

The Iran Nuclear Dispute – A New Approach

*by Eric A. Brill**

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In early 2006, the International Atomic Energy Agency referred Iran's nuclear file to the UN Security Council, which has since ordered Iran to comply with numerous IAEA requests. Though nearly all commentators overlook this, the Security Council has no authority to enforce Iran's Safeguards Agreement. Although the Security Council has also imposed harsh sanctions on Iran, the UN Charter authorizes punishment only if the Security Council determines that a threat to the peace exists, which it has never done. Authorized or not, the Security Council's actions appear to most observers as firmly grounded in international law, from which Iran appears to drift farther and farther away – indignantly demanding broad rights while suspiciously refusing to make required disclosures. Iran insists it is not seeking nuclear weapons and accuses the IAEA and the Security Council of ignoring Iran's well-grounded position in their relentless moving of goalposts. Under its Safeguards Agreement, Iran may demand that independent arbitrators identify the true drifter, and neither the IAEA nor the Security Council can prevent this. Iran's predictable arbitration victory would replace its ineffective protests with an authoritative confirmation that Iran is being asked to perform obligations that do not exist, to accept restrictions that no one has a right to impose. Handled well, it could lead to a broad resolution of the Iran nuclear dispute.

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Part 1. The Security Council Has No Authority to Enforce Iran's Safeguards Agreement

The Islamic Republic of Iran rarely sees eye to eye with the United States, the United Nations Security Council or the International Atomic Energy Agency. But all agree on this: On certain conditions, the IAEA may "refer" Iran's nuclear "file" to the Security Council for enforcement action. They disagree strongly on whether the conditions have been satisfied. Although the IAEA has never accused Iran of diverting nuclear material to non-peaceful purposes or of engaging in an activity prohibited by the NPT or Iran's Safeguards Agreement (facts that may surprise many readers), the IAEA referred Iran's nuclear file to the Security Council in 2006 based on disclosure violations that had occurred during the last two decades of the 20th century and ended in 2003 (see [footnote 10](#)). Iran's file remains with the Security Council, which has adopted five increasingly punitive [resolutions](#) over the past four years – numbers [1696](#), [1737](#), [1747](#), [1803](#) and [1929](#) (the *Iran Resolutions*).

The two international bodies have worked well together. The IAEA periodically [reports](#) Iran's alleged shortcomings to the Security Council, which transforms IAEA requests into iron-fisted Security Council demands and adds a few of its own. The IAEA presents the expanded demand list to Iran and, after a decent interval, reports back to the Security Council. If Iran has not responded as desired – always the case so far – the process is repeated, ratcheted up a notch each time.

One naturally assumes that something is written, somewhere, authorizing the Security Council to enforce Iran's Safeguards Agreement. Perhaps in the [UN Charter](#), or the Nuclear Non-Proliferation Treaty ([NPT](#)), or the [Safeguards Agreement](#) between Iran and the IAEA, or the statute that established the IAEA (the [IAEA Statute](#)), or the several IAEA/UN cooperation agreements (the [IAEA/UN Cooperation Agreements](#)). If not in one of these documents, certainly somewhere else.

In fact, no document grants the Security Council any authority to enforce Iran's Safeguards Agreement. Nothing but baseless assumptions, wishes and imagination support this belief. There is no such thing as a "referral" process under which the Security Council has authority to enforce Iran's Safeguards Agreement, under any circumstances. Iran is just as mistaken as its adversaries to believe there is.¹ The two sides are not alone.²

¹ A good example of Iran's own acceptance of this non-existent "referral" process appears in its March 26, 2008 letter to the IAEA ([INFCIRC/724](#)): "Referring a country's nuclear issue to the Security Council is only possible under certain conditions as described below:..." There follow three long paragraphs of conditions that Iran argues must be satisfied before the Security Council may properly be asked to intervene. Iran overstates one point and overlooks another. The IAEA need not satisfy any conditions to

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Nearly all commentators focus on whether the IAEA's "referral" of Iran to the Security Council was warranted, or the conditions on which Iran's "file" or "dossier" ought to be "returned" to the IAEA.³ Very few recognize that it never left, that the IAEA will always remain the only body with authority to enforce Iran's Safeguards Agreement.

Several documents do authorize⁴ – sometimes even require⁵ – the IAEA to "report" certain matters to the Security Council. There is an important purpose for those reports,

"report" whatever it may feel like reporting to the Security Council (*see*, footnote 4). On the other hand, the making of such a report confers no authority on the Security Council under Iran's Safeguards Agreement, regardless of what "conditions" the IAEA may have satisfied – notwithstanding Iran's concession that such authority exists, on certain conditions, under Article 19 of its Safeguards Agreement and Article XII.C of the IAEA Statute. Having forced the analysis into this too-narrow frame, Iran's letter moves on to unpersuasive arguments based, for example, on the IAEA's routine verifications that Iran has not diverted declared nuclear material (correct but insufficient, since Iran's Safeguards Agreement applies to undeclared nuclear material as well), and the assertion that the IAEA must first determine that a "threat to international peace and security is involved" (a task for the Security Council, not the IAEA). Iran's letter does include one ray of light – a well-put sentence that is the subject of [Part 2](#) of this article: "The Security Council has never determined Iran's nuclear program [is] a threat to international peace and security under Article 39 of the United Nations Charter and, thus, it could not adopt any measures against ... Iran under Chapter VII of the United Nations Charter." But the letter follows this promising sentence with an incorrect assertion that the Security Council "must have exhausted all required procedures under Chapter VI of the UN Charter" (a good idea discussed in [Part 3](#) of this article, but not required) and then drops the argument entirely.

² Dozens of examples can quickly be found in a simple Google search. Many writers have argued forcefully that the IAEA's "referral" was not warranted, but even the very best of them devote little or no attention to the point stressed here: Regardless of whether the IAEA report was warranted, the Security Council has no authority, under any circumstances, to enforce Iran's Safeguards Agreement (as distinguished from its right to act under Chapter VII of the UN Charter on certain conditions, discussed in [Part 2](#) of this article). *See, for example*, Sahimi, Muhammad, "[Double Standards for Iran's Nuclear Program](#)," *Washington Report on Middle East Affairs* (December 1, 2009). This occurs even more frequently in analyses by writers who support the Iran "referral." *See, for example*, Goldschmidt, Pierre, "[Correcting Iran's Nuclear Disinformation](#)," *Carnegie Endowment for International Peace* (March 27, 2007). Writers who take a neutral stance have also overlooked the point. *See, for example*, Jenkins, Peter, "[Staying Credible: How Precedents Can Help the IAEA Get Noncompliance Calls Right](#)," *Arms Control Association* (September 2010). Most common are analyses that ignore whether the "referral" was warranted and simply consider what will or should happen after referral occurs. *See, for example*, Perkovich, George, "[Stopping the Iranian Bomb – Part II](#)," *YaleGlobal Online* (January 26, 2006).

³ There are some exceptions, including several analyses by the Lawyers' Committee on Nuclear Policy. *See, for example*, Spies, Michael, "[Limits of the Non-Proliferation Regime – And Why Multilateralism is the Only Solution](#)," *Lawyers' Committee on Nuclear Policy* (February 9, 2006), at numbered paragraph 3 under "Enforcement of Safeguards." Not all LCNP writings take the same position, however. *See, for example*, Spies, Michael, "[Iran and the Role of the Security Council](#)," *Lawyers' Committee on Nuclear Policy* (March 8, 2007): "[F]ew would doubt the Security Council's role as the ultimate baseline for matters of compliance on an issue as crucial to global security as nuclear proliferation....The Council's evolving articulation of its role in (selectively) enforcing treaty compliance in the nuclear sphere is at least partially compelled (and more than certainly enabled) by the institutional deficits of the nuclear non-proliferation regime, and the lack of any standing enforcement mechanism."

⁴ *See, for example*, the [Agreement Governing the Relationship between the United Nations and the International Atomic Energy Agency](#), at Articles III(1) ("The Agency shall keep the United Nations informed of its activities."), III(1)(b), III(2), VI(1) ("There shall be the fullest and promptest exchange

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but it is not to enable the Security Council to enforce Iran's Safeguards Agreement. The purpose is to notify the Security Council that reasons exist (in the IAEA's view) to consider whether Iran's nuclear program is a "threat to the peace, breach of the peace, or act of aggression" under Article 39 of [Chapter VII](#) of the UN Charter (a *Peace Threat*).

If the Security Council determines that a Peace Threat exists, it may take many measures against Iran under Articles 40 and 41 – possibly even military action under Article 42. It may decide, for example, that imposing restrictions on Iran's nuclear program will help to "maintain or restore international peace and security." If so, it will not matter whether those restrictions are authorized by Iran's Safeguards Agreement or go beyond it, since the Security Council will be acting under Chapter VII of the UN Charter, not under Iran's Safeguards Agreement. On the other hand, if the Security Council has not determined that Iran's nuclear program is a Peace Threat (which it has not – see [Part 2](#) of this article), it has no authority to take any action under Chapter VII.

Because a Security Council resolution adopted after it has considered an IAEA report is likely to involve matters also covered by Iran's Safeguards Agreement, it is understandable that many people mistakenly believe the Security Council has authority to enforce Iran's Safeguards Agreement. The distinction between the Security Council's authority under Chapter VII (very substantial, if it determines that a Peace Threat exists) and under Iran's Safeguards Agreement independent of Chapter VII (none) becomes clear only when the Security Council has no authority to act under Chapter VII. To highlight the distinction, suppose that the Security Council reviews an IAEA report on Iran, agrees that Iran is not complying with its Safeguards Agreement, but determines that no Peace Threat exists and so concludes (as it must) that the Security Council has no authority to act under Chapter VII. This properly narrows the question: Setting aside its authority under Chapter VII of the UN Charter, does the Security Council have authority to enforce Iran's Safeguards Agreement? Indisputably the answer is "no" – no matter what Iran may have done or not done.

Even commentators who acknowledge that the UN Charter is the sole basis for Security Council authority often devote considerable attention to a question that does not matter:

between the United Nations and the Agency of appropriate information and documents."), VI(2), VII(2), VIII(2), IX and XII(1). *See, also*, Articles III(B)(4) and XII.C of the [IAEA Statute](#).

⁵ *See, for example*, Article III(B)(4) of the [IAEA Statute](#): "[If] in connection with the activities of the Agency there should arise questions that are within the competence of the Security Council, the Agency shall notify the Security Council, as the organ bearing the main responsibility for the maintenance of international peace and security, and may also take the measures open to it under this Statute, including those provided in [Article XII.C];..." *See, also*, Article XII.C, which provides, in part: "The Board shall report the non-compliance to all members and to the Security Council and General Assembly of the United Nations." *See, also*, Article III(2) of the [Agreement Governing the Relationship between the United Nations and the International Atomic Energy Agency](#): "The Agency shall report to the Security Council and the General Assembly any case of non-compliance within the meaning of [Article XII.C of the IAEA Statute]."

whether the IAEA's "referral" was warranted under Iran's Safeguards Agreement.⁶ The IAEA may report more or less whatever it likes to the Security Council, at any time.⁷ Rarely do commentators address the important question that must be answered under UN Charter Article 39 to determine whether the Security Council has authority to act: Is Iran's nuclear program a "threat to the peace, breach of the peace, or act of aggression?"⁸

Some may believe that a Peace Threat determination is implied by the IAEA's mere act of "reporting" that it cannot determine whether a country has "diverted" nuclear material, or that the country is in non-compliance with its Safeguards Agreement. If so, they are mistaken. Apart from the IAEA's obvious lack of authority to make a Peace Threat determination on behalf of the Security Council, IAEA reports of non-compliance do not always result in Chapter VII action. When the IAEA reported North Korea's non-compliance in 1993, the Security Council made no Peace Threat determination and its response (Resolution 825) was not based on Chapter VII. After the IAEA reported Romania's non-compliance in 1992, the Security Council adopted no responsive resolution at all. The same was true for Libya in 2004.⁹ When the IAEA reported Iran's non-compliance in 2006, the Security Council's likely reaction was far from certain – especially since the IAEA's finding was based expressly on disclosure violations that had ended years earlier and had had nothing to do with nuclear weapons.¹⁰

⁶ See, for example, Varadarajan, Siddharth, "The Game Plan on Iran is Becoming Clearer," *Global Research* (March 25, 2006); see, also, Spies, Michael, "The Iranian Nuclear Dilemma: Referral to the UN Security Council?," *Lawyers' Committee on Nuclear Policy* (September 27, 2005).

⁷ See, for example, the [Agreement Governing the Relationship between the United Nations and the International Atomic Energy Agency](#), at Article III(1) ("The Agency shall keep the United Nations informed of its activities.") and Article VI(1) ("There shall be the fullest and promptest exchange between the United Nations and the Agency of appropriate information and documents.").

⁸ Some writers note that the Security Council has more than Chapter VII at its disposal. Less intrusive actions could be taken instead under Article VI ("Pacific Settlement of Disputes"), a point mentioned in [Part 3](#) of this article. See, for example, Welsh, Steven C., "UN Security Council Authorities Under UN Charter Chapter VII: IAEA and Iran," *Center for Defense Information* (May 20, 2006). But even such writers often leave the impression that the Security Council is free to choose between Chapters VI and VII, ignoring that the much stronger remedies under Chapter VII are available only if the Security Council determines that a Peace Threat exists (see, [Part 2](#) of this article).

⁹ Some have argued that the IAEA's reports to the Security Council on Romania and Libya can be distinguished because the IAEA made them "for information purposes" only. See, for example (concerning Libya), Goldschmidt, Pierre, "Safeguards Compliance: A Challenge for the IAEA and the UN Security Council," *Arms Control Today* (January/February 2010). But this distinction reflects a plainly invalid assumption: that the IAEA has authority to limit or otherwise shape the action taken by the Security Council in response to an IAEA report. The Security Council is free to take (or not take) whatever action it has authority to take under the UN Charter, regardless of what the IAEA may believe is appropriate in the circumstances – indeed, even if the IAEA has made no "report" at all (see, [footnote 11](#) for examples of this).

¹⁰ **IAEA Referral of Iran to Security Council.** The IAEA Board of Governors declared Iran to be in "non-compliance" with its Safeguards Agreement on September 24, 2005 ([GOV/2005/77](#)), and formally "referred" Iran's nuclear file to the Security Council on February 4, 2006 ([GOV/2006/14](#)). The IAEA (*footnote continues on next page*)

Conversely, nothing in Chapter VII requires an IAEA report before the Security Council may act, and it has adopted several nuclear-related Chapter VII resolutions without any recent IAEA report having been made.¹¹ In short, though the IAEA's expert views deserve and receive careful attention, it is the job of the Security Council, not the IAEA, to determine whether a Peace Threat exists and to take appropriate action if one does. It is the job of the IAEA, not the Security Council, to enforce Iran's Safeguards Agreement.

Despite this clear separation of authority, there is almost no disagreement among commentators that the Security Council may enforce Iran's Safeguards Agreement, their

Board's non-compliance finding was based solely on disclosure violations that had occurred prior to October 2003: "[The IAEA Board] finds that Iran's many failures and breaches of its obligations to comply with its NPT Safeguards Agreement, as detailed in [the IAEA Director General's report] [GOV/2003/75](#) [November 10, 2003], constitute non-compliance in the context of Article XII.C of the Agency's Statute...." See, [GOV/2005/77](#), at numbered paragraph 1. The IAEA Board did not claim that any of the activities involved had been impermissible under the NPT or Iran's Safeguards Agreement – only that Iran should have disclosed them. See, Bali, Asli U., "The US and the Iranian Nuclear Impasse," *Middle East Report*, Vol. 241 (Winter 2006). Nor did the Board or the Director General claim that even the disclosure violations had continued after October 2003. For example, the IAEA Director General acknowledged in his November 2003 report cited by the IAEA Board that "Iran's policy of concealment continued *until last month*." (Emphasis added.) See, paragraph 50 of [GOV/2003/75](#). Subsequent IAEA Director General reports include the same statement. See, for example, the reports dated November 15, 2004 ([GOV/2004/83](#)), at paragraph 107, and September 2, 2005 ([GOV/2005/67](#)), at paragraph 42. IAEA Board of Governors resolutions contain similar statements. See, for example, [GOV/2005/77](#), the resolution in which Iran was declared to be in non-compliance, at paragraph (h) of the preamble, referring to Iran's "policy of concealment *up to October 2003*." (Emphasis added.) See, also, the IAEA Board resolution of November 29, 2004 ([GOV/2004/90](#)), at paragraph (c) of the preamble, "noting specifically the Director General's assessment that Iranian practices *up to October 2003* resulted in many breaches of Iran's obligations to comply with its Safeguards Agreement." (Emphasis added.) Although the IAEA Director General's investigation of Iran's pre-October 2003 disclosure violations later caused the IAEA Board to become even more concerned about Iran's pre-October 2003 activities (see, for example, [GOV/2005/77](#), at paragraph 2, and [GOV/2006/14](#)), at paragraph (g) of the preamble), and to become suspicious that Iran may have committed additional violations after October 2003, neither the Board nor the Director General has ever found that Iran's nuclear program after October 2003 has been in non-compliance with Iran's Safeguards Agreement. For example, in paragraph 5 of [GOV/2005/77](#), although the IAEA Board "calls upon Iran to observe fully its commitments," it nowhere states or suggests – in this or any other resolution – that Iran's nuclear program, at any time since October 2003, has failed to be in compliance with Iran's Safeguards Agreement. In short, with the exception of the parties' long-running Code 3.1 dispute (see, footnote 33) and minor violations described in some of the Director General's reports (see, footnote 31), the IAEA's charges that Iran's nuclear program is not in compliance with its Safeguards Agreement have been based entirely on the conduct of Iran's nuclear program prior to October 2003. Today – although this is not clear to many observers – the IAEA's complaints are based instead on Iran's unwillingness to take, or to continue taking, various "confidence building measures" that the IAEA itself has acknowledged are entirely "voluntary and non-legally binding." See, on this point, the lengthy example in the [Preliminary Note](#) to [Part 3](#) of this article, and Iran's hypothetical [arbitration argument](#), also in [Part 3](#).

¹¹ See, for example, Resolutions [1695](#) (2006), [1718](#) (2006), [1874](#) (2009) and [1928](#) (2010), directed at North Korea's nuclear weapons program. The IAEA Board had formally reported North Korea's non-compliance to the Security Council more than three years before the first of these Security Council resolutions was adopted ([GOV/2003/14](#)), but none of these Security Council resolutions even mentioned this. Nor did Resolution [1540](#) (2004), which did not identify any country by name but was widely understood to be aimed at North Korea.

only disagreement being whether its exercise of that authority has been warranted. Where do they claim to find such authority? Most cite no basis at all. They may assume that the UN Security Council has implied authority to intervene in any international dispute that interests it, and that it has sufficiently declared its interest here by "reaffirming its commitment to the [NPT]" in the preamble to each Iran Resolution. From those who understand that the Security Council has no such implied authority, the most common answer is that Article 19 of Iran's Safeguards Agreement grants the Security Council authority to enforce the Agreement. Article 19 provides:

If the ... [IAEA finds it] is not able to verify that there has been no diversion of nuclear material required to be safeguarded under this Agreement, to nuclear weapons or other nuclear explosive devices, it may make the reports provided for in ... [Article XII.C of the IAEA Statute.]

Article XII.C plainly authorizes the IAEA to report such a finding to the Security Council. Just as plainly, Article XII.C does not grant the Security Council authority to take any action under Iran's Safeguards Agreement. Nor does any other provision of that Agreement or any other document. The Security Council may act under Chapter VII in appropriate circumstances, but only the IAEA has authority to enforce Iran's Safeguards Agreement. It is not a subsidiary or other affiliate of the United Nations. Though the two bodies cooperate in many ways,¹² they are entirely separate and neither has a right to exercise any authority granted to the other – even if the other body asks for help. If Iran breaches its Safeguards Agreement, the IAEA may terminate assistance, or demand the return of materials and equipment, being provided to Iran under the IAEA Statute. If its violations persist, Iran may even be expelled from membership in the IAEA. These are the remedies available for Iran's violation of its Safeguards Agreement, and only the IAEA may enforce them.

There is at least one more argument, different but no stronger, under which the Security Council is said to have authority to enforce Iran's Safeguards Agreement – or at least the NPT. An Iran analyst insists that:

The general understanding was and is that the UN Security Council is responsible for enforcement [of the NPT], and this was reaffirmed in 1992 when the president of the Council declared that proliferation was a threat to international peace and security.¹³

¹² See, generally, the [Agreement Governing the Relationship between the United Nations and the International Atomic Energy Agency](#). See, also, Article III(B)(4) of the [IAEA Statute](#).

¹³ See, Perkovich, George, "Defining Iran's Nuclear Rights," *Carnegie Endowment for International Peace* (October 7, 2006).

He cites no authority, with good reason. The negotiations leading to the NPT's adoption do not suggest that such an "understanding" – "general" or otherwise – was reached or even discussed.¹⁴ Nor can any hint of it be found in the UN resolution memorializing the adoption of the NPT¹⁵ – nor in the NPT itself, Iran's Safeguards Agreement, the IAEA Statute, the IAEA/UN Cooperation Agreements, the UN Charter or any other document. This leaves only the unofficial 1992 remark by the Security Council's president, which the commentator characterizes as a universal Peace Threat determination with no expiration date, eliminating the Chapter VII requirement that the Security Council consider an actual situation and determine whether it amounts to a Peace Threat.

This analyst noticed that the NPT is missing not only an enforcer, but remedies as well. He fills this void too – this time by concluding that NPT Article II (which essentially prohibits a non-nuclear weapons country from manufacturing, acquiring or seeking nuclear weapons) authorizes the Security Council to take away a country's enrichment rights on certain conditions that, not surprisingly, he finds Iran has satisfied:

Because Iran has been found noncompliant with its [Safeguards Agreement] obligations and has not enabled the IAEA to verify its compliance with the core Article II obligation that conditions all rights to nuclear energy, Iran has lost, at least temporarily, the full enjoyment of its original nuclear rights.

In other words, once the IAEA finds a country is in "non-compliance" – even if the non-compliance was a disclosure violation that ended several years ago and had nothing to do with nuclear weapons development or any other prohibited activity¹⁶ – the country loses its enrichment rights unless and until the IAEA verifies that it is not manufacturing, acquiring or seeking nuclear weapons. He cites no authority for this guilty-until-proven-innocent presumption, much less for the IAEA's authority to decide whether the imaginary presumption has been rebutted.¹⁷ The NPT provides no such thing – nor that

¹⁴ See, for example, Goldschmidt, B., "The Negotiation of the Non-Proliferation Treaty (NPT)," International Atomic Energy Agency Bulletin, Vol. 22., No. 3/4 (1980) (article extracted from Dr. Goldschmidt's book, *Le Complexe Atomique*, Editions Fayard, Paris (1980)). See, also, Bourantonis, Dimitris, "The Negotiation of the Non-Proliferation Treaty, 1965-1968: A Note," *The International History Review*, Vol. 19, No. 2 (May, 1997), pp. 347-357 (available online (subscription required) at <http://www.jstor.org/stable/40107787>).

¹⁵ See, General Assembly [Resolution 2373](#) (XXII) (June 12, 1968). One week later, the UN Security Council adopted [Resolution 255](#) (June 19, 1968), which acknowledged with appreciation the expressed commitments of unnamed nuclear-armed states to defend non-nuclear states from actual or threatened nuclear attack, but did not mention any role for the Security Council in the enforcement of the NPT.

¹⁶ See, footnote 10.

¹⁷ Many other writers have made similar misstatements. See, for example, Farhi, Farideh, "[Anatomy of a Nuclear Breakthrough Gone Backwards](#)," *Middle East Report Online* (December 8, 2009): "... Iran does have a right under the Non-Proliferation Treaty to conduct nuclear research, *as long as the purpose can be verified as peaceful by the IAEA.*" (Emphasis added.)

the IAEA has authority to enforce the NPT even if it did include such a provision. Iran's Safeguards Agreement and the IAEA Statute specify several remedies for non-compliance, but those remedies do not include a suspension of enrichment rights.¹⁸

In short, this analyst concluded that the NPT and Iran's Safeguards Agreement lack adequate remedies, and so he deemed it necessary to invent some more – and to authorize the Security Council and IAEA to enforce them. Many other writers have done the same.¹⁹ But if these remedies are insufficient, they nevertheless are what they are, not what these writers wish they were or imagine them to be. Nor is Iran to blame for any insufficiency. Though it is not obvious, the fault lies with the several world powers who have failed for decades to perform their obligations under the NPT. Many consider the NPT and its associated Safeguards Agreements to be nothing more than an intrusive monitoring scheme aimed at restricting membership in the nuclear weapons club. But most countries that signed the NPT decades ago were focused on its loftier stated goals: a world in which all countries would be encouraged to produce peaceful nuclear energy with the assistance of experts from countries that already know how, in which rogue countries that have secretly developed nuclear weapons would be pressured to give them up and sign the NPT, in which even the five original nuclear-weapons states would take steps to disarm. These expectations, backed by clearly stated commitments from several world powers, are what induced countries like Iran to sign the NPT – not the prospect of filing detailed reports and answering numerous questions from nosy inspectors, though they were prepared to accept those burdens in exchange for the benefits they expected the NPT would bring.

Had the NPT produced these benefits, its early signers would want very much to retain them. The IAEA's authority to take them away would be a powerful enforcement weapon. But so far the NPT has not brought these hoped-for benefits to Iran. Four

¹⁸ See, Article 19 of Iran's Safeguards Agreement and Articles XII.C and XIX.B of the IAEA Statute. See, also, footnote 34, concerning the legal bases of Iran's enrichment rights.

¹⁹ Although nothing in the UN Charter, the NPT, Iran's Safeguards Agreement, the IAEA Statute, the IAEA/UN Cooperation Agreements or any other document states, or even suggests, that the absence of an enforcement mechanism in the NPT authorizes the UN Security Council (or any other international body – much less a country) to fill the resulting "enforcement gap," many writers nevertheless believe this is reason enough – indeed, it is considered so self-evident that one need not even bother to cite authority. See, for example, Spies, Michael, "Iran and the Role of the Security Council," *Lawyers' Committee on Nuclear Policy* (March 8, 2007): "[F]ew would doubt the Security Council's role as the ultimate baseline for matters of compliance on an issue as crucial to global security as nuclear proliferation....The Council's evolving articulation of its role in (selectively) enforcing treaty compliance in the nuclear sphere is at least partially compelled (and more than certainly enabled) by the institutional deficits of the nuclear non-proliferation regime, and the lack of any standing enforcement mechanism." Some writers are even bolder, insisting that the absence of an enforcement mechanism in the NPT ironically leaves it much stronger than if one had been spelled out. See, for example, Calamita, N. Jansen, "Sanctions, Countermeasures, and the Iranian Nuclear Issue," *Vanderbilt Journal of International Law*, Volume 42, No. 5 (November 2009), in which the author argues that any country in the world may consider itself an "injured State" and take action against Iran to enforce the NPT and Iran's Safeguards Agreement.

decades ago, enthusiastic American and European nuclear salesmen descended upon Iran, urging it to prepare for the inevitable exhaustion of its oil and gas reserves before it was too late, offering to help in any way they could. But since the fall of the Shah in 1979, offers of help have dried up, many millions of dollars in down payments have been pocketed, and descendants of those same eager salesmen now ask in suspicious tones why such a petroleum-rich country as Iran needs to develop nuclear energy. More countries than before have nuclear weapons, and new members of the nuclear weapons club either decline to sign the NPT (India, Pakistan, Israel) or simply withdraw when it becomes inconvenient (North Korea). The original five nuclear states have many more nuclear warheads than before the NPT was adopted, and show no inclination to give them up. From Iran's point of view, all that remains of the NPT is a burdensome enforcement scheme imposed upon it by countries that unapologetically ignore their own obligations. It is not surprising that the IAEA's authority to take away Iran's benefits does not frighten Iran very much – indeed, Iran might prefer that, since its burdens would end as well.

The anticipated benefits of the Non-Proliferation Treaty can still be achieved. The IAEA's authority to take them away can still become the effective enforcement remedy it was intended to be. Iran can and should contribute to this welcome change, but it lies principally in the hands of the nuclear energy "haves," who must reconfirm, and then carry out, their solemn commitments to help the "have nots" achieve a worthy goal for which the NPT was adopted – peaceful nuclear energy for every country that wants it.

Part 2. The Iran Resolutions Were Not Validly Adopted Because No Peace Threat Was Determined

Though the Security Council has no authority to enforce Iran's Safeguards Agreement, it has considerable authority, on certain conditions, to accomplish the same result under [Chapter VII](#) (Articles 39-51) of the UN Charter. The bulk of this Part 2 is devoted to Chapter VII, but Articles 25 and 103 of the UN Charter first deserve attention because they sometimes are mentioned in the Iran nuclear debate.

Article 25 of the UN Charter. Article 25 states: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." [Some argue](#) this means that Iran must obey any Security Council decision, authorized or not – in other words, that UN Members must comply "in accordance with the present Charter" with Security Council decisions that may or may not have been made "in accordance with the present Charter." But if that is what Article 25 means, it follows that every UN member signed away its sovereignty when it joined, a conclusion that would alarm every UN member – except for the five permanent members of the Security Council, of course, who can veto any action.

A country's decision to join the UN is voluntary. It reflects the country's determination that the benefits of UN membership are worth relinquishing some of the country's sovereignty to obtain. The amount of sovereignty it must relinquish, and the conditions

and terms on which it must do so, are spelled out in the UN Charter, which the country's representatives presumably read carefully before signing. The country is not asked simply to sign a blank check relinquishing however much of its sovereignty the Security Council may some day decide to take away, on whatever conditions and terms may seem appropriate to the Security Council at the time. Article 25 can fairly be interpreted to require only that UN members obey Security Council decisions made in accordance with the UN Charter, which explicitly states (and thus implicitly limits) the Security Council's powers in Article 24(2): "The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII." Each of those Chapters, in turn, sets forth specific conditions that must be satisfied and procedures that must be followed in order for a Security Council decision to be made "in accordance with the present Charter." In the case of Chapter VII, for example, the Security Council must determine that a country poses a Peace Threat before the Security Council may take action against it. One must wonder why so much paper, ink, thought and discussion was devoted to spelling out these conditions and procedures if a Security Council decision is just as binding whether it complies with them or not.

If this "authorized or not" interpretation of Article 25 were applied internally in the United States (though it has no institution equivalent to the Security Council), it would mean essentially that any action taken by the executive branch of the government would be binding on all Americans, whether constitutional or not. One assumes that the proponents of this broad Article 25 interpretation would not find this acceptable in the United States and hopes, therefore, that they simply have not considered the question thoroughly enough to appreciate this analogy.

The narrower "constitutional" view of Article 25 does not, of course, justify a UN Member's refusal to carry out a Security Council decision based on the Member's own determination that the decision was not made "in accordance with the present Charter" – any more than an American citizen has authority to decide whether a policeman who breaks down his front door has violated his constitutional rights. An independent decision would be necessary to resolve a good faith dispute – most likely an advisory opinion rendered by the International Court of Justice under UN Charter Article 96(2).

Article 103 of the UN Charter. Article 103 provides that a UN member's obligations under the UN Charter govern over its conflicting obligations "under any other international agreement." But neither side contends that Iran has conflicting obligations under the UN Charter and Iran's Safeguards Agreement. Quite the contrary: the Security Council contends Iran is violating essentially the same obligations under both documents (by enriching uranium, for example), while Iran insists it has no such obligations under either of them. The question here is not whether Iran has conflicting obligations, but whether Iran's sovereign right to carry on a peaceful nuclear program, notably including enrichment – a right that was not granted by the NPT, Iran's Safeguards Agreement or

any other agreement, but instead exists separately from all of them²⁰ – is restricted by authorized action taken under the UN Charter.²¹ If the answer is "yes," then Iran is subject to those restrictions (in the form of the Iran Resolutions) under Article 25, not Article 103. If the answer is "no," then neither Article 25 nor Article 103 restricts Iran.

Chapter VII of the UN Charter (Articles 39-51).

Chapter VII is the key part of the UN Charter in the Iran nuclear dispute, and its first four articles are the most important:

Article 39. The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40. In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41. The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42. Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

²⁰ See, footnote 34, concerning the legal bases of Iran's enrichment rights.

²¹ The same question arises separately under Iran's Safeguards Agreement, of course, but that question is not for the Security Council to decide (see, Part 1 of this article), nor is the answer governed by the UN Charter (see, Part 3).

Summed up, if – but only if – the Security Council determines the existence of a "threat to the peace, breach of the peace, or act of aggression" (a *Peace Threat*) under Article 39, it may take "provisional measures" under Article 40, stronger non-military measures under Article 41, and military measures under Article 42 if Article 41 is "inadequate."

The Security Council has adopted many Article 39 resolutions – in some cases citing Article 39 *specifically*, more often citing "Chapter VII" without specifying an Article. For example, when the Security Council adopted Resolution 1363 (2001), after "determining that the situation in Afghanistan constitutes a threat to international peace and security in the region," it declared that it was "acting under Chapter VII of the Charter of the United Nations." Similarly, numerous Security Council resolutions aimed at Saddam Hussein's Iraq were expressly based on "Articles 39 and 40" or generally on "Chapter VII" without specification of an Article.

In sharp contrast – and by careful design – none of the Iran Resolutions was based either on "Article 39" specifically or on "Chapter VII" generally. At the strong *urging* of John Bolton, the United States' ambassador to the United Nations in 2006, early drafts of the first Iran Resolution (1696) were *explicitly based* on "Chapter VII." But Russia and China adamantly *opposed* any language that suggested the Security Council was acting specifically under "Article 39" or generally under "Chapter VII" – in Resolution 1696 or in any other Iran Resolution. Neither "Article 39" nor any of its threshold phrases – "threat to the peace," "breach of the peace" or "act of aggression" – appears anywhere in the Iran Resolutions. Even the key single words of Article 39 are conspicuously absent: One searches in vain through many thousands of words for a single appearance of "threat" or "breach" or "aggression" in any of the Iran Resolutions. In short, the Security Council – intentionally and carefully, each time it adopted an Iran Resolution – declined to declare that Iran's nuclear program is a "threat to the peace, breach of the peace, or act of aggression." Why were they so cautious?

Russia and China had learned a sobering lesson from Resolution 1441 (2002), the Chapter VII resolution on which the United States relied to justify its 2003 attack on Iraq. It had *seemed sufficient* to state that the Security Council would "convene immediately upon receipt of a report [that Iraq is not cooperating with inspectors], in order to consider the situation...." But once the United States learned that the Security Council would *not approve* an attack on Iraq, it decided that further meetings would be unnecessary. The Security Council had already determined that a Peace Threat existed, after all, and that struck the United States (or so it later claimed) as *sufficient authorization* for it to attack Iraq. By the time the Security Council *revisited* Resolution 1441 six months after its adoption, American soldiers were sleeping in Saddam Hussein's Baghdad palace.²²

²² *US Justifications for 2003 Attack on Iraq*. The US did not rely solely on Resolution 1441 to justify its 2003 attack on Iraq. It also cited two Security Council resolutions left over from the 1990-1991 Iraq conflict: Resolutions 678 (1990) and 687 (1991), which the US insisted were still effective despite their age
(footnote continues on next page)

Russia and China [have not](#) made the same mistake this time.²³ In every Iran Resolution, they have refused to permit the Security Council to declare that Iran's nuclear program is a Peace Threat. As an [observer noted](#) when the first Iran Resolution (1696) was adopted, John Bolton was "clearly unhappy about the outcome. Brandishing a copy of the UN Charter for the cameras, he lashed out against the Chinese and Russian position: 'What happened here today was that Russia and China declined to quote from the UN Charter.'" Mr. Bolton eventually calmed down, however, and [made the best of a bad situation](#): "The notion that you have to have an 'abra cadabra' in a resolution to make it binding... may be good practice, but it's not a requirement." He had softened considerably from just a few weeks earlier, when he had insisted: "The [fundamental point](#) is for Russia and China to agree that this is a threat to international peace and security under Chapter VII."

and the much different purposes for which they had been adopted. *See, for example*, Bellinger, John B., III, "[Authority for Use of Force by the United States Against Iraq under International Law](#)," *Council on Foreign Relations* (April 10, 2003). In addition, the United States' assertion that another Security Council meeting was unnecessary had been challenged even by its normally dependable ally, Great Britain, which prompted the US (along with Great Britain and Spain) to draft a follow-up resolution to 1441 (never formally proposed) specifically authorizing an attack on Iraq. Ultimately, the United States also relied on a "self-defense" argument not based on any Security Council resolution: the US had a sovereign right to defend itself against the specific threat to the US posed by Iraq's weapons of mass destruction.

Under this closer analysis of the US' justification for its 2003 attack on Iraq, however, the importance to Russia and China of avoiding a Peace Threat determination in all of the Iran Resolutions was equal to or greater than its importance under a "1441-only" analysis. Few will doubt that the US would be prepared to make the same "self defense" argument this time: Iran is considerably stronger militarily than Iraq was before the US attacked it in 2003, and many more US troops are stationed within missile range of Iran than was true for Iraq in March 2003. If and when the US decides to attack, even the earliest Iran Resolutions (1696 and 1737 (2006)) probably would be more recent, and certainly more on point, than the two Gulf War resolutions that the US dusted off and re-used as justifications in 2003 (678 (1990) and 687 (1991)). Those early Iran Resolutions would be much more useful to the US if they included a Peace Threat determination (as had 678 and 687) than if they did not. The same would be true for the Resolution 1441-equivalent resolution, whether that turned out to be Resolution 1929 or a later Iran Resolution that by then had been adopted.

Possibly Russia and China took some comfort in the greater specificity of the "next steps" language in the Iran Resolutions. Instead of a vague threat of "serious consequences" as in Resolution 1441, which the US soon sought to define to include "military attack by any UN member, without further authorization," the Security Council in each of the Iran Resolutions specifically threatened "to adopt appropriate measures under Article 41" if Iran did not comply – arguably precluding military action under Article 42 without specific Security Council authorization. It is difficult to believe, however, that Russia and China pinned their hopes on this fine distinction in the "next steps" language. Their insistence that each Iran Resolution carefully omit language that could be interpreted as a Peace Threat determination suggests they recalled clearly the US' then-recent effort to exploit the Peace Threat determinations in Resolutions 678, 687 and 1441, and sought to ensure that the same arguments would not be available to the US again.

²³ The Russian Foreign Minister, Sergey V. Lavrov, observed during the negotiations: "I know how the Security Council works. You start with a soft reminder, then you call upon, then you require, then you demand, then you threaten. It will become a self-propelling function." *See*, Jahanpour, Farhang, "[The Politics Behind the Iran 'Nuclear Threat'](#)," *Antiwar.com* (July 4, 2006).

When John Bolton complained that "Russia and China declined to quote from the UN Charter," he was really complaining that they had declined to quote from the Article he liked best: Article 39. Despite his efforts, Resolution 1696 was adopted solely under Article 40, and each of the later Iran Resolutions was adopted solely under Article 41. But if none of the Iran Resolutions was adopted under Article 39 (or even mentioned it), or under Chapter VII generally (without specification of a particular Article), and none of them includes any Peace Threat determination, are they valid?

The most common response is the "implied Article 39 resolution" argument, though this label is rarely if ever used for the argument.²⁴ It concludes that the Security Council actually did determine that Iran's nuclear program is a Peace Threat, even if it took great pains not to say so in each of the Iran Resolutions. In the extreme form of this argument,²⁵ any mention of Article 40 or Article 41 in a resolution is sufficient to imply this. Article 39 is often referred to as the "gateway" to Chapter VII, through which the Security Council must pass before it may take any action under Article 40, 41 or 42. Therefore, if the Security Council has arrived at Article 40 as it did in Resolution 1696, or at Article 41 as it did in the later Iran Resolutions, it follows that it must have passed through the "gateway" of Article 39 somewhere along the road, even if it carefully avoided mentioning this in all records of its journey (the resolutions it adopted) – indeed, even if those records have been carefully edited to omit any suggestion that it passed anywhere near Article 39.

Conventional interpretations of Chapter VII, reflected in some UN debates, offer some support for this view.²⁶ Where support is entirely lacking, however, is in real life: actual

²⁴ See, generally, Johansson, Patrik, "The Humdrum Use of Ultimate Authority: Defining and Analysing Chapter VII Resolutions," *Nordic Journal of International Law*, Vol. 78, No. 3 (2009), and the sources discussed therein. All "implied" Chapter VII resolutions analyzed by Johansson included preamble language considerably more "explicit" (though nevertheless unclear, as he notes) than appears in any of the Iran Resolutions. Johansson recommends that all Chapter VII resolutions explicitly describe the Peace Threat involved and state that the Security Council is acting under Chapter VII. An earlier version of his paper, presented at the 2008 meeting of the International Studies Association (San Francisco, California, March 26, 2008), is available [online](#). See, also, another substantially similar version of the same study by Mr. Johansson, "Equivocal Resolve? Toward a Definition of Chapter VII Resolutions," *Umea Working Papers in Peace and Conflict Studies* (May 30, 2008).

²⁵ See, discussion of this author's exchange with Dr. Alan J. Kuperman, [below](#), relating to Resolution 1737, adopted under Article 41. Other proponents of the "implied Article 39 resolution" argument apply similar reasoning to Article 40 resolutions, such as Resolution 1696. See, for example, the remarks of Dr. William Burke-White, in "Continued Analysis of 1696," *Carnegie Endowment for International Peace – Proliferation News* (August 24, 2006): "The Council explicitly indicates that it is invoking Article 40 'in order to make mandatory the suspension required by the IAEA.' There is no doubt in the Council's language that it is using its Chapter VII authority...." The "implied Article 39 resolution" argument necessarily is presented in its most extreme form when applied to the Iran Resolutions, which have little if anything else to support their validity. For example, contrast Resolution 1696 with the only three other Article 40 resolutions ever adopted by the Security Council, summarized in [footnote 27](#).

²⁶ See, for example, Cot, Jean-Pierre and Pellet, Alain, *La Chartre des Nations Unies: Commentaire article par article*, second edition, Paris: Economica (1991). See, also, Johansson, at [footnote 24](#).

Security Council practice. Never before Resolution 1696, and never since, has the Security Council adopted a resolution under Article 40 without also taking two important steps that it carefully avoided taking when it adopted Resolution 1696: cite Article 39, and declare the existence of a Peace Threat.²⁷

Even though the Security Council took neither step when it adopted Resolution 1696, proponents of the "implied Article 39 resolution" argument say it was sufficient simply to mention Article 40.²⁸ If so, one wonders why Russia and China bothered to insist that Resolution 1696 – and each of the later Iran Resolutions – be scrubbed clean of any arguable reference to Article 39 or its text. Under this "implied Article 39 resolution" argument, the mere mention of Article 40 in the resolution would render that considerable effort immediately pointless. If the purpose of this Russian and Chinese caution was to deny the United States a pretext for military action against Iran without further authorization (as had occurred in Iraq just three years earlier), interpreting Resolution 1696 as an "implied Article 39 resolution" would mean they had utterly failed in that effort. The United States could claim the same "green light" it had claimed to justify its attack on Iraq.

If the "implied Article 39 resolution" argument is not persuasive for Resolution 1696, is it nevertheless persuasive for the later Iran Resolutions? All of them are based on a more "muscular" remedies provision, after all – Article 41, not Article 40. Besides, at least publicly, China and Russia opposed a Peace Threat determination in Resolution 1696 only because they *objected to sanctions* – an objection that obviously had disappeared when they approved sanctions in all of the later Iran Resolutions. Should the later Iran Resolutions, therefore, be interpreted to imply a Peace Threat determination even if Resolution 1696 cannot be?

²⁷ **Article 40 Resolutions.** Three other Security Council resolutions cited Article 40, but each of them also cited Article 39 and made an explicit Peace Threat determination: *See*, Resolution 54 (1948), adopted during the Arab-Israeli war following the formation of Israel ("The Security Council ... Determines that the situation in Palestine constitutes a threat to the peace within the meaning of Article 39 of the Charter of the United Nations; ... Orders the Governments and authorities concerned, pursuant to Article 40 of the Charter, to desist from further military action..."); *see, also*, Resolution 598 (1987), adopted during the Iran-Iraq war ("The Security Council, ... Determining that there exists a breach of the peace as regards the conflict between Iran and Iraq, ... Acting under Articles 39 and 40 of the Charter:..."); *see, also*, Resolution 660 (1990), adopted immediately following the Iraqi invasion of Kuwait ("The Security Council,...Determining that there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait, ... Acting under Articles 39 and 40 of the Charter of the United Nations,..."). By contrast, neither Resolution 1696 nor any other Iran Resolution declares a Peace Threat determination, cites Article 39, or was adopted when an armed conflict involving Iran was occurring, just completed or imminent.

²⁸ *See, for example*, the remarks of Dr. William Burke-White, in "Continued Analysis of 1696," *Carnegie Endowment for International Peace – Proliferation News* (August 24, 2006): "The Council explicitly indicates that it is invoking Article 40 'in order to make mandatory the suspension required by the IAEA.' There is no doubt in the Council's language that it is using its Chapter VII authority...."

Nothing in the "implied Article 39 resolution" argument suggests that the test is easier for an Article 41 resolution: Reaching either Article 40 or Article 41 requires the Security Council to pass through the same Article 39 "gateway." Nor can any other relevant distinction be found between Resolution 1696 and the later Iran Resolutions. All of them excluded any reference to Article 39 or any of its threshold phrases or key words. None of the later Iran Resolutions added language that can fairly be interpreted as a Peace Threat determination. Each merely repeated the statement that had appeared in Resolution 1696: "Concerned by the proliferation risks presented by the Iranian nuclear programme ... [and] mindful of its primary responsibility under the Charter of the United Nations for the maintenance of international peace and security...." Such a statement cannot plausibly be interpreted as a Peace Threat determination, any more than it could be in Resolution 1696.

Moreover, regardless of what China and Russia may have stated publicly, their careful choice of resolution language was necessary only if their actual purpose was to prevent unauthorized US military action against Iran, not sanctions. Even if the Security Council had explicitly declared a Peace Threat in each Iran Resolution, after all, the Security Council could not have imposed sanctions on Iran without explicit Russian and Chinese approval; either of them can veto any Security Council resolution. The only way the US could have overstepped its bounds was the same way it had overstepped its bounds in Iraq in 2003: through [unauthorized military action](#). Though Russia and China may have been too polite to say so publicly, their desire to prevent another unauthorized US attack, not sanctions, is the only plausible explanation for their stubborn insistence on language, in each of the Iran Resolutions, that could not be interpreted as a Peace Threat determination. Avoiding a Peace Threat determination was extremely important if that was their objective (see [footnote 22](#)), entirely pointless if it was not. In this light, one must wonder whether Russia and China would agree with proponents of the "implied Article 39 resolution" argument that each of the Iran Resolutions they approved includes a Peace Threat determination – just like the three Security Council resolutions the United States had recently cited to justify its attack on Iraq.

Some of Iran's harshest critics have pressed the "implied Article 39 resolution" argument so far that they implicitly concede the absence of a Peace Threat determination in the language of the Iran Resolutions. A good example appears in an email to this author (December 27, 2009) from Dr. Alan J. Kuperman, who has strongly advocated an immediate [US attack on Iran](#):

UNSC Res. 1737...says it is acting under Article 41. ... Therefore, in Res. 1737, the UNSC implicitly made an Article 39 determination. If the UNSC had not implicitly made such a determination, it could not have taken action under Article 41.

If one starts, as Dr. Kuperman does, by assuming that one's conclusion must be correct – that Resolution 1737 validly imposed sanctions on Iran – and then reasons backward to

validate the assumptions necessary to support that conclusion, it follows that the Security Council must have "made an Article 39 determination" – no matter how strongly its carefully chosen words suggest precisely the opposite. If one instead reasons forward, properly, from a finding that the Security Council did not make a Peace Threat determination in Resolution 1737, it follows that Resolution 1737 did not validly impose sanctions on Iran. Whatever the direction of one's reasoning, Dr. Kuperman makes two important concessions. First, the Security Council may not take action under Article 41 unless it has determined that a Peace Threat exists. Second, no express Peace Threat determination can be discerned in the language of the Iran Resolutions.

The "implied Article 39 resolution" argument is not always so unpersuasive. The vast majority of Chapter VII resolutions include both an explicit Peace Threat determination and an explicit statement that the Security Council is acting under Article 39 or Chapter VII generally. All but a few include at least one statement or the other. But a few include neither. In those few resolutions, however, the Security Council's determination of a Peace Threat is nonetheless clear from the language and context. In Resolution 688 (1991), for example, the Security Council did not mention Article 39 or Chapter VII, but did state that it was "gravely concerned by [certain Iraqi military actions] ... which threaten international peace and security in the region..." and "[condemned] the repression of the Iraqi civilian population..., the consequences of which threaten international peace and security in the region"²⁹ In addition, Resolution 688 was adopted shortly after the 1991 Gulf War had ended, on the heels of several other Security Council resolutions that had explicitly declared a Peace Threat and were expressly based on Chapter VII. Just two days earlier, for example, the Security Council had adopted Resolution 687, in which it recited "its objective of restoring international peace and security" and stated that it was "acting under Chapter VII of the Charter." Resolution 1214 (1998) was another "implied Article 39 resolution." Though it did not cite Chapter VII, the Security Council expressed "its grave concern at the continued Afghan conflict, which [is] causing a serious and growing threat to regional and international peace and security."³⁰

Nothing approaching such language appears in any of the Iran Resolutions. Nor can a Peace Threat determination be implied from the circumstances. There is no armed

²⁹ Though the "Peace Threat" language in Resolution 688 goes well beyond that in any of the Iran Resolutions, some scholars nonetheless consider it insufficient to classify Resolution 688 as a Chapter VII resolution. *See, for example*, the sources cited on this point in Johansson, at [footnote 24](#).

³⁰ *See, also*, Resolution 161 (1961), adopted during a bloody uprising in the Congo in which the country's president and other officials had been murdered ("Deeply concerned at the ... widespread bloodshed in the Congo and the threat to international peace and security..."). *See, also*, Resolution 169 (1961), adopted during the same conflict ("Gravely concerned at the continuing deterioration of the situation in the Congo and at the prevalence of conditions which ... threaten international peace and security..."). *See, generally*, Johansson, at [footnote 24](#).

conflict involving Iran – in progress, just finished, or imminent – and the Security Council has never suggested there is.

If the "implied Article 39 resolution" argument is no stronger than this, why have the Iran Resolutions been generally accepted as valid? As this Part 2 has explained, there are several answers, all mistaken. Many people do not understand that the Security Council must determine that a Peace Threat exists before it has authority to act under Chapter VII. Others believe that a reference to any article of Chapter VII in a Security Council resolution necessarily implies that a Peace Threat has been found to exist. Still [others believe](#) that any Security Council action is binding, authorized or not – that the Security Council's adoption of a resolution conclusively establishes its authority to adopt that resolution. Ironically, the last of these explanations is both the most absurd and the closest to the truth: Security Council actions are often accepted as valid simply because it is not practically possible to challenge its authority to take those actions. Whether secure in this knowledge or honestly mistaken in their analysis, Russia and China concluded they could accomplish both of their key objectives by approving the Iran Resolutions: dole out tough remedies when pressed by the United States, yet prevent another United States "end run" to war by insisting on language that could not possibly be interpreted as a Peace Threat determination. In their effort to rein in the United States, however, Russia and China invalidated even the carefully limited resolutions they approved. Chapter VII authorizes the Security Council to intervene in a country's affairs only when it has determined that a Peace Threat exists, but not otherwise. The Security Council has not done this, and so none of the Iran Resolutions is binding – on Iran or anyone else.

This serious shortcoming could be cured, of course, if the Security Council some day were to determine what it has never yet determined: that Iran's nuclear program is a "threat to the peace, breach of the peace, or act of aggression." But absent something beyond doubts about the peaceful purpose of Iran's nuclear program (for example, evidence that Iran is actually seeking nuclear weapons), it appears unlikely that the Security Council will expressly declare that a Peace Threat exists – even if Russia and China should overcome their dread of another United States "end run." A flat refusal by Iran to disclose any information at all – even its formal withdrawal from the NPT – would leave Iran in no more "threatening" a position than India, Pakistan and Israel have occupied for many years. Those three states have refused for decades to sign the NPT or to disclose anything about their nuclear programs. Each is known to have actual nuclear weapons and missiles to deliver them. Each has had very strained relations and occasional wars with one or more of its neighbors – India and Pakistan with one another, Israel with several countries in the Middle East. Despite all of this, the Security Council has never adopted, or even considered, an Article 39 resolution aimed at the nuclear program of any of those three countries.

In this light, an Article 39 resolution based explicitly on Iran's unwillingness to take voluntary "confidence building measures" – as distinguished from Iran's violation of its Safeguards Agreement – would appear to much of the world as a high form of hypocrisy.

For this reason, Iran's position will be much stronger if it can obtain an authoritative confirmation that this is exactly what has happened so far. As discussed in Part 3, Iran's Safeguards Agreement lays out a convenient procedure for accomplishing this.

Part 3. A New Approach: Arbitration Under Iran's Safeguards Agreement

Preliminary Note: Some skeptical readers may conclude in advance that arbitration would be an ineffective solution to what is ultimately a political dispute. But firming up one's legal position can be helpful even in a political dispute. Some readers also may note that the answers to most questions recommended below for arbitration are already well-known to the parties directly concerned – Iran, the IAEA, and the Security Council. As the example below will make clear, an arbitration ruling may nevertheless be useful so that the public can hear these answers from an independent authoritative source, rather than merely from a protesting Iran.

Each Iran Resolution includes at least one statement – sometimes several – that Iran has violated an IAEA directive, and at least several assertions suggesting to all but the most careful and well-informed readers that Iran is thwarting the IAEA's efforts to enforce Iran's Safeguards Agreement. This Part 3 explains how Iran can obtain an independent arbitration ruling that such assertions often are incorrect and misleading.

The Iran nuclear dispute is often presented less than clearly in the lengthy preambles to the Iran Resolutions. A good example began with the IAEA Board resolution that formally "referred" Iran's nuclear file to the Security Council in early 2006 (GOV/2006/14). The IAEA Board stated that, in order for "confidence [to be] built in the exclusively peaceful nature of Iran's programme," the Board "deems it necessary" for Iran to take several "confidence building measures:" suspend enrichment and reprocessing, reconsider whether to build a heavy water reactor, ratify and implement the Additional Protocol, and take various "transparency measures...which extend beyond the formal requirements of the Safeguards Agreement and Additional Protocol, and include such access to individuals [and] documentation ... as the Agency may request...." The Board expressly acknowledged that each of these "confidence building measures" would be "voluntary and non-legally binding." For this reason, it could not and did not require Iran to take any of them. But the Board instructed the Director General to tell the Security Council just the opposite: "The Director General [shall] report to the Security Council of the United Nations that these steps are required of Iran by the Board...." (Emphasis added.) The dutiful Director General's misstatement to the Security Council was soon reflected in Security Council Resolution 1696: "The Security Council ... calls upon Iran without further delay to take the steps required by the IAEA Board of Governors in its resolution GOV/2006/14....[and] demands that Iran shall suspend all enrichment-related and reprocessing activities...." (Emphasis added.)

Since then, as the Iran nuclear dispute has moved up and down the imaginary chain of command (see [Part 1](#) of this article), Iran's failure to take these voluntary steps has been

repeatedly cited by both the [Security Council](#) and the [IAEA](#) as a serious violation of the resolutions adopted by both bodies. By the time the Security Council adopted Resolution [1929](#) four years later, its displeasure had ballooned to this:

***Noting** with serious concern that, as confirmed by the reports of 27 February 2006 ([GOV/2006/15](#)), 8 June 2006 ([GOV/2006/38](#)), 31 August 2006 ([GOV/2006/53](#)), 14 November 2006 ([GOV/2006/64](#)), 22 February 2007 ([GOV/2007/8](#)), 23 May 2007 ([GOV/2007/122](#)), 30 August 2007 ([GOV/2007/48](#)), 15 November 2007 ([GOV/2007/58](#)), 22 February 2008 ([GOV/2008/4](#)), 26 May 2008 ([GOV/2008/15](#)), 15 September 2008 ([GOV/2008/38](#)), 19 November 2008 ([GOV/2008/59](#)), 19 February 2009 ([GOV/2009/8](#)), 5 June 2009 ([GOV/2009/35](#)), 28 August 2009 ([GOV/2009/55](#)), 16 November 2009 ([GOV/2009/74](#)), 18 February 2010 ([GOV/2010/10](#)) and 31 May 2010 ([GOV/2010/28](#)) of the Director General of the International Atomic Energy Agency (IAEA), Iran has not established full and sustained suspension of all enrichment-related and reprocessing activities and heavy water-related projects as set out in resolutions [1696](#) (2006), [1737](#) (2006), [1747](#) (2007) and [1803](#) (2008) nor resumed its cooperation with the IAEA under the Additional Protocol, nor cooperated with the IAEA in connection with the remaining issues of concern, which need to be clarified to exclude the possibility of military dimensions of Iran's nuclear programme, nor taken the other steps required by the IAEA Board of Governors, nor complied with the provisions of Security Council resolutions [1696](#) (2006), [1737](#) (2006), [1747](#) (2007) and [1803](#) (2008) and which are essential to build confidence, and **deploring** Iran's refusal to take these steps, (Emphasis in original.)*

A casual reader may be forgiven for not noticing that neither the preceding paragraph, nor any of the IAEA reports or Security Council resolutions it cites, states that Iran is breaching any obligation under its Safeguards Agreement.³¹ If Iran were to point this out,

³¹ **IAEA Director General Reports.** Several of these IAEA Director General's reports mention Iran's pre-October 2003 disclosure violations, and complain that Iran has not cooperated as diligently as expected with the IAEA's effort to learn more about those violations. But no report claims that Iran's conduct of its nuclear program after October 2003 has failed to comply with its Safeguards Agreement. The IAEA eventually verified that none of the nuclear material concealed until 2003 had been diverted to non-peaceful uses, and later IAEA reports routinely verify the same thing about all of Iran's declared nuclear material, without exception. Several reports also mention the absence of information suggesting that any undeclared nuclear material exists (*see, for example*, paragraphs 54 and 57 of IAEA Director General's report dated November 15, 2007 ([GOV/2007/58](#))), and no report suggests that any undeclared nuclear material exists.

A few reports mention more routine disagreements between IAEA inspectors and Iranian representatives (for example, IAEA complaints about delays in visa renewals for some inspectors – *see*, paragraph 23 of IAEA Director General's report dated August 31, 2006 ([GOV/2006/53](#)); Iranian complaints about too-frequent inspections (which generally are far more frequent in Iran than in other NPT-signatory countries) – *see, for example*, paragraph 7 of IAEA Director General's report dated August 31, 2006 ([GOV/2006/53](#));

(footnote continues on next page)

the reader might ignore its protest. An independent arbitration ruling making this fact clear might be more persuasive.

In a proper exercise of its Chapter VII authority, of course, the Security Council need not find non-compliance by Iran with its Safeguards Agreement. The Security Council could determine that Iran's nuclear program – compliant or not – is a Peace Threat and take IAEA-recommended measures against Iran simply by declaring them necessary "to maintain or restore international peace and security." Nonetheless, if the Iran Resolutions had not included preamble language suggesting that Iran was not complying with its Safeguards Agreement, it would have been very difficult to discern any valid basis for punishing Iran under Chapter VII. Future misstatements of Iran's Safeguards Agreement compliance – vague or clear, intentional or inadvertent – will be less likely if the Security Council and the IAEA understand that Iran can point to a binding arbitration ruling to establish the misstatement.

* * * * *

The Iran Resolutions have not persuaded Iran to curtail its nuclear program. Looking ahead, the Security Council appears to have nothing in mind except more of the same,

Iran's objections to certain inspectors – *see, for example*, paragraph 23 of IAEA Director General's report dated February 22, 2007 (GOV/2007/8)). Other disagreements, especially in earlier reports, relate to the IAEA's then-ongoing investigation into questions raised by Iran's pre-October 2003 disclosure violations – most important, according to the IAEA: the unexplained presence of low-enriched uranium (LEU) and highly-enriched uranium (HEU) particles on equipment that Iran had acquired from Pakistan's A.Q. Khan in the 1990s – *see, for example*, paragraph 5 of IAEA Director General's report dated August 26, 2003 (GOV/2003/63); and Iran's efforts to import, manufacture or use P-1 and P-2 design centrifuges. In reports issued over the ensuing several years, with minor exceptions, the IAEA Director General confirmed that such pre-October 2003 questions had been answered to his satisfaction (*see, for example*, IAEA Director General's report dated November 15, 2007 (GOV/2007/58), and paragraphs 11, 24, 29, 34, 53 of IAEA Director General's report dated February 22, 2008 (GOV/2008/4)). Long before the IAEA had closed its investigation into Iran's pre-October 2003 disclosure violations, however, it had opened a separate new inquiry (which still continues) into a possible "military dimension" of Iran's nuclear program (*see*, discussion of the "alleged studies" at [footnote 38](#)).

The IAEA has also complained at times that Iran's repeated objections to designated IAEA inspectors "hampers the inspection process" (*see, for example*, the IAEA Director General's report dated September 6, 2010 (GOV/2010/46), at paragraph 37), though the Director General has never considered the matter serious enough to refer it to the IAEA Board as prescribed in Article 9(a)(iii) of Iran's Safeguards Agreement. Finally, the IAEA has complained at times that Iran's "cooperation has been reactive rather than proactive" (*see*, paragraph 42 of IAEA Director General's report dated November 15, 2007 (GOV/2007/58)), though it has not alleged any actual violation of Iran's Safeguards Agreement when it makes this complaint.

Note: As mentioned in most or all IAEA reports after March 2007, Iran and IAEA also disagree on a more important issue: which version of Code 3.1 applies – a dispute that should be presented for decision by the arbitration panel as discussed in this Part 3. [Footnote 33](#) describes this Code 3.1 dispute in more detail, as well as a related but distinct IAEA complaint about Iran's failure to cooperate with the IAEA's design information verification efforts with respect to declared facilities, whether or not Iran had been required to declare the facility as early as it did.

and it appears unlikely, for the time being, that the United States will take matters into its own hands. The resulting impasse has left all parties frustrated and stubborn.

Nevertheless, this is a period of relative calm. Over four years have passed since the first Iran Resolution was adopted, with escalating tension but no major incident – and still no evidence of a secret Iranian nuclear weapons program. Despite some last-minute [sword-rattling](#), Iran's Bushehr reactor recently commenced operation without incident, and most observers have adopted a [wait-and-see](#) attitude toward Iran's supply-and-return fuel [arrangement](#) with Russia. The prospect of imminent settlement talks has even generated some limited optimism, well-founded or not. This may be an auspicious time to look for another way to narrow or resolve this dispute.

If the parties (or at least Iran) cast about for better solutions, they will quickly find useful guidance in Chapter VI of the UN Charter, entitled "Pacific Settlement of Disputes." An especially appealing piece of advice appears in Article 36(2):

The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.

One need not look far. Article 22 of Iran's Safeguards Agreement spells out just such a procedure:

Any dispute arising out of the interpretation or application of this Agreement, except a dispute with regard to a finding by the Board under Article 19 or an action taken by the Board pursuant to such a finding... shall, at the request of either [party], be submitted to ... [binding arbitration].

The Article 22 procedure is straightforward. Each party designates an arbitrator, and those two designate a third, who chairs the arbitration panel. If a party fails to designate an arbitrator, or the first two fail to designate the third, before specified deadlines, the President of the International Court of Justice will do so on either party's request. Though Article 22 does not require this, the arbitrators are likely to be three highly respected jurists from countries not involved in the dispute. Once constituted, the arbitration panel lays down procedural rules, hears the case, and decides by a two-thirds vote. Its decision is binding.

Only one type of dispute is exempt from arbitration under Article 22: "a dispute with regard to a finding by the [IAEA] Board under Article 19 [that the IAEA is unable to verify Iran's non-diversion of nuclear material] or an action taken by the Board pursuant to such a finding." Several times the IAEA has reported such a finding to the Security Council. Just as often, Iran has disputed the IAEA's finding and its right to report it. Iran

appears to be unaware that its protests are both ineffective and unnecessary. It has no right to prevent the IAEA from reporting such a finding to the Security Council,³² nor any reason to bother trying. As explained in [Part 1](#) of this article, the making of such a report does not authorize the Security Council to enforce Iran's Safeguards Agreement, and the Security Council's Chapter VII authority is the same whether such a report is made or not. Challenging the IAEA's claimed inability to verify non-diversion, or its right to report such a finding, accomplishes nothing but to create a "dispute" that is exempt from arbitration under Article 22. Arbitration does not become unavailable merely because the IAEA has made or reported a "finding" under Article 19. It becomes unavailable only if a dispute arises regarding the finding, or regarding "an action taken by the Board pursuant to the finding."

For this reason, if Iran decides to request arbitration, it should first eliminate the "dispute" it has pointlessly created – by acknowledging simply that the IAEA has found itself unable to verify Iran's non-diversion and that the IAEA has a right to report its inability to the Security Council. As will become clear below, these concessions will not affect Iran's arbitration arguments. Iran need not concede its right to dispute other "actions" that the IAEA may later take, but there is nothing to dispute unless and until the IAEA takes such an action.

If Iran's stance on the IAEA's non-diversion reports is "clarified" as just suggested, and probably even if not, these key questions will fall outside the Article 19 exemption from arbitration:

Question 1. *Does Iran's Safeguards Agreement grant the UN Security Council any authority to enforce the Agreement?*

Question 2. *Does Iran's Safeguards Agreement authorize the IAEA to impose additional obligations on Iran if the IAEA finds itself unable to verify Iran's non-diversion of undeclared nuclear material but does not contend that its inability has occurred because Iran is failing to perform its obligations?*

Question 3. *Does Iran's Safeguards Agreement authorize the IAEA to restrict Iran's right to enrich or reprocess uranium?*

³² Even if Article 19 did not authorize such reports, the IAEA has several independent bases for making them. *See, for example*, Articles III(1), III(1)(b), III(2), V, VI(1), VI(2), VII(2), VIII(2), IX and XII(1) of the [Agreement Governing the Relationship between the United Nations and the International Atomic Energy Agency](#). *See, also*, Article III(B)(4) of the [IAEA Statute](#).

Question 4. *Does Iran's Safeguards Agreement require Iran to comply with the revised version of Code 3.1?*³³

³³ **Code 3.1 Dispute.** The "revised" version of Code 3.1 essentially requires disclosure of a nuclear facility as soon as a country has decided to build it. The original (1976) version requires disclosure only 180 days before nuclear material is introduced into the facility. Iran voluntarily complied with the revised version for several years (February 2003 to March 2007), but ceased when Iran's parliament (Majlis) formally rejected it. The IAEA insists that Iran may not revert to the original Code 3.1 without the IAEA's consent.

It should be noted that the IAEA makes an additional argument – related to the Code 3.1 dispute but nevertheless based on the Safeguards Agreement itself. The IAEA complains that Iran is not cooperating fully with the IAEA's efforts to verify design information for certain declared facilities, which the IAEA argues Iran must do whether or not Iran had been required to declare the facility as early as it did. *See, for example*, paragraphs 12-14 and 18 of IAEA Director General's report dated May 23, 2007 (GOV/2007/22); paragraphs 8-9 of IAEA Director General's report dated February 19, 2009 (GOV/2009/8); paragraphs 7, 13 and 20 of IAEA Director General's report dated June 5, 2009 (GOV/2009/35); paragraphs 11 and 26 of IAEA Director General's report dated August 28, 2009 (GOV/2009/55).

Iran and IAEA Arguments on Code 3.1 Dispute. Presented in more detail, the arguments of Iran and the IAEA on the Code 3.1 issue are likely to be essentially as follows. References are to [Iran's Safeguards Agreement](#).

Iran probably would argue that (1) there is no dispute that Iran's Safeguards Agreement itself did not become effective until it was ratified by Iran's parliament (Majlis), which occurred nearly a year after the Agreement had been signed by Iran's representative to the IAEA (*see*, Article 25 and preliminary Note 2); (2) Articles 24(b) and 24(c) provide that any amendment to the Safeguards Agreement must also be approved by the "Government of Iran" and "shall enter into force on the same conditions as entry into force of the Agreement itself," which means that an amendment becomes effective only when "written notification [has been given by the Government of Iran to the IAEA] that Iran's statutory and constitutional requirements for entry into force have been met," as required under Article 25; (3) no such notification was ever given with respect to revised Code 3.1 (and those "statutory and constitutional requirements" in fact were never met, as the IAEA knew); (4) although Article 39 provides that Subsidiary Arrangements may be amended without amending the Agreement itself, Article 39 also provides that amendments of Subsidiary Arrangements, just like amendments of the Agreement itself, require "agreement between the Government of Iran and the [IAEA];" (5) nothing in the Agreement provides that "Government of Iran" approval may be given for amendments of a Subsidiary Arrangement in a different way from how "Government of Iran" approval must be given for amendments of the Agreement; (6) since the "Government of Iran" never approved the revised version of Code 3.1 in the manner required for approval of Agreement amendments (as the IAEA knew), it never became binding on Iran, and so Iran's voluntary compliance with revised Code 3.1 could be terminated at any time, which Iran did in March 2007 by notifying the IAEA that Iran's Majlis had formally disapproved revised Code 3.1; and (7) Iran's voluntary compliance with revised Code 3.1 for several years, approved only by Iran's IAEA representative, did not "estop" Iran later from enforcing the Agreement's requirement that amendments to Subsidiary Arrangements be approved by the "Government of Iran," since Iran's IAEA representative had no authority to modify this amendment-approval requirement and neither he nor the Government of Iran ever represented to the IAEA that he did.

The IAEA probably would argue that (1) unlike the Agreement itself and amendments to the Agreement, Subsidiary Arrangements and amendments to Subsidiary Arrangements customarily have been approved by a country without formal satisfaction of the country's "statutory and constitutional requirements for entry into force;" (2) Iran had acknowledged the validity of this "informal" approval process for Subsidiary Arrangements decades earlier by agreeing (through its IAEA representative) to Iran's original Subsidiary Arrangements without seeking or receiving formal approval from Iran's Majlis; (3) Iran again acknowledged the validity of this "informal" approval process for Subsidiary Arrangements by agreeing (through its IAEA representative) in February 2003 to observe revised Code 3.1 without seeking or

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Iran's position appears all but unassailable on the first three questions, and solid though far from certain on Question 4.

Question 1 (whether the Security Council has authority to enforce the Safeguards Agreement) would not ask the arbitration panel to rule on the Security Council's authority under the UN Charter or on any other basis outside Iran's Safeguards Agreement. This would be outside the panel's jurisdiction. Question 1 would ask only that the panel interpret Iran's Safeguards Agreement to determine what enforcement authority, if any, it grants to the Security Council – plainly within the panel's Article 22 authority.

Clearly the answer to Question 1 is "no." Any argument to the contrary would rest on the Security Council's authority under Chapter VII of the UN Charter, which would highlight the point made in [Part 1](#) of this article – indeed, highlighting that point would be the principal reason for posing Question 1. Identifying Chapter VII as the sole basis for Security Council action against Iran, in turn, would focus attention on the point made in [Part 2](#) of this article: unless the Security Council determines that a Peace Threat exists, which it has never done, it has no authority under Chapter VII to take action against Iran.

Question 2 (whether the IAEA may impose additional obligations on Iran if the IAEA finds itself unable to verify Iran's non-diversion of undeclared nuclear material but does not contend that its inability has occurred because Iran is failing to perform its obligations) would focus attention on the simple fact that nothing in Iran's Safeguards Agreement authorizes the IAEA to do this, and on the IAEA's flawed argument (discussed below) that its inability to verify non-diversion gives it "implied" authority to require Iran to make additional disclosures.

Question 3 (whether Iran's Safeguards Agreement authorizes the IAEA to restrict Iran's enrichment or reprocessing rights) would draw attention to certain indisputable but overlooked facts: (1) these are sovereign rights of Iran that exist separately from the NPT and Iran's Safeguards Agreement;³⁴ (2) Iran has never agreed to restrictions on these

receiving formal approval from Iran's Majlis; (4) Iran yet again acknowledged the validity of this "informal" amendment process by failing to inform the IAEA (until Iran formally notified the IAEA in March 2007 that it would no longer observe revised Code 3.1) that Iran considered its observance of Code 3.1 to be voluntary and revocable unless and until revised Code 3.1 had been ratified by Iran's Majlis; and (5) since the amendment to Code 3.1 had thus become effective, it could not be amended again (to revert to the original Code 3.1) absent an "agreement between the Government of Iran and the [IAEA]," as required under Article 39.

A key document in this Code 3.1 dispute is the February 26, 2003 letter from Iran to the IAEA in which Iran informed the IAEA that it would observe revised Code 3.1. To this writer's knowledge, that letter remains non-public, and the IAEA lacks authority to publicize it without Iran's consent. That letter, and other confidential information, undoubtedly would be reviewed by an arbitration panel.

³⁴ *Iran's Enrichment Rights*. Even writers who acknowledge the "sovereign right" source of Iran's enrichment rights sometimes consider as well the extent to which enrichment rights are "granted" under Article IV(1) of the NPT. *See, for example*, Miller, Steven E. "Proliferation Gamesmanship: Iran and the Politics of Nuclear Confrontation." *Syracuse Law Review* 57, No. 3 (Spring 2007), at pages 551-599. An

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rights under Iran's Safeguards Agreement (or any other document); and (3) even if the IAEA believes these rights are restricted under the NPT itself (which Iran disputes), the IAEA has no authority to enforce the NPT apart from Iran's Safeguards Agreement.

Question 4 (which version of Code 3.1 applies) would be presented principally because it should be resolved once and for all, even if the arbitrators rule against Iran. Each IAEA report after March 2007 devotes considerable attention to the issue.³⁵ Even if Iran is not entirely confident on this question, omitting it would be pointless cherry-picking, since Iran's reluctance probably would induce the IAEA to demand that it be added.

Iran should strongly consider demanding that all four questions be arbitrated under Article 22. The IAEA could not reject or ignore Iran's arbitration demand, since the procedure is unambiguously required upon either party's request. Nor could Iran's right to arbitration be denied by the Security Council. As explained in [Part 1](#) of this article, the Security Council has no authority under Iran's Safeguards Agreement to do so. Nor under the UN Charter: No Article would explicitly authorize the Security Council to block arbitration, especially in the absence of a Peace Threat determination. Article 36(2), quoted above, clearly would encourage the Security Council to support arbitration, not block it. So would Article 95: "Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future." Thus, the decision to request arbitration lies entirely in Iran's hands, and it may do so

early draft of Mr. Miller's article may be found [online](#). It rarely makes a practical difference which source of Iran's enrichment rights the writer chooses (sovereign rights or NPT Article IV(1)), so long as he ultimately concludes that the only restrictions on such rights in the NPT may be found in NPT Article II (which, in essence, prohibits a non-nuclear weapons country from acquiring nuclear weapons). The source does make a difference, however, if the writer ignores the "sovereign right" basis of Iran's enrichment rights, purports to find those rights only in NPT Article IV(1), and then argues that this Article IV(1) "grant" of enrichment rights may be "revoked" because Iran was found (years ago) to have been in non-compliance with its Safeguards Agreement. *See, for example*, Perkovich, George, "[Defining Iran's Nuclear Rights](#)," *Carnegie Endowment for International Peace*, September 2006, discussed above in [Part 1](#).

As Dr. Miller points out, although the United States has placed "tremendous focus on stopping the Iranian enrichment program," an NPT-signatory country's right to enrich uranium was unambiguously conceded long ago by the Chief US Negotiator, William Foster, when the NPT was being negotiated and drafted: "Neither uranium enrichment nor the stockpiling of fissionable materials in connection with a peaceful program would violate Article II so long as these activities were safeguarded under Article III." Iran's enrichment activities, of course, are safeguarded under Article III. (Foster quotation is from Shaker, Mohamad I., "The Iranian Nuclear Crisis: Is There a Way Out?," paper presented to the Pugwash Workshop on "Nuclear Non-Proliferation and Disarmament: The Role of Europe," Royal Netherlands Academy of Arts and Sciences, Amsterdam (June 7-8, 2006).)

³⁵ *See, for example*, the IAEA Director General's report dated September 6, 2010 ([GOV/2010/46](#)), at paragraphs 30-33. *See, also*, the discussion of the parties' Code 3.1 dispute at [footnote 33](#).

whether its "file" remains "referred" to the Security Council or has been "returned" to the IAEA.³⁶

Obviously a request for arbitration presupposes that the parties cannot settle their differences by negotiation. Left alone, the Iran/IAEA relationship might not have deteriorated that far. But the "referral" of their disagreements to the Security Council has effectively prevented these four key questions from being resolved by negotiation. Each Iran Resolution includes a hopeful statement that the dispute can be resolved peacefully, and a recommendation that the IAEA continue its efforts do so. But the IAEA's "negotiating" authority is practically limited to insisting that Iran capitulate to the Security Council's inflexible demands. Negotiation has become confrontation, and the IAEA has been reduced in status to a mere messenger.

In this light, arbitration appears far more promising than maintaining the status quo and occasionally holding "settlement talks" whose success will depend on compromises that appear less and less likely as more time passes (for example, the United States' formal acknowledgement of Iran's enrichment rights). An arbitration ruling, coupled with a clear understanding that the Security Council so far has overstepped its bounds, not only would resolve Iran's most important disagreements with the IAEA, but could restore the IAEA's status as a fully empowered agency capable of resolving its differences directly with Iran. Nor is there any reason that arbitration cannot proceed in parallel with other settlement efforts.

To be sure, Iran's arbitration request probably would provoke a harsh response from its critics – something essentially like this:

Iran has for many years defied the International Atomic Energy Agency and the UN Security Council. It adamantly refuses to disclose information about its nuclear program that other countries routinely report, all the while insisting it has nothing to hide. It is fair to ask this simple question:

³⁶ Contrary opinions abound on Internet blogs – many imaginative, some seemingly sound, all predictably lacking any citation of authority. *See, for example*, this September 22, 2010 comment by "MWG" at the [Arms Control Wonk website](#): "Iran violated its safeguards agreement, deliberately and repeatedly, and was reported to the UN Security Council. Once that happens, arbitration is no longer relevant. The Board of Governors has adjudicated the case." *See, also*, Fry, James D., "[Arbitrating Arms Control Disputes](#)," *The Free Library* (2008): "Critics will read this [Article 19] exception [to arbitration under Article 22] and claim that, once a dispute gets sufficiently dangerous (to the point where the Security Council would be warranted in considering getting involved), the parties can no longer submit the dispute to arbitration. This indeed would be the case where the Board has made a finding of non-compliance...." Why this "indeed would be the case" is left entirely unexplained. Article III(2) of the [Agreement Governing the Relationship between the United Nations and the International Atomic Energy Agency](#) provides that "the Agency shall report to the Security Council and the General Assembly any case of non-compliance within the meaning of Article XII, paragraph C, of its Statute." But neither that Agreement nor any other document provides that such a "report" either empowers the Security Council to decide such a dispute or eliminates the IAEA's authority to do so.

If Iran has nothing to hide, why does it refuse to tell the world what it is doing? Rather than try to dispel the suspicion it has created, Iran has demanded a confirmation that it is not required to cooperate.

It might seem advisable that Iran not invite such a critical response. But if one removes the final sentence, this does not differ from what already appears nearly every day in the Western press, to which Iran customarily responds with either indignant silence or angry denials that often do it more harm than good. If Iran can establish, through an arbitration ruling issued by a distinguished panel of neutral jurists, that its firm stance on these four questions reflects nothing more than a correct interpretation of its Safeguards Agreement, many observers are likely to reconsider which side is being stubborn.

The IAEA's Arbitration Argument. The text of Iran's Safeguards Agreement will provide no support for the IAEA's position on the first three questions, and shaky support on the fourth (the Code 3.1 question). As in the past, the IAEA probably would fashion an argument based on two assumptions – the first deemed so self-evident that it need not even be stated, the second saved for late in the argument so it can be presented as if it were a conclusion: (1) indefinite uncertainty about undeclared nuclear material is not an acceptable outcome under Iran's Safeguards Agreement; and (2) Iran's past disclosure violations entitle the IAEA to expand Iran's disclosure obligations and impose restrictions on its nuclear program.

From these assumptions, the IAEA's argument probably would proceed essentially as follows:

Our essential duty under Iran's Safeguards Agreement is to determine whether Iran has diverted nuclear material – declared or undeclared – to non-peaceful uses. We cannot perform this duty because Iran's concealment, until late 2003,³⁷ of nuclear material, facilities and activities

³⁷ ***Pre-October 2003 Disclosure Violations.*** The long-running disclosure violations reluctantly acknowledged by Iran in late 2002 and 2003 involved natural uranium it had purchased from China in 1991. (Many believe the IAEA also faulted Iran for not having declared its Natanz and Arak facilities revealed at the same time, but this is incorrect – see footnote 40.) Iran claimed it had believed that this uranium was exempt from disclosure because Article 95 of Iran's Safeguards Agreement provides that no advance notification of importation is required if the imported nuclear material will yield less than one effective kilogram of uranium (the amount purchased from China yielded only 0.13 effective kilogram – see, paragraph 33 and footnote 6 of IAEA Director General's report dated June 6, 2003 (GOV/2003/40)). The IAEA pointed out, however, that Article 34(c) of Iran's Safeguards Agreement requires certain reports regardless of the quantity involved (see, paragraphs 13, 16 and 17 of IAEA Director General's report dated June 6, 2003 (GOV/2003/40)). Iran's unreported importation of this Chinese uranium resulted in numerous additional disclosure violations, since Iran had thereupon become obligated to declare each facility where the uranium was thereafter received, stored, processed, used or reprocessed.

Though it acknowledged its pre-October 2003 disclosure violations, Iran explained that it had been difficult or impossible to acquire equipment or uranium openly from other countries after it restarted its nuclear program in the late 1980s – even including the Eurodif enrichment plant in France, in which the Shah had
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that it was obligated to report has left us justifiably uncertain even today whether Iran has declared all of its nuclear material. The suspicion created by Iran's past disclosure violations will remain until Iran cooperates fully to help us dispel it. Additional information uncovered during our investigations, and in the "alleged studies"³⁸ later revealed to us by third parties, have raised still more questions that must be answered to satisfy us that Iran's nuclear material is being used exclusively for peaceful purposes. Because Iran was responsible for creating our

invested over \$1 billion in exchange for a promise of 10% of the output. As the IAEA later learned (*see, for example*, the IAEA Director General's report dated September 2, 2005 ([GOV/2005/67](#))), these difficulties had led Iran to do business with underground suppliers such as Pakistan's notorious A.Q. Khan during the last two decades of the twentieth century. Iran's belated disclosure of its contacts with Khan – well after the initial revelation of Iran's pre-October 2003 disclosure violations – led to numerous additional questions from the IAEA, extending its investigation far longer than either side had anticipated. The IAEA did not contend that Iran's interactions with Khan had been prohibited by the NPT or Iran's Safeguards Agreement, or that Iran had been required to report them. It nevertheless expressed considerable disappointment and frustration because, after its pre-October 2003 disclosure violations were revealed, Iran had promised to help the IAEA achieve "full transparency" concerning Iran's past and present nuclear program, without regard to what was required under Iran's Safeguards Agreement. The IAEA complained that Iran had been far less than "proactive" in its responses to many IAEA questions, making it unnecessarily difficult for the IAEA to achieve a full understanding of Iran's nuclear program. The IAEA's early findings led it to probe more deeply into certain matters, especially questions concerning "contamination" and Iran's centrifuge-enrichment activities (*see, footnote* 31). Before the IAEA had completed its extended investigation, it launched a separate new inquiry (which still continues) after learning in 2004 of other alleged pre-October 2003 activities that suggested Iran may have engaged in military-related nuclear research (*see, discussion of "alleged studies" at footnote* 38).

³⁸ ***Alleged Studies.*** As discussed in several IAEA reports (*see, for example*, IAEA Director General's report dated February 27, 2006 ([GOV/2006/15](#)), at paragraphs 32-40, and IAEA Director General's report dated May 26, 2008 ([GOV/2008/15](#))), the IAEA in 2004 launched a separate inquiry into a possible "military dimension" of Iran's nuclear activities. It has focused principally on the so-called "alleged studies," which consist mostly of computer files delivered by third parties to the IAEA. The IAEA has complained that "the constraints placed by some Member States on the availability of information to Iran are making it more difficult for the Agency to conduct detailed discussions with Iran on this matter." *See*, IAEA Director General's report dated August 28, 2009 ([GOV/2009/55](#)), at paragraph 19. The IAEA nevertheless reported that it had summarized for Iran many of the "alleged studies" files it had received, which the IAEA said contained information that "appears to be generally consistent" (*see*, IAEA Director General's report dated May 26, 2008 ([GOV/2008/15](#)), at paragraph 16) and "needed to be taken seriously" (*see*, IAEA Director General's report dated September 15, 2008 ([GOV/2008/38](#)), at paragraph 16). The IAEA acknowledged that the "alleged studies" did not suggest that Iran had diverted any nuclear material (*see*, IAEA Director General's report dated February 22, 2008 ([GOV/2008/4](#)), at paragraph 54), or that Iran otherwise had violated its Safeguards Agreement. It nevertheless asked Iran to answer questions voluntarily to dispel the IAEA's suspicion that Iran may have engaged in military-related nuclear research. Iran agreed to cooperate, and answered many questions concerning the "alleged studies" over the next several years. The IAEA later reported, however, that Iran largely ceased cooperating with this inquiry about four years later (August 2008). Based on its findings during that four-year period, the IAEA has not asserted that Iran diverted or failed to declare any nuclear material, or engaged in any other conduct prohibited by its Safeguards Agreement. It nevertheless has complained that Iran's answers have not yet established to the IAEA's satisfaction that all of Iran's nuclear material (declared or undeclared) has been devoted exclusively to peaceful purposes. *See, for example*, IAEA Director General's report dated May 31, 2010 ([GOV/2010/10](#)), at paragraphs 40-45, especially paragraph 44.

suspicion, it now must take reasonable confidence-building measures necessary to dispel it – even if those measures go beyond Iran's Safeguards Agreement obligations. Among other things, Iran must comply with the Additional Protocol and revised Code 3.1, suspend enrichment and reprocessing, and answer more questions about the "alleged studies."

We have authority to refer Iran's non-compliance to the UN Security Council, and we have done so. Accordingly, the Security Council has authority to compel Iran to comply with our requests, and it has done so. Iran unjustifiably refuses to comply with our requests and the Security Council's demands.

Iran's Arbitration Argument. Iran's argument predictably would open with a focus on the text of its Safeguards Agreement:

Iran's Safeguards Agreement states clearly what it must do and may not do. That is what Iran agreed to – no more, no less – and it is in full compliance with its obligations.

The IAEA learned in 2003 that Iran had made incomplete disclosures about its nuclear program during the last two decades of the twentieth century, ending in 2003. The IAEA did not claim that any of the activities involved had been prohibited by the NPT or Iran's Safeguards Agreement³⁹ – only that Iran should have disclosed them. Even so, Iran's disclosure violations were exaggerated by its critics. For example, despite numerous press reports that Iran had illegally concealed its Natanz and Arak facilities, the IAEA never agreed.⁴⁰ Nearly all of Iran's disclosure

³⁹ See, for example, Bali, Asli U., "The US and the Iranian Nuclear Impasse," *Middle East Report*, Vol. 241 (Winter 2006).

⁴⁰ ***Natanz and Arak:***

Natanz. Many commentators have argued that Iran's failure to declare its nuclear facility at Natanz earlier than it did was a violation of Iran's Safeguards Agreement. See, for example, Goldschmidt, Pierre, and Perkovich, George, "Correcting Iran's Nuclear Disinformation," *Carnegie Endowment for International Peace* (March 27, 2007). This is a complicated question on which the IAEA has never expressed agreement with those who make this charge. Nuclear material was introduced into the Natanz facility on June 25, 2003. See, IAEA Director General's report dated November 10, 2003 (GOV/2003/75). This means that, under the original Code 3.1 indisputably in effect until late February 2003, Natanz should have been declared to the IAEA by late December 2002 (180 days before nuclear material was introduced). Natanz's existence was first revealed by an Iranian rebel group four months before then, in August 2002. Iran confirmed this to the IAEA in September 2002, and arranged for the IAEA Director General to visit Natanz in October 2002. The planned visit was postponed for four months. The IAEA has never suggested that the postponement was Iran's fault or that Iran otherwise had backtracked on its offer to host a visit in October 2002. The Director General finally visited Natanz in late February 2003, and Natanz was formally declared then. If the Director General had visited Natanz in October as Iran had offered, presumably Natanz would have been formally declared then instead, well before the December 2002 180-day deadline. No Code 3.1 violation occurred when Natanz was declared, since no nuclear material was then present at the facility and,

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violations involved a small amount of uranium (.13 effective kilogram, as measured under Iran's Safeguards Agreement – 4.6 ounces) that Iran had purchased from China in 1991.⁴¹

*Over the next several years, Iran voluntarily answered hundreds of questions from the IAEA, permitted more extensive inspections than any other country in the world, and disclosed far more about its nuclear program than its Safeguards Agreement calls for. It still does. The IAEA eventually finished its investigation⁴² and *verified* that Iran had not diverted any declared nuclear material. It has routinely verified the same thing in every report since then.*

Contrary to the IAEA's assertions, it is not "required by the Safeguards Agreement... to verify that all nuclear material in Iran is in peaceful activities."⁴³ It is required only to determine whether or not it can make

obviously, it was impossible to know for certain when it would be introduced. If the IAEA had given Iran reason to believe it would be held to a February 2003 declaration date (in essence, that Iran would be blamed for the four-month postponement of the Director General's visit), Iran could later have avoided a Code 3.1 violation simply by delaying introduction of nuclear material into the Natanz facility for an additional two months (August 2003 instead of June 2003). One speculates that Iran did not bother with this delay because the IAEA had never indicated it would blame Iran for the four-month postponement of the Director General's visit. And the IAEA effectively never did: Notwithstanding the charge of a Code 3.1 violation by Messrs. Goldschmidt and Perkovich (and others), the IAEA has never expressed agreement with them in any report or resolution. *See, for example*, Bali, Asli U., "The US and the Iranian Nuclear Impasse," *Middle East Report*, Vol. 241 (Winter 2006): "In its June 2003 report [GOV/2003/40] following initial inspections of both sites, the IAEA did not find violations of Iranian reporting obligations related to the construction of facilities at either Natanz or Arak." Nor did the IAEA find such a reporting violation in any subsequent Board resolution or Director General's report.

Arak. During the IAEA Director General's visit in late February 2003, Iran declared two facilities at Arak (*see*, paragraph 30 of IAEA Director General's report dated June 6, 2003 (GOV/2003/40)) – a heavy water production plant then under construction (even though the IAEA acknowledged that heavy water production plants are not required to be declared under Iran's Safeguards Agreement – *see*, paragraph 5 and footnote 1 of IAEA Director General's report dated June 6, 2003 (GOV/2003/40)), and a heavy water research reactor (IR-40) on which construction was then scheduled to commence in 2004. The IAEA has never contended that either facility was declared later than required. (In several later reports, however, the IAEA did complain that Iran was improperly withholding updated design information on the IR-40 reactor – *see*, discussion of this issue in second paragraph of footnote 33).

⁴¹ *See*, footnote 37.

⁴² The IAEA identified the "two issues [that] remain key" as early as 2004 (*see*, IAEA Director General's report dated September 1, 2004 (GOV/2004/60), at paragraph 58): (1) the presence of suspicious radioactive particles on certain equipment imported by Iran; and (2) the extent of Iran's efforts to import, manufacture and use centrifuges of P-1 and P-2 design. *See*, IAEA Director General's report dated November 15, 2004 (GOV/2004/83), at paragraph 108. Both issues eventually were resolved to the IAEA's satisfaction. *See, for example*, IAEA Director General's report dated November 15, 2007 (GOV/2007/58), at paragraph 41. By then, however, the IAEA had identified the "alleged studies" as a new key issue. *See*, discussion of "alleged studies" at footnote 38.

⁴³ *See*, IAEA Director General's report dated May 31, 2010 (GOV/2010/10), at paragraph 40.

such a verification, and to do so if it can. If it cannot, the IAEA has authority to take certain actions and make certain reports, and it must report to the Security Council, among others, if it finds Iran is in "non-compliance" with its Safeguards Agreement.

Only once, in February 2006, has the IAEA reported Iran's "non-compliance" to the Security Council. Although the IAEA Statute also required the IAEA Board to "call upon [Iran] to remedy forthwith any non-compliance which it finds to have occurred," the IAEA Board did not do so – for a very good reason: Iran's reported "non-compliance" was based entirely on disclosure violations that, according to the IAEA itself, had ended more than two years earlier.⁴⁴ Although those violations have led the IAEA to examine Iran much more carefully ever since, it has never found "non-compliance" based on Iran's conduct of its nuclear program since 2003.⁴⁵ Instead, it misrepresents to the Security Council that Iran is "required" to take various actions that the IAEA itself acknowledges are entirely voluntary. The IAEA asks the Security Council to transform these voluntary steps into obligations by insisting that Iran's long-ago disclosure violations now require it to provide whatever information, and to accept whatever restrictions, the IAEA deems necessary to verify the absence of undeclared nuclear material.

The IAEA has no such authority under Iran's Safeguards Agreement – nor does the Security Council or anyone else. Although the IAEA now insists it is unacceptable, indefinite uncertainty about undeclared nuclear material is not only an acceptable outcome under Iran's Safeguards Agreement, but one that plainly was contemplated when the Agreement was drafted by the IAEA decades ago. Article 98(O), for example, explicitly excludes uranium "ore" from the definition of "nuclear material" that must be declared, and Article 33 states: "Safeguards under this Agreement shall not apply to material in mining or ore processing activities." Such exclusions would never appear in an agreement whose purpose was to detect undeclared nuclear material. Undoubtedly that is why the IAEA sought to remove them when detection of undeclared nuclear material became important to the IAEA many years later. Article 2(v) of the Additional Protocol, for example, requires extensive disclosures about uranium mines.

⁴⁴ See, [footnote 10](#).

⁴⁵ The IAEA does dispute the timing of Iran's reporting of nuclear facilities, which reflects the parties' disagreement on which version of Code 3.1 applies, but it has never suggested this alleged disclosure-timing violation amounts to "non-compliance." See, [footnote 33](#) for more detail on the Code 3.1 dispute.

Iran's obligations under its Safeguards Agreement may not be increased without its consent merely because the IAEA decided, many years later, to place greater emphasis on detecting undeclared nuclear material and devised a more burdensome inspection scheme to accomplish its new goal – including, for example, the Additional Protocol and revised Code 3.1. Much less does the IAEA's belated emphasis on detection entitle it to venture even beyond the Additional Protocol to ask unending questions about the so-called "alleged studies" files delivered to the IAEA by third parties several years ago. As the IAEA itself acknowledges, even if those files were not entirely fabricated, none of them suggests that Iran has diverted or failed to declare nuclear material, the subject matter of Iran's Safeguards Agreement. Although Iran nevertheless has answered many questions about those files, it is not willing – much less obligated – to reveal sensitive information about its conventional military capabilities merely because the IAEA considers this necessary to satisfy itself about the "alleged studies."

Iran does not dispute that it must declare its nuclear material as required under its Safeguards Agreement, and it has declared all of it. If the IAEA is not persuaded, Article 19 of Iran's Safeguards Agreement requires it "to afford the Government of Iran every reasonable opportunity to furnish the [IAEA] with any necessary reassurance" that Iran has not diverted nuclear material to non-peaceful purposes. The IAEA has afforded many such opportunities to Iran since 2003, and Iran has availed itself of many of them. But Article 19 does not require Iran to continue accepting every opportunity the IAEA may choose to offer. At some point – and that point was reached long ago – Iran fairly may ask that the IAEA accept the same inescapable fact it has accepted for many other countries: No matter what more Iran might disclose, it can never prove that it has no undeclared nuclear material, just as no other country can ever prove this. For dozens of countries, the IAEA has concluded that it cannot determine whether undeclared nuclear material exists. It claims to have reached the same conclusion for Iran. Just as for other countries, such a determination does not mean that Iran has violated its Safeguards Agreement, nor does it give the IAEA a right to impose additional obligations on Iran.

Iran's Safeguards Agreement authorizes the IAEA to report certain matters to the Security Council, but it does not authorize the Security Council to enforce or interpret the Agreement. Only the IAEA,⁴⁶ and now

⁴⁶ See, Articles XII.C and XIX.B of the IAEA Statute.

this arbitration panel,⁴⁷ has that authority. Iran acknowledges that the Security Council may act under the UN Charter if it determines Iran's nuclear program is a Peace Threat. When the Security Council next considers that threshold question, it should be told clearly what has been kept obscure in the past: Except for the parties' Code 3.1 disagreement, the IAEA does not claim that Iran's nuclear program has failed to comply with its Safeguards Agreement since late 2003, and Iran has no obligation to implement the Additional Protocol or to suspend enrichment or reprocessing. Nor, in Iran's opinion, is it required to observe revised Code 3.1. The arbitrators should now decide who is correct and their binding decision should promptly be reported to the Security Council. If the arbitrators rule as we expect, the Security Council will be obliged to acknowledge that it has no basis for demanding that Iran do any of these things.

Iran is very likely to prevail on the first three questions posed, and probably on the fourth (which version of Code 3.1 applies – a closer question). If so, Iran will have received independent confirmation of two important points: Not only does the Security Council lack authority to enforce Iran's Safeguards Agreement, but the Iran Resolutions have purported to enforce "obligations" that do not even exist. Many people who now believe Iran is unjustifiably defying the IAEA and Security Council will wonder this: "If the IAEA does not claim that Iran's nuclear program has ever been out of compliance with its Safeguards Agreement since 2003, and the Security Council has never said that its nuclear program is a Peace Threat, what, exactly, has Iran done to deserve sanctions?" Iran's critics, stripped of their convenient reply that Iran is violating its Safeguards Agreement, may find this question difficult to answer. The Security Council, in turn, may find it difficult to justify sanctions against Iran for declining to take actions that independent arbitrators have declared it is not required to take.

Part 4. From Arbitration to Resolution

Although no American politician who hopes for re-election would formally acknowledge Iran's enrichment rights, few would openly challenge a binding confirmation of those rights issued by an independent arbitration panel. The United States probably would continue to protest, cajole, threaten and work behind the scenes to thwart Iran's nuclear program. But many other countries probably would rely on the authoritative validation of Iran's position to increase their nuclear business with Iran. Nevertheless, when Iran considers how to proceed after a favorable arbitration ruling, it should anticipate an argument from critics that builds quickly to a dangerous conclusion:

⁴⁷ See, Article 22 of Iran's Safeguards Agreement.

*Our goal is a simple one shared by people everywhere: to prevent the spread of nuclear weapons. Today's ruling is a setback not for the IAEA, but for those whom it seeks to protect: all of us. Most countries willingly disclose the important information called for under the Additional Protocol and revised Code 3.1 – invaluable supplements to the nuclear monitoring scheme put in place when the world learned that Saddam Hussein had been developing nuclear weapons entirely undetected. When questions arise outside even these expanded disclosure requirements, most countries answer those questions too. They are willing, even eager, to show the world they are not seeking nuclear weapons. But not Iran. It refuses to disclose this information, and now the arbitrators have decided that it need not do so. There is only one important question, and it was not answered today: What is Iran trying to hide? Whatever it is, today's ruling makes clear that the IAEA cannot protect us from it. Nor can the Security Council – the arbitrators have ruled that this is none of its business. The United States may now *stand* as the world's *last defense* against a nuclear-armed Iran.*

If this "enforcement gap" response were to carry the day, Iran might end up wishing the arbitrators had ruled against it. Instead of a tense but inconclusive stand-off between Iran on the one side and the IAEA and Security Council on the other, the IAEA and the Security Council might be pushed aside entirely, with the battle recast as a stark conflict between Iran and the United States – the latter unrestricted by Iran's Safeguards Agreement, Chapter VII or anything else but easily inflamed American public opinion.

While such a response might strike Iran as nothing but more lawless American aggression, the US might receive substantially stronger support than Iran predicts. Many people who are skeptical of US motives nevertheless share at least one of its goals: non-proliferation of nuclear weapons. Chapter VII of the UN Charter may be too blunt a tool to accomplish this. The IAEA's remedies under Iran's Safeguards Agreement may be ineffectual. The NPT may be toothless.⁴⁸ All this and more may be true, but Iran's position will quickly erode if it fails to agree to a stronger monitoring scheme that promises to achieve the widely shared goal of nuclear non-proliferation.

Those who press for a US (or Israeli) attack on Iran are heartened by Iran's refusal to observe the Additional Protocol or revised Code 3.1. Correctly or not, their spoken or

⁴⁸ See, for example, Spies, Michael, "[Limits of the Non-Proliferation Regime – And Why Multilateralism is the Only Solution](#)," *Lawyers' Committee on Nuclear Policy* (February 9, 2006). Ironically, some commentators argue that the absence of an enforcement mechanism in the NPT leaves it even stronger than if enforcement mechanisms had been spelled out. See, for example, Calamita, N. Jansen, "[Sanctions, Countermeasures, and the Iranian Nuclear Issue](#)," *Vanderbilt Journal of International Law*, Volume 42, No. 5 (November 2009), in which the author argues that any country in the world may consider itself an "injured State" and take action against Iran to enforce the NPT and Iran's Safeguards Agreement.

unspoken question: "What is Iran trying to hide?" is answered by many suspicious observers each day: "Probably more than yesterday, and certainly more than a month ago or a year ago." With an authoritative validation of its enrichment rights in hand, Iran might reconsider whether it remains wise to hold out for a highly unlikely formal acknowledgement of those rights from the United States – all the while strengthening the "What is Iran trying to hide?" argument of Iran's most bitter opponents.

Required or not, Iran can exploit its predictable arbitration victory most effectively by agreeing to observe the Additional Protocol and revised Code 3.1. It will probably be rewarded promptly with greater cooperation from other countries, and soon will be entitled to insist that the IAEA verify non-diversion of all nuclear material – declared or undeclared – as the IAEA has promised to do within a reasonable time after Iran implements the Additional Protocol (provided, of course, that nothing suspicious has turned up).

It cannot be ignored that Iran has tried this approach before, though from a much weaker position: for limited periods, it previously suspended enrichment and complied with both the Additional Protocol and revised Code 3.1, but stopped because it had not received the anticipated benefits in return. Understandably, this has bred considerable skepticism within Iran. Nevertheless, if Iran takes the same steps after its position has been bolstered by an arbitration ruling that it is doing nothing wrong – rather than seriously weakened by recent revelations of disclosure violations stretching back more than a decade – the response is likely to be much more favorable.

Some Iran supporters oppose expanded disclosures for a different reason: Greater disclosure would reduce uncertainty about whether Iran has the capability to produce nuclear weapons. Such capability breeds respect, this group believes. Maintaining ambiguity about Iran's nuclear program may oblige other countries to treat Iran as if it has such capability whether it does or not. Japan is the example most often cited: It has made no apparent decision to develop nuclear weapons, but is widely understood to possess this capability. Some proponents of this view argue further that Iran should use this "cover" actually to develop nuclear weapons capability. Sooner or later, they acknowledge, Iran would need to withdraw from the NPT to complete the effort, but they are confident that Iran could avoid taking this revealing step until it had become too late to prevent it from producing a deliverable nuclear bomb. They point out that a country can get far down the road without actually violating the NPT, and presume that the United States would accept this acknowledged shortcoming of the NPT and stand by patiently as long as Iran does not cross this line.

Opponents of this view acknowledge that Iran will learn a great deal through its peaceful nuclear program that could be used for military purposes, just as Japan has, and do not disagree that Iran should pay close attention and take careful notes. But they oppose any effort to seek more than "inevitable" nuclear-military knowledge, or to limit disclosures in an effort to achieve "useful ambiguity" about Iran's nuclear-weapons capability. They

argue that US uncertainty about Iran's nuclear weapons capability might induce it to attack even if Iran has taken no steps at all to develop weapons – and in any case before Iran can put the finishing touches on a nuclear bomb. Japan, they point out, has diligently observed the Additional Protocol and revised Code 3.1 for many years.

* * * * *

Several years ago, those who warned that Iran could become the United States' next Iraq were said to underestimate the depth of Americans' skepticism toward trumped-up allegations that might be used to justify another Middle East war. Today, it is hard not to conclude that the American public's guard is down once again. Despite the absence of evidence, 7 in 10 Americans believe Iran already has nuclear weapons. Six in 10 agree that the US should bomb Iran if diplomacy and sanctions do not persuade it to give up its nuclear program – 25% would not even wait to find out.

The fact that Iran has not yet been attacked is nevertheless offered by some as proof that war fears have been overblown. Other factors may account for this, however: the weak US economy, the manpower and financial strains imposed by its current Middle East wars, the 2009 replacement of George W. Bush by Barack Obama, the frustrating stalemate in Afghanistan, the lingering (albeit fading) memory of fabricated WMD claims before the Iraq war. If one or more of these restraining factors were to disappear or decrease in significance, it is not clear how long the peace would last. This period of relative calm provides an opportunity for Iran to pull this dispute back from the Security Council, dispel false charges against it, re-establish its cooperation with the IAEA, attract more international support, and bring this too-long-running dispute to a successful close.

Some skeptics nevertheless argue that this hopeful view is hopelessly naive. The United States' real objective (regime change) has nothing to do with Iran's nuclear program, they insist, and so it will continue to move the goal posts no matter what Iran may do. Iran has already offered, after all, to observe the Additional Protocol if its enrichment rights are explicitly acknowledged. A favorable arbitration ruling, they predict, would not measurably improve Iran's chances of receiving that acknowledgement from the United States, and the ruling itself would not be an effective substitute. Disclosing more about its nuclear facilities will only provide valuable targeting information when the inevitable US attack occurs. Iran might just as well continue to demand its rights, refuse to disclose more information than it does now, hunker down and hope for the best.

Even if skepticism is warranted by the history of this dispute, it does not justify a head-in-the-sand response to this clear and present danger to Iran and its people.⁴⁹ Left

⁴⁹ *"At the approach of danger there are always two voices that speak with equal power in the human soul: one very reasonably tells a man to consider the nature of the danger and the means of escaping it; the other, still more reasonably, says that it is too depressing and painful to think of the danger, since it is not in man's power to foresee everything and avert the general course of events, and it is therefore better to*
(footnote continues on next page)

unchallenged, the United States is unlikely to change direction or even to slow down. Pressure is building for military action, and may become irresistible once most Americans conclude – as *inevitably they will* – that *"sanctions have not worked."* The 2012 presidential campaign (which will begin in 2011) undoubtedly will feature candidates vowing to respond more forcefully than their opponents to the "Iranian threat." After the election, the winner will be pressed hard to follow through. The window may soon be closing.

The course of action recommended here would be preferable to a continuation of Iran's stubborn passivity, which enables the United States to shape world-power public opinion with little effective resistance and heightens the risk of war each day it continues. Even if no broad resolution can be achieved, an arbitration ruling in Iran's favor would at least highlight the United States' ulterior purpose by exposing the weakness of its claim that Iran is violating its Safeguards Agreement. The US government might find itself unable to marshal sufficient support from the American public and other countries to launch an attack on Iran – just as support for the Iraq war might have fallen short if the baseless WMD claims had been exposed earlier.

In a more optimistic view, the steps suggested here may resolve the Iran nuclear dispute once and for all, well before the world reaches the brink of yet another avoidable war. In either case, the prospects for a peaceful resolution will be much brighter than they are today.

– *Eric A. Brill*

disregard what is painful till it comes, and to think about what is pleasant. In solitude a man generally listens to the first voice, but in society to the second."

Leo Tolstoy, *War and Peace*