

VERIFICATIONMATTERS

VERTIC RESEARCH REPORTS • NUMBER 7 • MAY 2007

**Thinking inside the box:
exploring legal approaches to build
confidence in Iran's nuclear programme**

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Acronyms and abbreviations

CSA	Comprehensive safeguards agreement
DIV	Design information verification
FEP	Fuel enrichment plant
IAEA	International Atomic Energy Agency
NPT	Nuclear Non-Proliferation Treaty (1968)
SPNWFZ	South Pacific Nuclear Weapon Free Zone Treaty (1985)
UCF	Uranium conversion facility
UNSCR	United Nations Security Council resolution

Foreword

The development of nuclear energy has important benefits and applications, most notably in electricity generation and medical science. However, the same technology and materials can also be adapted and utilised in nuclear weapons, to wreak havoc on an almost unimaginable scale. It is the Janus-like nature of nuclear research and technology (as well as the possibility of a severe nuclear accident) that create concern about the development of new nuclear power programmes. This is especially so if such programmes, for whatever reason, are established under a veil of secrecy. The current controversy surrounding Iran's nuclear plans is a case in point.

Iran failed to fully inform the international community about its ambitious plans to master the nuclear fuel cycle. This secrecy has given rise to considerable suspicion and distrust of Iran's intentions with regard to its newly acquired technology. Consequently its programme may, even if it was always meant to be peaceful, have a profound impact on regional stability and, indeed, international peace and security as a whole. Therefore, it is fundamentally important that international trust in Iran's intentions is restored.

This paper, together with its companion study, collectively aim to identify a range of possible verification, transparency and confidence-building mechanisms—through which trust can be re-established and further strengthened. The two papers are written from a technical and legal perspective and are intended to give an independent, impartial and dispassionate analysis of possible measures and processes to facilitate resolution of the current situation.

The aim of verification is to establish or increase confidence that all parties are implementing an agreement fairly and effectively. However, no verification regime is ever going to be one hundred per cent effective. Such verification mechanisms in isolation would only partly address the international community's concerns. International trust in Iran's long term intentions cannot be restored simply by making sure that no nuclear material is diverted. The solution has to be broader, transparent, legally binding, and based on dialogue and respect. Additional confidence-building measures could play an important role in strengthening any agreed verification system, promoting transparency and allowing states to demonstrate goodwill.

Although these two VERTIC reports concentrate on the case of Iran's nuclear programme, we believe they are more widely applicable. The world seems to be facing a nuclear renaissance, and questions relating to the intentions of states are bound to surface again, long after the Iranian issue is solved and forgotten. It is therefore important to think in terms of what, if any, verification, transparency and confidence-building measures can be devised and applied if and when a country is attempting to develop a nuclear programme, in order to address the potential concerns of the international community.

I am grateful to our reviewers, drawn from various governments and academia on three continents, whose comments on the two reports were invaluable. Indeed, their advice, support, and enthusiasm were much appreciated by the research staff and have strengthened the final product. Finally, I wish to thank the Joseph Rowntree Charitable Trust for funding these studies—and for its unwavering support for VERTIC and its mission.

Michael Crowley

Executive Director, VERTIC

1. Introduction

Iran's nuclear programme has been at the centre of the international community's attention since mid-2003. Findings by the International Atomic Energy Agency (IAEA) that Iran had breached its comprehensive safeguards agreement (CSA) with the agency have given rise to a confidence deficit in the country's long-term intentions in respect of its nuclear programme. Initially, negotiations between the so-called European-3 (France, Germany and the United Kingdom) and Iran to resolve the situation showed considerable promise. Since mid-2005, however, these negotiations have stalled. At present, relations between the European-3 and Iran are frosty. The deterioration in relations started with Iran's decision to restart uranium conversion at its facility in Esfahan, having suspended fuel cycle operations for a considerable time. The situation worsened after Iran's decision to resume uranium enrichment at its facilities in Natanz. Iran was under no legal obligation to suspend activities at these facilities but its decision to resume and expand operations has seriously jeopardized any possibility of reaching an amicable solution to the current situation.

By exploring possible legal approaches to confidence building, this report seeks to provide a possible framework on which an acceptable solution to the current situation can be built. The proposed framework is designed to optimize transparency with regard to Iran's nuclear fuel cycle, and in particular its interconnectedness with Iran's military-industrial establishment.

The framework outlined in this report is based on a delicate balance between Iran's inalienable right to develop research, production and use of nuclear energy for peaceful purposes without discrimination, and Iran's duty to assuage the concerns of the international community that its plans may not conform with articles II and III of the 1968 Nuclear Non-Proliferation Treaty (NPT). The framework also takes into account Iran's obligations to comply with relevant UN Security Council resolutions (UNSCRs).

The framework is based on a co-operative solution, where Iran plays an active part in the transparency-building process. The proposal is formulated in such a way that the burden of its successful implementation rests with Iran. This is the way it should naturally be. It may not be a popular proposition in all quarters, but Iran's historical actions are the main cause of the present crisis of confidence.

2. Rights and obligations

The principles of free consent and good faith are universally recognized in international law. Together with the principle of the equal rights and self-determination of peoples, they form the bedrock of international relations. Iran is a sovereign state. As such, it has the right to enter freely into agreement on whatever subject matter it desires, and, under protection of the principle of non-interference in domestic affairs, to unilaterally develop nuclear energy. However, the right to conclude treaties is not without restrictions. Nor is a state's sovereignty limitless: state sovereignty has been increasingly diminished through the establishment of inter-governmental or supranational organizations with various degrees of norm-creating power. Moreover, state sovereignty is increasingly recognized as being conditioned by other rights and responsibilities. As a consequence, international law itself has become increasingly fragmented. There are a large number of substantive sources of law to take account of and to respect, which increases the chance of normative conflicts, that is, situations 'where two norms that are both valid and applicable point to incompatible decisions so that a choice must be made between them'.¹

The Iranian issue highlights the conflict between the principles of non-interference and self-determination and the collective security system of the United Nations. While insisting that other nations respect Iran's rights, the country has not fulfilled its own obligations under the United Nations Charter. Iran argues that international law gives it an inalienable right to develop nuclear energy, as long as it does so for peaceful purposes and in conformity with the NPT. According to Iran, any attempt to curtail or modify this right is unlawful. Moreover, Iranian diplomats portray such efforts as an extension of a campaign, stretching back 50 years and orchestrated by a number of Western powers, to curtail the country's technological development.² The reality, however, is that Iran's right to develop nuclear energy is constrained by its obligations under the UN Charter, and by the NPT itself.

Article 103 of the UN Charter stipulates that 'in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. The imperative is repeated in article 30 (6)

of the Vienna Convention on the Law of Treaties. The rule is designed to ensure that a state, a grouping of states, or an international organization cannot agree on something that would effectively circumvent the UN Charter.³ Moreover, article 103 protects and upholds the authority of the Security Council, which has primary responsibility for the maintenance of international peace and security. All UN member states have agreed ‘to accept and carry out the decisions of the Security Council in accordance with the present Charter’ (article 25). Individual member states do not have the right to judge the legality of Security Council decisions, although they certainly have the right to protest against them. If states could judge themselves, the binding character of the Security Council’s resolutions would be undermined and article 25 would become meaningless.⁴

The UN Security Council has adopted three resolutions on Iran’s nuclear programme. The first, UNSCR 1696 adopted on 31 July 2006, requires Iran to suspend uranium enrichment and associated activities. Further resolutions to that effect were adopted on 23 December 2006 (UNSCR 1737) and 24 March 2007 (UNSCR 1747). The resolutions have been adopted under Chapter VII of the UN Charter, which makes them legally binding. Iran has unilaterally rejected all the resolutions, arguing that the Security Council’s action is ‘unlawful, unnecessary and unjustifiable’.⁵

While Iran’s arguments, before the Security Council and elsewhere, may be morally compelling for some, they are not convincing from the standpoint of international law. This is for two principal reasons: first, Iran’s rights may not be as unconditional as the country declares. Article IV of the NPT does refer to the ‘inalienable’ right of the parties to ‘develop research, production and use of nuclear energy for peaceful purposes without discrimination . . .’. At first sight, the word inalienable implies that the right to develop nuclear power is ‘incapable of being alienated, surrendered, or transferred’.⁶ However, since terms in a treaty should be read in their context and in the light of the object and purpose of the treaty itself, such a rigid interpretation is not entirely convincing. It is obvious that this right can be constrained. Article IV stipulates that the right has to be exercised ‘. . . in conformity with articles I and II of this Treaty’. In other words, the right to develop nuclear power remains intact as long as the party respects its central non-proliferation commitments. If the party does not respect its non-proliferation obligation, that right is forfeited—or at least subject to curtailment. Otherwise, the treaty’s purpose would be seriously jeopardized. The parties to the treaty have also made moves to augment the conditional nature of the right to develop nuclear power. For instance, in 2000 the parties to the treaty agreed that article IV should also be interpreted as meaning that a country’s right to nuclear energy is conditional on its adherence to IAEA safeguards.⁷

Second, and more significantly, the legal context has changed through the adoption of the three UNSCRs. The language of the resolutions leaves no doubt that the Security Council intended the resolutions to be

legally binding. However, the lawfulness of their adoption has been disputed by Iran, which does not acknowledge their legal force.⁸

Existing Security Council resolutions do not specify per se when Iran will be permitted to restart its nuclear activities. However, it is widely assumed that the suspension will be lifted when ‘international confidence in Iran’s intentions has been restored’.⁹ Since this terminology has been criticized by the Iranian Government, it is reasonable to assume that the language is a potential barrier to a negotiated settlement.¹⁰ The accompanying VERTIC report considers one possible solution: that after Iran has come into compliance with Security Council resolutions and the IAEA has been able to resolve any outstanding questions about the exclusively peaceful nature of its nuclear programme, Iran be permitted to restart some or all of its sensitive nuclear activities under enhanced safeguards.¹¹

2.1 What is the scope of the Security Council’s resolutions?

Not all parts of a UN Security Council resolution are legally binding. Careful differentiation needs to be made in respect of legally binding *decisions* or *demands* and the parts of a resolution that contain recommendations or the wishes of the Council, which are often differentiated by language such as *calls upon* or *encourages*.¹² While there are no recognized principles for how a Security Council document should be interpreted, it is reasonable to assume that principles relating to treaty interpretation could be applied by analogy. Consequently, the principle that ‘what is not prohibited is permitted’ (also known as the Lotus Principle) should be kept in mind when reading the Council’s three resolutions.¹³

The resolutions differentiate between two sets of requirements. The first set calls on Iran to take steps outlined in a resolution adopted by the IAEA Board of Governors on 4 February 2006.¹⁴ It can be argued that this set falls under a political request by the Council, and that it is therefore not legally binding (see below). However, in resolutions 1737 and 1747 the Council states that Iran *shall* take the steps required by the Board of Governors. The use of the word *shall* clearly implies that the Council intends to transform the IAEA’s requirements into legally binding demands.¹⁵ However, some of these requirements are rather flexible. Iran would need to implement them in order to be in full compliance with relevant resolutions but, since the wording is loose, the Security Council will need to allow Iran considerable flexibility when making its compliance determination.

The second set *decides* that Iran *shall suspend* certain nuclear activities. The wording here cannot be interpreted in any way other than as spelling out the legally binding steps that must be taken by Iran. These steps include the *suspension* of: (a) all enrichment-related and reprocessing activities, including research and develop-

ment; and (b) work on all heavy water-related projects, including the construction of a research reactor moderated by heavy water (i.e. the reactor in Arak).

2.1.1 Legally required suspension

It is clear that the installation, testing and running of centrifuges would constitute 'enrichment' and thus be prohibited under the three resolutions. However, what is meant by the term 'enrichment-related' is less clear in the context of the resolution. The term has not been explained by any member of the Security Council. During discussions prior to and after adoption of the resolutions, the term was referred to only a few times and then just to repeat the language of the resolution itself. While it is clear that, for instance, the maintenance of centrifuges would fall under the term 'enrichment-related', it is less clear whether precursor stages to enrichment, such as uranium conversion, are covered by the language. Neither uranium conversion nor uranium mining and milling were mentioned during the Security Council meeting.¹⁶

The IAEA has interpreted the term with respect to its own activities. It has referred to the installation, testing and running of centrifuges under the rubric 'enrichment-related activities'. It also groups design information verification (DIV) activities at the Fuel Enrichment Plant (FEP), the Uranium Conversion Facility (UCF) and the Iran Nuclear Research Reactor (IR-40) under that rubric (quite improperly in the latter case, since the operation of the reactor does not have anything to do with uranium enrichment).¹⁷

An alternative definition can be found in the now defunct 'Paris Agreement', which stipulated that enrichment-related activities include 'the manufacture and import of gas centrifuges and their components; the assembly, installation, testing or operation of gas centrifuges . . . and all tests or production at any uranium conversion installation'.¹⁸ This list of activities could be regarded as indicative of what constitutes 'enrichment-related activities'. However, it was never referred to during UN Security Council deliberations. Moreover, the term was the subject of considerable controversy during the implementation of the Paris Agreement itself. The Iranian government disputed that the term 'enrichment related' included the production of uranium hexafluoride gas, something which contrasted with the view of the IAEA.¹⁹ Indeed, it was Iran's resumption of activities at their uranium conversion facility that eventually led to the collapse of the Paris Agreement.

On balance, there seems to be a certain degree of freedom with regard to activities at the UCF.²⁰ On the one hand, it could be argued that uranium conversion is prohibited under UNSCR 1696, UNSCR 1737 and UNSCR 1747. On the other hand, it is also possible to conclude that it is permitted. Since the members of the Security Council never attempted to define the term 'enrichment-related activities', there is room for flexibility in its interpretation. It is therefore possible to conclude that uranium conversion can be conducted lawfully, although this would be a difficult interpretation bearing in mind the object and purpose of the resolution.²¹

A suspension of all enrichment-related activities at any uranium enrichment site in Iran should be re-established. Therefore, a relatively comprehensive suspension by Iran of certain nuclear activities is required,²² at least until Security Council requirements are lifted and a negotiated solution is found that guarantees that Iran's nuclear programme is exclusively for peaceful purposes.²³ The suspension should, at a minimum, include a prohibition on the manufacture or import of gas centrifuges and their components; as well as on the assembly, installation, testing or operation of gas centrifuges. Arguably, the prohibition includes typical support activities such as the construction and maintenance of buildings and other necessary infrastructure—including the electrical grid, communications, computing power, and so on.

2.1.2. Other requirements

While it is fairly clear that a suspension of certain nuclear activities would be a requirement under international law, the extent to which other aspects of the resolutions are legally binding is less certain. UNSCR 1696 'calls upon Iran without further delay to take the steps required by the IAEA . . . which are essential to build confidence in the exclusively peaceful purpose of its nuclear programme and to resolve outstanding questions'. Later resolutions, however, *affirm* that Iran *shall* take the enumerated steps, which include:

- The reconsideration of the research reactor moderated by heavy water in Arak (although, according to UNSCR 1737 and UNSCR 1747 heavy water-related projects must be suspended);
- The prompt ratification and full implementation of the Additional Protocol;
- A return to the provisional application of the Additional Protocol; and
- The implementation of transparency measures that 'extend beyond the formal requirements' of Iran's safeguards obligations.

Moreover, in operative paragraph 8 of UNSCR 1737 the Security Council decides that Iran *shall* provide such access and co-operation that the IAEA requests to be able to verify the suspension (as is discussed above). The paragraph also decides that such access and co-operation should also be afforded the IAEA in resolving all the outstanding issues identified in IAEA reports.

In legal usage, the word *shall* is often reserved for a legally binding requirement, from which there is no exception. However, compliance benchmarks for some of the measures outlined above are ill-defined. Therefore, a framework agreement, such as the one detailed in this paper, can elaborate and give substance to some of these benchmarks, in particular with respect to what it means to implement transparency measures that extend beyond the formal requirements of the Additional Protocol. The sections below outline the elements of a possible legal framework and provide some examples of how similar requirements have been defined in legal practice.

3. An obligation to refrain from certain activities

At present, Iran's nuclear non-proliferation obligations are set out in article II of the NPT.²⁴ According to the article, Iran has undertaken 'not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices' and 'not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices'. As is noted above, Iran is also bound by UN Security Council resolutions 1696, 1737 and 1747, which require it to 'suspend all enrichment-related and reprocessing activities, including research and development' as well as work on heavy water-related projects. It would be useful for the legal framework to clarify and distinguish between Iran's undertakings under the NPT and its obligations under relevant UN Security Council resolutions.

The legal framework could establish that Iran shall not acquire or develop *nuclear weapons*²⁵ or *nuclear-weapon-usable material*.²⁶ Such wording would allow Iran to conduct enrichment up to the point where the product becomes usable in weapons. Other forms of enrichment and the reprocessing of irradiated fuel would constitute a breach of the agreement. Naturally, with the relevant UNSCRs in force, all forms of enrichment are disallowed irrespective of whether the product is usable in weapons. A possibility when negotiating a legal framework would therefore be to recognize the existence of relevant resolutions in a prospective agreement, but to allow for the proposed fallback definitions to enter into force if and when the suspension is lifted.

The legal framework could also require Iran to not develop any *subsystems or components* that could be used in the development of nuclear weapons. Since the precise scope of such a requirement would be the subject of intense interpretation, the framework could pre-empt potential divisions by asking a consultative committee (see section 5 below) to decide which activities or items should be proscribed, and for what period of time.

The legal framework could also allow for the temporary suspension of any *research, development, support or manufacturing facilities* which are related to the development of nuclear weapons or nuclear weapon-usable material, as well as their subsystems or components. Once again, a consultative committee could decide on the precise meaning of these terms.

4. A right to conduct verification

An interesting formula, which may help to solve the controversy surrounding Iran's nuclear programme, is found in the 1985 South Pacific Nuclear Free Zone Treaty (the Rarotonga Treaty). The treaty provides for two parallel verification regimes.

Article 8 calls on all member states to apply IAEA safeguards to their nuclear activities, and the treaty's Annex 2 clarifies that those safeguards shall be equivalent in scope and effect to the model comprehensive safeguards agreement (INFCIRC/153). Consequently, the treaty recognizes that the IAEA bears the responsibility for nuclear safeguards and does not in any way undermine its authority. However, the treaty also provides for a parallel complaints procedure, through which the parties can make their case should they suspect that another party is in non-compliance. The complaints procedure also involves the formation and deployment of a 'special inspection team', should the need arise.

While the IAEA is best placed to verify compliance with most of the requirements of the proposed legal framework, the fact that it may not have the necessary authority—under its established safeguards system—to initiate and complete all forms of inspections may be an argument in favour of adopting a similar process in this case.²⁷

4.1 Continued application of INFCIRC/214

Over the years the IAEA's safeguards system has been successfully designed and implemented to provide confidence that any militarily significant diversion of nuclear materials from *declared* civilian activities to a weapons programme, or at the very minimum to purposes unknown, will be detected. The central component of the safeguards system is the comprehensive safeguards agreement based on INFCIRC/153, which states sign with the IAEA. It is essential that comprehensive nuclear safeguards continue to be applied in Iran in accordance with Iran's Comprehensive Safeguards Agreement (INFCIRC/214).

4.2 Renewed application of INFCIRC/540 safeguards

To verify the *completeness* of Iran's declarations, the IAEA would need to be able to take advantage of the enhanced information flow facilitated by the model additional protocol. The IAEA would also benefit from the protocol's provisions on complementary access. These benefits are well known. Therefore, any legal solution would be strengthened by an operational paragraph that required Iran to ratify its Additional Protocol. Since Iran's Additional Protocol is of fundamental importance, the legal framework should specify a date by which Iran should have brought the instrument into force. A common timeframe for completion of constitutional procedures in respect of nuclear weapon-free zones is 18 months.²⁸ In the meantime, Iran should resume provisional application of its Additional Protocol.

4.3 Measures extending beyond the formal requirements of safeguards

As is noted above, the IAEA Board of Governors has requested that Iran apply confidence-building measures that 'extend beyond' the requirements of its Safeguards Agreement and its Additional Protocol as it was provisionally applied. This is also a requirement under UNSCR 1737 and UNSCR 1747. Historically, Iran has voluntarily applied such measures by giving the IAEA access to a number of military sites, to dual-use equipment, and to individuals so that they can be interviewed. The level and scope of such measures have often been highlighted by Iranian officials.²⁹ However, such access has been given on an ad-hoc and intermittent basis. There is a clear need to systematize this voluntary co-operation. An interim, systemized and legally binding extra-safeguards approach would make IAEA activities in Iran more predictable and effective—to the benefit of all parties. This, in turn, would increase the likelihood that the IAEA's non-routine activities will be brought to a close with the minimum of cost and in a timely fashion.

Such a systematized extended-safeguards approach should, as a minimum, give the IAEA access to those information sources previously deemed necessary by the IAEA Board of Governors:³⁰ (a) access to individuals; (b) access to documentation relating to procurement; (c) access to documentation relating to dual-use equipment; (d) access to documentation relating to certain military-owned workshops; and (e) access to documentation relating to research and development.

4.3.1. Access to individuals

There are law-based mechanisms available that ensure that an inspection team has access to individuals involved or associated with the processes under investigation while, at the same time, respecting the inspected country's sovereignty.³¹ As is noted in VERTIC's companion research report on transparency measures in Iran, these

provisions could serve as a suitable template for inclusion in any proposed investigatory mechanism. For instance, the IAEA could be assured the right to interview and examine persons who have been *directly involved* in Iran's procurement efforts, and research and development programmes or in the design, construction or operation of defined military-owned workshops related to its nuclear programme. In addition, the IAEA could have the formal right to interview and examine people who have been *indirectly involved* in these activities. This circle of individuals could include eyewitnesses to such activities, as well as any other person who may have come into contact with individuals directly or indirectly involved in such activities. The IAEA could also have the formal right to *access the personnel files* of individuals directly involved in these activities—primarily to ascertain their job description, employment history, work assignments, and so on.

The legal framework could include provisions establishing interview procedures, such as allowing for interviews of individuals to be conducted without a representative of the Iranian government present. The framework could also include clauses designed to protect the individual after the interview has been conducted. The idea of protecting 'whistleblowers' from domestic prosecution, and its utility in international arms control law, has been explored in the literature in the past and this paper does not examine the matter further.³² The rationale behind such arguments is that 'employees, particularly those involved in sensitive work, are in a special situation because they owe their employer a certain loyalty and, by law, are normally not allowed to disclose internal or confidential information. Whistleblowers, therefore, need protection if they make a disclosure in good faith and on the basis of reliable evidence'.³³ The potential difficulties in achieving a consensus-based solution where the state—in this case Iran—is prepared to surrender a considerable part of its jurisdiction should not be underestimated, but this avenue is certainly worth exploring.

4.3.2 Access to documentation

There are few provisions in arms control law that specifically deal with *access to documentation*. Most agreements have been phrased in terms of the protection of confidential information (see section 4.4 below). A few notable exceptions do exist.³⁴ A preferred model would be to have a tightly worded principal rule, but with exceptions designed to protect sensitive data. The principal rule should state that all relevant accounts and documents shall be made available to the IAEA on demand. It should also state that the relevant national authority should co-operate and take an active part in the IAEA's activities in this regard.³⁵

4.4 A right to protect confidential information

Like any state, Iran is not likely to want the transparency regime, nor any state party to it, to acquire confidential and secret information *not relevant to the question at hand* (i.e. the exclusively peaceful nature of Iran's

nuclear programme), especially where such information is relevant to its national security or defence. In developing the transparency regime it is important to address the concern that other parties to the framework may want to gather such information.³⁶ In seeking to establish the right balance between transparency and confidentiality, elements of good practice in existing arms control law can be applied.³⁷ For instance, the legal framework could provide:

- that Iran has the right to take measures to protect sensitive installations and to prevent disclosures of confidential information and data not related to the implementation of the legal framework;
- that the work of a consultative committee (see section 5 below) should be designed to reduce to a minimum the possible inconvenience and disturbance to Iran and its nuclear activities, as well as to ensure the protection of industrial secrets or any other confidential information coming to the knowledge of the committee;
- that the independent observer (see section 6 below) should not seek or receive instructions from any government or from any other external authority; and
- that no involved party should disclose any industrial secrets or other confidential information coming to their knowledge through their work.

5. A consultative committee

Iran's active co-operation and full and open engagement with the development and implementation of all the abovementioned procedures will be indispensable if such confidence-building measures are to enjoy any degree of success. Without Iran's consent and active co-operation in the process, access to facilities, personnel or documents will be denied or limited in such a way as to give an incomplete or distorted picture of events on the ground.

While Iran is likely to view such a confidence-building mechanism as in its own interests, it is also likely to reject any proposal that does not acknowledge its active involvement and allow it some measure of control over the process. On the other hand, if the other parties to the agreement believe that Iran is in effective control of the confidence-building venture, their confidence in the outcome of the process will decrease or, in the worst case, completely disappear. A delicate balance must therefore be struck. The process should involve Iran to the greatest extent possible, but contain checks that ensure that the international community is convinced that its product accurately reflects conditions in Iran.

Such a balance can be struck through the mechanism of a consultative committee, or executive group, of state-nominated actors. This consultative committee would oversee the fulfilment of all aspects of the agreement. The concept of establishing a consultative committee to facilitate the effective implementation of treaty obligations has been used extensively in international arms control law.³⁸

The role of such committees is to give practical guidance on the operation and interpretation of a constituting agreement. The main advantages of setting up such a committee are that it brings the parties closer together, and that it transforms the underlying agreement from a rigid text to something that is sometimes referred to as 'a living instrument'.³⁹

While the main obligations are fixed by the legal framework itself, a consultative committee could be entrusted with several tasks relating to the interpretation and development of the agreement as well as to verification of compliance. For instance, it could:

- consider questions regarding verification of compliance with those obligations assumed that may be considered ambiguous;
- provide, on a voluntary basis, such information as any party considers necessary to assure confidence in compliance with the obligations assumed;
- consider possible changes in the strategic situation that have a bearing on the provisions of the legal framework;⁴⁰
- consider, as appropriate, possible proposals for further increasing the viability of the legal framework, including proposals for amendments;
- consider, as appropriate, proposals for further measures aimed at restoring long-term confidence in Iran's intentions; and
- decide whether long-term confidence in Iran's intentions has been restored.⁴¹

There are a number of options for establishing the life-span of the committee. It could be open-ended, that is, established for an unlimited period, or it could be given a specific term that could be renewed if required. Such considerations can be reflected in the framework agreement's entry into force and termination clauses.

5.1 Participants in the committee

Participation in the committee should be restricted to the parties to the framework agreement. Each party should have the right to serve on the committee and the chair should rotate on a regular basis. Each member could be assisted at meetings by one or more advisers.

Depending on how the decision-making process is set up (see section 5.2 below) it might be appropriate to allocate more seats to the minority party (i.e. Iran). If procedural matters are decided by majority voting, as is suggested below, it could be prudent to 'level the playing field' by allowing Iran as many representatives as the other parties combined. One possible drawback would be the potential for a deadlocked committee. If all decisions were made by consensus, however, there would be no technical need to enlarge Iranian participation in the committee.

5.2 Decision-making processes

The committee should agree on and adopt rules of procedure for itself as well as financial rules governing its funding. It could decide *procedural questions* related to the organization of its work where possible by consensus, but otherwise by a majority of those present and voting.

There should be *no voting on matters of substance*.⁴² This point is of particular importance because it would otherwise be possible for one party to claim unfair treatment, and use that claim as grounds for withdrawal. The disadvantage of allowing no voting on matters of substance is obvious: it allows one party to effectively deadlock the process. However, the temptation to deadlock the process could be disincentivized by the introduction of an independent observer (see below).

6. An 'independent observer'

The concept of an independent observer has been used in other areas of international law, such as in the monitoring of peace agreements, but has not been fully utilized in arms control law. However, the Conference on Security and Co-operation in Europe agreed in 1990 to 'undertake to seek new forms of co-operation . . . in particular a range of methods for the peaceful settlement of disputes, including mandatory third-party involvement'.⁴³ While the precedent is weak in respect of arms control law, the use of independent observers has been very successful in monitoring the use of economic assets, such as conflict diamonds or forests.

The observer could be asked to oversee the process and, at the request of one of the parties, to deliver a public statement on a specific question relating to the implementation of the legal framework. The public exposure of potential failures or disagreements will provide an incentive to agree on a certain interpretation or course of action in order to avoid the issue being referred to the observer. The observer would play no other role—it would not have the right to speak at meetings of the consultative committee or be allowed to influence the committee's work in any direction.

There is, of course, a possibility that the instrument might be misused. Therefore, the objectivity of the observer must be properly safeguarded. Since the perceived objectivity of the observer will depend on the method of appointment, one solution would be to apply procedures developed under commercial arbitration. In commercial arbitration, the parties often select one representative each to serve on the arbitration tribunal. These representatives in turn must agree the appointment of a third arbitrator. The procedure guarantees that all decisions on matters of substance will be taken with at least a 2-1 majority. The observer can also be given the right to refuse to give an opinion if it deems a request to be rash, unfounded or unwarranted.

7. A 'special verification process'

It has long been acknowledged that state obligations under article II of the NPT cannot currently be verified effectively by the IAEA under its existing mandate. This realization has caused lawyers such as Jozef Goldblat to call for the establishment of a mechanism of some kind that could investigate complaints of non-compliance with the NPT that fall outside IAEA safeguards.⁴⁴

However, any verification process set up in Iran should be designed in such a way that it does not duplicate any safeguards procedures to be undertaken by the IAEA pursuant to their safeguards agreements with Iran.⁴⁵ Such an approach is in line with the conviction of the states parties to the NPT that the IAEA is the competent authority responsible for verifying and assuring state compliance with their respective safeguards agreement, and that nothing should be done to undermine the authority of the IAEA in this regard.⁴⁶

There is, however, precedent in international arms control law for supplementary verification measures in legal grey zones not covered by IAEA safeguards. An important example is Annex 4 of the 1985 South Pacific Nuclear Weapon Free Zone Treaty (SPNWFZ)—the 'Complaints Procedure'. This procedure forms an integral part of the treaty's control system, which aims to verify the parties compliance with treaty provisions.⁴⁷ These treaty provisions could serve as a prototypical architecture for a supplementary verification regime in Iran. This regime would essentially be entrusted with tasks that fall outside 'traditional' IAEA rights and obligations. Section 7 is largely based on these provisions.⁴⁸ Alternatively, the verification responsibilities could instead be entrusted to the IAEA—something envisaged in the 1996 African Nuclear-Weapons-Free Zone Treaty (the 'Pelindaba Treaty').⁴⁹ However, as of 16 April 2007, that treaty had acquired only 22 of the 28 ratifications required for it to enter into force. Similarly, in 1992, several articles of the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean were amended. The most important amendment stipulated that the so-called special inspections under the treaty should be carried out exclusively by the International Atomic Energy Agency. However, conditions for the entry into force of the amendments are not clearly stated in the treaty. The depositary government (Mexico) considers the amendment to be in force for those states that have ratified them and waived the requirements specified in article 29.⁵⁰ This paper uses the SPNWFZ as the primary precedent.

7.1 Initiation of the special verification process

Any party may ask the consultative committee to convene to consider a party's request to initiate a special verification process in Iran. The requesting party should present the grounds for its request, which should be supported by an account of the evidence known to the complainant of a potential breach of obligations.

7.2 Involvement of the consultative committee

Before taking further action, the consultative committee should afford the party complained of a reasonable opportunity to provide it with an explanation of the matter. The consultative committee as a whole may decide to stop the special verification process. This removes the possibility of one party having a veto over the special verification process. Alternatively, should any member believe that the request is unfounded or that it constitutes an abuse of its rights, the matter could be referred to the independent observer.

7.3 Formation of the special inspection team

If the consultative committee does not decide to stop the special verification process, it should proceed with the appointment of three suitably qualified special inspectors in consultation with the complained of and complainant parties.⁵¹ No nationals of the parties to the legal framework should serve on the special inspection team. The legal framework should stipulate that the consultation and appointment process should not unduly delay the work of the special inspection team.

7.4 Managed access

It is important to alleviate potential Iranian concerns that this process might be misused by agreeing strict measures relating to the protection of sensitive data and, consequently, relating to managed access. In respect of IAEA inspections under relevant safeguards agreements, managed access should be allowed in accordance with Iran's Additional Protocol or with the subsidiary arrangements for each site.

In respect of inspections organized either by the consultative committee or by others, Iran should maintain its right to take measures to protect sensitive installations and locations. However, if access is restricted Iran should make every reasonable effort to satisfy the requirements of the inspection mandate through alternative means. Furthermore, Iran should commit itself to not allow questions regarding managed access to unduly delay or interfere with the conduct of the inspection teams or with other aspects of the inspection. Iran should

have the right to make the final decision regarding access for the inspection team, taking into account its obligations under the legal framework.⁵² Managed access provisions could, for instance, allow for:

- a) the shrouding of sensitive displays, stores, and equipment;
- b) limitations on access to buildings and other structures; or
- c) the declaration of restricted-access sites.

7.5 Abuse of rights

In order to pre-empt any attempt to potentially misuse the special verification process, a provision could be included on the ‘abuse of inspection rights’.⁵³ This concept is not new in international arms control law and has been incorporated into several arms control treaties concluded after 1993.⁵⁴ In essence, the legal framework should make it clear that parties should refrain from unfounded inspection requests. In other words, inspections should be carried out for the sole purpose of determining facts relating to possible non-compliance with the framework itself—and not for any other purpose.

If the right to inspection is abused, the consultative committee should examine whether any party to the framework should bear any of the financial implications of the activity. Admittedly, under this solution, any member of the consultative committee could veto its own financial responsibility. The independent observer could therefore play an important role in assessing the reasons for a such veto—and give effect to its conclusions by making them public. The consultative committee should be proactive and, if abuse is established, make recommendations on how to prevent a repetition.

7.6 The work of the special inspection team

Under the framework agreement, the consultative committee will issue directives concerning the tasks and objectives of the special inspection team as well as on procedures and confidentiality. The composition of the team is discussed above. The team is subject to the direction of the committee and may not receive instructions from any actor other than the committee. The special inspectors should discharge their duties with due respect for Iranian laws and regulations.

Iran should give the special inspectors full and free access to all the information and places on its territory that may be relevant to enabling the special inspectors to implement the directives given to them by the consultative committee. If so desired, the special inspection team should be accompanied by Iranian representatives. As is noted above, Iran should have the right to manage access to personnel, facilities or equipment.

7.7 The duration of the special verification process

The maximum duration of the special verification process should be established by the framework agreement.⁵⁵ The main benefit of this is that it helps safeguard the system against verification requests that have an unreasonably large scope. The main disadvantage is that the special verification process may run out of time before it is able to collect conclusive data. The special inspection team should therefore have the right to ask for an extension.⁵⁶

7.8 Activity reports

The special inspection team should report its findings in writing. The report should outline its activities, setting out relevant facts and information. Supporting evidence and documentation should be attached. The report should clearly state the conclusion of the special verification process.

7.9 Immunity

Members of the special inspection team should be afforded the status of 'diplomatic agents', and should be offered protection under the 1961 Vienna Convention on Diplomatic Relations. The exceptions and conditions in articles 32, 38 and 39 of the convention should apply. Any documents and evidence collected should be protected from seizure.

8. Technical legal considerations

8.1 Reservations

The agreement should stipulate that it is not subject to reservations.

8.2 Interpretation and conflict resolution

The agreement should state that nothing contained therein should be interpreted as affecting the inalienable right of Iran to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with articles I and II of the NPT. The agreement should also allow for the formation of an Arbitral Tribunal.⁵⁷ The composition and procedures of the tribunal could be brought into conformity with the procedures outlined in Iran's Comprehensive Safeguards Agreement.⁵⁸

8.3 Amendment

Each party should be able to propose amendments. Agreed amendments should enter into force by application of the framework agreement's entry into force clause.

8.4 Entry into force

A framework agreement of this type would need to be ratified in accordance with the respective constitutions of all the states involved. Therefore, entry into force cannot be tied to the signature of the parties. The agreement should enter into force on ratification by all signatory states. However, the agreement should also allow for provisional application while each country completes its respective constitutional procedures. The period of provisional application could be time-limited or subject to review.

8.5 Termination

The framework agreement should contain a termination clause. This clause could be modelled on the often used 'supreme interests clause' found in, for example, article X of the NPT. It is strongly recommend that in a situation where one party decides to terminate the agreement, the termination clause contains language making it mandatory to report the grounds for withdrawal to the United Nations Security Council in addition to the parties themselves. Moreover, the framework should contain articles making some form of consultation between the parties mandatory before termination.

9. Financial considerations

Each party should bear the cost of its participation in the work of the consultative committee.⁵⁹ The costs of special inspections should be borne by the parties in equal measure. The consultative committee may seek special funding should this be required.⁶⁰

Endnotes

- 1 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law', Adopted by the International Law Commission at its 58th session, 2006.
- 2 See statement by Iran's permanent representative to the United Nations, H.E. Dr. Zarif, to the UN Security Council, 31 July 2006, S/PV.5500, p. 8.
- 3 For a discussion on the relationship between article 25 and article 103 of the UN Charter see Vera Gowlland-Debbas and Djacobia Liva Tehindrazanarivelo, *National Implementation of United Nations Sanctions: A Comparative Study*, Martinus Nijhoff, The Hague, The Netherlands, 2004, p. 151.
- 4 The International Court of Justice probably has the competence to judge whether the UN Security Council has acted ultra vires. See, for instance, Erika De Wet, André Nollkaemper and Petra Dijkstra, *Review of the Security Council by Member States*, Intersentia, 2003, p. 24; for a comprehensive survey of the limitations of Security Council power see H.E. Judge Mohammed Bedjaou, *The New World Order and the Security Council: Testing the Legality of its Acts*, Martinus Nijhoff, The Hague, The Netherlands, 1994.
- 5 See statement by Iran's Foreign Minister, H.E. Mr Manouchehr Motaki, to the UN Security Council, 24 March 2007, S/PV.5647, p. 14.
- 6 *Merriam-Webster's Collegiate Dictionary*, 11th edn, Merriam Webster, Springfield, 2003.
- 7 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, Volume I, NPT/CONF.2000/28 (Parts I and II), p. 8, paragraph 2.
- 8 The view of the Iranian Government is that UNSCR 1696 'violates the fundamental principles of international law, the Non Proliferation Treaty and IAEA Board resolutions. It also runs counter to the views of the majority of UN member states, which the Security Council is obliged to represent'. See 'Letter dated 31 July 2006 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the President of the Security Council', S/2006/603, p. 6. Some of these objections can be assessed by reviewing resolutions addressing Iraq's nuclear programme. This, however, falls outside the scope of this paper. See Andre Gsponer, Jean-Pierre Hurni and Stephan Klement, '*UN Security Council Resolutions 687, 707 and 715 and their Implications for a Halt of all Proliferation Prone Nuclear Activities: A Technical and Legal Assessment*', ISRI-96-06, 12 February 1997.
- 9 See statement by the UK's permanent representative to the United Nations, H.E. Sir Emyr Jones Parry, to the UN Security Council, 31 July 2006, S/PV.5500, p. 4; See also the statements of the permanent representatives of Russia p. 5; and China p. 6; The formulation is taken from the proposal made by China, France, Germany, Russia, the UK and the US, with the support of the EU High representative (UN Document S/2006/521). This proposal was endorsed by the Security Council in UNSCR 1696 (2006), operative paragraph 4, and annexed to UNSCR 1747 (2007).
- 10 According to Iran, 'It is necessary to have a clear definition for the term 'international confidence in the exclusively peaceful nature of Iran's civil nuclear programme', since this is a very general and vague term. It should be clarified that [sic] what the international confidence building standards are. And who are those who do the assessment? What are the criteria and legal basis for the establishment of the international confidence on the exclusively peaceful nature of Iran's civil nuclear programme? Are there any criteria beyond the current international rules and treaties in mind?'. See the Iranian Government's response to the package presented on 6 June 2006, available at www.isis-online.org/publications/iran/iranresponse.pdf.
- 11 See James Acton with Joanna Little, 'The use of voluntary safeguards to build trust in States' nuclear programmes: the case of Iran', *Verification Matters: VERTIC Research Reports* no. 8, Verification Research, Training and Information Centre (VERTIC), London, May 2007.
- 12 The phrase 'calls upon' can be more than a political appeal if there are legal consequences attached to it.

- 13 This principle is well known in international law. See Permanent Court of International Justice, *The Case of the SS Lotus* (France v. Turkey), Judgment on 7 September 1927, PCIJ, Ser.A., no. 10, 1927. It is worthwhile remembering that the Lotus Principle is controversial, but it is relied on by some arms control lawyers when discussing national security and reciprocity in international arms control and disarmament law. See Guido Den Dekker, *The Law of Arms Control: International Supervision and Enforcement*, Martinus Neijhoff, The Hague, the Netherlands, 2001, p. 69. For a contrasting view see James Brierly, 'The Lotus Case', *Law Quarterly Review*, vol. 44 (1928), no. 145, pp. 155–156. Admittedly, the Lotus Principle may have less importance in other functional areas of international law, such as International Criminal Law, see, for instance, Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge University Press, Cambridge, 2005, p. 88.
- 14 See IAEA Board of Governors, 'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran: Resolution adopted on 4 February 2006', GOV/2006/14, last preambular paragraph and operational paragraph 1. The resolution also contains language on other measures that the IAEA Board of Governors deems it necessary to implement in order to build confidence in the 'exclusively peaceful nature of Iran's programme'.
- 15 It could be argued that the Board of Governor's decision was binding on Iran already. What is relatively clear is that decisions of the IAEA Board have some normative impact—see, for instance, Dinah Shelton, *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*, Oxford University Press, Oxford, 2000, p. 524. This is a technical question relating to the concept of 'self-contained regimes', which falls outside the scope of this report.
- 16 See United Nations Security Council, Verbatim report of the 5500th meeting of the Council, 31 July 2006, S/PV.5500.
- 17 See IAEA Board of Governors, 'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran: Report by the Director General', GOV/2006/53, paragraphs 4–7. Design information verification is 'activities carried out by the IAEA at a facility to verify the correctness and completeness of the design information provided by the State. An initial DIV is performed on a newly built facility to confirm that the as-built facility is as declared. A DIV is performed periodically on existing facilities to confirm the continued validity of the design information and of the safeguards approach. The IAEA's authority for performing a DIV is a continuing right throughout all phases of a facility's life cycle until the facility has been decommissioned for safeguards purposes'. See IAEA, 'Safeguards glossary', 2001 edn, *International Nuclear Verification Series*, no. 3, p. 23.
- 18 Paris Agreement between the Islamic Republic of Iran and France, Germany and the United Kingdom, with the support of the High Representative of the European Union, available at www.armscontrol.org/country/iran/ParisAgreement.asp.
- 19 See Wyn Q. Bowen, 'Iran and nuclear safeguards: establishing the facts and seeking compliance', *Verification Yearbook 2004*, Verification Research, Training and Information Centre (VERTIC), London, 2005, pp. 119, 121.
- 20 According to a Western diplomat the author spoke to during the autumn of 2006, the term 'enrichment-related' is deliberately loose to facilitate prospective future negotiations.
- 21 It has been suggested by a senior international lawyer consulted by the author during the spring of 2007 that the 'principle of ambiguity' could be applied to the Security Council's decision. This principle is commonly used in domestic contractual law (in both civil and common law jurisdictions) and essentially stipulates that any ambiguities in the text count against the drafter of the ambiguous text. In addition, it could equally be argued that the importance of state sovereignty in international arms control law, both dictated and consensual, would support a conclusion that any UN Security Council dictum should be read narrowly.
- 22 According to the IAEA there are no indications of on-going reprocessing activities in Iran. However, the country 'has not suspended its enrichment related activities'. See IAEA, 'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran: Report by the Director General', GOV/2006/53, paragraph 8 and 28.
- 23 A negotiated solution is called for by the UN Security Council. See UNSCR 1696, preambular paragraph 7, which reads 'Emphasizing the importance of political and diplomatic efforts to find a negotiated solution guaranteeing that Iran's nuclear programme is exclusively for peaceful purposes, and noting that such a solution would benefit nuclear non-proliferation elsewhere'.
- 24 Iran signed the NPT on 1 July 1968. Its instrument of ratification was deposited with the US government on 2 February 1970. Iran is also a member of other arms control and disarmament regimes. It signed the Partial Test Ban Treaty (PTBT) on 8 August 1963 and ratified on 5 May 1964. It signed the Comprehensive Nuclear Test Ban Treaty (CTBT) on 24 September 1996. It is a signatory of the Outer Space Treaty (27 January 1967) and a party to the Sea-Bed Treaty (11 February 1971). In respect of biological and chemical weapons, Iran is a party to the 1925 Geneva Protocol (5 November 1929), the Biological

- Weapons Convention (BWC) (22 August 1973) and the Chemical Weapons Convention (CWC) (3 November 1997). It is also a signatory to the Environmental Modification Convention (ENMOD) (18 May 1977).
- 25 Here definitions are important. The most comprehensive definition of a nuclear weapon (or atomic weapon as it was called then) was offered by the Federal Republic of Germany in 1954. According to the text an '(a). . . atomic weapon is defined as any weapon which contains, or is designed to contain or utilise, nuclear fuel or radioactive isotopes and which, by explosion or other uncontrolled nuclear transformation of the nuclear fuel, or by radioactivity of the nuclear fuel or radioactive isotopes, is capable of mass destruction, mass injury or mass poisoning. (b) Furthermore, any part, device, assembly or material especially designed for, or primarily useful in, any weapon as set forth under paragraph 'a', shall be deemed to be an atomic weapon. (c) Nuclear fuel as used in the preceding definition includes plutonium, Uranium 223, Uranium 235 (including Uranium 235 contained in Uranium enriched to over 2.1 per cent by weight of Uranium 235) and any other material capable of releasing substantial quantities of atomic energy through nuclear fission or fusion or other nuclear reaction of the material. The foregoing materials shall be considered to be nuclear fuel regardless of the chemical or physical form in which they exist'. See Protocols to the 1948 Brussels Treaty (Paris Agreements on the Western European Union), Protocol no. III (with Annexes) on the Control of Armaments, Annex III.
- 26 The term is taken from Annex 1 of UN Security Council document S/22872/Rev.1, which defines nuclear-weapon-usable material as 'Nuclear material that can be used for the manufacture of nuclear explosive components without transmutation or further enrichment, such as plutonium containing less than 80% plutonium-238, uranium enriched to 20% uranium-235 and uranium-233 or more; any chemical compound or mixture of the foregoing. Plutonium, uranium-233 and uranium enriched to less than 20% uranium-235 contained in irradiated fuel do not fall into this category', see Annex 1, paragraph 1.3
- 27 For a discussion about the mandate of the IAEA see James Acton with Carter Newman, 'IAEA verification of military research and development', *Verification Matters: VERTIC Research Reports* no. 5, Verification Research, Training and Information Centre (VERTIC), London, July 2006.
- 28 See 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, article 13; 1968 Treaty on the Non-Proliferation of Nuclear Weapons, article III.4; 1985 South Pacific Nuclear Free Zone Treaty, Annex 2 (2); 1995 Treaty on the Southeast Asia Nuclear Weapon-Free Zone, article 5; and the 1996 African Nuclear-Weapon-Free Zone Treaty (Pelindaba Treaty), UN Doc A/50/426, Annex II.2.
- 29 In the words of H.E. Dr Zarif, Iran's Permanent Representative to the United Nations, ' . . . we enabled the International Atomic Energy Agency (IAEA) to carry out a series of inspections that amounts to the most robust inspection of any IAEA member State. It included more than 2,000 inspector-days of scrutiny over the past three years; the signing of the Additional Protocol on 18 December 2003 and its immediate implementation until 6 February 2006; the submission of more than 1,000 pages of declaration under the Additional Protocol; allowing over 53 instances of complementary access to different sites across the country; and permitting inspectors to investigate baseless allegations by taking the unprecedented step of providing repeated access to military sites'.
- 30 GOV/2006/14, operative paragraph 1, bullet point 5.
- 31 See for instance the Chemical Weapons Convention, Annex on Implementation and Verification, Part II.E.45 and XI.C.21.
- 32 Joseph Rotblat, 'Societal verification' in Joseph Rotblat, Jack Steinberger and Bhalchandra Udgaonkar (eds), *A Nuclear-Weapon-Free World: Desirable? Feasible?*, Westview Press, Boulder, Colorado, 1998, p. 107. However, some lawyers doubt the effectiveness of whistleblower protection, especially when its legal basis lies in an international agreement and not in national legislation.
- 33 Dieter Deiseroth, 'Societal verification: wave of the future?', *Verification Yearbook 2000*, Verification Research, Training and Information Centre (VERTIC), London, 2000, p. 265.
- 34 See, for instance, the Chemical Weapons Convention, Annex on Implementation and Verification, Part II.E.47, Part X.B.33 and Part XI.D.25(b) in particular and the Confidentiality Annex; and the Protocols to the 1948 Brussels Treaty (also known as the Paris Agreements on the Western European Union), Protocol no. IV on the Agency of Western European Union for the Control of Armaments, Part II, article 12.
- 35 Compare with the Protocols to the 1948 Brussels Treaty (note 34).
- 36 The uneasy relationship between national intelligence agencies and multilateral verification organizations is highlighted by Brian Jones in 'Intelligence, verification and Iraq's WMD', *Verification Yearbook 2004*. The close relationship between UNSCOM and US and British intelligence agencies eventually led to UNSCOM's ejection from Iraq. In Brian Jones's words 'Iraq claimed, apparently with justification, that it had discovered injudicious intelligence collection activity by certain participants in UNSCOM missions and used this to end its

- co-operation with the UN inspectorate in the second half of 1998' (p. 204).
- 37 See 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America, article 11.6; 'The structure and content of agreements between the IAEA and States required in connection with the Treaty on the Non-Proliferation of Nuclear Weapons', INFCIRC/153, paragraph 5 and 9; 1995 Treaty on the Southeast Asia Nuclear Weapon-Free Zone, Annex, paragraph 6; and the identical provision in the 1996 Comprehensive Nuclear Test Ban Treaty, article IV.A.7 (compare with article IV.D.57 (b) and the treaty's protocol, Part II, paragraph E.89); See also 1997 Model Protocol Additional to the Agreement(s) Between State(s) and the International Atomic Energy Agency for the Application of Safeguards, INFCIRC/540 (Corrected), article 15.
- 38 See, for instance the 1972 Treaty Between the USA and the USSR on the Limitation of Anti-Ballistic Missile Systems, article XII; See also the 1977 Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, article V.1 and V.2 and Annex; see also the 1985 South Pacific Nuclear Free Zone Treaty, article 10 and 11, and Annex 3 and 4; see also 1990 Supplementary Document to Give Effect to Certain Provisions Contained in the Charter of Paris for a New Europe, article 1.F.4–6; See also the Inter American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Material, articles XX and XXI.
- 39 The use of the term 'living instrument' is prevalent in European Human Rights Law, and especially with respect to the living instrument doctrine of the European Court of Human Rights in respect of the European Convention on Human Rights. The concept entails that the meaning of the convention is constantly developed by the European Court of Human Rights in the light of present day standards and in order to deal with current issues. This practice has allowed the court to deal with issues relating to environmental protection, non-traditional families and their right to respect, and sexual orientation in public and private life. The term is sometimes used in contemporary arms control. See Tariq Rauf, 'The April 1999 NPT Prepcom', *Non-Proliferation Review*, vol. 5, no. 52.
- 40 A provision of this kind could be used to streamline the process, to strengthen or relax the verification regime, and to harmonize the confidence-building mechanism with a larger framework agreement covering other aspects of relations between the parties.
- 41 The vagueness of the term has been the subject of criticism. In its reply to the E3+3 proposal, Iran asked several questions on this issue (see note 10). Objective criteria cannot be applied to a subjective determination, and determining the intent of individuals or states needs to be carried out by carefully assessing all the available evidence at hand. While this operation is reserved to national courts in domestic law, it is largely reserved to states in international law, although international courts sometimes rule on intent—see, for instance, the International Court of Justice's reasoning in respect of certain statements of France in the Nuclear Tests Cases (Australia v. France and New Zealand v. France, judgements on 20 December 1974, General List no. 58 and 59). With respect to Iran, a co-operative determination that trust had been restored would be preferable.
- 42 While this significantly increases the risks of a deadlocked consultative committee, it also, paradoxically, helps to ensure its survivability—the rationale being that a vote against a party could prompt that party to withdraw from the agreement. The risk of belligerent voting actually enhancing the risks of war rather than mitigating them was one of the reasons for the introduction of the Security Council veto into the UN Charter.
- 43 1990 Charter of Paris for a New Europe, Guidelines for the Future, 'Security'.
- 44 Jozef Goldblat, *Arms Control: The New Guide to Negotiations and Agreements*, second edn, SAGE, London, 2002, p. 105. The 1996 African Nuclear-Weapons-Free Zone Treaty (note 28), however, entrusts the IAEA with some verification responsibilities not foreseen in the Non-Proliferation Treaty. See Jan Priest, 'Efforts to Establish Other Nuclear Weapons Free Zones', *Salvaguardias: Verificación de su Cumplimiento con los Compromisos de No Proliferación*, Kingston, Jamaica, 25–26 April 1996, www.opanal.org/Articles/Jamaica/jam-Priest.htm. See also the 1992 amendment to the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean.
- 45 Compare with the 1985 South Pacific Nuclear Free Zone Treaty, Annex 4, paragraph 5. This also conforms with Iran's suggestion that 'The NPT and the IAEA safeguards would form the essential basis of applicable law', Islamic Republic of Iran's Response to the Package Presented on 6 June 2006 (informal translation), p. 7.
- 46 See 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, Part I, p. 3, paragraph 7.
- 47 See in particular article 8 (2) (d) of the treaty.
- 48 The SPNWFZ drafters 'anticipated that this system of informal consultations would be sufficient to resolve most cases of suspected violation'. See Caroline Millar, 'Regional Non-Proliferation Arrangements: Rarotonga', *Salvaguardias: Verificación de su Cumplimiento*

- con los Compromisos de No Proliferación, Kingston, Jamaica, 25–26 April 1996, www.opanal.org/Articles/Jamaica/jam-Millar.htm.
- 49 1996 African Nuclear-Weapon-Free Zone Treaty (note 28).
- 50 See Goldblat, p. 202.
- 51 It could also be stipulated that the IAEA bears primary responsibility for inspections and that the parties ‘designate its representatives to accompany the IAEA’s inspectorate team’ as envisaged in the Pelindaba Treaty, see Annex IV, paragraph 4. See also article 16 of the Treaty of Tlateloco, which reads: ‘. . . At the request of any of the Contracting Parties and in accordance with the procedures established in Article 15 of this Treaty [which refers to the provision of complementary or supplementary information], the Council may submit for the consideration of the International Energy Agency a request that the necessary mechanisms be put into operation to carry out a special inspection . . .’.
- 52 Compare with CTBT, Protocol, Part II, E.88.(a)–(c).
- 53 The doctrine of abuse of rights, found in various guises in Civil Law jurisdictions, refers to the concept that the malicious or antisocial exercise of otherwise legitimate rights can give rise to civil liability. See Elspeth Reid, ‘The Doctrine of Abuse of Rights: Perspective from a Mixed Jurisdiction’, *Electronic Journal of Comparative Law*, vol. 8, no. 3, October 2004, www.ejcl.org.
- 54 See the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention, CWC), articles VIII. C.36, IX.9, IX.22.c and 23; the 1996 Treaty on the African Nuclear-Weapon-Free Zone, Annex IV.4.(h); the 1996 Comprehensive Nuclear Test Ban Treaty (CTBT), articles II.C.41, IV.A.2, IV.D.65.(b) and Protocol, Part II.B.29; and the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, article 8.2.
- 55 VERTIC is not prepared to make a recommendation on what the duration of a special verification process should be. Proper guidance could be found, however, in other concluded arms control and disarmament treaties, such as the 1996 Comprehensive Nuclear Test Ban Treaty.
- 56 See the CWC, Part XI.C.20. See also the CTBT, article IV.D.49; and the CTBT Protocol, Part II, E.70.
- 57 In Contrast to the consultative committee, the arbitral tribunal would have the right to deliver a legally binding interpretation of the framework.
- 58 See ‘The text of the Agreement between Iran and the Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons’, INFCIRC/214, 13 December 1972, article 22.
- 59 Compare with the 1991 Treaty between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms, Protocol on the Joint Compliance and Inspection Commission, paragraph VI.
- 60 Compare with the 1985 South Pacific Nuclear Free Zone Treaty, Annex 3 (2).

