

Raising the stakes: Iran's resumption of nuclear activities

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Introduction

For over two years, Iran's nuclear activities have been a cause of concern for the international community. The International Atomic Energy Agency (IAEA) has concluded that Iran has failed in a number of instances over an extended period of time (from 1991 and onwards) to oblige with its safeguards agreement. Specifically, Iran has breached its safeguards agreement with respect to the reporting of nuclear material, its processing and its use, as well as the declaration of facilities where such material had been processed and stored.[1]

On 1 August 2005, Iran decided to resume uranium conversion at its uranium conversion facility (UCF) in Esfahan. Iran's decision to resume conversion was immediately followed by an E-3 (UK, France and Germany) decision to back an US initiative to send the question of whether Iran is in compliance with its safeguards agreement and its obligations under the 1968 Nuclear Non-Proliferation Treaty (NPT) to the United Nations Security Council (UNSC).

The UCF is based in a complex (the Esfahan Nuclear Technology Centre (ENTC), see picture below), located near the city of Esfahan in central Iran. The complex hosts four operational research reactors,[2] a fuel fabrication laboratory (FFL) and a closed down uranium chemistry laboratory (UCL). In June 2003, Iran reported that the facility also hosts a Fuel Manufacturing Plant (FMP).

The UCF is based upon a facility started by China in 1992, which they backed out of in 1996 under pressure from the Clinton Administration. While the Iranians got US\$62.5m in compensation, they were forced to commence construction (in 1999) relying solely on indigenous resources.[3] The facility was declared to the International Atomic Energy Agency (IAEA) in 2000. Operations are scheduled to begin in earnest in 2007.[4] Its design capacity is said to be 200 tonnes of uranium hexafluoride gas per year, considerably lower than that required to feed Iran's planned nuclear power plants with a total capacity of 6,000 MWe within two decades.[5] At present, Iran's only known enrichment facility, at Nantaz, is also not large enough to achieve this enrichment capacity.[6] Of course, the Iranian government may plan to expand its uranium conversion capacity by constructing another facility or expanding the one in Esfahan in the future.

Presently, activities at the UCF are safeguarded and remotely monitored by the IAEA. Iran did not resume its activities at Esfahan until the IAEA was able to verify the removal of seals and to install cameras.

Breaching good faith?

On 21 October 2003, the foreign ministers of the United Kingdom, France and Germany visited Iran to discuss the nuclear issue. At the end of that visit, they announced a set of measures aimed at settling all outstanding issues with the IAEA. The Iranians agreed to cooperate fully with the IAEA to settle all outstanding issues and to correct any failures to comply with its safeguards agreement. To that end, they announced their willingness to sign an additional protocol to its comprehensive safeguards agreement and to commence ratification procedures.[7] Iran also agreed to temporarily suspend all uranium enrichment and reprocessing activities as defined by the IAEA.[8]

On 15 November 2004, Iran, France, Germany and the United Kingdom signed the 'Paris Agreement',[9] outlining how negotiations were to proceed. Iran agreed to continue and extend its suspension to include all tests or production at any uranium conversion installation.[10] The E-3/EU recognized that this suspension was a voluntary confidence building measure and not a legal obligation.[11] During suspension, the E-3 and Iran agreed to negotiate on long term arrangements. According to the Paris Agreement, the aim of the negotiations was to produce the following specific results:[12]

- Objective guarantees that Iran's nuclear programme is exclusively for peaceful

purposes.

- Firm guarantees on nuclear, technological and economic cooperation; and
- Firm commitments on security issues.[13]

Apparently, negotiations did not begin well. The E-3 reportedly concentrated upon the need for Iran to cease use of and dismantle 'sensitive parts' of the fuel cycle,[14] whilst the Iranians stressed that a solution should be sought in the framework of its legal rights and obligations under IAEA safeguards and the additional protocol.[15] Generally, E-3 negotiators felt frustrated by Iran's 'legalistic' approach to negotiations.[16] Their Iranian counterparts have not denied that their arguments are legal by nature, stressing the importance not to compromise Iran's right to research and develop nuclear energy for peaceful purposes.[17] Recently, Iran has argued that a country's right to nuclear power development 'cannot be undermined or curtailed under any pretext. Any attempt to do so, would be an attempt to undermine [the NPT]'.[18] Moreover, the Iranian negotiators believed that the E-3 used the negotiations with 'the purpose of keeping the suspension in place for as long as it takes to make the cessation a fait accompli'. This, they argue, 'is ... not in line with principles of good faith negotiations.'[19]

Negotiations in good faith broadly mean negotiating in a way that is likely to yield a mutually-beneficial agreement.[20] The International Court of Justice, in considering the case of the Gabcikovo-Nagymaros Project (Hungary v. Slovakia),[21] deemed evidence of good faith negotiations were, amongst other things, the parties' willingness to contemplate the others proposals, avoid preconditions and accept help from third parties.[22] It is important to note that the law only governs the conduct of negotiations-that they are conducted honestly and with fair intent. The law cannot determine the final outcome of negotiations. Good faith negotiations do not guarantee a specific outcome.[23]

It would seem that the principal stumbling block in respect to the E-3-Iran negotiations was the requirement, as stipulated in the Paris Agreement, to negotiate 'objective guarantees that Iran's nuclear programme is exclusively for peaceful purposes'. As indicated above, the E-3 position was that the only acceptable guarantee for them was the permanent cessation of uranium enrichment and reprocessing activities. Iran made it clear from the beginning that they would not accept the E-3's suggestion. As a result, both parties entered into negotiations with conflicting and inflexible preconditions that rendered negotiations meaningless - the blame lies with both sides.[24] The E-3 have failed to produce any 'substantial, detailed incentives or a creative, compromise solution on enrichment which could reasonably have been expected to receive Iran's endorsement'.[25] Iran, by hiding behind legal arguments, has as effectively cut off any possibility of an agreement.

The political spanner in the verification works

It is important to keep in mind that IAEA verification activities have not been concluded. Although they commenced two and a half year ago, the agency is still not in a position to clarify some outstanding issues. This would mean either that Iran has not extended the IAEA the necessary transparency, or that the IAEA is employing stricter verification on Iran than they are with other-comparably sized-nations.

The Agency notes that 'given Iran's past concealment efforts over many years, such transparency measures should extend beyond the formal requirements of the Safeguards Agreement and Additional Protocol and include access to individuals, documentation related to procurement, dual use equipment, certain military owned workshops and research and development locations'.[26] Not surprisingly, Iranian representatives have harshly criticized the IAEA's handling of Iran's verification responsibilities, labelling the process as politicized.[27] It is imperative that the IAEA is allowed to finish its investigation. An objective conclusion, supported by hard evidence, to the effect that no

undeclared activities exist in Iran is the only way to end suspicion.

If such a conclusion were reached and Iran shown to have acted in good faith then the remaining question would be purely political; can certain states be trusted with sensitive nuclear technologies? The E-3/US line appears to be that Iran cannot.[28] This question, however, is not a technical assessment of whether Iran is in breach of its obligations under the NPT.

The rocky road to the Security Council

Those who hope for an early and decisive condemnation of Iran from the IAEA Board of Governors or the Security Council will surely be disappointed.[29] A decision by the IAEA Board of Governors is made by a majority of those present and voting and there seem to be only lukewarm support for a referral of the Iranian issue to the UNSC.[30] The division is primarily along a north-south line with western states forming one faction and non-aligned (developing) states forming the other. The Non-aligned Movement (NAM) presently controls 14 votes on the board of governors. Iran also has some support from China and Russia.[31]

The European Union controls 11 votes on the board. With the support of Australia, Canada and the United States, the western faction is as large as the NAM. Five votes are left unaccounted for in this equation: Argentina, Brazil, Japan, Mexico and South Korea.

While some NAM states may swing, a simple breakdown such as the one above shows that there is a clear potential for a deeply divided board of governors. While a referral may get the required majority, the decision on Iran would reflect a fragmented board of governors; where the non-aligned states are anxious that the Iranian case would create a precedent against their own nuclear development plans.

To get the Iranian issue to the Security Council is one thing. To expect the Council to take firm action on Iran is a completely different matter. The first item of the provisional agenda for each meeting of the UNSC is the adoption of the agenda.[32] A decision of the Security Council on procedural matters is made by an affirmative vote of nine members.[33] If Iran gets continued support from NAM in the UNSC, and continued support by China and Russia, there may not even be enough votes for a decision to put the Iranian issue on the Council's agenda. And even if the issue gets on the agenda of the UNSC, decisions on substantive matters need to include the concurring votes of the permanent members (abstaining is considered to be concurrence).[34] Naturally, if Iran manages to keep Chinese and Russian support-the Council will not be able to take a decision containing enforcement related language. It may even be difficult to get the Council to agree on a presidential statement.

The way ahead

Further negotiations between the E-3 and Iran will be useless unless one side is prepared to cross its red line. Either the E-3 accepts Iran's proposal of verification arrangements going beyond what is required under the present safeguards framework or Iran accepts the idea of a permanent cessation of enrichment and reprocessing. Neither side seems willing to make any concessions.[35]

It is not for the author to tell the parties to the Paris agreement what they did or did mean with the words 'objective guarantees'. It is nevertheless important to note two things. First, that the right to develop and use nuclear energy for peaceful purposes is dependant on the state being in compliance with its obligations under Article II of the NPT. Second, that the evidence so far produced has not shown Iran in breach of this article. Even though Iran has breached Article III of the NPT by not honouring its safeguards agreement, its right to develop and use nuclear energy is intact. Arguably, the law should

state that when one state party has been in extensive breach of its safeguards agreement, its right to continue its nuclear activities should, at a minimum, be suspended. That the NPT does not stipulate this is most unfortunate.

Iran has the option to forsake its right to nuclear energy until the international community has re-established trust in its intentions. Sadly, Iran is not likely to take a sovereign decision to this effect. Are there other solutions then, short of a permanent cession of uranium enrichment and reprocessing that could appeal to all interested parties? The number of options seems to be limited. There is little trust in Iran's argument that it is seeking nuclear energy solely for peaceful purposes. As has been pointed out, Iran's front-end of its nuclear fuel cycle is undersized for its ambitious nuclear power programme. It is, however, very suitable for a nuclear weapons programme. This is something Iran needs to factor in when it is offering its interpretation of 'objective guarantees' to the international community.

Trust needs to be re-established. One way of doing this would be to establish a permanent inspectorate in Tehran with the authority to conduct wide-ranging inspections of any facility it may designate and unhampered access to any person involved in the nuclear programme. Since it is unlikely that such an inspectorate will be mandated by the UNSC (as the IAEA Iraq Nuclear Verification Office in Baghdad, Iraq, was), its mandate has to be agreed on by any principals involved in negotiations. The aim would be to keep inspectors in Iran for as long as is necessary for the international community to regain trust in Iran's intentions.

It is important to note that inspections cannot guarantee that Iran complies with its obligations under the NPT. What it can do, if inspectors are given meaningful authority, is to provide reasonable assurance that any military significant breach of Iran's commitments are detected and reported in time.

In the meantime it is imperative that the agency's verification activities in Iran continue and that Iran continues to cooperate with agency inspectors. A referral to the UNSC may trigger Iranian defiance, making them less transparent than now. It is important to keep in mind that Iran has-albeit grudgingly and bit by bit-admitted the Agency access to military facilities. The importance of such steps should not be underestimated given Iran's location and its relations with other states. On the other hand, it should not be overestimated. Iran's past breaches of its safeguards commitments make it difficult to take their declarations at face value. Only additional inspections authority going beyond what is stipulated by the additional protocol may give the international community the assurances it needs. The question of Iran's long-term intentions is ultimately of secondary importance and can be addressed once the present round of verification is completed.

Note on the author

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Endnotes

[1] See GOV/2004/83 and GOV/2005/67 for specific details on Iran's failure to comply with its safeguards agreement (both documents available at <http://www.iranwatch.org>).

[2] A miniaturized neutron source reactor (reached criticality on 1 March 1994), a light-water sub-

critical reactor reached criticality on 1 January 1992), a graphite sub-critical reactor (reached criticality on 1 January 1992) and a heavy water zero power reactor (reached criticality on 1 June 1995). All reactors are fuelled by China. See GOV/2004/83, Annex 1 and the IAEA's nuclear research reactor database at <http://www.iaea.org/worldatom/rpdb/>.

[3] GOV/2003/75, Annex 1, para. 1 and 'Esfahan UCF: view from inside', in Keyhan, 11 August 2005.

[4] GOV/2003/40, para. 30.

[5] GOV/2003/40, p. 1, para. 2. According to Iranian officials, their programme requires the presence of all elements of the nuclear fuel cycle. In this respect, the IAEA has noted that Iran possesses 'a practically complete front end', including uranium mining and milling, conversion, enrichment, fuel fabrication, heavy water production and associated research and development facilities, as well as a light water reactor and a heavy water research reactor, see GOV/2005/75, at p. 9. See also Wyn Q. Bowen, 'Iran and nuclear safeguards: establishing the facts and seeking compliance', *Verification Yearbook 2004*, VERTIC, London (2003), at p. 108.

To produce fuel for reactors producing approximately 52,700 GWhe-which is the estimated annual output of reactors in a 6,000 MW programme-Iran would need the capacity to produce some 1,800 tonnes of uranium hexafluoride gas per year.

[6] David Albright and Corey Hinderstein, *The Iranian Gas Centrifuge Uranium Enrichment Plant at Natanz: Drawing from Commercial Satellite Images*, The Institute for Science and International Security (ISIS), 14 March 2003, <http://www.isis-online.org>.

[7] Iran signed the additional protocol on 18 December 2003. Upon signature, Iran pledged to apply its Additional Protocols pending entry into force. Interestingly, the Tehran Statement only binds Iran to the commencement-not the conclusion-of ratification procedures.

[8] Joint statement at the end of a visit to the Islamic Republic of Iran by the Foreign Ministers of Britain, France and Germany, Tehran, 21 October 2003, para. 2 (b) (ii). The formulation 'as defined by the IAEA' can be interpreted two ways; meaning either (1) that IAEA interpretation prior to the statement shall apply or (2) that the IAEA is free to redefine uranium enrichment and reprocessing at will.

[9] 'Paris Agreement' between the Islamic Republic of Iran and France, Germany and the United Kingdom, with the support of the High Representative of the European Union, Paris, 15 November 2004.

[10] Paris Agreement, para. 5.

[11] Paris Agreement, para 6.

[12] This interpretation follows by the wording of para. 7 ('The agreement will provide ...').

[13] The negotiations on security commitments were fraught with difficulties from the beginning. Reportedly, Iran sought a security guarantee from the United States, something the European Union obviously cannot deliver. In the E-3 framework, INFCIRC/651 (<http://www.iaea.org>), the E-3 does not offer any guarantees beyond what is already stipulated in international law (with the exception of a negative security assurance offered by the United Kingdom and France).

[14] The E-3 was apparently referring to uranium conversion and enrichment since 'light water power reactors, reactors with no significant capacity to produce plutonium, waste storage sites, uranium mines, or concentration plants, could be maintained by Iran. See 'Summary of the latest round of nuclear talks between Iran and the European Union', Reuters, 26 January 2005.

[15] *Ibid.*

[16] Author interview with E-3 official.

[17] Author interview with Iranian official.

[18] INFCIRC/648, at p. 5.

[19] *Ibid.*

[20] Barry O'Neill, 'What does it mean for nations to negotiate in good faith?', Centre for International Security and Cooperation, Stanford University (2001).

[21] ICJ, *Case Concerning the Gabčíkovo-Nagymaros Project*, judgement on 25 September 1997, General List No. 92, available at <http://www.icj-cij.org>.

[22] For more information on good faith negotiations in general, see David A. Koplow, 'Parsing Good Faith: Has the United States Violated Article VI of the NPT?' in the Wisconsin Law Review (1993).

[23] Note 19. See also Karel Wellens (ed), International Law: Theory and Practice. Essays in honour of Eric Suy, Martinus Nijhoff Publishers (1998), at p. 796.

[24] 'Nuclear brinkmanship', the Guardian leader, 4 August 2005

[25] Paul Ingram, Preliminary analysis of E3/EU proposal to Iran, BASIC Note, 11 August 2005, <http://www.basicint.org>.

[26] GOV/2005/47, p. 11, para. 50.

[27] 'Iran gives note-to-note reply to EIBaradei's report to IAEA Board', Islamic Republic News Agency, 13 September 2005

[28] Several observers have voiced concern that Iran may develop a latent nuclear weapons capacity and then simply withdraw from the NPT. Then it would be legally entitled to nuclear weapons production.

[29] Legal grounds for UNSC referral can be found in article IV (B) (4) and XII (C) of the IAEA Statute.

[30] Voting procedure is covered in IAEA Statute, article VI (E). Membership of the Board of Governors: Algeria, Argentina, Australia, Belgium, Brazil, Canada, China, Ecuador, France, Germany, Ghana, Hungary, India, Italy, Japan, Republic of Korea, Mexico, Netherlands, Nigeria, Pakistan, Peru, Poland, Portugal, Russian Federation, Singapore, Slovakia, South Africa, Sri Lanka, Sweden, Tunisia, United Kingdom, United States, Venezuela, Vietnam and Yemen.

[31] China phrased its support for the latest IAEA resolution on Iran in the following manner. 'The Chinese delegation is of the view that ... all the parties should ... settle differences in a constructive manner through continued negotiations and avoid taking any actions that might further complicate the situation [...] Continuation of the negotiation is the most appropriate and realistic approach to the resolution of the issue'. See Statement by Chinese Ambassador Wu Hailong at the Special Session of the IAEA Board of Governors Regarding Iran Nuclear Issue, 9 August 2005, <http://www.fmprc.gov.cn>.

The Russian Federation phrased its support for the latest IAEA resolution on Iran as follows. 'Having supported the adoption of the resolution, we proceed from the necessity to create conditions for de-escalating the situation and getting it back into the negotiation mainstream. We are convinced that in this way, through a mutually keen dialogue, it is possible to arrive at solutions ultimately meeting the interests of Iran, including through the creation of an atmosphere of necessary trust around its nuclear program. Russia, for its part, is ready to assist the development of the process in this direction comprehensively'. See press-release 1706, 12 August 2005, <http://www.in.mid.ru>.

[32] Rule 9 of the UN Security Council's provisional rules of procedure. Present membership of the Security Council: Algeria, Argentina, Benin, Brazil, China, Denmark, France, Greece, Japan, Philippines, Romania, Russian Federation, United Kingdom, United Republic of Tanzania and the United States.

[33] Article 27 (2) of the UN Charter

[34] Article 27 (3) of the UN Charter

[35] For the Iranian view, see Communication dated 1 August 2005 received from the Permanent Mission of the Islamic Republic of Iran to the Agency, INFCIRC/648, at p. 3. The E-3 response is contained in the Communication dated 8 August 2005 received from the Resident Representatives of France, Germany and the United Kingdom to the Agency, INFCIRC/651. Both documents are available at <http://www.iaea.org>.