



COUNTERMEASURES AND THE IRANIAN NUCLEAR ISSUE: PROBLEMATIC TENSIONS BETWEEN THE LAW OF TREATIES AND THE LAW OF STATE RESPONSIBILITY

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I. INTRODUCTION

The signing of the Joint Plan of Action on 24 November 2013 marks a brief respite in the escalation of the Iranian nuclear issue.¹ The most significant contemporary reason for said escalation was the International Atomic Energy Agency's (IAEA) November 2011 report on Iran.² It has been a dispute that has spilt over into diplomatic rows, covert military conduct and threats of military attacks. But what has remained a persistent problem throughout the ebb and flow of this dispute is the legality of some of the economic sanctions being undertaken by states and international organizations.³ Subsequent to the 2011 IAEA Report, there was a broadening of such sanctions by the European Union and various other states, including the United States. This piece addresses the following question: Do states, beyond the scope of existing Security Council mandated sanctions, have standing to take unilateral countermeasures against Iran, and if so, upon which particular legal grounds?

This piece only examines the issue of standing in relation to Article 42(b)(ii) of the International Law Commission's Articles on State Responsibility (ILC Articles)⁴ and collective non-proliferation obligations contained in the Treaty on Non-Proliferation of Nuclear Weapons (NPT).⁵ It will first consider the background of the dispute and delineate the legal question at stake (section II), identify the nature of the Iranian break (section III), highlight the ambiguities arising in the law (section IV) before concluding. It determines that there is a good case to argue that states who undertake

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1 Joint Plan of Action, signed 24 November 2013 between China, France, Russia, United Kingdom, United States, Germany and Iran.

2 IAEA, Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions in the Islamic Republic of Iran, IAEA Doc. GOV/2011/65, 8 November 2011.

3 See how the EU has shifted its position between various judicial pronouncements: Case T-509/10, *Kala v. Council*, Judgment of the General Court, 25 April 2012; Case C-348/12P, *Council v. Kala*, Judgement of the Court, 28 November 2013 (overturning Case T-509/10); and Case T-489/10, *Islamic Republic of Iran Shipping Lines v. Council*, Judgement of the General Court, 16 September 2013.

4 See J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002)

5 729 UNTS 161.

unilateral economic sanctions as a form of countermeasures against Iran, may not have a strict legal standing to do so.⁶

II. BACKGROUND & DELINEATING THE LEGAL QUESTION

Since 2002, when Iran revealed uranium enrichment facilities in Natanz and Arak that had been previously concealed for nearly 18 years, the IAEA and the international community has viewed Iran's nuclear program with concern for its possible military dimensions. Iran has continuously sustained its 'inalienable right' to peaceful use of nuclear technology (including acceptable levels of uranium enrichment) under Article IV NPT. Despite mere suspicions and no conclusive evidence of a clandestine nuclear weapons program, and acting in discordance (although not necessarily in breach) with Article XII(c) of its Statute, the IAEA referred the case of Iran to the UN Security Council (UNSC) in February 2006. Since the passage of UNSC Resolution 1696 (2006), Iran's rights and obligations in relation to its nuclear program have been severely transformed, and the first of four rounds of UNSC Chapter VII economic sanctions were put in place. The most extensive of these was UNSC Resolution 1929 (2010), passed on 9 June 2010.⁷

Yet, against this background, matters were significantly inflamed by the release of the controversial IAEA Report on Iran, in early November 2011. Specifically, the Report included an Annex entitled: 'Possible Military Dimensions to Iran's Nuclear Programme', which for the first time detailed all available evidence as to Iran's clandestine program. The Report is controversial not merely for its apparent breach of the procedural confidentiality requirements relating to States' nuclear programs, but more so because the IAEA has arguably proceeded well outside its legal mandate, choosing to undertake an aggressive reading of the NPT.⁸ Dan Joyner, a leading non-proliferation expert, makes a scathing and persuasive critique in this regard.⁹ Yet, regardless of the principled arguments that can be made against its publication, this post concerns itself with the ramifications of the latter.

Immediately after the Report was released certain steps were taken: (a) the EU, some of its member states and the US implemented a new round of sanctions;¹⁰ (b)

6 S. Singh, 'Non-proliferation Law and Countermeasures' in D. Joyner & M. Roscini (eds.), *Non-proliferation Law as a Special Regime* (Cambridge University Press, 2012) 196-249, 204-219 (see for a more detailed examination of the legal issues).

7 *Ibid.* 235-241 (for a more detailed discussion of parts of the Resolution).

8 IAEA, Communication dated 8 December 2011 received from the Permanent Mission of the Islamic Republic of Iran to the Agency regarding the Report of the Director General on the Implementation of Safeguards in Iran, IAEA Doc. INFCIRC/833, 12 December 2011 (outlining the considered Iranian response and this reading of the relevant legal provisions by Iran).

9 D. Joyner, 'Iran's Nuclear Program and the Legal Mandate of the IAEA', *Jurist*, 9 November 2011.

10 For a detailed up to date designation of sanctions undertaken by the US and the legal basis for these, see Kenneth Katzman, 'Iran Sanctions' Congressional Research Service Report No. RS20871, 11 October 2013, 65-74. For the EU, see EU Council Decision 2010/413/CFSP, 26 July 2010; Council Decision 2012/457/CFSP, 2 August 2012; Council Regulation No. 267/2012, 23 March 2012; and Council Regulation No. 1203/2013, 26 November 2013.

further UNSC action was contemplated, but rejected, despite meetings with the 1737 Committee;¹¹ (c) the escalation of the matter led to Iran threatening to suspend transit through the Strait of Hormuz in December 2011 – a threat subsequently without teeth (on its right to do so, refer to Articles 37, 38 and 44 of UNCLOS, though Article 44 seems to decide the issue against Iran).

I am concerned with only the first of these, namely, the implementation of unilateral economic sanctions upon Iran. This piece, broadly speaking, is also potentially applicable to previous economic sanctions implemented by various states since 2006, including Japan and Australia.

But the legal question to be answered here requires five points of delineation. First, I am only concerned with those sanctions that may be regarded as breaches of international law, and not as retorsions. Second, I am only concerned with those sanctions that extend beyond those mandated by the UNSC in its various resolutions between 2006 and 2010. This is the majority of actions taken by the US and the EU. Third, I am not concerned with those sanctions that can be justified upon the basis of a bilateral breach: i.e. of an obligation simply between the sanctioning state and Iran. The substantive law of bilateral countermeasures may be applicable to these. Fourth, I presume that in accordance with the current position of international law, unilateral countermeasures are permissible, despite the UNSC having taken Chapter VII action.¹² Fifth, I will only consider standing to take countermeasures under the traditional criteria of Article 42 ILC Articles only. The role of Articles 48 and 54 are not only too murky to be dealt with in such a small piece, but there has been an insufficient development in practice to say that the right to resort to countermeasures is permissible under such articles. This criterion also presumes that I am talking only of the legality of measures taken by States, although certain parallels may be found in the law of international organizations.

III. IDENTIFYING THE NATURE OF THE IRANIAN BREACH

Before being able to answer the question identified in the first paragraph, there is an anterior issue that needs to be clarified: the source and nature of the obligation(s) breached by Iran, in response to which the countermeasures are being taken.

The evidential information provided in the IAEA Iran Report is comprehensive and certainly does not paint a pretty picture. The Report details Iranian possession of a certain document that would give it partial knowledge on how to build a nuclear warhead, or some of its component parts. The Report also expresses a considerable concern with the ability of Iran to enrich uranium as a fissile material. Whilst constituting a continuing breach of numerous UNSC Resolutions, these are irrelevant for the purpose of analyzing states' standing to take unilateral countermeasures. The

11 UN Doc. SC/10502, 21 December 2011.

12 See (1992) 1 Yearbook of the International Law Commission 144 (contra opinion expressed by Pellet)

dominant arguments rest on stating that Iran has breached two specific collective obligations contained in the NPT. First, the Article II obligation “not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices” has been breached. Second, it is argued that, Iran has breached its obligations to follow and apply accepted IAEA safeguards in contravention of Article III(1). The veracity of these claims shall not be broached here, but for the reader’s interest I would refer to Joyner’s eloquent argument as to why there has been no breach of Article II – based on a comprehensive and objective examination of the term “manufacture” and its misuse.¹³ It is widely accepted that Iran has breached certain IAEA safeguard obligations, but the scope of these are unclear (i.e. whether they simply relate to the IAEA-Iran Safeguards Agreement INFCIRC/214¹⁴ or whether they extend to the Additional Protocol which Iran has not ratified (but has been made binding through UNSC Res. 1929 (2010) and not Art. III(1) NPT), and even subsidiary agreements).

Given the argued and, for present purposes, presumed breach is of collective obligations contained in the NPT, Art. 42(b) ILC Articles is triggered as the only reasonable basis of standing for countermeasures. Art. 42(b)(i)’s threshold is not met in the present case. Standing to take unilateral countermeasures can only be justified under Art. 42(b)(ii) if the ‘breach of the obligation ... is of such a character as radically to change the position of all other States to which the obligation is owed with respect to the further performance of the obligation.’

IV. LOGICAL INCONSISTENCIES: INTERDEPENDENT OBLIGATIONS IN THE LAW OF TREATIES AND ART. 42(B)(II) ILC ARTICLES

Article 42(b)(ii) is premised on defining a legal rule for standing to invoke responsibility for the breach of an interdependent obligation (ILC Commentaries, para (5) of Art. 42), as a subset of collective obligations. This article operates on the presumption that a diverse (including countermeasures) and decentralized response to the breach of interdependent obligations arises from the inherent characteristics and nature of such obligations. Yet, Article 42(b)(ii)’s text and conceptual grounding in interdependent obligations is founded upon the ILC’s work on the law of treaties, and in particular Fitzmaurice’s exposition of different types of multilateral treaties and obligations.¹⁵ It is argued that overreliance on this foundation has led to logical inconsistencies in conceptualizing when an obligation can be classified as interdependent, and thus, when responsibility may be invoked to undertake available countermeasures. This has particularly unsettling consequences for nonproliferation

13 D. Joyner, *Interpreting the Non-Proliferation Treaty* (Oxford University Press 2011); *International Law and the Proliferation of Weapons of Mass Destruction* (Oxford University Press 2009), 16-18.

14 IAEA, *The Text of the Agreement between Iran and the Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, INFCIRC/214, 13 December 1974.

15 *Second Report on the law of Treaties*, by Mr. G.G. Fitzmaurice, Special Rapporteur, A/CN.4/107, (1957) 2 Yearbook of the International Law Commission, 31 and 37.

law and identifying how the law on standing to take countermeasures should be applied in the current situation with Iran.

The central question is whether the Art. II NPT obligation not to “manufacture” nuclear weapons, as well as, the Art. III(1) obligation to apply accepted IAEA safeguards are to be considered as interdependent obligations. If so, a breach of them shall certainly trigger Art. 42(b)(ii), thereby enabling standing to take countermeasures. Approaches to this question have loosely classified the NPT as an interdependent treaty and therefore a breach of the safeguards provisions or substantive provisions would permit recourse to countermeasures through Article 42(b) (ii).¹⁶ This approach collapses the distinction between treaties and obligations, as well as, the law of treaties with the law of state responsibility. One must be concerned with classifying obligations as interdependent or not; the classification of the treaty is irrelevant to an application of the law of state responsibility.

Fitzmaurice defined interdependent obligations as those in which ‘performance by any party is necessarily dependent on an equal or corresponding performance by all other parties’¹⁷ and whose breach ‘tends to undermine the whole regime of the treaty between all the parties’.¹⁸ Crawford defined it as that where ‘performance of the obligation by the responsible state is a necessary condition of its performance by all the other States’ (ILC Commentaries, para (5) of Art. 42).¹⁹ Forgive the quick statements of quite complex positions, but my paper can be viewed for more detail.²⁰ In short, what emerges is that the defining or core principle of what comprises an interdependent obligation differs based on whether considered from a treaty law or state responsibility law perspective. From a treaty law perspective, the core characteristic is that a breach of a specific treaty obligation of an interdependent nature renders future performance of the treaty by all other parties to it impossible, indeed breach of a specific obligation threatens the entire structure of the treaty and the sum of its obligations. However, from a state responsibility law and Art. 42(b) (ii) perspective, the determining characteristic of an interdependent obligation is that a breach of the specific obligation would per se affect and undermine every other state’s future performance of solely that same specific obligation. Thus far there is a stable and predictable logic to the different regimes.

16 J. Calamita, ‘Sanctions, Countermeasures, and the Iranian Nuclear Issue’ (2009) 42 *Vanderbilt Journal of International Law* 1393.

17 Second Report, note 15, at 31 and para. 126.

18 Report of the International Law Commission to the General Assembly on the second part of its Seventeenth Session and Eighteenth Session, UN Doc. A/6309/Rev.1, (1966) 2 *Yearbook of the International Law Commission* 255 (ILC Draft Articles on the Law of Treaties and Commentaries).

19 See also, Third Report on State Responsibility, by Mr. James Crawford, Special Rapporteur, UN Doc. A/CN.4/507, para. 91.

20 Singh, note 6, at 204-221.



The application of this logic to Iran's Article II and III(1) NPT obligation leads to some worrying ambiguities. Dealing first with Iran's Article II obligation not to "manufacture" nuclear weapons. From a treaty law perspective, Iran's breach of this obligation would clearly call into question the ability of all other NPT state parties to perform most of their substantive obligations. Indeed, the other state parties' performance of these obligations is effectively conditioned upon the performance of the other state parties of their substantive obligations (not actually conditioned, as for synallagmatic obligations). Iran's nonperformance of its obligation not to manufacture would thereby radically modify other states performance of their obligations. It cannot be questioned that non-performance by one party of such an obligation would threaten the entire treaty structure of the NPT. However, under the narrower state responsibility perspective, Iran's breach of this obligation would not undermine or modify the position of all other States to which the obligation is owed, with respect to the future performance of that same specific obligation. Two reasons emerge as to why these requirements of Article 42(b)(ii) cannot be met. First, not all other state parties to the NPT will have their further performance of this particular obligation compromised or affected, for the simply reason that not all other states are required to perform the obligation not to manufacture. The obligation not to "manufacture" only attaches to non-nuclear weapon states (NNWS), not to nuclear weapon states (NWS) such as the US, and is owed to all the NPT state parties. Second, as a direct consequence of the first point, the future nonperformance of the same specific obligation is not necessarily at issue (as required by the core criteria of interdependent obligations). For NWS, potential non-performance would attach to different, but related, substantive obligations contained in Article I NPT. The apparent asymmetry between those obligations being breached and those obligations in danger of future non-performance, reveals a core problem as to which substantive nonproliferation obligations can be qualified as interdependent (despite the common conception that all of them are).²¹

Turning to Iran's safeguard obligations under Article III(1), it should be clear that from a state responsibility and Art. 42(b)(ii) perspective, these cannot be considered as interdependent within the strict test. Yet, under a treaty law perspective it is my position that only a specific sub-set of safeguard obligations (namely those with a distinct and concrete link to substantive obligations) only in cases of a significant breach, can be qualified as interdependent. There are two sub-issues here; the type of verification obligation involved and the type of breach involved. First, one must differentiate those procedural safeguard obligations that have a distinct and direct connection to substantive obligations (e.g. the obligation to disclose and report and the existence of a facility utilizing WMDs for peaceful purposes) and those that do not (e.g. reporting within a specific timeframe). Second, one must consider that for

21 Singh, note 6, at 214-5 and fn. 67.

the first type of obligation just submitted, the significance of the breach involved is critical. Should it be a case of technical non-compliance, which are manifest, of a safeguard obligation that is strongly linked to substantive ones, then this is hardly sufficient to enable standing for all state parties to that obligation to take countermeasures.

V. CONCLUSION

Worryingly, it emerges that it is difficult to find a legal basis for standing to take countermeasures for the assumed Iranian breaches of Articles II and III(1) NPT, for the likes of NPT state parties such as the US, certain EU member states, Japan and many others taking economic sanctions. This difficulty arises from the expedient but logically inconsistent transference of a treaty law conceptualization almost directly, without much modification, into the law of state responsibility. There are two ways to read Article 42(b)(ii), namely: (1) it provides standing to the aforementioned states because it is premised on the broad understanding of interdependent obligations in the law treaties – and such an understanding of the concept should be read into the Article. (2) it must pertain solely to the situation where it is concerned with the modification of the future performance of the same specific obligation that has been breached; this is the only conceptually coherent reading available if one it to maintain the methodology of the ILC Articles on State Responsibility. I personally fall into the latter camp, because Article 42(b)(ii) must be conceived of as articulating a rather novel legal position based on conceptualizations with significant intellectual baggage – the relevance of this baggage to the particularities of the law of state responsibility is perhaps to be doubted.

Needless to say, such a conclusion is not particularly favorable to supporting unilateral sanctions by the US and other States against Iran, within the context of the NPT.