years of the crisis concerning Iran's nuclear program, IAEA Director General ElBaradei seemed to correctly understand the proper legal scope of the IAEA's investigative role and its limits when it came to investigating allegations of weaponization—as well he might, having served as the Head of the IAEA's Office of Legal Affairs prior to taking the position of Director General. In his February 27, 2006, report to the Board of Governors concerning Iran's nuclear program, he made this statement on the matter:

> The Agency continues to follow up on all information pertaining to Iran's nuclear programme and activities. Although absent some nexus to nuclear material the Agency's legal authority to pursue the verification of possible nuclear weapons related activity is limited, the Agency has continued to seek Iran's cooperation as a matter of transparency in following up on reports related to equipment, materials and activities which have applications both in the conventional military area and in the civilian sphere as well as in the nuclear military area.[24]

The IAEA's increased emphasis on the PMD issue, as one regarding which the IAEA's suspicions had to be resolved by Iran to the IAEA's satisfaction, can be dated to Director General Amano's November 8, 2011, report to the Board of Governors, which I discussed in Chapters 1 and 3.[25] In that report and in those following it, the IAEA has never formally claimed that Iran is in noncompliance with its safeguards agreement on the basis of the IAEA's unresolved PMD questions. Director General's reports since the November 2011

24. GOV/2006/15, para. 52.
25. GOV/2011/6.

report, rather, typically include a sentence such as the following from the February 24, 2012, report:

> The Agency continues to have serious concerns regarding possible military dimensions to Iran's nuclear programme, as explained in GOV/2011/6.[26]

Notwithstanding the fact that there has never been a formal determination by the IAEA that Iran was in noncompliance with its safeguards agreement due to the IAEA's concerns regarding the PMD issue, the IAEA nevertheless continued from 2011 throughout the remainder of the period of confrontation to place a high priority on Iran's cooperation with the Agency to resolve its concerns in this regard. I will return in Chapter 7 to discuss the means through which the PMD issue was eventually finally resolved in December 2015. For purposes of the present discussion, however, I would like to focus on the legal basis for the IAEA's investigations and assessments during the period of confrontation.

For Iran's part, the PMD issue was generally at least rhetorically dismissed as one that had been created on the basis of forged documents and false intelligence information given to the IAEA by hostile third-party states, as Iran explained in its June 5, 2013, explanatory note to the IAEA.[27]

> Taking into account the above-mentioned facts, and that no original document exists on the Alleged Studies, and there is no valid documentary evidence purporting to show any linkage between such fabricated allegations and Iran's activities . . . and the fact that the former DG has already indicated in his reports in June, September and November 2008 that the Agency has no information on the actual design or manufacture by Iran of nuclear material components for a nuclear weapon or of certain other

26. GOV/2012/9.
27. INFCIRC/853.

> key components, such as initiators, or on related nuclear physics studies; therefore this subject must be closed.[28]

Since the publication of the November 2011 Director General's report on the PMD issue, one major obstacle to progressing the effort of resolving the IAEA's concerns was the very absence in the IAEA Statute, and in Iran's safeguards agreement, of any provisions or standards relating to weaponization activities. It is simply not a subject addressed in any IAEA-related legal source. The resultant problem for the IAEA in pursuing the route that it decided to take in investigating the PMD issue in Iran was that there is no guidance to be found in any relevant legal documents concerning the scope or subjects of such an investigation; what discretion the IAEA has in demanding access to sites or information; and what criteria or standards the IAEA should use to determine when it should consider its concerns resolved. There is therefore little save the IAEA's own subjective notions of "resolution of concerns" and "satisfactory cooperation," that it has mentioned in its resolutions concerning the matter, that is available to guide Iran or outside observers on the subject of what standards the IAEA could or should use in this case, on which to base their investigations and assessments.

It is frankly difficult to join a rigorous legal discussion on the PMD question because, unlike on the undeclared materials and facilities question, there are to my knowledge no serious defenders of the IAEA's legal authority to investigate and assess nuclear weaponization questions not involving nuclear material on the basis of IAEA legal documents. I could set up any number of straw-man arguments to this effect to attack, but I don't see any value in such an exercise. There simply are no serious arguments to be made to justify the IAEA's actions in this regard, by reference to IAEA legal documents.

I think that an understanding of why the IAEA pursued the course of prioritizing and formalizing the PMD issue in Iran's case since 2011 will have to be based not upon a legal argument or debate,

28. Para. 51.

but rather on a political assessment, which I will give briefly in the next section of this chapter.

It will suffice at this point to say that, from a legal perspective, the IAEA clearly overstepped the bounds of its legal authority in any of its organization-specific legal sources (i.e., the IAEA Statute and safeguards agreements) through its engagement in investigations and assessment of the PMD issue in the Iran case.[29]

## III. THE POLITICAL DIMENSION

As a legal summary, then, according to an application of the correct legal standards, Iran was in compliance with its safeguards agreement with the IAEA and had not violated its safeguards law obligations, from 2008 up through the adoption of the JCPOA in July 2015. Furthermore, the IAEA during this time used incorrect legal standards for assessment in the Iran case, both on the question of undeclared nuclear materials in Iran and on the question of possible military dimensions to Iran's nuclear program. Due to the application of these incorrect legal standards, the IAEA during that time reached erroneous conclusions regarding Iran's compliance with its

29. It has also, in connection with its PMD investigation particularly, engaged in practices of intelligence sharing with third-party states, and reliance upon such intelligence in making its safeguards compliance determinations, that has concerned a number of states. As I discussed in Chapter 1, the IAEA's reliance upon information shared with it by national intelligence agencies of states, but not made publicly available for review and not even submitted to the accused state for its interrogation and response, has raised concerns about the propriety of the IAEA's accepting and basing safeguards compliance assessments on such information. The IAEA is certainly not itself an intelligence agency and does not have the physical capacity to independently review information submitted to it for veracity. And particularly following the intelligence-led debacle of the 2003 war in Iraq, the possibility of states sharing fraudulent or simply incomplete intelligence information with an international organization, which the organization cannot independently vet, in order to allow the organization to take prejudicial legal action against another state, strikes many, including myself, as a very real concern that argues strongly against allowing such organizational practice. *See, e.g.*, Mark Hibbs, *Intel Inside: Has the IAEA's Information Become Politicized?*, Foreign Pol'y, Dec. 10, 2012.

safeguards agreement and improperly withheld its determination that Iran was in fact in compliance with its safeguards obligations.

The Non-Aligned Movement (NAM), an informal group of 120 mostly developing states, has noted the IAEA's departures from normal safeguards standards application in its reports on Iran. In a 2010 statement to the IAEA Board of Governors, the Egyptian ambassador, speaking on behalf of the NAM, said the following:

> NAM noted with concern the possible implications of the continued departure from standard verification language in the summary in the Director General's report, which stated that "Iran has not provided the necessary cooperation to permit the Agency to confirm that all nuclear material in Iran is in peaceful activities", and it had sought further clarification from the Agency on that matter, given that the Safeguards Implementation Report for 2009 contained in document GOV/2010/25 stated that "while the Agency was able to conclude for Iran that all declared nuclear material remained in peaceful activities, verification of the correctness and completeness of Iran's declarations remained ongoing". NAM regretted that no further clarification had been received to date.[30]

This recognition by a majority of states that the IAEA has applied incorrect legal standards to Iran's case raises the inevitable question of why the IAEA has done this. I have given my opinion as to the legal dimension of this question previously. But as I have noted, there is a political dimension to the answer to this question as well. I will offer my thoughts on this point briefly, as it is not the primary focus of this book. But I do think it is important to identify relevant political dynamics in the context of which the law operates and which have an inescapable bearing upon how the law is used or misused by interested parties.

It has been widely reported that, just prior to Yukiya Amano's ascendance to the Director Generalship of the IAEA in December 2009,

30. GOV/OR.1280, at para. 44.

in private diplomatic cables subsequently revealed by WikiLeaks, U.S. diplomatic staff in Vienna noted the convergence of Amano's views with those of the United States, including with regard to Iran, and U.S. hopes to capitalize on this convergence to influence Amano during his tenure as Director General. Quoting from those cables:

> Amano reminded [the] ambassador on several occasions that he would need to make concessions to the G-77 [the developing countries group], which correctly required him to be fair-minded and independent, but that he was solidly in the U.S. court on every key strategic decision, from high-level personnel appointments to the handling of Iran's alleged nuclear weapons program. More candidly, Amano noted the importance of maintaining a certain "constructive ambiguity" about his plans, at least until he took over for DG ElBaradei in December . . .
>
> This meeting, Amano's first bilateral review since his election, illustrates the very high degree of convergence between his priorities and our own agenda at the IAEA. The coming transition period provides a further window for us to shape Amano's thinking before his agenda collides with the IAEA Secretariat bureaucracy.[31]

The apparent correspondence between, on the one hand, this identified convergence of views between Director General Amano and the United States and, on the other hand, the demonstrably harsher language of Director General's reports on Iran and more aggressive approach to the PMD issue since Amano took the reins of the IAEA Secretariat in 2009, is difficult to ignore. It has produced a deep suspicion, often voiced by Iranian officials, of political bias against Iran within the IAEA leadership.[32]

31. Julian Borger, *Nuclear WikiLeaks: Cables Show Cosy U.S. Relationship with IAEA Chief*, The Guardian, Nov. 30, 2010.

32. *Interview with IAEA Head Yukiya Amano*, Der Spiegel, Jan. 11, 2011.

More systemically, and of longer standing, experts have identified a significant gap between the expectations placed upon the IAEA by governments and the IAEA's ability, both with regard to its legal authority and physical resources, to meet those expectations, particularly since the first Gulf War of 1990–1991. Pierre Goldschmidt, the former Deputy Director General of the IAEA and head of its Department of Safeguards from 1999 to 2005 has described this gap:

> There are two main reasons the safeguards system has been "manifestly failing." First, the Department of Safeguards doesn't have the legal authority it needs to fulfill its mandate and to provide the assurances the international community is expecting. Second, the Department lacks the necessary cooperation and transparency from Member States of the IAEA . . .
>
> Under the IAEA Statute, safeguards are "designed to ensure that special fissionable and other materials, services, equipment, facilities, and information . . . under [Agency] supervision or control are not used in such a way as to further any military purpose" (Article III.5) To reach that objective, Article XII.A. provides that the Agency will have the right and responsibility "to send into the territory of the recipient State inspectors . . . who shall have access at all times to all places and data and to any person who by reason of his occupation deals with materials, equipment, or facilities which are required by this Statute to be safeguarded, as necessary . . . to determine whether there is compliance with the undertaking against use in furtherance of any military purpose."
>
> This excellent and forward looking mandate was agreed more than half a century ago. Unfortunately, in practice the commitments accepted by Non-Nuclear-Weapon States (NNWSs) under Comprehensive Safeguards agreements (CSA) and even the Additional Protocol (AP) are much more limited.[33]

33. "Looking Beyond Iran and North Korea from Safeguarding the Foundations of Nuclear Nonproliferation," address given to NPEC conference, Nov. 3, 2011.

Since the discovery of Iraq's clandestine nuclear weapons program in 1991, governments and international civil society have placed upon the IAEA an expectation that it play the role of "the United Nations nuclear watchdog"—a phrase that is today quite common in media references to the Agency. A mistaken impression of the IAEA as a general nuclear weapons supervision regime, or a sort of an international bureau of investigation for rooting out and dismantling secret nuclear weapons programs, has emerged. It is true, as I noted previously, that a small team of inspectors organized by the IAEA did in fact play such a role in Iraq in the aftermath of the first Gulf War, on the assignment of the U.N. Security Council. And perhaps this is where the confusion originates.

But as I stressed above, the IAEA Iraq Action Team was in actuality not an IAEA-authorized group at all, but rather simply an IAEA-organized group under the authority of the Security Council, acting according to the Council's power under the U.N. Charter. I think that this crucial distinction has been lost on many states and that since that time states and international civil society have come to expect the IAEA to continue on as the international community's law enforcement Agency for all nuclear-weapons-related issues.

The problem with this expectation is that it is completely divorced from the actual legal authority that the IAEA's member states have given to the organization in the IAEA Statute and in the various safeguards agreements which states have negotiated and concluded with the Agency. As I have explained in this chapter, the IAEA's authority under these legal sources is actually quite limited and is focused solely on nuclear materials accountancy. This limitation on the legal authority of the IAEA was quite deliberate, as states have always been understandably reluctant to grant authority and discretion to the IAEA, or to any international organization, to delve too deeply into their security infrastructure. The IAEA is simply not the international nuclear weapons watchdog that so many think it is, and that some states want it to be.

These heightened expectations create immense political pressure for the Agency to be active and aggressive in dealing with cases

of suspected clandestine nuclear weapons programs, particularly, I think it must be said, when those cases concern states that are otherwise generally perceived by powerful states as being "bad actors."

For IAEA officials and for state members of the IAEA Board of Governors, there are a number of possible ways to respond to this gap between expectations and authority. One is to fastidiously stay within the Agency's actual legal authority when conducting safeguards inspections and assessments, even in cases in which this path might result in the disappointment of some states, including powerful states that contribute the lion's share of the Agency's budget.

Another option, which could be pursued alongside the first option, is to push for states to increase the authority of the IAEA yet further, through the conclusion of additional legal sources even beyond the 1997 Additional Protocol, in order to close the expectations/authority gap.

A third option is to bend to the desires of particularly influential states, recognizing that states are unlikely to give the IAEA significant additional legal authority to close the gap, and attempt rather to fulfill the broader expectations placed upon the Agency through internal policy evolution, justifying this path through less-than-satisfactory legal arguments grounded in the Agency's existing authority.

This is of course a simplistic assessment of the Agency's options, and to be fair I know from researching the history of deliberations within the IAEA on these issues that they have been considered seriously and thoroughly and generally in good faith by IAEA officials and IAEA member states on many occasions throughout the Agency's history, in order to determine the best course for the Agency to follow. I do think, however, that particularly during Amano's tenure as Director General, and as illustrated by the IAEA's treatment of the Iran case, the Agency has in a number of instances unfortunately chosen the third option outlined above and has overstepped its legal authority to a troubling extent in its safeguards policy and practice, in order to please powerful states seeking to use the Agency as a tool of their own foreign policy.

In addition to this long-standing mandate-authority gap, the IAEA has also suffered for some time from increasing systemic politicization in its governing organs, and particularly in the Secretariat and Board of Governors. This increased politicization can be traced to the lead-up to the second Gulf War in 2003 and to the IAEA's actions at the time—for which the IAEA and Director General ElBaradei jointly won the Nobel Prize, but which also seriously alienated powerful Western countries that led the charge for war in Iraq. As Mark Hibbs explained in a 2012 article:

> During the past decade, the world's global nuclear governance has come unhinged. Beginning in 1958 and until the mid-2000s, the members of the International Atomic Energy Agency (IAEA) resolved conflicts over nuclear issues on the basis of consensus reached at the IAEA's most important decision-making body, its board of governors. About eight years ago this arrangement broke down, and the IAEA has become subject to intense politicization, which has eroded its credibility and hindered its effectiveness. In parallel, the big powers on the IAEA board and in the UN Security Council cannot agree on a common approach to solve important nuclear security issues . . .
>
> Politicization of the IAEA, its limited authority, and the lack of cooperation of major powers deters effective global governance in areas of crisis that have a nuclear dimension: North Korea, Iran, and South Asia.[34]

Unfortunately, it appears that the IAEA is currently continuing to move its safeguards policy and practice in a direction that is likely only to increase the potential for discriminatory, subjective, and politicized administration of safeguards through the

34. *Nuclear Energy 2011: A Watershed Year*, 68 Bulletin of the Atomic Scientists 10–19 (2012).

adoption of its "state level concept" safeguards initiative, discussed in Chapter 4.[35]

In summary, the combined systemic phenomena of the gap between expectations and capacity for the IAEA and the deep politicization of the IAEA's governing bodies, added to the pro-Western views of the current IAEA Director General, have in my view created a political environment in the IAEA which is ripe for producing an overstepping of the bounds of the IAEA's legal authority, in order to please powerful Western governments by over-aggressively pursuing allegations of wrongdoing by Iran.

The implications of these excesses by the IAEA are not confined solely to the Iran case, however. The IAEA's influence in international affairs is based upon a perception that it is an independent, objective, technical body tasked with supervising states' compliance with their safeguards agreements, which are linked to the Nuclear Nonproliferation Treaty. It is for this reason that states and international organizations, including importantly the U.N. Security Council, rely on IAEA assessments of safeguarded states' nuclear programs. To the extent that the IAEA is perceived as having become politicized, acting as an agent for powerful states to achieve their national interests, and using incorrect legal standards in the Agency's safeguards compliance assessments, the IAEA's support among states, particularly in the developing world, will decrease.

35. *See* Mark Hibbs, *The Plan for IAEA Safeguards*, Carnegie Endowment for International Peace, Nov. 20, 2012; Daniel H. Joyner, *The IAEA State Level Safeguards Approach Report*, Arms Control Law, Aug. 29, 2013; Daniel H. Joyner, *Statement by Russian Representative to the IAEA Grigory Berdinnekov*, Arms Control Law, Oct. 21, 2014.