

Understanding the IAEA's Mandate in Iran: Avoiding Misinterpretations

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Much attention has focused on Iran's advancing nuclear program, on the peace and security concerns which that program has raised, and on the international policy debate over how to respond to that program. Far less attention has been paid to the various legal-sounding arguments used by Iran and a few academics to call into question the mandate of the International Atomic Energy Agency (IAEA) to investigate and make determinations about actual or suspected violations of Iran's legal obligations. Although arguments used by Iran and these academics to undermine the legitimacy of IAEA activities regarding Iran are patently false, they are nevertheless dangerous to both current and future nonproliferation efforts. Unless these arguments are clearly countered, and their fallaciousness clearly demonstrated for all the world to see, these arguments may decrease the chances of Iran agreeing to comply with its international legal obligations, could provide a fig leaf to those countries disinclined to hold Iran accountable, and might undercut the IAEA's and the United Nations Security Council's potentially pivotal roles in facilitating a peaceful resolution to disputes over the nuclear programs of Iran and future proliferators.

It is in that light that we have chosen to address the dangerous [claim](#) published on September 13, 2012 by Daniel Joyner, a law professor at the University of Alabama, that the IAEA has exceeded its legal mandate in applying safeguards in Iran in accordance with a comprehensive safeguards agreement (CSA) under the Nuclear Non-Proliferation Treaty (NPT). In view of the importance of the IAEA's activities regarding Iran, the persistent efforts by Iran to call into question the legitimacy of those IAEA activities, and our concern to ensure that there is no misunderstanding as to the agency's mandates, we are writing to discuss those mandates and explain why Joyner is incorrect.

Joyner's interpretations are far outside the mainstream of what the IAEA Board of Governors (BOG) and General Conference (GC) have affirmed is legally permissible – and required – under the IAEA's mandate. Many of the narrow interpretations espoused by Joyner on September 13 and in several of

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his other publications seek to limit the IAEA's legitimate activities and are egregious misinterpretations of the NPT and the IAEA's legal authorities.³ For example, contrary to Joyner's claims, the IAEA is acting within its authorities in requesting access to Iran's Parchin military site, in pursuing greater cooperation from Iran in the IAEA's investigation of possible military dimensions to Iran's nuclear program, and in updating the Board of Governors on the IAEA's efforts to address its concerns about those possible military dimensions.⁴ Moreover, comprehensive safeguards agreements involve more than the verification of a state's declared nuclear materials. They also involve that which should be declared.

The Challenge Posed by Undeclared Nuclear Materials and Facilities

In the early 1990s, the IAEA Board of Governors, which reflects the positions of 35 governments and includes each region of the world, responded to the challenges posed by undeclared nuclear programs in Iraq and North Korea – states which had in force a comprehensive safeguards agreement based on INFCIRC/153 – as well as the need to verify whether South Africa had undeclared nuclear material and activities after concluding its CSA. As a result, it took a number of measures to strengthen the implementation of IAEA safeguards under such agreements. These efforts were largely triggered by the failure of the IAEA to detect Iraq's clandestine nuclear weapons program prior to the 1991 Persian Gulf War. The Board of Governors, in conjunction with the IAEA Secretariat, re-examined the IAEA's previous focus on declared nuclear material, and concluded that, based on the existing legal authority reflected in INFCIRC/153, the IAEA not only had the right, but the obligation, to determine both the correctness and the completeness of a country's declarations.

As stated by the IAEA's Director General in 1995:⁵

“Indeed, the need for the safeguards system to provide assurances regarding both the correctness and the completeness of a State's nuclear material declarations was considered by the drafters of the INFCIRC/153 (Corr.), the basis for comprehensive safeguards agreements. The scope of INFCIRC/153 was not limited to the nuclear material actually declared by the State; *it also includes that which should be declared* (emphasis added). However, the system such as it had developed up to the 1991

³ For a critique of the major fallacious claims about the NPT which Joyner made in his book titled *Interpreting the Nuclear Nonproliferation Treaty*, see Norm Wulf, “Misinterpreting the NPT,” *Arms Control Today*, September 2011. http://www.armscontrol.org/2011_09/Misinterpreting_the_NPT. For another critique of the major fallacious claims about legal issues relating to Iran's nuclear program which Joyner has made in various publications, see Christopher A. Ford, “Iran, Nonproliferation and the IAEA: A Legal History,” November 2012, <http://www.hudson.org/files/publications/Ford--IranIAEPaper1112.pdf>.

⁴ Joyner has argued that the IAEA is acting *ultra vires* (a Latin phrase meaning “beyond the powers”), namely that its actions are outside the scope of its authority. In fact, not just the Board of Governors (see e.g. resolution GOV/2636, adopted by the Board on February 25, 1993, at Annex 3 of INFCIRC/419, in connection with the DPRK), but the entire membership of the IAEA has confirmed the IAEA's own authority to verify the correctness and completeness of declarations under comprehensive safeguards agreements—even in cases where the Security Council has not adopted a resolution calling for such verification – and that it did so long before the Additional Protocol was even contemplated (see, e.g., General Conference resolution (GC(XXXV)/RES/567 (1991) in connection with South Africa (see text)).

⁵ IAEA Director General, *Strengthening the Effectiveness and Improving the Efficiency of the Safeguards System*, GOV/2784, February 21, 1995, pp. 2-3. This report from the IAEA Director General can be found as annex 1 in the following: http://www.iaea.org/About/Policy/GC/GC39/GC39Documents/English/gc39-17_en.pdf At the time Hans Blix was the Director General and Mohammed ElBaradei was the Assistant Director General for External Relations, prior to becoming Director General in 1997.

Iraqi case, had limited capability to deal with completeness. This was the result of practical, rather than legal, considerations.”

To be clear, the Director General refers to the negotiation of INFCIRC/153 by the open-ended Committee of the Board of Governors established to provide guidance on the structure and content of the comprehensive safeguards agreements required by the NPT, and notes that, although language which would have limited the IAEA’s authority to declared nuclear material was proposed and discussed by the Committee, that proposal was rejected. As a result, paragraph 2 of INFCIRC/153 provides as follows:

“The Agreement should provide for the Agency’s right and obligation to ensure that safeguards will be applied, in accordance with the terms of the Agreement, on *all* source or special fissionable material in all peaceful nuclear activities within the territory of the State, under its jurisdiction or carried out under its control anywhere . . .” (emphasis added) (Note: the IAEA is usually called Agency in its documents.)

This formulation is consistent with Article III.1 of the NPT itself, which specifies: “The safeguards required by this Article shall be applied on *all* source or special fissionable material in all peaceful nuclear activities within the territory of such State, under its jurisdiction, or carried out under its control anywhere.” (emphasis added)

Consistent with NPT Article III.1 and paragraph 2 of INFCIRC/153, Article 2 of Iran’s comprehensive safeguards agreement, concluded on the basis of INFCIRC/153, provides as follows:

“[t]he Agency [IAEA] shall have the right and the obligation to ensure that safeguards will be applied, in accordance with the terms of [the] Agreement, on *all* source or special fissionable material in all peaceful nuclear activities ...” (emphasis added)

The scope of such agreements was never limited, or intended to be limited, to “declared” nuclear material, as Joyner falsely asserts.⁶

The first post-Iraq instance of the governing structures of the IAEA acting to emphasize the determination of completeness was the case of South Africa in 1991. South Africa had just become party to the NPT and was suspected to have had a covert nuclear weapons program, although it denied ever having one. In September 1991, South Africa signed and brought into force a comprehensive safeguards agreement pursuant to the NPT. Immediately following that action, the IAEA General Conference, which is composed of all member states of the IAEA (about 100 members in 1991), passed a resolution requesting the “Director General to verify the completeness of the

⁶ INFCIRC/153 offers further support that Joyner’s argument is wrong. The language of paragraph 73 makes clear that the IAEA is not limited to that information to which it is entitled under *ad hoc* and routine inspections. It can extend to information and locations in addition to the access specified for such inspections if, as provided for in paragraph 73(b), “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 fulfil its responsibilities under the Agreement”. In addition, paragraph 19 of INFCIRC/153 provides that, if the Board finds that “the Agency is not able to verify that there has been no diversion of *nuclear material required to be safeguarded under the Agreement* [emphasis added] to nuclear weapons or other nuclear explosive devices, it may make the reports provided for in paragraph C of Article XII of the Statute” (including to the Security Council). This makes clear that the IAEA has the obligation to make sure that everything required to be safeguarded is in fact safeguarded.

inventory of South Africa's nuclear installations and material."⁷ The IAEA needed to ensure that South Africa's initial declaration was not just correct but complete, e.g. that South Africa did not have undeclared stocks of nuclear material, perhaps even in nuclear weapons, despite South Africa's denials. Based on this authority, the IAEA launched an investigation that involved visits to many undeclared sites and South Africa's provision of additional information. In a critical development, in March 1993, nearly two years after its initial declaration, South Africa reversed course and declared its past nuclear weapons program and subsequently detailed its scope and history to the IAEA. The openness and cooperation of South Africa in the months after this declaration were indispensable for the IAEA in reaching the conclusion that South Africa's declaration was both correct and complete.

In February 1992, soon after the September 1991 General Conference resolution on South Africa, "the Board of Governors re-affirmed the requirement that the IAEA provide assurance regarding the correctness and completeness of nuclear material declarations by states with comprehensive safeguards agreements."⁸ This was a natural development following discoveries in Iraq throughout 1991 of undeclared nuclear weapons activities, efforts to provide assurance that South Africa did not have hidden fissile material, and the growing importance of establishing confidence in the absence of any undeclared nuclear material and activities in states with comprehensive safeguards agreements.

It is not the IAEA's job to "prove a negative," as an overly simplistic interpretation of "the absence of any undeclared material and activities" would suggest. The IAEA has focused its completeness determinations on establishing with confidence the absence of undeclared nuclear material, activities, and facilities. One way it achieves this confidence is by systematically investigating indications of potential violations. This approach is workable and avoids the logical impossibility of proving a negative.

In March 1995, the Board of Governors again reaffirmed the position on completeness. According to the 1995 Chairman's statement approved by the Board:⁹

"The Board reiterates that the purpose of comprehensive safeguards agreements, where safeguards are applied to all nuclear material in all nuclear activities within the territory of a State party to such an agreement, under its jurisdiction or carried out under its control anywhere, is to verify that such material is not diverted to nuclear weapons or other nuclear explosive devices. To this end, the safeguards system for implementing comprehensive safeguards agreements should be designed to provide for verification by the Agency of the correctness and completeness of States' declarations, so that there is credible assurance of the non-diversion of nuclear material from declared activities *and of the absence of undeclared nuclear activities.*" (emphasis added)

⁷ IAEA General Conference, *South Africa's Nuclear Capabilities, Resolution adopted during the 341st plenary meeting on 20 September 1991*, GC(XXXV)/RES/567, September 1991.

⁸ Emphasis in original. IAEA Director General, *Strengthening the Effectiveness and Improving the Efficiency of the Safeguards System*, GOV/2784, February 21, 1995, p. 3. This report from the IAEA Director General can be found as annex 1 in the following: http://www.iaea.org/About/Policy/GC/GC39/GC39Documents/English/gc39-17_en.pdf

⁹ IAEA Director General, *Strengthening the Effectiveness and Improving the Efficiency of the Safeguards System, Report by the Director General to the General Conference*, GC(39)/17, August 22, 1995, Annex 3, "Excerpt from the record of the Board's 864th meeting," p. 58. http://www.iaea.org/About/Policy/GC/GC39/GC39Documents/English/gc39-17_en.pdf

The 1995 decision was conveyed in a Chairman's "summing up" statement that was amended by the chairman to reflect a few members' concerns. None of these amendments had any bearing on the issue of verification of correctness and completeness under comprehensive safeguards agreements.

Joyner asserts the following about the Chairman's summing up: "The statement is his own alone and [was] never endorsed by the BOG" (emphasis Joyner's). Moreover, he states that no decision was taken by the Board on the Chairman's summing up in this regard. Both assertions are simply wrong.¹⁰ The Board's normal practice of taking decisions is by consensus; many of the decisions are taken by the Board without a vote. And the decisions that are taken are, as a matter of course, reflected in the Chairman's summing up of the debate. As is the normal practice of the Board, its decision to approve the Chairman's summary of the debate in connection with this issue was in fact taken – and taken by consensus.¹¹

¹⁰ IAEA Director General, *Strengthening the Effectiveness and Improving the Efficiency of the Safeguards System, Report by the Director General to the General Conference*, GC(39)/17, August 22, 1995, Annex 3, "Excerpt from the record of the Board's 865th meeting," pp. 63-124. http://www.iaea.org/About/Policy/GC/GC39/GC39Documents/English/gc39-17_en.pdf ; To understand why Joyner is incorrect in stating that the Chairman's statement was his own alone and never endorsed by the Board of Governors, see the following excerpt from the Board meeting, especially paragraphs 52-54:

45. The CHAIRMAN asked whether he could take it that his summing-up, with the amendments suggested by him, was acceptable to the Board.

46. Mr. ARCILLA (Philippines) said that his delegation had reservations about the summing-up and that those reservations should be reflected in it.

47. The CHAIRMAN said - following procedural remarks by Mr. AKAO (Japan), Mr. HELLER (Mexico), Mr. YIMER (Ethiopia), Mr. WALKER (Canada) and Mr. GROGAN (Ireland) - that it was his impression that the Board as a whole would not wish those reservations to be reflected in the summing-up.

48. Mr. SIEVERING (United States of America) proposed that the matter be resolved through a vote, by a show of hands, on the summing-up with the amendments suggested by the Chairman.

49. Mr. ARCILLA (Philippines) said that, if the summing-up was to be voted on, he would request a roll-call vote.

50. The CHAIRMAN said that, if the Board was going to proceed to a vote, it should know exactly what it was voting on. His understanding was that the Board would be voting on an amendment to the summing-up (with the amendments suggested by him) – that amendment, moved by the Governor from the Philippines, being the insertion, in the last paragraph of the summing-up, of a sentence reading "One Governor requested the Secretariat to submit a paper on which of the measures ultimately proposed under Programme 93+2 could be applied under item-specific and 'voluntary offer' safeguards agreements." [Note from authors: The Philippines' Governor did not object to the application of completeness in verifying CSAs.] 51. Mr. AKAO (Japan), noting that the question of voting on amendments was dealt with in Rule 44 of the Board's Provisional Rules of Procedure, asked whether a Chairman's summing-up could be considered a "proposal" in the terms of Rules 43-45.

52. The CHAIRMAN suggested - following procedural remarks by Mr. WALKER (Canada) and Mr. YIMER (Ethiopia) - that there be a short suspension of the meeting. The meeting was suspended at 4.55 p.m. and resumed at 5.35 p.m.

53. The CHAIRMAN said that a basis for agreement appeared to have been found during informal consultations. Accordingly, he took it that the Board wished to accept his summing-up with the two amendments suggested by him at the start of the meeting.

54. It was so decided.

55. All aspects of the debate under agenda sub-item 4(a) would be reflected in the summary records.

56. Mr. ARCILLA (Philippines) thanked delegations for agreeing on an amicable resolution of the matter and Mr. ElBaradei, Director of the Division of External Relations, for his help during the informal consultations.

57. His delegation - like others - believed that there was a need to strengthen Agency safeguards, but it would like to see all Agency safeguards strengthened. He assumed that its position would be reflected in the summary records.

¹¹ GOV/OR.865, paragraphs 52-54, see footnote 8 for more of this record.

This part of Joyner’s report compounds mistakes with an accusatory narrative. Not content with making a point, albeit an incorrect one, he accuses the IAEA’s Office of Legal Affairs of negligence and even dishonesty in its portrayal of this Chairman’s statement. Moreover, he portrays himself as an “independent” lawyer taking the trouble to look up an “obscure” document and calls out the Office of Legal Affairs on its “intentionally erroneous interpretation.” Yet, it is he who is in error. Moreover, the 1995 Chairman’s statement is highlighted in IAEA publications about safeguards; it is not obscure.¹²

In contrast to what Joyner implies, IAEA member states in the 1990s extensively discussed the increased need to focus on the completeness of a safeguards declaration under a CSA. Few members disagreed about its universal application to such safeguards agreements. This was shown in deliberations, at the IAEA’s 1991 General Conference, on the South African resolution,¹³ immediately following the signature and entry into force of South Africa’s CSA. The draft resolution, introduced by Zaire on behalf of the African Group, requested “the Director General to verify the completeness of the inventory of South Africa’s nuclear installations and material and to report to the Board of Governors and to the General Conference.”¹⁴ The General Conference debated the draft resolution, made no amendments to the completeness reference cited above, and approved the resolution by consensus. Brazil joined the consensus on the South African resolution but, supported by Argentina and Pakistan, then placed on record its concern that verifying completeness did not fall within the mandate of the Director General. During the debate, only India expressed similar concerns.¹⁵ Brazil again objected to the 1995 Chairman’s statement referencing the application of completeness, but the Board nonetheless overwhelmingly accepted this statement.

Thus, the Board of Governors and the General Conference during the first years following the revelations of Iraq’s undeclared nuclear materials and activities affirmed the IAEA’s authority to determine both the correctness and completeness of declarations under a comprehensive safeguards agreement.

Joyner argues that the necessity to negotiate the Additional Protocol (INFCIRC/540) shows that the IAEA would not otherwise have the authority to verify the absence of undeclared nuclear materials and activities. This argument is not supported by the history leading to the elaboration of INFCIRC/153. It was considered by the member states of the IAEA who drafted INFCIRC/153 that the IAEA’s authority for ad hoc and special inspections, and decisions of the BOG on essential and urgent actions, would be sufficient for the IAEA to do so. The Additional Protocol was developed simply to provide it with access to additional information and tools for carrying out that responsibility more effectively and on a more routine basis – tools which would allow for a consistent, objective and transparent generic approach to verification activities with respect to undeclared, as well as declared,

¹² IAEA Department of Safeguards, *IAEA Safeguards: Staying Ahead of the Game*, IAEA, July 2007, p. 11.

¹³ IAEA General Conference, *Record of the Three Hundred and Forty First Plenary Meeting*, held at the Neue Hofburg, Vienna, on Friday, 20 September 1991, at 11.30 a.m. GC(XXXV)/OR.341, January 16, 1992.
http://www.iaea.org/About/Policy/GC/GC35/GC35Records/English/gc35or-341_en.pdf

¹⁴ *South Africa’s Nuclear Capabilities*, GC(XXXV)/989/Rev.1,
http://www.iaea.org/About/Policy/GC/GC35/GC35Documents/English/gc35-989-rev1_en.pdf. See reference for final resolution in footnote 5.

¹⁵ None of these four states had signed the NPT in 1991 and thus did not have a comprehensive safeguards agreement. Argentina acceded to the NPT in 1995 and Brazil did so in 1998. India and Pakistan have not done so. As of late October 2012, Argentina and Brazil had not signed the Additional Protocol, joining Egypt, Syria, and Venezuela as the only states with significant nuclear activities that have not done so. Iran has signed but not ratified.

nuclear materials and activities. The Additional Protocol is important for efficiency and effectiveness. But the essential point is that the IAEA already has under the CSA the essential mandate—indeed, as articulated in paragraph 2 of INFCIRC/153, the obligation—to verify the absence of undeclared nuclear material and activities.

The September 2010 IAEA General Conference resolution on safeguards affirmed this relationship between a CSA and the Additional Protocol.¹⁶ It notes that “the implementation of comprehensive safeguards agreements should be designed to provide for the verification by the Agency of the correctness and completeness of a State’s declaration.” The resolution stresses the “importance of the Model Additional Protocol approved on 15 May 1997 by the Board of Governors aimed at strengthening the effectiveness and improving the efficiency of the safeguards system.” No state objected in the debate to the completeness reference; even Iran voted in favor of the resolution.

The Secretariat has, since the early 1990s, distinguished between correctness and completeness conclusions and has reported every year to the IAEA’s Member States on those conclusions. While different formulations have been used over the years, the yearly Safeguards Implementation Reports have, since 2000, reported on its ability to draw the broader conclusion based on its conclusions with respect to correctness (“no indication of the diversion of declared nuclear material from peaceful nuclear activities”) and completeness (“no indication of undeclared nuclear material or activities”).¹⁷ These conclusions are not new or specific to the Iranian case, as Joyner would have readers believe.

Moreover, the determination of correctness and completeness involves more than just investigating the initial declaration; it is a continuing process. The purpose is to provide credible ongoing assurance of the non-diversion of nuclear material from declared activities and of the absence of undeclared nuclear material and activities.

Determining Completeness in Iran: Parchin Case

The IAEA has indications that Iran’s Parchin military site was used to carry out high explosive tests relevant to the development of nuclear weapons. The IAEA therefore necessarily has doubts about whether Iran has declared all of the nuclear material, facilities, and activities which it is required to declare under its comprehensive safeguards agreement.¹⁸

¹⁶ IAEA General Conference, *Strengthening the effectiveness and improving the efficiency of the safeguards system and application of the Model Additional Protocol*, GC(54)/RES/11, September 2010. The vote was 80 yes, 0 no, and 20 abstentions.

¹⁷ The current formulation of the broader conclusion that “all nuclear material remained in peaceful activities” was first articulated in 2001. See the IAEA Safeguards Statement for 2000 at <http://www.iaea.org/newscenter/pressreleases/2001/prn0114.shtml>, and the IAEA Safeguards Statement for 2005 at <http://www.iaea.org/OurWork/SV/Safeguards/es/es2005.html>

¹⁸ The IAEA states in its August 30, 2012 safeguards [report](#) on Iran that due to Iran’s failure to provide access to the Parchin military site, suspected of housing a high explosive chamber and support facilities for high explosive tests relating to the development of nuclear weapons, and “extensive activities and resultant changes” seen in satellite imagery, “the Agency’s ability to verify the information on which its concerns are based has been adversely affected and, when the Agency gains access to the location, its ability to conduct effective verification will have been significantly hampered.” On September 10, 2012, IAEA Director General Yukiya Amano also [stated](#), “The activities observed further strengthen our assessment that it is necessary to have access to the location at Parchin without further delay in order to obtain the required clarifications.”

In carrying out its mission to ensure that there is no diversion of nuclear material to proscribed purposes, the IAEA has to look beyond that which is declared to ensure that everything required to be declared is in fact declared. It need not justify its request for access to locations such as Parchin on the basis that there are undeclared nuclear activities being carried out there. The IAEA may seek such access if it believes that such access will contribute to its fulfilling its mandate. Indeed, the IAEA can only provide assurances that nuclear material is not diverted to nuclear weapons or other nuclear explosive devices if it investigates any indication that such a program exists, including weaponization-related activities. The point is not whether the activities being carried out at Parchin, for example, are permitted or prohibited under the NPT; the IAEA is acting pursuant to an obligation to verify compliance by a state with its safeguards agreement. The point is that, if Iran is carrying out or has carried out what the IAEA believes to be nuclear weaponization-related activities, this gives rise to doubts about the completeness of Iran's declarations about nuclear material and nuclear activities, an issue clearly within the IAEA's mandate.

The standard Joyner would have the IAEA use is that the IAEA could only require access to a location involved in weaponization activities if the site actually involved the fabrication of a nuclear weapon using nuclear material. This would be too little too late, most would agree, just as the IAEA Board of Governors – and the General Conference of the IAEA – agreed in the 1990s. The objective of safeguards is the *timely* detection of the diversion of significant quantities of nuclear material to the manufacture of nuclear weapons or other nuclear explosive purposes or for purposes unknown and to deter its diversion through the risk of early detection.¹⁹ It is very difficult to see how the position espoused by Joyner would permit the IAEA to fulfil that objective.

Conclusion

The IAEA has the mandate and responsibility to investigate the completeness of Iran's declarations. Joyner's assertions about limitations on the IAEA's authority are not only out of step with the reality of evidence of how Iran may have violated its CSA obligations, but they are inaccurate about the IAEA's legal rights to make legitimate inquiries about this evidence. To deny this authority, the existence of which has been fully confirmed over decades by the Board of Governors and the General Conference, is both incorrect and dangerous to non-proliferation efforts.

Joyner's misinterpretations are not occurring in a vacuum, but in the context of a highly charged debate on Iran. Many of these misinterpretations would limit the IAEA's actions in Iran. The international community is seeking to avoid war breaking out over possible proliferation in Iran. Arguing to limit the IAEA's authority, and erroneously calling its actions illegal, may decrease the chances of Iran agreeing to comply with its international legal obligations. Achieving more transparency and cooperation from Iran and supporting the creation of a path that can determine answers to questions about the military dimensions of Iran's nuclear program, is the best way forward to settle the issue while avoiding military conflict.

¹⁹See paragraph 28 of INFCIRC/153.