Legal Implications of the U.S. Withdrawal from the JCPOA and Re-imposition of Secondary Sanctions under International Litigation and Arbitration Proceedings

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Abstract

An acronym for the Joint Comprehensive Plan of Action, the "JCPOA" paved the way for multinational as well as major and small foreign companies to invest in different potential areas in the Iranian market and infrastructure right after the United Nations, the European Union and the United States have lifted sanctions. However, these were temporary and the U.S. Administration withdrew from the nuclear deal and re-imposed its secondary sanctions against Iran. Immediately after the re-imposition of U.S. sanctions, foreign companies have terminated or suspended their contractual obligations without considering the legal consequences. Since then, the situation for Iranian companies is quite different; foreign companies are prohibited from working with Iran, and banking transactions are halted by foreign banks owing to U.S. sanctions. In fact, they cannot evade their responsibility under the withdrawal of the U.S. from the JCPOA and the re-imposition of sanctions. Contractual commitments of the parties to a contract with Iranian entities must be respected and enforced; otherwise, they must compensate all losses and damages. The Defense of force majeure cannot be invoked, particularly for European companies, since U.S. sanctions were foreseeable. European Union's Blocking Statute, lack of good faith, and the due diligence for the fulfillment of their obligations as to humanitarian exemptions and exceptions indicating force majeure could not be upheld here too. Therefore, Iranian companies shall raise their claims based on dispute settlement clauses stipulated in their contracts with foreign parties and other legal mechanisms in order to establish a concrete procedure to deal with ongoing and future situations regarding secondary sanctions.

Keywords: Economic Sanctions, Contractual Obligations, JCPOA, EU Blocking Statute, Force Majeure, International Court of Justice, Over-compliance.

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Introduction

The United States (U.S.) withdrawal from the Joint Comprehensive Plan of Action (the JCPOA) together with the re-imposition of (secondary) sanctions was a nightmare for those major as well as small foreign companies that have invested in Iran after the JCPOA. Years of complicated negotiations behind it, Iran's nuclear deal with 5+1 endorsed by the United Nations Security Council Resolution 2231 was an authentic authorization for those enthusiastic companies that have been patient for years to return to Iran for investing in different potential areas including oil and gas, automotive, and energy sector, only to name a few.

Expectedly, the JCPOA has led to the conclusion of a bunch of contracts concerning foreign investments in Iran and paved the way for the participation of multinational companies ranging from Shell and BP LTD. to Peugeot and Renault as well as other famous brands.[1] However, having been elected as the President of the United States, Donald Trump withdrew from the JCPOA and re-imposed nuclear-related sanctions on 8 May 2018 and 5 November 2018 since which sanctions have been expanding continuously.

U.S. allegations against Iran including Iran's nuclear ambitions, supporting acts of terrorism, Iran's ballistic missiles program[2] as well

[1] David ADESNIK and Saeed GHASSEMINEJAD, "Foreign Investment in Iran: Multinational Firms' Compliance with U.S. Sanctions" (2018) Foundation for Defense of Democracies.

[2] For more information about legal nature of the Iran's ballistic missiles program see: JURIST — Academic Commentary, "Iran's Ballistic Missile Program from an International Law Perspective" (December 2017), online: http://jurist.org/forum/2017/12/Alireza-Ranjbar-iran-ballistic-missile.php (last seen: 08 December 2020)

as violation of human rights[3] leading to re-imposition of sanctions by the Trump Administration, totally sabotage the JCPOA mechanisms.

Trump Administration's sanctions against Iran eventually made foreign investors leave the lucrative markets of Iran, while, there were – and there is still – ongoing contracts and incomplete commitments on their sides and have left no choices for Iranian companies but to recourse to dispute settlement clauses including arbitration to be compensated. Yet, the main question here is the legal status of those investments made in Iran by foreign investors thanks to the JCPOA and after the U.S. withdrawal from the deal and the re-imposition of sanctions.

For responding to this question, the impact of U.S. sanctions on foreign (third-country) investments' contracts should be probed from international law and the law of international contracts perspectives (Section B). For this purpose, it is necessary to analyze the U.S. sanctions in comparison with the United Nations (UN) sanctions (Section A).[4]

I. The Distinction between UN Sanctions and U.S. Sanctions

Several distinctions could be drawn with respect to UN sanctions and U.S. sanctions most notably based on "nature" and "scope" of sanctions.

a) Nature of Sanctions

[3] U.S. Department of the Treasury (Press Releases), "U.S. Government Fully Re-Imposes Sanctions on the Iranian Regime as Part of Unprecedented U.S. Economic Pressure Campaign" (5 November 2018), online: https://home.treasury.gov/news/press-releases/sm541 (last seen: 08 December 2020)

[4] It should be mentioned here that damages arising from U.S. withdrawal from the JCPOA and the re-imposed sanctions differ from damages arising out of contractual obligations toward foreign companies which the latter is the subject of this article.

Generally, "[s]anctions are measures taken in support of law"[5] which could be applied at national, regional, and international levels by governments or regional and international organizations. Although UN sanctions and U.S. sanctions pursue the same goal (support of law), they are different in many aspects some of which are discussed as follows:

Firstly, U.S. re-imposed sanctions are based on Trump Administration's unilateral decisions and are originated from U.S. domestic legal system. However, United Nations sanctions are imposed by UN Security Council (UNSC) in compliance with article 41 of the UN Charter according to which, Member States of the UN agreed that "the Security Council acts on their behalf". Then, acts of the UNSC are those of the international community, neither simple acts of UNSC members itself nor a sole country. Simply put, as the Court of Appeal of Paris noted, "[…] the unilateral sanctions taken by the American authorities against Iran cannot be regarded as the expression of an international consensus."[6]

Secondly, contrary to the UNSC imposed sanctions against Iran's nuclear program (resolutions 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1835 (2008), 1929 (2010), and 2224 (2015)), re-imposed sanctions by Trump Administration against Iran are not binding for other countries and their nations (in theory). UN sanctions under chapter 7 of the UN Charter are binding for both UN Members and non-Members[7]. Article 25 of

[5] John P. GRANT and J. Craig BARKER, eds., Parry & Grant Encyclopedic Dictionary of International Law (New York: Oxford University Press, Third Edition, 2009), p.539.

[6] SA T. v Société N., Cour d'appel de Paris, Chambre Commerciale Internationale, Pôle 5 - Chambre 16, Arrêt du 03 Juin 2020, Recours en Annulation, para.62.

[7] Charter of the United Nations, 26 June 1945, United Nations, Treaty Series (Entered into force 24 October 1945), article.2(6).

the UN Charter provides that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council"[8]; however, in case of U.S. sanctions against Iran, it is just the decisions of the U.S. Administrations to impose sanctions against Iran. Under the Vienna Convention, a State may not invoke its internal laws to avoid an international obligation[9]. *A fortiori*, a State may not invoke its internal laws to impose its laws on the international community against rules and principles of international law. The sanctions imposed against Iran are, *inter alia*, violations of the principles reflected in the "Charter of Economic Rights and Duties of States" including the principle of "equal sovereignty"[10].

Thirdly, the main purpose of the UN sanctions, based on Article 1(1) of the UN Charter is maintaining international peace and security[11]; while the purpose of the U.S. sanctions is to keep U.S. national security, foreign policy, and economy safe from the [alleged] threats that Iran's behavior continues to pose. Nothing could explain this reasoning better than this: "UN sanctions are applied to support UN Charter principles; other sanctions may in some cases support UN sanctions and by extension UN Charter principles, but are primarily applied in the interest of national or

[8] International Court of Justice, in one of its advisory opinions, acknowledged that the position of the UN Member States in relation to the organization has been defined by requiring them, among other things, "to accept and carry out the decisions of the Security Council": Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion: I.C.J. Reports 1949, p.178.

[9] Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, Vol.1155 (entered into force: 27 January 1980) [VCLT], article.27.

[10] Charter of Economic Rights and Duties of States, GA Res.3281(xxix), UN Doc. A/RES/29/3281 (1974), articles 1, 2, 4, 8, 11, 14, 24, 26, and 32.

[11] Maintaining international peace and security is the key to binding effects of Security Council's Decision reflected in Article 25 of the UN Charter. See: Marko DIVAC ÖBERG, "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ" (2006) European Journal of International Law, Vol.16, No.5, pp.884-885.

regional foreign policy objectives."[12] According to U.S. Authorities, the genuine purpose of the sanctions against Iran is "to disrupt the Iranian regime's ability to fund its broad range of malign activities, and places unprecedented financial pressure on the Iranian regime to negotiate a comprehensive deal that will permanently prevent Iran from acquiring a nuclear weapon, cease Iran's development of ballistic missiles, and end Iran's broad range of malign activities"[13] which it is not followed by UN at all at least after the JCPOA.

Fourthly, the U.S. invokes national reports and national policies to impose sanctions against Iran which could not be impartial and independent, but UN sources for imposing sanctions are based on expert reports prepared by UN cognizable, well-trusted, and less U.S.-influenced entities such as International Atomic Energy Agency (IAEA).

Fifthly and more importantly, U.S. sanctions generally cannot be upheld as *force majeure* [as would be explained later] as a ground for termination or suspension of the contract since they are a matter of applying territorial and extra-territorial jurisdiction. On the other hand, UN sanctions can be invoked as *force majeure* by foreign investors due to the binding Status of the UNSC resolutions issued under chapter 7 of the UN Charter[14].

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[12] Enrico CARISCH, Loraine RICKARD-MARTIN, and Shawna R. MEISTER, eds., The Evolution of UN Sanctions; From a Tool of Warfare to a Tool of Peace, Security and Human Rights, (New York: Springer, 2017), p.453.

[13] U.S. Department of the Treasury (Press Releases), supra note 3.

[14] In one of the cases brought to the ICJ, it was argued that "even if the Montreal Convention did confer on Libya the rights it claims, they could not be exercised in this case because they were superseded by Security Council resolutions 748 (1992) and 883 (1993) which, by virtue of Articles 25 and 103 of the United Nations Charter, have priority over all rights and obligations arising out of the Montreal Convention". In its consideration, ICJ stated "[t]he Court cannot uphold this line of argument. Security Council resolutions 748 (1992) and 883 (1993) were in fact

In fact, "there are no reasons to believe that international arbitration tribunals are prevented from interpreting and applying the Security Council resolutions to commercial disputes, on a case-by-case basis, where the merits thereof so require."[15]

Interestingly enough, the French Court of Cassation in its 2020 judgment, with respect to the effects of the UNSC's sanctions, has raised a pivotal consideration. In the view of the Court, sanctions imposed against Bank Sepah (an Iranian State bank), for providing and facilitating banking services to certain Iranian sanctioned entities, could not be considered as a pretext to justify Bank Sepah's inability to perform its obligations and the ensuing legal consequences.[16] By this argument, the French Court of Cassation reaffirms the dual effect of UNSC's sanctions: firstly, those entities who are subjects of UNSC's sanctions are forbidden to have any working or commercial relationships. Secondly, those entities who are subjects to the UNSC's sanctions might not be able to justify their inability to perform their obligations and it is not a *force majeure* situation for them since it is the fruit of their

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adopted after the filing of the Application on 3 March 1992. In accordance with its established jurisprudence, if the Court had jurisdiction on that date, it continues to do so; the subsequent coming into existence of the above-mentioned resolutions cannot affect its jurisdiction once established". *Contra rationem*, ICJ accepted the view in which UNSC resolutions issued under chapter 7 of the UN Charter are prevailed over ICJ jurisdiction, and *a fortiori*, other international and national fora; see: Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment: I.C.J. Reports 1998, pp.23-24, paras.37-38.

[15] Elvira R. GADELSHINA, "On the Role of UN Security Council Resolutions in International Commercial Arbitration", Kluwer Arbitration Blog (30 January 2013), online: http://arbitrationblog.kluwerarbitration.com/2013/01/30/on-the-role-of-un-security-council-resolutions-in-international-commercial-arbitration/

[16] La société Bank Sepah v la société Overseas Financial Ltd et la société Oaktree Finance Ltd, Arrêt de la Cour de Cassation, siégeant en Assemblée Plénière, 10 Juillet 2020, paras.9-13.

very own unlawful conduct and they might have been aware of the results of that conduct. This ruling reflects the authoritative nature of the legal status of the UNSC's sanctions.

In conclusion, the UNSC's sanctions enjoy a vast legal and rational framework and benefit from a persuasive character, while the U.S. sanctions are rather political and incorporated with misuse of power.

(b) Scope of Sanctions

The UN sanctions regime against Iran began with and followed by U.S. unilateral sanctions where "both the IAEA and UNSC highlighted the threat posed by Iran using the logic that ambiguity is suspicious and thus dangerous"[17], even though, UN sanctions' multilateral framework was concentrated on Iran's nuclear programs and ballistic missiles and related financial issues.

Previous UN sanctions against Iran are reflected in the resolutions 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1835 (2008), 1929 (2010), and 2224 (2015), targeted at limited areas related to Iran's nuclear program and ballistic missiles. According to the aforementioned resolutions, the main purposes of the UN sanctions against Iran were to virtually restrict access of Iran, Iranian entities, and nationals to facilities, equipment, materials, and knowledge concerning Iran's nuclear programs and ballistic missiles as well as to narrow Iran's access to financial resources and aids[18]. U.S. sanctions,

[17] Hisae NAKANISHI, "The Construction of the Sanctions Regime Against Iran: Political Dimensions of Unilateralism" in Ali Z. MAROSSI and Marisa R. BASSETT, eds., Economic Sanctions under International Law; Unilateralism, Multilateralism, Legitimacy and Consequences, (The Hague: T.M.C. ASSER Press, 2015), pp.31-32.

[18] For examples see: SC Res.1696, UN Doc. S/RES/1696 (2006), para.5; SC Res.1737, UN Doc. S/RES/1737 (2006), paras.3 and 6; SC Res.1747, UN Doc. S/RES/1747 (2007), paras.2, 5, 6 and 7; SC Res.1803, UN Doc. S/RES/1803 (2008),

on the contrary, are complex with more diversity; they cover different targets, issued by different governmental bodies from Congress to the Department of the Treasury and the President himself (executive orders).[19] Specifically, the U.S. re-imposed sanctions cover a variety of Iranian industries, entities, and persons and their financial and banking activities as well. However, there are distinctions between U.S. primary sanctions and secondary sanctions as follows.

Primary sanctions "are those that apply to activities that have a jurisdictional nexus with the U.S. — including, for example, transactions involving U.S. persons or overseas subsidiaries of U.S. companies."[20] In fact, in primary sanctions, the U.S. applies its jurisdiction to "any nationals who are located on its own territory [territorial jurisdiction], or its own nationals wherever they are located [personal jurisdiction]."[21] When primary sanctions fail to alter the behavior of the target State(s), it comes to secondary sanctions to come in place to establish a more intensive and expanded mechanism for sanctions[22]. Secondary sanctions "are designed to deter and penalize certain activities of non-U.S. persons that may not be covered by primary sanctions [...][and] apply to non-U.S. firms and individuals, even in the absence of a jurisdictional nexus with the U.S."[23]. In other words, primary sanctions are related to State jurisdiction, while secondary sanctions are a matter of extraterritorial jurisdiction. This distinction is important to depict the scope of

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paras.3, 5, 9 and 11; and SC Res.1929, UN Doc. S/RES/1929 (2010), paras.7, 8 and 9.

[19] Nakanishi, supra note 17, p.26.

[20] Latham & Watkins LLP, Top 10 Things to Know About Expanded US Sanctions on Iran (Client Alert Commentary), No.2408, 06 November 2018, p.1.

[21] Cecile FABRE, "Secondary Economic Sanctions" (2016) Current Legal Problems, Vol.69, No.1, p.260.

[22] Tom RUYS and Cedric RYNGAERT, "Secondary Sanctions: A weapon Out of Control? The International Legality of, and European Responses to, US Secondary Sanctions" (2020) British Yearbook of International Law, p.8.

[23] Latham & Watkins LLP, supra note 20, p.2.

primary sanctions and secondary sanctions. Principally, State jurisdiction is applied within the territory of a country, however, it is not limited to the territory of a State. Orakhelashvili believes "any exercise of public authority by the State, […] whether lawful or unlawful under international law, involves the exercise of State jurisdiction. The exercise of State jurisdiction takes place in the context that rights may be acquired by individuals and other private entities outside the forum State's boundaries, which is a matter that could fall within the jurisdiction of more than one State"[24].

On the other hand, there is "extraterritoriality" or "extraterritorial jurisdiction". According to the Max Planck Encyclopedia of Public International Law, the terms "extraterritoriality" and "extraterritorial jurisdiction" are referred to "the competence of a State to make, apply and enforce rules of conduct in respect of persons, property or events beyond its territory. Such competence may be exercised by way of prescription, adjudication, or enforcement. Prescriptive jurisdiction refers to a State's authority to lay down legal norms. Adjudicative jurisdiction refers to a State's authority to decide competing claims. Enforcement jurisdiction refers to a State's authority to ensure compliance with its laws."[25]

Based on the United States' extra-territorial jurisdiction, the United States has extended its jurisdiction to "American-related persons" beyond its territory. In fact, some third companies are considered American-related persons in accordance with the United States' extra-territorial jurisdiction. Therefore, the United States has made the third

[24] Alexander ORAKHELASHVILI, "State Jurisdiction in International Law: Complexities of A Basic Concept" in Alexander ORAKHELASHVILI, ed., Research Handbook on Jurisdiction and Immunities in International Law, (The Lypiatts: Edward Elgar Publishing, 2015), p.1.
[25] Menno T. KAMMINGA, Extraterritoriality (Subject) in Max Planck Encyclopedia of Public International Law [MPEPIL], 2009.

parties obey its sanctions based on their relations to and connections with this country.

Many companies are affected by the United States' extra-territorial jurisdiction. In fact, by imposing extra-territorial jurisdiction, the United States widened the meaning of its territory. For instance, BP PLC, a British multinational oil and gas company headquartered in London, United Kingdom, which is owned by U.S. shareholders left Iran after U.S. withdrawal from the JCPOA[26].

Inevitably, U.S. primary sanctions could be regarded as a *force majeure* for those companies which are located in the geographical territory of the U.S. or considered U.S. companies outside the U.S.; in contrary, then, U.S. secondary sanctions are extra-territorial sanctions based on legal jurisdiction of the U.S. and, from a legal perspective, are not binding for companies beyond the U.S. territory.

II. Enforceability of Contractual Commitments in the Light of U.S. Sanctions

It is better to make a distinction between foreign companies and their contractual commitments to Iranian companies after re-imposition of U.S. sanctions on the one hand, and Iranian nationals' obligations before foreign companies on the other, to explain the enforceability of contractual commitments in light of U.S. sanctions.

a) *Foreign Companies and their Contractual Commitments to Iranian Companies after Re-imposition of the U.S. Sanctions*

Despite the fact that U.S. unilateral sanctions, in contrary to its obligations under international law, particularly the JCPOA and United Nations Security Council Resolution 2231, has totally

[26] Adesnik and Ghasseminejad, supra note 1, p.26.

degraded international law[27], there is still commitment upon foreign companies to fulfill their obligations arising from their contractual relations with Iranian companies and entities. This is while the majority of foreign companies have left Iran and have dropped their projects owing to U.S. sanctions.

Initially, it should be determined whether U.S. sanctions are stipulated as a *force majeure* clause in the contract or not; if both parties considered U.S. sanctions as a reason for termination or suspension and agreed on it, the challenging argument will not be accepted. The question is raised when no such a clause exists within the contract. Rarely do all contracts have a *force majeure* clause or sometimes the framework of the clause is too vague or restricted to include all situations outside the controls of the parties. In the presumption of no *force majeure* clause, basically, it should be determined whether *force majeure* is recognized through the governing law[28] of the contract or not. If the governing law deals with these issues, that is enough and what is determined by governing law must be applied[29]. Otherwise, where legislation is faced with lacunae,

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[27] CILJ — Cambridge International Law Journal, "Degrading the International Law by the Trump Administration Regarding the JCPOA" (December 2018), online: http://cilj.co.uk/2018/12/15/degrading-the-international-law-by-the-trump-administration-regarding-the-jcpoa/ (last seen: 08 December 2020)

[28] Governing law could be any law or laws determined by parties to govern the contract in terms of application, implementation or interpretation of the provision of the contract. It could be determined either expressly or implicitly; for instance, for the latter, a general term such as "mandatory provision of law" in the contract could be considered as governing law by parties or recognized by a court. See: Lamesa Investments Limited (Claimant/Appellant) -and- Cynergy Bank Limited (Defendants/Respondents), Judgment of 30/06/2020, paras.18, 22, and 23.

[29] Iranian Civil Code of 1928, for instance, in article 227 provides that "[t]he party who fails to carry out the undertaking will only be sentenced to pay damages when he is unable to prove that his failure was due to some outside cause for which he could not be held responsible." Furthermore, article 229 of Civil Code states that "[if] a man who has into an undertaking is prevented from fulfilling it by some elements not within his control, he shall not be convicted to compensate for losses."

the issue is resolved through recourse to the universal principle of *pacta sunt servanda*. The latter principle simply means that "contracts have force of law between the parties and failure to discharge obligations thereunder is a breach of that law."[30] One of the prominent results of the principle of *pacta sunt servanda* is that "supervening changes to the original economic situation justify neither exemption from the performance of the party in hardship or any modification of the contractual clauses for its benefit"[31] unless there is a *force majeure* which is an exception to the fundamental principle of *pacta sunt servanda*.

In the definition of *force majeure*, three elements have been enumerated and recognized[32]:

- such event should be unforeseeable;
- such event should be beyond the control of the parties (irresistible);
- such an event should have such effect as to render performance impossible or at least not reasonably sustainable.

Inter alia, "earthquakes, fires, floods or other natural disasters, and those of wars, riots, insurrections, rebellions, acts of sabotage or terrorism, on ordinary business life"[33] are examples of *force majeure* to name a few.

Art. 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG)[34], art. 7.1.7 of the UNIDROIT

[30] Renzo CAVALIERI and Vincenzo SALVATORE, eds., An introduction to International Contract Law (Torino: G. Giappichelli Editore, Second Edition, 2019), p.40.
[31] Ibid, pp.40-41.
[32] Ibid, p.43.
[33] Ibid, p.42.
[34] (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

principles[35] and ICC Force Majeure Clause[36] are international instruments that stipulated a provision for *force majeure*.

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(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if: (a) he is exempt under the preceding paragraph; and (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.
(3) The exemption provided by this article has effect for the period during which the impediment exists.
(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.
(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

[35] (1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.
(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.
(4) Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

[36] 1. "Force Majeure" means the occurrence of an event or circumstance that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that that party proves: [a] that such impediment is beyond its reasonable control; and [b] that it could not reasonably have been foreseen at the time of the conclusion of the contract; and [c] that the effects of the impediment could not reasonably have been avoided or overcome by the affected party.
2. In the absence of proof to the contrary, the following events affecting a party shall be presumed to fulfil conditions (a) and (b) under paragraph 1 of this Clause: (i) war (whether declared or not), hostilities, invasion, act of foreign enemies, extensive military mobilisation; (ii) civil war, riot, rebellion and revolution, military or

In case of U.S. sanctions, foreign companies cannot consider sanctions as a justifiable reason for termination or suspension of the contract since they have chosen a greater benefit that is preferring (U.S.) over another one (Iran) unless, in their contracts with Iranian parties, U.S. sanctions are expressly considered as a ground for termination or suspension of the contract. In other words, U.S. sanctions cannot be invoked by foreign companies for termination or suspension of their contracts unless U.S. sanctions expressly have been stipulated as a *force majeure*.

In fact, the legal status of the post-JCPOA foreign investment and commercial contracts in Iran after U.S. withdrawal of the JCPOA and re-imposition of sanctions completely depends on the stipulated provisions in the contracts that have been concluded between Iranian companies and entities on the one side and foreign companies and entities on another side.

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usurped power, insurrection, act of terrorism, sabotage or piracy; (iii) currency and trade restriction, embargo, sanction; (iv) act of authority whether lawful or unlawful, compliance with any law or governmental order, expropriation, seizure of works, requisition, nationalization; (v) plague, epidemic, natural disaster or extreme natural event; (vi) explosion, fire, destruction of equipment, prolonged break-down of transport, telecommunication, information system or energy; (vii) general labour disturbance such as boycott, strike and lock-out, go-slow, occupation of factories and premises.

3. A party successfully invoking this Clause is relieved from its duty to perform its obligations under the contract and from any liability in damages or from any other contractual remedy for breach of contract, from the time at which the impediment causes inability to perform, provided that the notice thereof is given without delay. If notice thereof is not given without delay, the relief is effective from the time at which notice thereof reaches the other party. Where the effect of the impediment or event invoked is temporary, the above consequences shall apply only as long as the impediment invoked impedes performance by the affected party. Where the duration of the impediment invoked has the effect of substantially depriving the contracting parties of what they were reasonably entitled to expect under the contract, either party has the right to terminate the contract by notification within a reasonable period to the other party. Unless otherwise agreed, the parties expressly agree that the contract may be terminated by either party if the duration of the impediment exceeds 120 days.

The U.S. sanctions are not binding for the international community; however, those entities who act otherwise would be punished economically by the U.S. As a result, in case foreign companies stick to the U.S. sanctions provisions and terminate or suspend their contractual relations with the Iranians, they are responsible for losses inflicted on the Iranian side.

There are some rational and legal, lucid reasons showing that foreign investors left Iran's markets has intentionally chosen to work under U.S. jurisdiction and obey U.S. rules rather than working with Iranian companies and entities under principles and rules of international law, European law, and the law of international contracts:

Firstly, European Union updated its Blocking Statute to protect European companies against U.S. secondary sanctions and underpinned their commercial relations with the Iranian[37], even though, European companies preferred to work in compliance with U.S. sanctions' provisions because of their fear of being sanctioned by the U.S. Administration and of course, for their greater good.

The legal opinion of Advocate General Hogan in a case between Bank Melli Iran and Telekom Deutschland GmbHa in the Court of Justice of the European Union (the ECJ) clarifies how the Blocking Statute works as to U.S. secondary sanctions against Iranian companies. The findings of the Advocate General is summarized as follow:

- "The Advocate General finds, first, that the general prohibition contained in the EU blocking statute for EU undertakings which is directed against compliance with certain third-country legislation providing for secondary sanctions applies even if

[37] European Union's Blocking Statute, online: https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/blocking-statute_en (last seen: 08 December 2020)

such an undertaking complies with that legislation without first having been compelled by a foreign administrative or judicial agency to do so;

- Second, an EU undertaking seeking to terminate an otherwise valid contract with an Iranian entity subject to the US sanctions must demonstrate to the satisfaction of the national court that it did not do so by reason of its desire to comply with those sanctions;
- Third, in the event of non-respect by an EU undertaking of the prohibition contained in the EU blocking statute to comply with US legislation providing for secondary sanctions, the national court seized by its contracting party subject to US primary sanctions is required to order the EU undertaking to maintain their contractual relationship."[38]

Given the working mechanism of the Blocking Statute explained in the legal opinion of Advocate General Hogan, suspension or termination of contracts, have been concluded between European and Iranian companies, by European parties only because of U.S. sanctions is not justifiable. More recently, the ECJ further elaborated the framework for the Blocking Statute in its 2021 judgment in the same case[39]. In this Judgement, among other things, the ECJ narrowed down the scope of article 5 of the Blocking Statute[40] by ruling that if

[38] Court of Justice of the European Union (ECJ), Advocate General's Opinion in Case C-124/20 Bank Melli Iran, Aktiengesellschaft nach iranischem Recht v Telekom Deutschland GmbH, Press Release No 78/21, 12 May 2021. Available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-05/cp210078en.pdf (last seen: 17 September 2021).

[39] Court of Justice of the European Union (ECJ), Case C-124/20 Bank Melli Iran v Telekom Deutschland GmbH, Judgment of the Court (Grand Chamber), 21 December 2021, Request for a preliminary ruling from the Hanseatisches Oberlandesgericht Hamburg.

[40] Article 5 of the Blocking Statute provides that "No person referred to in Article 11 shall comply, whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission, with any requirement or prohibition, including

the person to whom the prohibition is addressed, according to the second paragraph of that Article 5, does not have an authorization granted by the Commission may, having regard to the first paragraph of that Article 5, terminate contracts concluded with a person subject to secondary sanctions without providing reasons for that termination (to the Commission); however, "in the context of civil proceedings concerning the alleged breach of the prohibition laid down by the regulation, it is the person to whom the prohibition is addressed who has the burden of proving, to the required legal standard, that his or her conduct, in this case, the termination of all contracts, did not seek to comply with the American legislation referred to in the regulation where, prima facie, that appears to be the case."[41]

Additionally, the Office of Foreign Assets Control (OFAC) of the U.S. Treasury Department has issued certain General Licenses[42], dealing with humanitarian exceptions of U.S. sanctions against Iran; for instance, General License L and General License N, respectively, authorizing "any person for conducting or facilitating a transaction for

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requests of foreign courts, based on or resulting, directly or indirectly, from the laws specified in the Annex or from actions based thereon or resulting therefrom. Persons may be authorized, in accordance with the procedures provided in Articles 7 and 8, to comply fully or partially to the extent that non-compliance would seriously damage their interests or those of the Community. The criteria for the application of this provision shall be established in accordance with the procedure set out in Article 8. When there is sufficient evidence that non-compliance would cause serious damage to a natural or legal person, the Commission shall expeditiously submit to the committee referred to in Article 8 a draft of the appropriate measures to be taken under the terms of the Regulation."

[41] Court of Justice of the European Union Press Release No 227/21, 21 December 2021 Judgment in Case C-124/20 Bank Melli Iran v Telekom Deutschland GmbH. Available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-12/cp210227en.pdf (last seen: 6 January 2022).

[42] For more information, see: Iran Sanctions, Office of Foreign Assets Control (OFAC) - Department of the Treasury, online: https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/iran-sanctions (last seen: 17 September 2021).

the provision (including any sale) of agricultural commodities, food, medicine, or medical devices to Iran"[43] and "certain COVID-19-related transactions prohibited by the Iranian Transactions and Sanctions Regulations"[44]. Although the complexity and inefficiency of the abovementioned mechanism[45] have called the U.S. humanitarian exceptions and licenses into question, European companies have the legal foundations to work with Iranian companies, at least in humanitarian-oriented fields; otherwise, it is an over-compliance and discriminatory act[46].

Secondly, as mentioned above, foreign companies preferred working under the U.S. jurisdiction rather than working with the Iranians. In fact, while the geographical jurisdiction of the U.S. is mainly restrained to its sovereign territory, the legal jurisdiction of the U.S. is beyond its boundaries and applies to third countries. It is, then, *volenti non fit injuria* and foreign companies cannot invoke the U.S. sanctions as a basis for termination or suspension of their contractual obligations since their acts are based on their consent.

Thirdly, the snapback clause in the JCPOA[47] and UNSC resolution 2231[48] shows that re-imposition of sanctions against Iran were predictable; however, in case of snapback and re-imposition of

[43] General License L, Authorizing Certain Transactions Involving Iranian Financial Institutions Blocked Pursuant to Executive Order 13902, Office of Foreign Assets Control (OFAC) - Department of the Treasury, October 8, 2020.
[44] General License N, Authorizing Certain Activities to Respond to the Coronavirus Disease 2019 (COVID-19) Pandemic, Office of Foreign Assets Control (OFAC) - Department of the Treasury, June 17, 2021.
[45] Human Rights Watch, "Maximum Pressure; US Economic Sanctions Harm Iranians' Right to Health", HRW, 2019, p.55.
[46] Gordon DEEGAN, "Bank fined €20k for discriminating against Iranian couple", The Irish Times, 7 June 2018, online: https://www.irishtimes.com/business/work/bank-fined-20k-for-discriminating-against-iranian-couple-1.3522868 (last seen: 17 September 2021)
[47] Joint Comprehensive Plan of Action (JCPOA), Vienna, 14 July 2015, para.37.
[48] Joint Comprehensive Plan of Action (JCPOA) on the Islamic Republic of Iran's nuclear programme, SC Res. 2231, UN Doc. Resolution 2231 (2015), para.11

previous UN sanctions, the reimposed sanctions "do not apply with retroactive effect to contracts signed between any party and Iran or Iranian individuals and entities prior to the date of application, provided that the activities contemplated under and execution of such contracts are consistent with the JCPOA, this resolution, and the previous resolutions"[49]. Nevertheless, other sanctions including U.S. sanctions do not involve this provision. It bifurcates into two important results: re-imposition of U.S. sanctions was predictable in case of snapback and in contrary to UN sanctions, no contract would be excepted by U.S. Administration. Besides, there is a long history of sanctions imposed by the U.S. against Iran[50]. As result, those arguments which try to describe the re-imposition of U.S. sanctions as a *force majeure* because of their unforeseeability are virtually flawed. In line with this argument, the Swiss Federal Tribunal acknowledged that "the debtor is responsible for the legal impossibility of performance where he knew or should have known, having investigated the matter with due diligence at the time of conclusion of the contract, that the circumstances preventing the proper performance could arise."[51] In other words, the impossibility of performance is acceptable where a party who calls on this rule "did not and could not foresee the events which would make it impossible to perform its obligations under the contract"[52].Another indication demonstrating foreign companies have not acted on the basis of good faith is that they have not tried to achieve OFAC licenses in order to continue

[49] Ibid, para.14.
[50] Kenneth KATZMAN, Iran Sanctions, Congressional Research Service, Updated April 6, 2021, p.1.
[51] Andrey KOTELNIKOV, "Contracts Affected by Economic Sanctions: Russian and International Perspectives" (2020) Transnational Dispute Management (Special Issue on the "The Changing Paradigm of Dispute Resolution and Investment Protection in Post-soviet and Greater Eurasian Space"), Vol.17, Issue.1, p.18.
[52] Ibid.

cooperation with Iranian companies working in the field of humanitarian activities including "medicines and medical devices", "foodstuffs and agricultural commodities" and "spare parts, equipment, and associated services (including warranty, maintenance, repair services, and inspections) necessary for the safety of civil aviation". These are the fields the ICJ required the U.S. to remove any impediments arising from the measures announced on 8 May 2018 to the free exportation to the territory of the Islamic Republic of Iran in the above-mentioned fields in its order of 03 October 2018[53]. The ICJ also ordered that "[t]he United States of America shall ensure that licenses and necessary authorizations are granted and that payments and other transfers of funds are not subject to any restriction in so far as they relate to the goods and services referred to in [abovementioned fields]".[54] It is worth adding that "[t]he more sanction regimes increase in strength and scope, the higher the level of obligation of the sanctioning state in seeking the "protection of fundamental human rights," […]. Therefore, when it comes to U.S. economic sanctions, the United States, due to its greater authority in the global financial system, shall ensure that the banking transfers related to humanitarian goods shall be made without any restriction."[55]

Immediately after the re-imposition of sanctions, certain companies suspended or terminated their contracts and did not try to achieve OFAC's licenses. This is an indication that foreign counterparts have not acted in good faith and with due diligence to fulfill their contractual obligations.

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[53] Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures, Order of 3 October 2018: I.C.J. Reports 2018, p.652, para.102(1).

[54] Ibid, para.102(2).

[55] Seyed Mohamad Hassan RAZAVI and Fateme ZEYNODINI, "Economic Sanctions and Protection of Fundamental Human Rights: A Review of the ICJ's Ruling on Alleged Violations of the Iran-U.S. Treaty of Amity" (2020) Washington International Law Journal, Vol.29, No.2, p.339.

In its oral observation, the U.S. declared "the United States takes seriously the importance of ensuring that sanctions do not apply to humanitarian activities. This is why there are humanitarian exceptions in all of the U.S. domestic sanctions statutes at issue in this case."[56] Despite the explanation of the U.S., the Court confirms that "companies providing maintenance for Iranian aviation companies have been prevented from doing so when it involved the installation or replacement of components produced under United States licenses"[57] and later on in the executive section of its Order required the U.S. to "ensure that licenses and necessary authorizations are granted and that payments and other transfers of funds are not subject to any restriction in so far as they relate to the goods and services [in the field of humanitarian activities including "medicines and medical devices", "foodstuffs and agricultural commodities" and "spare parts, equipment, and associated services (including warranty, maintenance, repair services, and inspections) necessary for the safety of civil aviation]."[58] It shows that neither the U.S. nor foreign companies have acted based on principles of good faith and due diligence.

b) Iranian Nationals' Obligations before Foreign Companies

If any case is instituted against the foreign companies, they might put forward a counterclaim in which they will argue that Iranian companies did not respect their obligations owing to U.S. sanctions whatsoever.

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[56] Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Verbatim Record of Public Sitting held on Tuesday 28 August 2018 (Verbatim record 2018/18), p.13, para.12.

[57] Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures, Order of 3 October 2018: I.C.J. Reports 2018, p.649, para.88.

[58] Ibid, p.652, para.102(1).

For Iranian companies, the current situation is undoubtedly and absolutely a *force majeure*. By withdrawal of the U.S. from the JCPOA, all U.S. lifted sanctions against Iran, either primary or secondary, have been re-imposed. Consequently, there is no way for Iranian companies to honor their obligations.

In its oral argument[59], Iran illustrated for the Court that the unilateral sanctions of the U.S. have been sabotaging Iran's economy. Having reviewed the facts, documents, and arguments of both parties, the ICJ generally confirmed, in its Order of 03 October 2018 (provisional measures), that different parts of Iran's economy are being affected by U.S. sanctions[60].

In the view of the ICJ, "while the importation of foodstuffs, medical supplies, and equipment is in principle exempted from the United States' measures, it appears to have become more difficult in practice, since the announcement of the measures by the United States, for Iran, Iranian companies and nationals to obtain such imported foodstuffs, supplies and equipment"[61]. The Court also considers that, "as a result of the measures, certain foreign banks have withdrawn from financing agreements or suspended co-operation with Iranian banks. Some of these banks also refuse to accept transfers or to provide corresponding services. It follows that it has become difficult if not impossible for Iran, Iranian companies, and nationals to engage in international financial transactions that would allow them to

[59] Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Public Sittings held on Monday 27 August 2018 and Wednesday 29 August 2018, available on: https://www.icj-cij.org/en/case/175/oral-proceedings (last seen: 08 December 2020).

[60] Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures, Order of 3 October 2018: I.C.J. Reports 2018, pp.649-650, paras.88-93.

[61] Ibid, p.649, para.89.

purchase items not covered, in principle, by the measures, such as foodstuffs, medical supplies, and medical equipment."[62]

Given that the ICJ confirms the effects of U.S. sanctions on humanitarian importation including foodstuffs, medical supplies, and equipment, *a fortiori* the sanctions have been affecting other sections of Iran, undoubtedly.

Not only did the World Court confirm the impacts of sanctions on Iran's industries, infrastructures, and commercial activities, these impacts have been perused in a variety of researches and reports as well. The International Monetary Fund projected the negative impacts for Iran's economy in its 2019 World Economic Outlook due to U.S. sanctions[63]. According to this report, the negative effects of the U.S. sanctions are too grave that influence the growth in the Middle East and Central Asia region consequently[64]. In the "Maximum Pressure", a comprehensive report done by Human Rights Watch, the negative effects of U.S. sanctions on Iranian medicine section including the Iranian medical market, financing of Iranian humanitarian imports, and impact on patients are explained in depth.[65] In line with the subject of the report of Human Rights Watch, Organization for Defending Victims of Violence (ODVV), an NGO located in Iran, has published several reports and researches regarding the effects of sanctions on Iran among which "Sanctions and Medicines: Fact and Fiction" is worth mentioning here. According to this report, ODVV refuted the U.S. allegation concerning "putting no sanctions on medicines and humanitarian goods" and "shows that the claim is

[62] Ibid.
[63] International Monetary Fund, "World Economic Outlook; Global Manufacturing Downturn, Rising Trade Barriers", IMF, 2019, pp.14, 45, 60.
[64] Ibid.
[65] Human Rights Watch (HRW), supra note 45, parts. II, III, IV.

contrary to the on-the-ground reality"[66]. There are, of course, other researches and reports analyzing the effects of U.S. sanctions in general and in detail on different parts of Iran, the Iranian and even non-Iranian including Iranian Energy[67], Refugees and Migrants[68], and so forth.

In all the abovementioned references, the effects of U.S. sanctions on Iran have been assessed. Furthermore, U.S. authorities, themselves, described the U.S. sanctions as the process that "brings to more than 900 the number of Iran-related targets sanctioned under this Administration in less than two years, marking the highest-ever level of U.S. economic pressure on Iran."[69] [emphasized by author]

It's crystal clear that because of the U.S. sanctions Iranian companies could not fulfill their obligations under the current circumstances so they have no other choices to fulfill their obligations. It is not an argument but a fact that is extremely obvious. However, Iranian companies are also obliged to act in accordance with good faith and due diligence and they had better explain the reasons based on which they cannot fulfill their obligations.

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[66] Organization for Defending Victims of Violence (ODVV), Sanctions and Medicines: Fact and Fiction Report (2019), No.6, p.11.

[67] David Ramin JALILVAND, "The US Exit from the JCPOA: What Consequences for Iranian Energy?" (2018) Oxford Institute for Energy Studies; "Iran: sanctions cast a long shadow" (2018) Gas Strategies Group; David Ramin JALILVAND, "Back to Square One? Iranian Energy after the Re-Imposition of US Sanctions" (2019) Oxford Institute for Energy Studies; Bassam FATTOUH and Andreas ECONOMOU, "Iranian Sanctions 2.0: Oil Market Risks and Price Stakes" (2019) Oxford Institute for Energy Studies.

[68] The Impact of Sanctions on Refugees and Migrants in Iran, Organization for Defending Victims of Violence (ODVV), 2019;

[69] U.S. Department of the Treasury (Press Releases), supra note 3.

Conclusion

Inevitably, U.S. withdrawal from the JCPOA and re-imposition of sanctions have led to enormous damages to a variety of Iranian sectors from public to private. In the public sector, the government of Iran instituted an application against the United States in the ICJ, on 16 July 2018 alongside a request for provisional measures. In paragraphs 88-93 of its order of 03 October 2018 (provisional measures) concerning alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (the Islamic Republic of Iran v. the United States of America), ICJ affirmed the impacts of U.S. sanctions against Iran. Besides, ICJ asks the U.S. to remove any impediments arising from the measures announced on 8 May 2018 to the free exportation to the territory of the Islamic Republic of Iran of (i) medicines and medical devices; (ii) foodstuffs and agricultural commodities; and (iii) spare parts, equipment, and associated services (including warranty, maintenance, repair services, and inspections) necessary for the safety of civil aviation[70].

Yet, in the private sector, Iranian companies can raise their claims based on dispute settlement clauses stipulated in their contracts with foreign investors as well as their foreign commercial counterparts and other mechanisms such as Bilateral Investments Treaties (BITs). Although it is difficult, if not impossible, to claim for a minute reparation of damages caused by U.S. withdrawal of the JCPOA and re-imposition of sanctions for the government of Iran and the Iranian individuals and legal persons, Iranian companies must resort to settlement dispute clauses of their contracts to pursue their contractual rights.

[70] Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures, Order of 3 October 2018: I.C.J. Reports 2018, p.652, para.88., para.102(1).

Ignoring their contractual obligations without considering the legal consequences, foreign parties have relinquished their investment projects and even bear the burden of losses on their shoulders in order to keep their businesses safe and immune from the punishments of the U.S. OFAC. However, this whole process (withdrawal of the JCPOA and re-imposition of secondary sanctions) is, of course, in contradiction with the provisions of the JCPOA, UNSC Resolution 2231, and notably principles of international law concerning direct foreign investment and free commerce between nations[71].

Obviously, foreign companies cannot elude their responsibility under the withdrawal of the JCPOA and re-imposition of sanctions. Contractual commitments of the parties to a contract with Iranian entities must be respected and enforced; otherwise, they must compensate all losses and damages. On the other hand, the situation for Iranian companies is quite different; foreign companies are prohibited from working with the Iranian, and banking transactions are halted by foreign banks owing to U.S. secondary sanctions. In addition, Trump's Administration repeatedly declares that the re-imposition and possible expansion of nuclear-related sanctions would be grave in scale and scope. As Judge ad hoc Djamchid Momtaz explained in his declaration, "[t]he unilateral measures taken by the United States against Iran seek strongly to discourage any State and its nationals, and any foreign financial institutions, from maintaining relations with Iran"[72].

[71] Declaration of Judge ad hoc Djamchid MOMTAZ, Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures, Order of 3 October 2018: I.C.J. Reports 2018, p.690, para.15 and p.693, para.22.
[72] Ibid, p.691, para.19.