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The Basis of Good Faith and Creation of International Commitment (Case Study of JCPOA)

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Abstract

Although good faith is an obvious principle of international law, there is no detailed definition of it. In all of treaties it is just told that the parties must observe the principle in all of the steps of treaty. Joint Comprehensive Plan of Action has the similar condition and just it has been told that parties must observe the good faith principle. Also in the procedure of dispute resolution nonconformity with good faith is not a cause to complaining from a party. On the other hand among the defined treaties in international law there is no criterion for observing the good faith and detection of non-compliance is the responsibility of judge or arbitrator.

Key Words: International Law, Good Faith, Commitment, Joint Comprehensive Plan of Action, Arbitration.

The issue of good faith in international law has a high position in treaties and agreements from long time ago. Today good faith has been promoted to a foundation that rules the overall international relations and gained credit and special prominence in law of treaties. This notion seems too wide and vague, because the domain of opposite position, which is the ill will, is not specified enough.¹ Commitment in international law shall be studied from various angles. On one hand subject is the dispute over commitment of states to loyalty in treaties, because of independence of states it is not possible to force them to accept a treaty; and on the other hand all of the states are the same and equal regarding to sovereignty and no state shall decide over the power of other states.

The Joint Comprehensive Plan of Action (JCPOA) is an international agreement on the nuclear program of Iran reached in Vienna on 14 July 2015 between Iran, the P5+1 (the five permanent members of the United Nations Security Council—China, France, Russia, United Kingdom, United States—plus Germany),[a] and the European Union.

Formal negotiations toward the Joint Comprehensive Plan of Action on Iran's nuclear program began with the adoption of the Joint Plan of Action—an interim agreement on the Iranian nuclear program signed between Iran and the P5+1 countries in November 2013. For the next twenty months, Iran and the P5+1 countries engaged in negotiations, and in April 2015 agreed on a

¹ Ziaee Bigdeli, M. R. (2013). *The Law of International Contracts*. Tehran: Ganj Danesh.
Volume-II, Issue-IV

The Basis of Good Faith and Creation of International Commitment... Sartipi Hosein & Hamid Reza Oraee
framework agreement for the final agreement. In July 2015, Iran and the P5+1 agreed on the Joint Comprehensive Plan of Action.

Under the agreement, Iran agreed to eliminate its stockpile of medium-enriched uranium, cut its stockpile of low-enriched uranium by 98%, and reduce by about two-thirds the number of its centrifuges for at least fifteen years. For the next fifteen years, Iran will only enrich uranium up to 3.67%. Iran also agreed not to build any new uranium-enriching or heavy-water facilities over the same period. Uranium-enrichment activities will be limited to a single facility using first-generation centrifuges for ten years. Other facilities will be converted to avoid proliferation risks. To monitor and verify Iran's compliance with the agreement, the International Atomic Energy Agency (IAEA) will have regular access to all Iranian nuclear facilities. The agreement provides that in return for verifiably abiding by its commitments, Iran will receive relief from U.S., European Union, and United Nations Security Council nuclear-related sanctions.

Ultimately, on 14 July 2015, all parties agreed to a landmark comprehensive nuclear agreement. At the time of the announcement, shortly before 11:00 GMT, the agreement was released to the public. On 18 October 2015, EU High Representative Mogherini and Iranian Foreign Minister Zarif jointly announced "Adoption Day" for the JCPOA, noting actions taken and planned by the EU, Iran, the IAEA, and the United States, and stating that "All sides remain strongly committed to ensuring that implementation of the Joint Comprehensive Plan of Action can start as soon as possible."¹

Good faith term has been used in numerous cases in the JCPOA. Survey of these cases shall help us to achieve the perfect result: The E3/EU+3 and Iran commit to implement this JCPOA in good faith and in a constructive atmosphere, based on mutual respect, and to refrain from any action inconsistent with the letter, spirit and intent of this JCPOA that would undermine its successful implementation. The E3/EU+3 will refrain from imposing discriminatory regulatory and procedural requirements in lieu of the sanctions and restrictive measures covered by this JCPOA. This JCPOA builds on the implementation of the Joint Plan of Action (JPOA) agreed in Geneva on 24 November 2013.

In article 26 of the document it is written that: The EU will refrain from re-introducing or re-imposing the sanctions that it has terminated implementing under this JCPOA, without prejudice to the dispute resolution process provided for under this JCPOA. There will be no new nuclear related UN Security Council sanctions and no new EU nuclear-related sanctions or restrictive measures. The United States will make best efforts in good faith to sustain this JCPOA and to prevent interference with the realization of the full benefit by Iran of the sanctions lifting specified in Annex II.

Also in article 28 of the same part we have: The E3/EU+3 and Iran commit to implement this JCPOA in good faith and in a constructive atmosphere, based on mutual respect, and to refrain from any action inconsistent with the letter, spirit and intent of this JCPOA that would undermine its successful implementation. Senior Government officials of the E3/EU+3 and Iran will make every effort to support the successful implementation of this JCPOA including in their public statements². The E3/EU+3 will take all measures required to lift sanctions and will refrain from imposing exceptional or discriminatory regulatory and procedural requirements in lieu of the sanctions and restrictive measures covered by the JCPOA.

¹ JCPOA. 2015, from www.wikipedia.org
Volume-II, Issue-IV

In the access section article 74 goes: Requests for access pursuant to provisions of this JCPOA will be made in good faith, with due observance of the sovereign rights of Iran, and kept to the minimum necessary to effectively implement the verification responsibilities under this JCPOA.

And eventually in article 38 of Upon receipt of the notification from the complaining participant, as described above, including a description of the good-faith efforts the participant made to exhaust the dispute resolution process specified in this JCPOA, the UN Security Council, in accordance with its procedures, shall vote on a resolution to continue the sanctions lifting.¹

The main concern of author is, to what extend the good faith shall create obligation for treaty parties. Based on it the question of paper is:” whether the good faith shall create obligation for a state like traditional sources of international law?” in the paper after statement of problem and presenting required definitions, we will survey the good faith and then obligation in both internal and international law and eventually it will be studied that whether the good faith in JCPOA creates obligation for parties. In the conclusion section the answer of the question will be uncovered with the hope that carrying out this paper shall extend the law literature.

1. The good faith: Good faith has a specific position in treaties and it has been named directly and indirectly in various fields. In ‘Dehkhoda’ dictionary it means good will, to good intent and antonym of ill will. In insurance industry, treaty based on the good faith principle, which means that the insurer accepts the honesty and rightly remarks of costumer and accordingly accept the compensations.² Insurance contracts are among those contracts that good faith has a key role in them and because of that; they are named the “good faith contracts”.³ Although the good faith has been recognized in internal laws and in laws of some countries some articles have been dedicated to it, but there is no clear definition of it. Some called the definition of good faith as “easy and at the same time impossible”.⁴

Good faith is a general principle of international law. General principles of law function to ‘make the law of nations a viable system for application in a judicial process...’ The obligation to protect good faith, together with standards of good faith implied in treaty provisions, the underlying or ensuing customary rule of *pacta sunt servanda* as well as the customary rule of estoppel, and the good faith-related concepts of equity and fairness are sources known to public international law.⁵

Lawyers always try to find a specified definition of good faith or every phenomenon, because of that, regarding the provided definition by lawyers about good faith it can be realized that the concept of good faith generally categorized in two ways: firstly the honesty and avoid from fraud and fraudulence thoughts which are against of good faith. Accordingly the person with good faith who thinks his wrong act is in line with law because of ignorance or deception, in law enforcement shall not face harsh act. Secondly, have honest behavior and observing conventional model in practice of treaties.⁶

¹ JCPOA. (2015). from www.state.gov/e/eb/tfs/spi/iran/jcpoa/

² Avansian, A. (1988). The Good Faith Principle. *Insurance Industry*, 12, 12-16.

³ Katoozian, N. (1990). *Civil Law: General Principles of Contracts* (Vol. 5). Tehran: Behnashr.

⁴ Deilami, A. (2009). *Good Faith in Civil Responsibility*. (PHD), Tehran University, Faculty of Law and Political Sciences.

⁵ Panizzon, M. (2006). *Good Faith in the Jurisprudence of the WTO*. Oregon: Oxford and Portland.

⁶ Farooghi, H. S. (1988). *Al mojam Al Ghanooni: English- Arabic* (Vol. 1). Beirut.

The obligation to act in accordance with good faith is a fundamental principle of international law, and includes equity. Article 2(2) of the UN Charter requires all Members to fulfill their Charter obligations in good faith. Similarly, the Vienna Convention on the Law of Treaties 1969 requires parties to a treaty to perform the treaty (Article 26), and to interpret it (Article 31(1)), in good faith. The principle is not restricted to treaties but applies to all international obligations.¹

After considering all of the existing definitions of good faith, may be the following definition shall be the most comprehensive one: an honest, fair and logical act which in all of the stages of treaty must be observed. The similarities among definitions of good faith are honesty, truth in treaty and practice of them in honest, fair and logic way.²

1.1. Good faith in internal law regimes:

1.1.1. Iran legal system: In Iran legal system there is no rule about good faith or obligation to observe it. Accordingly some believes that in Iran legal system observance or non-observance of good faith has no effect on the credibility of contracts.³

Although, survey on laws shown the existence of good faith, but in sporadic manner. In article 8 of civil liability code adopted in 1339 (Hijri) wrote: a person hurts some ones prestige, credibility and position because of publication or certification of an untrue, shall be responsible. A person whom because of the publication the number of his customers cut or be at the risk of loss, shall ask for the suspension and in case of proofing his claim ask for the compensation of the loss. Yet the judge shall decide on the bases of good faith as implicit condition.⁴

1.1.2. France legal system: Definition of good faith inspired from France law is: good faith is from well-known principles of contract law in the international dimension and the position shall lead to penetration and effect of it in internal laws. Good faith has different meanings. Definition of good faith as the France law considered it has a twofold meaning. Good faith includes two meanings which these days are independent from each other. The concept includes meanings of wrong impression or legitimate imagination that explains the psychological position of a person from appearance of objects. This understanding is practicable in territory of estate and marriage law and business documents. Also good faith includes honesty. In fact this meaning is what has been told in article 1134 of France civil code and explains the practice of contracts with good faith.⁵

Recently the France legal system has been modified and the good faith principle is in act between parties of contract. Although despite of the fact that there are some ambiguities about good faith but from view point of structure it is completely obvious.⁶

1.1.3. England legal system: England legal system does not recognize good faith as a norm ruling on contracts and also some lawyers see the definition of good faith as definitely hard.¹ In return some of English lawyers have a positive view toward the theory of good faith in practice.

¹ Anthony, A. (2010). *Handbook of International Law*: Cambridge.

² Jafarzadeh, M. (2005). Good Faith in International Contracts: Comprehensive or Specific Principle. *Legal Research*, 41, 140-141.

³ Babaie, I. (2006). *Insurance Law* (1 ed.). Tehran: SAMT.

⁴ Katoozian, N. (1984). *Civil Law*. Tehran: Behnashr.

⁵ Ansari, A. (2010). Concept of Good Faith in Iran and France Law. *Modarres Oloom Ensani*, 63, 19-46.

⁶ Janssen, A. (2009). *CISG Methodology*: Sellier.

Finally by gathering various ideas it can be said that the good faith in practice of treaties are not recognized like the written legal systems and despite of its popularity, it is hard to witness and proof the ruling of this principle in the legal system. Treaty parties, except in frame work of doctrines likes mistake, reluctance, fraud, undue influence, the prohibition of denial after confession and so on, shall pursue their rights in detailed and without considering motives. In other words although it is right that there is no rule by the name good faith in principles governing contracts, therefore it is not possible to observe the practice of each part in any steps of a contract, but there are many breadcrumbs which, it cannot be said the major base, at least one of the infrastructures of it is to observe good faith and fair treatment in contract.²

2. Basis of commitment in international law: Commitment in international law is an element of obligation on parties of treaty. The meaning of commitment in 'Dehkhoda' Dictionary is 'to renew vows' and 'refresh treaty'. The 'Moein' Dictionary believes the meaning is 'to accept obligation' and 'to pledge'.

2.1. Traditional sources

2.1.1. Treaty: Treaty or convention or pact is an international agreement which is held among states or international organizations according to international law. Treaty is a general term and includes convention, international agreement, agreement, protocol, and pact.³

Although 'Klabbers' has a positive view toward treaty, he talks about its definition with doubt: treaty is a clear and reliable source in international law and discuss about a treaty is simpler than that of custom. But also the definition of treaty is not as clear as it seems to be at the first glance.⁴

Primary international obligations which required the act or omission of a specific act, shall be seen in international treaties in its best way, in which subjects ask for create an international rules.⁵

About the treaties, states themselves with their own will shall create obligations for themselves that they are obliged to observe them. Since the independence and sovereignty of countries is so important in international law, it is not possible to found a reference over the power of countries to supervise them. Therefore obligations of countries regarding treaties and tasks shall relate to elements like: bilateral interest, self-help and reciprocity, recognition of international law in internal laws of countries, moral responsibility and⁶

Good faith covers various fields of bilateral international treaty relations, such as primary treaty negotiations, formation and interpretation of treaty, treaty practice and to practice the enforcement of it.⁷

¹ - Zimmermann, R. (2003). *Good Faith in European Contract Law* (3rd Ed.): Cambridge Press.

² Roger, B., Gaint, Howells. (1999). *Good Faith in Contract* (5th ed.). London: London Ashgate Publishing Co.

³ Abooei, H. R. (2010). Good Faith in Practice of Contracts in Iran and England Legal System. *Faculty of Law and Political Sciences*, 2, 1-20.

⁴ Wallas, R. (2003). *Intrernational Law* (S. G. a. B. Zamani, Mahnaz, Trans. 1 ed.). Tehran: Institute of Law Studies.

⁵ Klabbers, J. (1998). *The Concept of Treaty in International Law*: Kluwer.

⁶ Hosein Gholi, R. Z. (2003). International Society and International Commitment. *Law*, 24.

⁷ Jahanbazi, A. (2005). Enforcement in International Law. *Islamic and Human Sciences*, 5.

Also in article 26 of Vienna Convention on the law of treaties we have: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith. Article 31, general rule of interpretation says: A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.¹

In the annex of Vienna Convention on the law of treaties, declaration on the prohibition of military, political or economic coercion in the conclusion of treaties said: The United Nations Conference on the Law of Treaties, Upholding the principle that every treaty in force is binding upon the parties to it and must be performed by them in good faith, Reaffirming the principle of the sovereign equality of States, Convinced that States must have complete freedom in performing any act relating to the conclusion of a treaty.²

2.1.2. Custom: According to this principle, if any contract signed, custom will affect it from different directions. In fact custom is non-ignorable. Sometimes effect of custom is on the recognition of nature of treaty; and the effect shall refer to components and functions of the treaty subject and sometimes affect the result and consequences.³

Custom with the support of moral and logical roots in good faith and with its effect on legal relations and personal interests, place it among legal binding norms and it is obligatory for everybody to observe good faith from this view point and is not a moral suggestion anymore.⁴

Not only Good faith has an important position in ratification and practice of contract but also the principle is significant in the pre-contract period. Acceptance of good faith in pre-contract period has some consequences. Observance of the principle leads to the fact that parties in primary talks stage for reaching the joint aims, with honesty, clarity and in serious manner cooperate with each other and give information and while observing secrecy respect the other ones interest and private information and avoid parallel negotiation.⁵

2.1.3. Judicial procedures: ICJ in the dispute between Belgium and Senegal named custom as one of the elements of commitment cause. In other place sees UNIC as the references for commitment and called for observance by parties.⁶

In dispute between Chile and Bolivia, Court in its verdict told that the treaty signed by parties is the reference for complete commitment of them and any distortion is not welcomed.⁷

Good faith in all of the legal aspects, whether internal or international, and in all of the stages of treaty and contract ratification has its fixed position, however there is no certain criteria to define the

¹ . from <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>

²Fromhttp://legal.un.org/diplomaticconferences/lawoftreaties-1969/docs/english/confdocs/a_conf_39_26.pdf

³ . from <http://www.hvm.ir/print.asp?id=42254>

⁴ Iran, US Arbitration Court case number 43 (Iran, US Arbitration Court.

⁵ Barikloo, A. (2011). Good Faith and its Consequences in Pre-Contract Period. *Legal Journal of Justice*, 76, 53-87.

⁶ ICJ Cases. from <http://www.icj-cij.org/docket/files/144/17084.pdf>

⁷ ICJ Cases. from <http://www.icj-cij.org/docket/files/153/18622.pdf>

The Basis of Good Faith and Creation of International Commitment... Sartipi Hosein & Hamid Reza Oraee
principle in any of legal sources. (e.g. in internal law of Iran recognition of good faith observance is up to the judge).

ICJ in its verdict over the Cameroon and Nigeria dispute about intervention in Guinea, the soil and water borders case, said: court believes that good faith is a well-founded principle in international law. Court continued with the idea that, although it is one of the main principles which govern the creation and practice of legal obligations, but it is not a binding source.¹

In the case of 'legality of the threat or use of nuclear weapons' ICJ believes: There exists an obligation to pursue good faith and came to a conclusion that negotiations leading to nuclear disarmament in all its aspects is under strict and effective international control".²

2.1.4. Jus Cogens: In Vienna convention on the law of treaties article 53 we have: A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

2.1.5. Erga Omnes: Erga Omnes Is one of the obligations arising from principles relating to fundamental rights of human beings, called the society obligations, which not only the contractual consent but also membership in international society is due to observe of them and consent of states assumed as a definite fact.³ Accordingly ICJ in its advisory opinion about CPPCG told that the bases of convention even without any contractual obligation are obligatory to states.

2.2. New sources

2.2.1. Soft law: To answer about the quiddity of soft law- which is the symbol of effort to overcome traditional limitations of legal international discipline – it must be said that there is no certain definition with acceptability in legal literature. In other words, this twisted concept is full of vagueness and conceptual difficulties and to some extends confusing.⁴ Yet not only has the concept been used in numerous formal legal literatures but also recognized in many international procedures.⁵

It can be said that the soft law in its most concise definition is: norms which are non- obligatory from legal view point; in fact they are transforming to legal norms and/or are Involves a degree of legal obligation or basically involves non legal obligations.⁶

¹ICJ Cases. from <http://www.icj-cij.org/docket/index.php?sum=496&code=cn&p1=3&p2=3&case=94&k=74&p3=5>

²ICJ Cases. from <http://www.icj-cij.org/docket/index.php?sum=498&code=unan&p1=3&p2=4&case=95&k=e1&p3=5>

³ Hosein Gholi, R. Z. (2003). *International Society and International Commitment; Erga Omnes. Omnes. Law*, 33, 9-17.

⁴ Crawford J., P. A., Olleson S. (2010). *The Law of International Responsibility*. London: Oxford University Press.

⁵ Abbott K. and Snidal D. (2000). *Hard and Soft Law in International Governance: International International Organization*.

⁶ Tavakol, H. (2012). Evaluation of Soft Law Concept in International Law Sources. *Comparative Law Researches*, 2, 1-21.

2.2.2. Procedure of international organizations: In the Resolution adopted by the General Assembly United Nations, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations said: Considering that the faithful observance of the principles of international law concerning friendly relations and co-operation among States and the fulfillment in good faith of the obligations assumed by States, in accordance with the Charter, is of the greatest importance for the maintenance of international peace and security and for the implementation of the other purposes of the United Nations.¹

In Resolution 913 of national Security Council about the situation in Bosnia and Herzegovina goes: The Bosnian Serbs were condemned further for their failure to uphold commitments and negotiate in good faith. In United Nations Security Council Resolution 1818 about the conflict between Greek Cypriot and the Turkish Cypriot we have: The resolution also welcomed the agreement between Greek and Turkish Cypriot leaders of 21 March, and the 23 May Joint Statement, which, among other things, demonstrated a renewed political willingness to support and engage fully and in good faith with the United Nations efforts.²

In WHO there is an emphasis that treaty is binding for parties and must be carried out by observance of good faith. Also good faith has been defined as one the general principles of law.³ Among strategic goals of ICAO, Economic growth in the transportation industry, we have: this declaration is on the base of said assumptions and shall be carried out by good faith.⁴ In ILO section 31 refers to parties' obligation to negotiate with good faith and said: all the treaty parties must be signed by good faith and do their best to reach a comprehensive agreement.⁵

2.2.3. Legal unilateral acts: Legal unilateral acts of states were the only way for cooperation of states in international medium, now acts arising from will and desire some times are just is a matter of effect in a subject in international medium, which in this case no unilateral relation has been created and/ or may be these acts done independently by a state and creates an unilateral relation and has a concept except for any limitation.⁶

Acts carried out by a competent authority in the name of one or some states and with the purpose of having legal effect and in unilateral manner, in public, final and apart from any other act, whether oral or written and for the founder or founders by observing general principles of international law shall create undoubful obligation.

3. Conclusion: As it was said in the introduction, in five sections of 'JCPOA' the good faith principle has been cited, but there is no definition or criteria for recognition of observance. As it was told previously, no exact definition for good faith exists and in internal law of Islamic republic of Iran, judge is the only reference to recognize the existence or absence of it and in international

¹ . from <http://www.un-documents.net/a25r2625.htm>

² United Nations Security Council Resolution 1818. From https://en.wikipedia.org/wiki/United_Nations_Security_Council_Resolution_1818

³ WHO. from <http://www.who.int/trade/glossary/story061/en/>

⁴ ICAO. from www.icao.int/MID/Documents/2014/.../11%20-%20ASBUs.pptx

⁵ ILO. from <http://www.ilo.org/legacy/english/dialogue/ifpdial/llg/ch3/ex8.htm>

⁶ Hashemi, Hamid. (2000). *Laws Governing on Unilateral Acts of States as a Source in International Law*. (MA).

The Basis of Good Faith and Creation of International Commitment... Sartipi Hosein & Hamid Reza Oraee
 medium, arbitrator or arbitration authority shall decide about it. By studying the traditional and new sources of international law it was seen that the reliability is more on traditional ones.

Also In settling disputes, non-observance of good faith is not the reason to pursue the case with defined references and just it was asked from parties to carry out their activities by observing good faith. It must be added that in fields that the examples of good faith has been recognized sovereignty and independence of states lead to the fact that there is no reference over the state's power to oblige them and just the before consent of them shall authorize courts and arbitrators to investigate in a case, also the enforcement of writs need states consent.

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