

The Investigative Authority of the International Atomic Energy Agency to Conduct On-Site Inspections

Kalman A Robertson

Strategic and Defence Studies Centre,
School of International Political and Strategic Studies,
Australian National University

8 September 2011

Based on research undertaken at the ANU Centre for International and Public Law, the Department of Nuclear Physics, and the Strategic and Defence Studies Centre, ANU between 2009 and 2011.



Quality of verification assurance = f(L,M,P,R)

Where:

L = Legal authority (extent and precision)

M = Monitoring techniques and technical capabilities

P = Political considerations (decision making, NPT 3 pillars)

R = Resources and organizational culture

Horizontal proliferation in NPT NNWS

‘Sovereignty remains a vigorous and contradictory force against empowering international institutions with far-reaching authority’

-Lawrence Scheinman, ‘National and International Verification and Action in the Event of Non-Compliance’ 1995

Mohamed ElBaradei September 2009: ‘in all our work, we need more legal authority, more state-of-the-art technology and more resources’

Conventional wisdom: global nuclear governance is increasingly inadequate for catching proliferators. The chances of getting caught cheating appear slim



Overview

- In what way could the investigative authority of the IAEA in NNWS, with or without an AP, be extended or better utilised to achieve the objectives of verification?
- 3 aspects of legal authority: investigative, quasi-judicial and enforcement
- Role to verify compliance and to detect and deter violations
- ‘Prevention’ of state-based proliferation is beyond technological, legal and political capacity of international safeguards system
- Even though the NPT did not originally contain a developed mechanism for catching cheaters, investigative authority has evolved (is evolving) to be far-reaching through the implementation and interpretation of comprehensive safeguards agreements
- In relation to undeclared activities, finding evidence to decide where to request access is primarily a technical/intelligence/resource problem

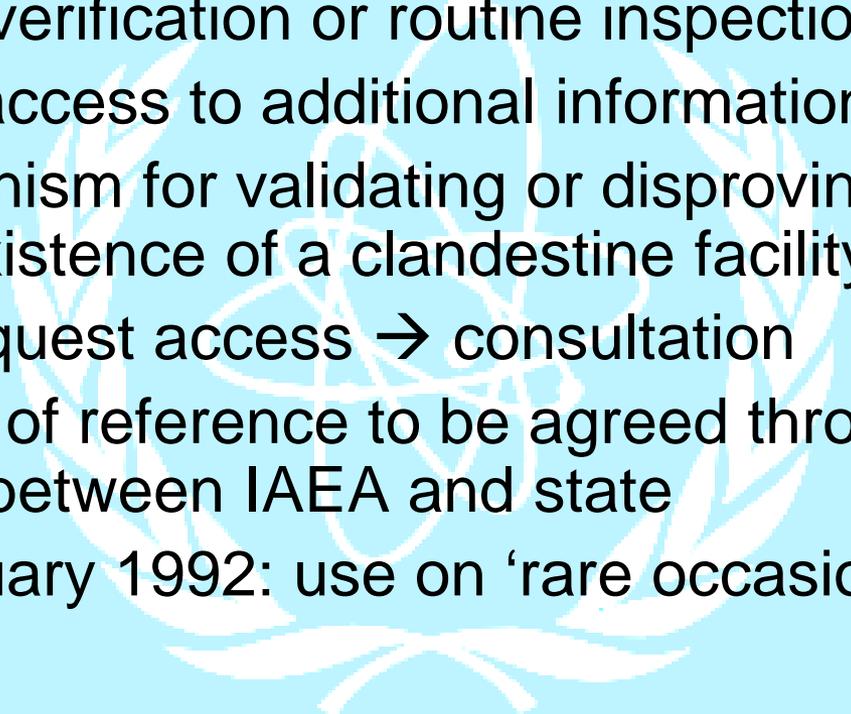


Limits of thesis

- Most contentious issue: special inspections
 - (i) away from strategic points in declared sites or
 - (ii) at any location other than a declared site
- Ability to detect undeclared independent nuclear fuel cycle capabilities away from declared sites is important for safeguards credibility
- Hardest case: No AP (5 NNWS with significant nuclear activities + Iran) or break-out capability
- ElBaradei 2004: 'Without the authority provided by the protocol our ability to draw conclusions is mostly limited to the non-diversion of material already declared, with little authority to verify the absence of undeclared nuclear material or activities'



Special inspections

- Any inspection that is additional to the ad hoc, design-information verification or routine inspection effort
 - Authorizes access to additional information or locations
 - Best mechanism for validating or disproving a claim about the existence of a clandestine facility
 - Power to request access → consultation
 - Exact terms of reference to be agreed through negotiation between IAEA and state
 - Board February 1992: use on 'rare occasions'
- 



Special inspections

- Director-General: information provided by the state and obtained from routine inspections is ‘not adequate for the Agency to fulfil its [verification] responsibilities’
- ‘or for purposes unknown’
- Board: ‘essential and urgent’ (denies right of refusal)
- Authority to conduct inspections away from declared sites clearly envisaged
- A refusal to allow an IAEA request to access a location other than a declared site could be the basis of a finding of non-compliance (burden of proof allows investigative and enforcement authority to be decoupled)



Special inspections practice

- February 1992 Board statement: comprehensive safeguards
 - correct and complete (non-diversion of declared material and absence of undeclared material)
 - location-specific environmental sampling
 - special inspections away from declared sites
- Special inspections formally invoked in Romania 1992 (by invitation of post-revolution government, cooperative) and DPRK 1993 (refused)
- Often used informally ('technical visits') at declared sites by agreement of the state to clarify a matter reported by the state
- US-DPRK Agreed Framework 1994 suggests an expansive interpretation
- Power exists even though the Agency does not normally reach a conclusion about the completeness of declarations in NNWS that do not have an AP
- Greatest relevance to NNWS that do not have an AP



Additional Protocol and Complementary Access

- Commonplace verification activity; not accusatory
- Operates in addition to special inspections power to
 - allow specified verification activities at nuclear sites and certain nuclear-related locations (eg. sensitive enrichment tech) and
 - access at any location specified by the IAEA for location-specific environmental sampling where necessary to resolve a question
- Arts 7, 15: managed access including shrouding of equipment to protect against disclosure of commercial, technological and industrial secrets

CWC challenge inspections

- Disarmament (no quantitative accounting)
 - State party may request ‘for the sole purpose of clarifying and resolving any questions concerning possible non-compliance’
 - Up to parties through national means to identify locations
 - Untested
1. Short notice (contrast consultation requirements for special inspections)
 - In theory, negotiations about the perimeter can only go for a few days
 - Relative capacity for location-specific sampling after ‘decontamination’
 - Different conversion/lead times
 2. Compulsory (unless $\frac{3}{4}$ majority ‘considers the inspection request to be frivolous, abusive or clearly beyond the scope’)
 - Lower procedural hurdle and evidentiary burden
 3. Right to limit access to protect commercial rights or national security
→ non-compliance may not automatically follow from a refusal to grant access



Expanding authority?

- Practical difficulties of obtaining enough information to identify a specific location
- Weaponization activities not involving nuclear material (technical capability?)
- Interviews (access to scientists or officials at state's discretion)
- Wide-area environmental sampling: UO_2 , UO_2F_2 , Pu, fission products, etc (Under AP, Board approval pending)
- Overflights for air-sampling (not authorised under AP, tech not proven)
- Export of dual-use items
- Further reduce notice periods
- United Nations satellite monitoring agency?



Conclusions

- Inspections as widely accepted part of international life
- Although 'anytime, anywhere inspections with no right of refusal' are impossible, state sovereignty recognises the legal authority of an international security institution with broad physical access powers
- Even in relation to special inspections, extension of investigative authority is unlikely to have a significant impact (focus on determinates and enforcement)
- Desirable to normalise cooperative special inspections