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## **SPECIAL INSPECTIONS REVISITED**

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### **Abstract:**

Under comprehensive safeguards agreements (INFCIRC/153) a “special inspection” is an inspection that is additional to specified routine inspection effort, or involves access to information or locations in addition those specified for ad hoc and routine inspections. Special inspections offer an important mechanism for resolving matters that are beyond the scope of routine inspections.

In practice special inspections have been little used, and they have come to assume a narrow meaning, with substantial accusatory and political overtones. In 1992 the IAEA Board of Governors concluded that special inspections should occur only on “rare occasions”. The last formal request to undertake special inspections occurred in 1993.

Since the early 1990s the safeguards system has undergone substantial evolution, and the importance to safeguards credibility of greater availability and use of information, and greater physical access for inspectors, is now understood and accepted.

This paper discusses whether the high threshold for special inspections assumed in past Board deliberations is consistent with contemporary expectations for the safeguards system and for cooperation between states and the Agency. The paper also discusses the relevance of special inspections now that the additional protocol – with its complementary access mechanism – has entered widespread application.

### **1. INTRODUCTION**

The special inspection provisions of INFCIRC/153 are notable for having been **formally** invoked only twice, in respect of Romania in 1992 and the DPRK in 1993. In the case of Romania, the government invited the IAEA to undertake a special inspection to resolve matters that had occurred under the previous Romanian political regime. In the case of the DPRK, the DPRK did not agree to the requested inspections, and eventually the issue was overtaken by the conclusion of the Agreed Framework between the US and the DPRK.

Reasons for the lack of formal use of the special inspection provisions are not clear, but the situation appears to have become self-reinforcing, i.e. the longer the provisions were **not** used, the more they came to be regarded as being available only in very exceptional circumstances. This perception may have been strengthened by the 1993 case which occurred in adversarial circumstances – and by the discussion in the Board in 1992 that special inspections should occur only on “rare occasions”.

Thus, it is the general perception that the threshold for a special inspection is very high – however, as outlined below, there have been instances where what are technically special inspections have been conducted **informally**, without the Agency and the states concerned regarding them as such. While

some may question the precedential value of such inspections, they clearly show the possibility of a non-contentious, cooperative approach to special inspections – as also demonstrated in the Romanian case.

The fundamental importance of greater access for safeguards inspectors was recognised early in the program to strengthen safeguards. In the deliberations on the Model Additional Protocol in Committee 24 of the Board of Governors, the concept of **complementary access** was developed to redress the shortcomings in the access rights given by INFCIRC/153.

Complementary access this is available only in those states that conclude an Additional Protocol (AP). It is hoped all states will conclude APs, but this is taking longer than desirable, and some states have indicated they have no intention of doing so in the near future. Hence, the Agency and Member States need to consider how to give the greatest effect to strengthened safeguards – which apply to **all** states subject to comprehensive safeguards agreements – in the case of states that do not have an AP in place. In this context, the circumstances in which special inspections may be used warrant further consideration.

Although the Board’s 1992 discussions imply a very high threshold for special inspections, the safeguards system has undergone substantial evolution in the decade since then, and the importance to the credibility of safeguards of greater availability and use of information and greater physical access for safeguards inspectors is now understood and accepted. Safeguards have not stood still for states outside the AP. The need for effective safeguards is just as great – if not greater – for these states. While it is obvious that special inspections cannot become **regular** occurrences, and cannot substitute for complementary access, it can be questioned whether the very high threshold assumed in the 1992 Board deliberations is consistent with contemporary expectations for the safeguards system and for the level of cooperation that states extend to the Agency.

## 2. INFCIRC/153 PROVISIONS

Paragraph 73 provides that the Agency may make special inspections:

- (a) in order to verify the information in special reports – special reports are outlined in paragraph 68, and relate to unusual incidents or circumstances where there is or may have been a loss or unauthorised removal of nuclear material; or
- (b) if the Agency considers that information made available by the state, including explanations from the state and information obtained from routine inspections, is not adequate for the Agency to fulfil its responsibilities to ensure safeguards are applied to **all** nuclear material in peaceful nuclear activities in the state.

According to paragraph 73, an inspection is deemed to be “special” when it is either additional to the routine inspection effort specified in INFCIRC/153 or involves access to information or locations in addition to access specified for ad hoc and routine inspections.

Paragraph 77 sets out procedures relating to special inspections – where there are circumstances that may lead to special inspections, the state and the Agency are to consult. As a result of such consultations the Agency may:

- (a) make inspections in addition to the routine inspection effort specified in the safeguards agreement; and
- (b) obtain access to information or locations in addition to the access specified in the agreement for ad hoc and routine inspections.

In considering the interpretation and possible application of these provisions, there are limited precedents to review. The principal one, the case of the DPRK in 1993, involved substantial grounds for suspicion of undeclared nuclear activities. Access was sought to locations where it was expected that evidence – in the form of high level waste – would be found. The other major precedent, that of Romania in 1992, is of particular interest because it underscores the fact that special inspections can take place in a **cooperative** atmosphere – the special inspection took place by invitation.

### 3. DISCUSSION BY BOARD OF GOVERNORS

The Board of Governors discussed the issue of use of special inspections in December 1991, and in February 1992 concluded that special inspections should occur “only on rare occasions”. However, the Board also reaffirmed the Agency’s right to undertake special inspections, when necessary and appropriate to ensure that all nuclear material in peaceful nuclear activities is under safeguards.

The Board also reaffirmed the Agency’s rights to obtain and to have access to additional information and locations in accordance with the Agency’s Statute and comprehensive safeguards agreements. This explicit reference rights under the Statute (Article XII.A-6) is a useful reminder that, contrary to the views of some, the Agency’s rights under the Statute have not been displaced by the provisions of safeguards agreements.

What is one to make of this discussion? Does the Board’s conclusion that special inspections should occur only on rare occasions impose a substantial limitation, for all time, on the use of the special inspection provisions?

One interpretation is that the Board was simply assuming the majority of states would cooperate fully with the Agency, so that occasions when special inspections were required should, accordingly, be limited. A special inspection would come at the end of a consultation process that includes the seeking of information from the state – so in this sense too it could be anticipated that an actual inspection might not often be needed. Finally, the record indicates that cost was a factor in the Board’s conclusion – there was some concern that substantial additional costs would be incurred if special inspections were to become commonplace.

### 4 INFORMAL USE OF SPECIAL INSPECTIONS

INFCIRC/153 paragraph 73 states that an inspection is deemed to be “special” when, inter alia, it is additional to the routine inspection effort specified in paragraphs 78-82. There are many cases where, in order to clarify a matter arising from a routine inspection, or to complete a task which could not be completed during a routine inspection, the Agency, with the agreement of the state, undertakes additional inspection activity, in excess of the routine effort specified in INFCIRC/153. Such inspection activity would meet this aspect of the definition of a **special inspection**, although neither the Agency nor the states concerned have characterised the inspections as such.

These informal examples of special inspections serve as a useful reminder that special inspections are not limited to contentious situations. Indeed, the reference in subparagraph 73(b) to “... information made available by the State ... not (being) adequate ...” need not imply some wrongdoing or lack of cooperation on the state’s part. There can be many circumstances when the information available requires some supplementation, and the special inspection provisions offer a mechanism for gaining the additional information required.

### 5. INTRODUCTION OF STRENGTHENED SAFEGUARDS

From the outset of the program to develop strengthened safeguards, it was recognised that more extensive access rights for safeguards inspectors is of fundamental importance. This led to the central place of complementary access provisions in the Model Additional Protocol (INFCIRC/540). Complementary access was seen as a normal verification activity, without any of the accusatory overtones that had become associated with special inspections.

It is important to appreciate that strengthened safeguards apply – to the greatest extent possible – to **all** states with comprehensive safeguards agreements. While clearly the application of strengthened safeguards is greatly facilitated by the conclusion of an AP, even in the absence of an AP many strengthened safeguards measures may be applied. In 1995 the Board considered a number of inspection-related activities and activities relating to information review and evaluation which do not depend on conclusion of an AP – it is significant that the Board noted the proposals before it were not intended to affect the Agency’s right to implement special inspections.

Today, in the case of states that have concluded an AP, for practical purposes complementary access has almost – though not entirely – displaced any need for special inspections. At locations away from nuclear sites the right of access under special inspection may be more extensive than provided under complementary access – the latter allows conduct of specified verification activities, not necessarily access inside the location.

## 6. SPECIAL INSPECTIONS IN CSA STATES THAT HAVE NOT CONCLUDED AN AP

As the combination of a comprehensive safeguards agreement (INFCIRC/153) and an AP (INFCIRC/540) becomes firmly established as the NPT safeguards norm, it is interesting to consider how INFCIRC/153 paragraph 73 might be interpreted in the case of a state that continues to have in place only a comprehensive safeguards agreement.

By definition, the information provided by such a state – and information obtained from routine inspections – will be **less** than the information available with respect to states having an AP in place. The IAEA may well find there are occasions where the information made available by the state is not adequate for the Agency to fulfil its responsibilities, e.g. where the Agency’s information evaluation identifies matters which cannot be satisfactorily clarified through routine inspection.

The possibility of information evaluation identifying matters for clarification is by no means confined to states with APs – the key difference is that the AP explicitly recognises this possibility, and provides a mechanism, complementary access, for resolving questions or inconsistencies. For non-AP states, the special inspection provisions can be seen as fulfilling a similar role.

Complementary access covers two broad categories of access:

- (a) access as of right, on a “selective” basis, to establish the absence of undeclared nuclear activities at nuclear sites and certain nuclear-related locations;
- (b) access at other locations where necessary to resolve a question or inconsistency.

It is clear that special inspections cannot encompass category (a), access as of right. What is less clear, however, is the relativity between special inspections and complementary access to resolve questions or inconsistencies. Here, two differences are apparent between INFCIRC/153 and INFCIRC/540:

- (a) the first relates, not to the availability of **access**, but to the availability of **information** to enable the Agency to identify matters for resolution. INFCIRC/540 has detailed requirements in this regard, to overcome shortcomings in INFCIRC/153. However, for states without an AP the Agency is still entitled – indeed, expected – to undertake

information analysis, albeit with less information available, and can still identify matters which cannot be satisfactorily resolved without access;

- (b) as regards **access**, although INFCIRC/540 stipulates that complementary access for the purpose of resolving questions or inconsistencies should not be mechanistic or systematic (Article 4), nonetheless this kind of complementary access can be considered a commonplace activity. By contrast, special inspections cannot be thought of as commonplace (which is **not** to say, however, that they should be “rare”).

### **Cooperation as a basis for undertaking special inspections**

Reference has been made to the informal use of special inspections – this illustrates an important point, that special inspections can be carried out in a spirit of cooperation and normality between the Agency and the state. The fact that these examples relate to declared nuclear sites, rather than other locations in the states concerned, does not diminish this point.

As part of facilitating the confidence-building role of safeguards, clearly it is in the interest of states to cooperate in meeting the Agency’s requests for information. In considering how the special inspection provisions might apply, therefore, they should **not** be thought of in terms of the imposition of an inspection on an unwilling state, but as an opportunity for the state to provide the international community – through the Agency – with clarifications and assurance. Indeed, as the Romanian case demonstrated, special inspections need not be initiated by the Agency, but could be at the request of the state. To quote the then Director General of the IAEA at that time:

“... states might wish to take advantage of the special inspection procedure and invite the Agency on their own initiative to conduct such an inspection in order to dispel doubts that might have arisen and to create confidence.”

Cooperation by the state – in facilitating a special inspection or even inviting one – is in line with subsequent decisions of the Board on strengthening the safeguards system.

Some might question whether the Agency can realistically expect cooperation when it proposes a special inspection. So this argument goes, the states that do not conclude APs in the near future happen to be the “problem states” most likely to have something to hide, and therefore least likely to cooperate with the Agency. Even if this is the case, it can be expected most states will be reluctant to refuse, since the international community will draw adverse implications. Thus, even if a state is unenthusiastic about cooperating, there will be considerable pressure to do so.

### **Technical visits as an alternative to cooperative special inspections**

The Agency has established a practice of undertaking cooperative “technical visits” where there are activities it wishes to carry out beyond the usual categories of inspections set out in INFCIRC/153. Some may argue that reliance on such visits is preferable to attempting a fresh interpretation of the special inspection mechanism. It should be noted, there is a substantive difference between the two mechanisms – technical visits have no formal status and depend entirely on the good will of the state concerned, whereas in the circumstances set out in INFCIRC/153 the Agency is entitled to ask for a special inspection.

A judgment on which is the preferable mechanism – technical visit or special inspection – will depend on whether advantage is seen in making special inspections less of the last resort mechanism they are generally considered to be at the moment. Those who believe special inspections must (should?) always be contentious will favour the technical visit option. On the other hand, if advantage is seen in,

as far as possible, de-politicising the special inspection mechanism, there is no doubt that establishing a number of cooperative precedents will be helpful.

## 7. CONCLUSIONS

For reasons that are probably lost in time, the IAEA has been very cautious about applying the special inspection provisions, so cautious in fact that they have been **formally** invoked on only two occasions – one contentious, one cooperative. While the Board's conclusions in the early 1990s are commonly thought of as limiting the application of special inspections, this is not so clear-cut from the record – the Board's reaffirmations both of the Agency's right of special inspection and of the right to information and access under the Statute are very positive.

Further consideration of the circumstances when special inspections might be applied has been largely overshadowed by the conclusion of INFCIRC/540 and the establishment of the complementary access mechanism. However, complementary access is not available in respect of states that have not concluded an AP, and it is appropriate to address the role of special inspections under strengthened safeguards in circumstances where an AP is not in place.

Using the additional information and access provided under the AP, the Agency is no longer limited to reaching a conclusion on the non-diversion of declared nuclear material, but is able to reach a conclusion on the absence of undeclared nuclear material and activity in the state as a whole. As already noted, these two elements together are becoming firmly established as the NPT safeguards standard. For states that only have an INFCIRC/153 agreement in force, the absence of the tools provided by the AP gives the Agency insufficient means, and therefore insufficient confidence, to draw a conclusion that all nuclear material has been placed under safeguards. The use of special inspections, in a cooperative and non-confrontational manner, would allow the Agency to take some steps to resolve outstanding queries.

Of course, this would be no substitute for having an AP in place – the range of activities open to the Agency and the availability of information would fall well short of AP standards, and the Agency would still not be in a position to draw a general conclusion on the absence of undeclared nuclear activities and material – but special inspections could go some way towards addressing specific questions that arise with respect to states that have not concluded an AP.

The special inspection procedures taken as a whole – with their provisions for consultation and for providing additional information to the Agency – should be considered as neither confrontational nor exceptional. In the effort to enhance the effectiveness of safeguards, the Agency cannot afford to neglect such an important tool. A careful application of the special inspection procedures should be seen as a normal part of strengthened safeguards, consistent with the Board's call for states to cooperate with the Agency in the strengthening of the safeguards system.