Diplomacy and the Pursuit of International Justice between Iran and the United States

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I. Introduction

Whatever may be the domestic politics in Tehran and Washington, the States parties to the Geneva Joint Plan of Action of 24 November 2013 are well aware that they can achieve more by negotiated settlement than continuation and aggravation of their disputes to their own detriment and that of third states in violation of international law. And this can be seen in the continued implementation of the Joint Plan of Action and progress of negotiations for comprehensive solution of the dispute in Vienna since 18 February 2014. The Joint Plan of Action was concluded between Iran and US, UK, France, Germany, Russia and China, invariably referred to as Iran-E3+3 or E3/EU+3, although the main parties being Iran and the United States.

II. Joint Plan of Action

The Joint Plan of Action,[1] which went into effect on 20 January 2014, though an interim agreement, is an international agreement,[2] aimed at achieving in one year, now extended to 30 June 2015,[3] a long term comprehensive solution to the crisis concerning Iranian nuclear energy program. The "comprehensive solution would enable Iran to fully enjoy its right to nuclear energy for peaceful purposes under the relevant articles of the NPT in conformity with its obligations therein" and "would produce the comprehensive lifting of all UN Security Council sanctions, as well as multilateral and national sanctions related to Iran's nuclear programme," on a schedule to be agreed upon, involving a reciprocal, step-by-step process, where the "comprehensive solution constitutes an integrated whole [and] nothing is agreed until everything is agreed." The parties however "will be responsible for conclusion and implementation of mutual near-term measures and the comprehensive solution in good faith."

For an initial period of six months, now extended to 30 June 2015, and in return for a list of specified voluntary nuclear-related measures undertaken by Iran, the other parties, namely US and E3/EU, undertook to voluntarily pause efforts to further reduce Iran's crude oil sales, enabling Iran's few current customers to

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[1] http://www.nytimes.com/interactive/2013/11/25/world/middleeast/iran-nuclear-deal-document.html?module=Search&mabReward=relbias%3As%2C%7B%222%22%3A%22RI%3A13%22%7D&_r=0

[2] Vienna Convention on the Law of Treaties, Article 2.1(a) "'[T]reaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

[3] http://www.state.gov/secretary/remarks/2014/11/234363.htm; http://eeas.europa.eu/statements-eeas/2014/141124_02_en.htm

purchase their current average amounts of crude oil with associated insurance and transportation services and to allow repatriation of a limited agreed amount of Iran's revenue held abroad in installments. They would also suspend existing US and EU sanctions on Iran's export of petrochemicals and transactions on gold and other precious metals, suspend US sanctions on Iran's auto industry and associated services, license the supply and installation in Iran of spare parts for safety of flight for Iranian civil aviation and safety related inspections and repairs in Iran as well as associated services such as insurance, transportation and financial, add no new EU and Security Council sanctions and "[t]he U.S. Administration, acting consistent with the respective roles of the President and the Congress, will refrain from imposing new nuclear-related sanctions."

Under the interim agreement, the other parties, namely US and E3/EU, would also "[e]stablish a financial channel to facilitate humanitarian trade for Iran's domestic needs using Iranian oil revenues held abroad," including payment of Iran's UN obligations and tuition of Iranian students abroad for the initial six month period, and would "[i]ncrease the EU authorisation thresholds for transactions for non-sanctioned trade to [ten fold[4]]," but otherwise maintain all other sanctions.

III. Discussion

However remarkable achievement in the circumstances, it is clear that the interim agreement has suspended for the initial six months and now to 30 June 2015 a limited US and EU financial and energy sanctions and associate services in return for specific nuclear related measures to be carried out by Iran, both of which measures the disputing parties claim are reversible. The interim agreement has not suspended any UN nuclear related US and EU sanctions, US and EU terrorism and human rights sanctions or other US trade and economic sanctions going back to 1995 and early 1980s, because the parties have not considered them either as urgently necessary at this time or relevant to the present crisis. The disputing parties also continue to maintain their claim of the international illegality of the actions of each other side, giving rise to the dispute, despite attempts at resolution of the immediate difficulties.

The limitations of the interim agreement should not be seen as a failure but key to the success of the comprehensive solution, considering that addition of diverse elements unnecessarily expanded the scope of the dispute during the last decade of negotiations and thereby made it difficult to resolve the dispute. This is not to suggest that other subjects or elements in dispute should not be resolved or that they are completely unrelated to the core of the present dispute but that success of the demarcated comprehensive solution under the interim agreement would also pave the way for the resolution of other matters to the extent necessary.

However, this modest provisional achievement has unfortunately led the

[4] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2014:015:0022:0023:EN:PDF

antagonists in both camps to exasperate the situation by opposing the interim agreement, one side pushing for imposition of additional sanctions, extraction of further advantages and dismantling of the Iranian nuclear energy program with saber rattling of military action and threat thereof and the other side questioning the whole concept of the accord by denying any changes to the Iranian program and at the same time demanding revocation of all nuclear and non-nuclear related sanctions. In the circumstances, it is not difficult to foresee that absent its comprehensive resolution by the end of June 2015, the dispute may be aggravated.

Under the United Nations Charter, Articles 2.3 and 33, State parties are required to settle their disputes by peaceful means. What is not permissible in international law since the advent of the U.N. Charter, itself adopted in the form of an international convention, is "the threat or use of force" against another state under Article 2 (4) of the Charter, unless for necessary and proportionate self-defense against an armed attack until the Security Council intervenes under Article 51. In other words, threat of unlawful force is equally unlawful and "it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths."[5] That is so because as a principle of international law, "Every State has the duty to refrain in its international relations from the threat or use of force against […] any State [and that] Such a threat or use of force constitutes a violation of international law and the *Charter of the United Nations* and shall never be employed as a means of settling international issues."[6] Prohibition of the threat or use of force in Article 2 (4) is not only a principle of *jus cogens* and fundamental or cardinal principle of customary international law,[7] but also "a cornerstone of the United Nations Charter."[8] For this reason even the last Security Council resolution on Iran, that is, resolution 1929 of 9 June 2010, in the preamble "Stress[es] that nothing in this resolution compels States to take measures or actions exceeding the scope of this resolution, including the use of force or the threat of force".

Interesting enough, in its preamble, the Treaty on the Non-Proliferation of Nuclear Weapons also "Recall[s] that, in accordance with the Charter of the United Nations, States must refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations".

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[5] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 47 (8 Jul.).

[6] UNGA Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operations among States in accordance with the Charter of the United Nations (24 Oct. 1970).

[7] Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA), Merits, Judgment, 1986 I.C.J. 14, ¶¶188-191 and 227 (Jun. 27).

[8] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, 2005 I.C.J.168, ¶148 (Dec. 19).

Further, under the Algiers Accords of 19 January 1981, "The United States pledges that it is and from now on will be the policy of the United States not to intervene, directly or indirectly, politically or militarily, in Iran's internal affairs."[9] A corollary of the customary international law principle of non-intervention undertaken here is that "No State may use or encourage the use of economic, political or any type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind," as confirmed by the General Assembly resolution 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (24 Oct. 1970).

In connection with negotiation process and protection of communication with counsel in *Timor-Leste v. Australia,*[10] the ICJ also has recently held that based on the principle of equal sovereignty of States under the UN Charter, Article 2 (1) and (3), "equality of the parties be must preserved while they are involved in the process of settling an international dispute by peaceful means" and that a party "would expect to undertake these arbitration proceedings or negotiations without interference by the other party in the preparation and conduct of its case. It would follow that in such a situation, a State has a plausible right to the protection of its communications with counsel relating to an arbitration or to negotiations, in particular, to the protection of the correspondence between them, as well as to the protection of confidentiality of any documents and data prepared by counsel to advise that State in such a context."[11] Consequently, the Court held that "Australia shall not interfere in any way in communications between Timor-Leste and its legal advisers in connection with the pending [cases], with any future bilateral negotiations concerning maritime delimitation, or with any other related procedure between the two States".[12]

The temporary sanctions relief mechanism under the interim agreement is obviously not a panacea for the present crisis. The controversial UN Oil for Food Program for Iraq of 1995, created more problems, faced widespread corruption, as shown by Volcker Inquiry Committee of 2005, and actually ended up financing war reparations by the UN Compensation Commission for Iraq until 2010. Under the Algiers Accords between Iran and the United States, which resolved much greater crisis arising from the occupation of the American Embassy and detention of the United States diplomatic and consular staff in Tehran in November 1979, all sanctions were revoked and all blocked funds in $8 billion were released to Iran with the release of the U. S. nationals on 19 January 1981, subject only to payment of certain bank debts at the time, transfer of certain other funds to Iran within six months and establishment of the Iran-United States Claims Tribunal for resolution of certain other disputes or property claims by each side and their nationals against the government of the other. However,

[9] Declaration of the Government of the Democratic and Popular Republic of Algeria, General Declaration, paragraph 1.

[10] Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Request for the Indication of Provisional Measures, Order, 2014 I.C.J. – (Mar. 3).

[11] *Id.,* ¶ 27.

[12] *Id.,* ¶ 55 (3).

soon thereafter, most of the sanctions were reintroduced and major Iranian properties remained blocked since. This also contributed to the delay in the resolution of the claims before the Iran-U.S. Claims Tribunal, which still has pending before it a few but major Iranian claims against the United States for the recovery of Iranian properties since 1981 or 1982 in addition to a later claim for breach of the non-intervention obligation due to a 1995 US legislation for regime change in Iran and an oil sanction legislation.

However genuine and significant the grievances of either side may be, the continuation of the present dispute and the purported measures taken in response have seriously affected the adverse parties, but also the rights of their nationals and companies and in particular the rights of innocent third states and their nationals and companies due to the extraterritorial and secondary nature of the recent sanctions. Although for different reasons, both sides have now come to recognize that prolongation of the status quo is not in their favor, and in consequence they should be able to reach the comprehensive solution within the one-year period provided for and now extended to 30 June 2015 under the interim agreement.

The economic, social and political costs of the continuation, let alone aggravation, of the dispute should considerably outweigh any benefit, when due to the sanctions, Iran has reportedly lost $65 billion in oil sales during 2013 as compared to oil sales of over $100 billion in 2011,[13] and accordingly Iran continues to lose $5.4 billion each month with maintaining the current average oil sales. This is in addition to Iran's $60 billion to $80 billion hard currency reserves that are reportedly blocked abroad, an amount which is increased by $1.5 billion per month from the proceeds of oil sales under the interim agreement, despite the release of $4.5 billion in eight installments and $3 billion in other sanction relief during the six months period.[14] The sanctions have reportedly also caused Iran to lose 5% of its Gross Domestic Product in 2013, first in two decades.[15]

It is commendable that after 35 years of the Islamic Republic, Iran has publically engaged in direct negotiations with the United States and done so with an internationally recognized and equally competent foreign affairs negotiating team for resolution of the present dispute. It is necessary for any good faith negotiation that the negotiators be able to show that they are credible so that the promises exchanged can be relied to be carried out in good faith by their principals and nothing helps this better than when they share the same professional backgrounds and skills and speak the same working language. In a less publicized manner, the high level legal advisers of Iran and the United States met regularly twice a year at the Peace Palace in The Hague from 1981 to 2005 for direct negotiation and resolution of disputes under the Algiers Accords, pending before the Iran-US Claims Tribunal, in which they had a certain measure

[13] KENNETH KATZMAN, IRAN SANCTIONS, 51-52, Congressional Research Service, 31 January 2014, https://www.fas.org/sgp/crs/mideast/RS20871.pdf

[14] *Id.*

[15] *Id.*

of success, although the two governments had never met in the negotiations that led to the conclusion of the Algiers Accords, mediated by the good offices of the Government of Algeria. They also regularly met, negotiated and finally settled the Iranian claim, *Aerial Incident of 3 July 1988 (Iran v. USA*) before the International Court of Justice in 1996.[16]

Although the nature of the present dispute may be negligible as compared to the American Embassy crisis of 1979, which was resolved under the Algiers Accords of 1981, the geopolitics of the world, Europe, the Middle East and Iran has considerably changed since then, in particular with the collapse of the Soviet Union and the further changes in progress in the region. In the circumstances, the present dispute, built up with four Security Council sanctions resolutions and expansive US and EU primary and extraterritorial, secondary sanctions, perhaps needs an economic cost free, traditional confidence building measure of resumption of diplomatic relations, kicked off by consular relations, to support the fragile interim agreement towards the comprehensive solution and in particular its faithful implementation. Such an opening obviously also needs a consistent political will to ensure the functioning and inviolability of the mission to avoid the repeat of the American Embassy incidence of 1979 or more recently the British Embassy incidence of 2011 so that it would not backfire. Diplomatic or consular relations do not of course eradicate cold war hostilities if Iran and the United States do not wish to, but the opening can at least contribute to détente, easing of the strained relations and good faith implementation of the comprehensive solution. It would also help prevent reintroduction of the revoked sanctions under different pretexts or maintaining them as other proliferation, terrorism or human rights sanctions so long as the legality of the sanctions is not finally resolved by the International Court of Justice.

The fact that neither Iran nor the United States has referred the dispute to the International Court of Justice could perhaps be explained by their domestic politics, uncertainty of result or desire for negotiated settlement. However, they may find it necessary to refer to the Court as an impartial arbiter in aid of the negotiations or in place thereof rather than continuation or aggravation of the dispute.

The Security Council resolutions made under Chapter VII of the Charter may be binding and take precedence over conflicting obligations under other international agreements, but to the extent the resolutions are consistent with the Charter, customary international law and *jus cogens* under the Charter, Articles 25 and 103, and the Vienna Convention of the Law of Treaties, Article 53. Yet, they are temporary, administrative and obviously not judicial or final and so their legality may be examined in a judicial proceeding before the ICJ, the principal judicial organ of the United Nations.[17] The Security Council works on the basis of only delegated powers, which are subject to review and not absolute

[16] Aerial Incident of 3 July 1988 (Iran v. USA), Order of Discontinuance, 1996 I.C.J. 9 (Feb. 22).

[17] Separate Opinions of Judge Kooijmans and Judge Rezek in Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. USA), Preliminary Objections, Judgment of 27 February 1998, [1998] I.C.J. 115, 144 ¶¶ 19-20 and ¶¶ 2-4.

powers. The ICJ has not denied that legality of such resolutions may be reviewed in appropriate cases. It has also held that such resolutions in any event do not affect a claim already pending before it.[18]

The judicial review of the Security Council sanction resolutions by the ICJ should be necessary in particular because they are assumed to deal with a violation of international law by the target State and to induce that State to comply with its obligations. Although presumably for the maintenance of international peace and security under the UN Charter, Articles 39 and 41, all such measures are subject to the relevant rules of general international law and therefore their legality subject to authoritative review by the ICJ in contentious or advisory proceedings.[19] Other international tribunals may also competently deal with the legality of the Security Council resolutions, as in *Tadic*[20] before the International Criminal Tribunal for the Former Yugoslavia and in numerous cases even before domestic and community courts such as the European Court of Justice and the European Court of Human Rights for the purpose of the issues before them, including consideration of the right of defense, due process and proportionality of the measure for individuals and entities.

Further, the Security Council resolution 1929 does not mandate any sanction on the Iranian oil and gas sector. Regarding energy, a clause in the preamble merely "not[es] the potential connection between Iran's revenues derived from its energy sector and the funding of Iran's proliferation- sensitive nuclear activities," without any provision in the operative part on it. Devising a national monitoring mechanism for such a purpose is far from blocking the sale, transportation and insurance of Iranian oil and gas altogether under such a clause. Similarly, prohibition of certain proliferation sensitive matters and related transactions under the resolution is a far cry from blocking all banking and other financial transactions with Iran.

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[18] Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. USA), Preliminary Objections, Judgment, 1998 I.C.J. 115, ¶¶ 37 and 43 (Feb. 27).

[19] THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 835-836, MN 156-15-7 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte & Andreas Paulus eds., 3rd ed., Oxford, 2012): "[T]he Court can pronounce itself on the legality of the Council decision, first, in a contentious proceeding against any State, if the question of the legality of a SC decision arises. Secondly, it can give an assessment in an advisory proceeding, either when the question of the legality is directly asked, or incidentally. [] Should the ICJ find that a Security Council decision is illegal, the members would be relived from their obligation to carry out that decision, simply because a decision declared illegal (and invalid) by the ICJ deploys no binding force." Citations omitted.

[20] In *Tadic*, the ICTY Appeals Chamber held that " It is clear … that the Security Council plays a pivotal role and exercises a very wide discretion under this Article. But this does not mean that its powers are unlimited… In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law). … The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain *constitutional limitations*, however broad its powers under the constitution may be." ICTY, Case No. IT-94-1-AR72, Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber 2 October 1995), ¶ 28. Emphasis added.

It is interesting that none of the Security Council resolutions on the subject have determined a threat or breach of the peace by Iran under Article 39 to authorize the sanctions it has prescribed under Article 41 for the maintenance of international peace and security. Rather, they rest merely on concerns about proliferation risks of the Iranian nuclear energy program, which in turn are based on disputed reports and resolutions of the IAEA that there are remaining issues of concern to exclude the possibility of military dimensions of Iran's nuclear energy program. The IAEA, being a technical agency ruled by a political board, is not an independent and impartial judicial body with due process and for that reason its decisions may be reviewed before the ICJ in cases between disputing States parties to the IAEA Statute, where the IAEA could also appear to explain its conduct.

Adopted in the form of an international convention, the Statute of the International Atomic Energy Agency, Article XVII (A), provides that "Any question or dispute concerning the interpretation or application of this Statute which is not settled by negotiation shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement."[21] And under Article XX (B), every state by ratifying the Statute becomes a party to it.

Although it does not contain a dispute settlement clause, the Non-Proliferation of Nuclear Weapon Treaty, in Article III, entrusts the IAEA with the administration of international safeguards, including conclusion of safeguard agreements to verify that non-nuclear weapon States party to the NPT fulfill their non-proliferation obligations, "with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices" and in a manner to comply with Article IV and "to avoid hampering the economic or technological development of the Parties or international cooperation in the field of peaceful nuclear activities." Under Article IV the Agency also facilitates and provides a channel for contribution to "the further development of the applications of nuclear energy for peaceful purposes, especially in the territories of non-nuclear-weapon States Party to the Treaty, with due consideration for the needs of the developing areas of the world."

It is obvious therefore that the Security Council resolutions on Iran, including resolution 1929, would have no basis, if the ICJ finds that the IAEA decisions due to any violations are without effect, needless of even reviewing the legality of the Security Council resolutions.

Similarly, the Unites States energy and financial sanctions on Iran, especially when not mandated by a valid Security Council Chapter VII resolution, may also be reviewed by the ICJ under the 1955 Iran-US Treaty of Amity, Economic Relations and Consular Rights, Article XXI (2), which provides that "Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to

[21] http://www.iaea.org/About/statute.html#A1.17

settlement by some other pacific means."[22] And, as the ICJ has held, measures necessary to protect national security interests under Article XX (1)(d) of the Treaty are not an exception to jurisdiction or admissibility or self-judging, but a possible defense on the merits. [23]

Under the Treaty of Amity, Article VII (1), "Neither High Contracting Party shall apply restrictions on the making of payments, remittances, and other transfers of funds to or from the territories of the other High Contracting Party." And under Article VIII (1), "Each High Contracting Party shall accord to products of the other High Contracting Party, from whatever place and by whatever type of carrier arriving and to products destined for exportation to the territories of such other High Contracting Party, by whatever route and by whatever type of carrier, treatment no less favorable than that accorded like products of or destined for exportation to any third country, in all matters relating to:(a) duties, other charges, regulations and formalities, on or in connection with importation and exportation; and (b) internal taxation, sale, distribution, storage and use. The same rule shall apply with respect to the international transfer of payments for imports and exports. [And] 2. Neither High Contracting Party shall impose restrictions or prohibitions on the importation of any product of the other High Contracting Party or on the exportation of any product to the territories of the other High Contracting Party, unless the importation of the like product of, or the exportation of the like product to, all third countries is similarly restricted or prohibited."

Although direct economic measures may in certain cases not breach the customary law principle of non-intervention, they may at the same time violate an FCN treaty as was the case regarding the trade embargo of Nicaragua by the United States.[24] In *Nicaragua*, the Court quoted Article XIX, paragraphs 1 and 3 of the FCN Treaty with Nicaragua, which is identical to Article XI, paragraphs 1 and 3 of the Treaty of Amity with Iran, providing that:

> "1. Between the territories of the two [High Contracting] Parties there shall be freedom of commerce and navigation. []
>
> 3. Vessels of either Party shall have liberty, on equal terms with vessels of the other party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other party open to foreign commerce and navigation …"

The Court held that the freedom of Nicaraguan vessels under that provision "to come with their cargoes to all ports, places and wagers" of the United States could not be interfered with and that accordingly the embargo constituted a

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[22] https://treaties.un.org/doc/publication/UNTS/Volume%20284/v284.pdf

[23] Oil Platforms (Iran v. USA), Judgment, 2003 ICJ 161, ¶ 33, (Nov. 6) and Oil Platforms (Iran v. USA), Preliminary Objections, Judgment, 1996 I.C.J. 803, ¶ 20 (Dec. 12); Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA), Merits, Judgment, 1986 I.C.J. 14, ¶¶ 222 and 282 (Jun. 27).

[24] Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA), Merits, Judgment of 27 June 1986, [1986] ICJ 14, ¶¶ 245 and 279 (Jun. 27).

measure in contradiction with that article.[25] Further, it held that the measure was not justified as "necessary to protect essential security interests" of the United States under Article XXI, paragraph 1(d) of that treaty,[26] identical to Article XX, paragraph 1 of the Treaty of Amity with Iran, in the absence of evidence to show how Nicaraguan policies had in fact become a threat to US national security interests, emphasizing that the provision is not for the subjective judgment of a party.[27] In *Oil Platforms*, however, as the Court noted, Iran chose "not to put formally in issue" that the US embargo breached the Treaty of Amity, Articles X (1) and XX (1) (d) and the Court did not hear necessary argument to be in a position to decide on the legality of the embargo other than its practical effects, about which there was no dispute.[28]

Iran and EU member States also have various bilateral investment or friendship, commerce and navigation treaties with each other and third states, including some with the United States, which recognize individual rights for such States and their nationals and companies and invariably refer the disputes under such treaties to the International Court of Justice or international arbitration with direct access for foreign investors under the investment treaties. Iran has concluded 60 bilateral investment treaties,[29] many of them with European countries but also with major countries from Asia, Africa and Latin America, which have been in force since before the economic measures under discussion. Iran has also joined with 26 other countries the 1981 Islamic Conference Investment Guarantee Agreement,[30] which under Article 17 provides foreign investors with direct access to international arbitration against the host state.[31]

It is obvious that even if they are qualified as lawful countermeasures, such economic measures cannot affect the right of third parties, including nationals and companies of Iran and third states, owed to them under treaty or international law. Under the 2001 International Law Commission Articles on State Responsibility, Article 49 (1), "An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations". As confirmed by the Court in *Gabcikovo-Nagymaros Project,* [32] an essential element

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[25] *Id.*, ¶ 279.

[26] *Id.*, ¶ 280.

[27] *Id.*, ¶ 282.

[28] Oil Platforms (Iran v. USA), Judgment, 2003 I.C.J. 161, ¶ 94 (Nov. 6).

[29] They include major countries in Europe: Austria, Finland, France, Germany, Greece, Italy, Poland, Sweden, Switzerland and Turkey, in Asia: China, India, Indonesia, Malaysia, Pakistan, Qatar and South Korea, in Africa: Algeria and South Africa, and in Latin America, Venezuela: http://unctad.org/Sections/dite_pcbb/docs/bits_Iran.pdf

[30] Among others, the ratifying States include Egypt, Kuwait, Oman, Saudi Arabia and UAE: http://www.oic-oci.org/oicv2/upload/pages/conventions/en/accords_oct_30_en.pdf. For the text of the Agreement, see http://www.oic-oci.org/english/convenion/Agreement%20for%20Invest%20in%20OIC%20%20En.pdf; http://unctad.org/sections/dite/iia/docs/Compendium/en/38%20volume%202.pdf

[31] *Al-Warraq v. Indonesia*, Award on Jurisdiction of 21 June 2012: http://italaw.com/sites/default/files/case-documents/italaw3174_0.pdf

[32] Gabcikovo-Nagymaros Project (Hungry v. Slovakia), Judgment, 1997 I.C.J. 7, ¶ 83 (Sep. 25).

of countermeasures is that they "must be directed against that State," which has committed an internationally wrongful act. Thus, the arbitral tribunal in *Cargill* v. *Mexico,*[33] held that "Countermeasures may not preclude wrongfulness of an act in breach of obligations owed to third States [or] *nationals* of the offending State, rather than the offending State itself,"[34] concluding that Mexico's "argument that its actions were countermeasures cannot have the effect of precluding wrongfulness of those actions in respect of a claim asserted under Chapter 11 [of the North American Free Trade Agreement] by a national of the allegedly offending State."[35] Similarly, in *Corn Products International* v. *Mexico,*[36] it was held that "A countermeasure cannot, therefore, extinguish or otherwise affect the rights of a party other than the State responsible for the prior wrongdoing,"[37] "conclude[ing] that the investor, such as CPI, has rights of its own under Chapter XI of the NAFTA. As such, it is a third party in any dispute between its own State and another NAFTA Party and a countermeasure taken by that other State against the State of nationality of the investor cannot deprive that investor of its rights."[38]

The significance of treaties of this nature in international law is such that their operation subsists even during armed conflict, as recognized in the 2011 ILC Articles on Effects of Armed Conflicts on Treaties, Article 7 and Annex thereto.[39] Among the treaties whose continued operation during armed conflict result from their subject matter, the Annex in particular provides for in paragraphs (e) "Treaties of friendship, commerce and navigation and agreements concerning private rights," (k) "Treaties relating to the international settlement of disputes by peaceful means, including resort to conciliation, mediation, arbitration and judicial settlement," and (l) "Treaties relating to diplomatic and consular relations." Agreements concerning *private rights* in paragraph (e) clearly include investment treaties and cover both substantive and procedural rights.[40] Although the Annex is indicative and may be rebutted, its presumption is strong, as held in the *United States Diplomatic and Consular Staff in Tehran case,* regarding the Treaty of Amity between Iran and the United States as well a the Conventions on Diplomatic and Consular Relations.[41]

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[33] Award of 18 September 2009 (Pryles, Caron and McRae, arbs.), ICSID Case No. ARB(AF)/05/2: http://www.italaw.com/sites/default/files/case-documents/ita0133_0.pdf

[34] *Id.*, ¶ 422.

[35] *Id.*, ¶ 429.

[36] Decision on Responsibility of 15 January 2008 (Greenwood, Lowenfeld and Alfonso Serrano de la Vega, arbs.), ICSID Case No. ARB(AF)/04/01: http://www.italaw.com/sites/default/files/case-documents/ita0244.pdf

[37] *Id.,* ¶ 164.

[38] *Id.*, ¶ 176.

[39] ILC Yearbook 2011, Vol. II, Part Two: http://legal.un.org/ilc/texts/instruments/english/commentaries/1_10_2011.pdf

[40] *Id.,* ¶¶ 46 and 48.

[41] United States Diplomatic and Consular Staff in Tehran (USA v. Iran), Judgment, 1980 I.C.J. 3, ¶¶ 53-54 and 86 (May 24).

IV. Conclusion

In order to ensure its good faith implementation, the comprehensive agreement may require a reliable disputes settlement provision for application by either party before the International Court of Justice. It cannot be overlooked that under the interim agreement performance of the Iranian obligations may be verified by the politically run IAEA, whereas even such a mechanism is absent for the US and EU obligations. While this may not be an issue for the interim agreement, it does not seem to be so for implementation of the comprehensive agreement.