The Legality of US Investment Sanctions against Iran before the ICJ: A Watershed Moment for the Essential Security and Necessity Exceptions

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La CIJ saisie de la légalité des sanctions américaines en matière d'investissement contre l'Iran: un tournant décisif pour les notions de l'état de nécessité et des intérêts essentiels de la sécurité

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Abstract

International courts and tribunals so far have shown reluctance to delimit the normative scope of the essential security and necessity exceptions in international economic law. Legal scholars have also refrained from identifying the point of equilibrium between maintaining the core protections of international law and allowing for necessary flexibility in its application. This article argues that such stances are now untenable. The unilateral US withdrawal from the Iran nuclear deal, and the reintroduction of sanctions, has challenged the multilateral order. Although the sanctions resemble earlier measures, violation of the deal

Résumé

Jusqu'à présent, les tribunaux internationaux se sont montrés réticents à délimiter la portée normative des exceptions en cas d'état de nécessité et d'atteinte aux intérêts essentiels de la sécurité en droit international économique. Les juristes se sont également abstenus d'identifier le point d'équilibre entre le maintien des protections fondamentales du droit international et le besoin de souplesse dans son application. Cet article soutient que de telles positions ne sont plus soutenables. Le retrait unilatéral des États-Unis de l'accord nucléaire avec l'Iran et sa réintroduction de sanctions contre ce dernier ont remis en cause l'ordre multilatéral.

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and of United Nations Security Council Resolution 2231(2015) has altered the normative context. The threat to the stability of the post-war multilateral order by a permanent member of the Security Council is unique. The author shows why Iran's recourse to the International Court of Justice (ICJ) in this context should become a landmark case for international economic law and how it traps the ICJ in a gilded cage.

Bien que ces sanctions ressemblent à des mesures antérieures, la violation de l'accord et de la résolution 2231(2015) du Conseil de sécurité des Nations unies ont modifié le contexte normatif. La menace à la stabilité de l'ordre multilatéral de l'après-guerre par un membre permanent du Conseil de sécurité est inédite. L'auteur montre pourquoi le recours par l'Iran devant la Cour internationale de Justice (CIJ) dans ce contexte marquera vraisemblablement un point tournant dans le droit international économique et comment ce recours piège la CIJ dans une cage dorée.

Keywords: Economic necessity; economic sanctions; essential security interests; international economic law; investment sanctions; necessity; *Russia–Traffic in Transit*; state responsibility.

Mots-clés: Droit international économique; état de nécessité; intérêts essentiels de la sécurité; nécessité économique; sanctions économiques; sanctions d'investissement; responsabilité de l'État; *Russie – Mesures concernant le trafic en transit.*

Pax Americana without the United States

From the beginning of his presidency, Donald Trump has taken a collision course with multilateralism; it has included moratoriums on multilateral treaties[1] and the funding of various international organizations,[2] the obstruction of World Trade Organization (WTO) Appellate Body operations,[3] the

[1] The move was, allegedly, dictated by the administration's concerns over the *Convention on the Elimination of Discrimination against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); and the *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). "A Trump Moratorium on International Treaties Could Roll Back Human Rights — Here at Home," *Washington Post* (1 March 2017), online: <https://wapo.st/2NZ5nhp>.

[2] Kristen Boon, "President Trump and the Future of Multilateralism" (2017) 31 Emory Intl L Rev 1075; Jack Goldsmith, "The Trump Onslaught on International Law and Institutions," *Lawfare* (17 March 2017), online: <https://bit.ly/2nrmCwZ>; Kate Brannen, "10 Times President Trump's Wishes Have Been Thwarted," *Newsweek* (5 November 2017).

[3] Arman Sarvarian & Filippo Fontanelli, "The USA and Re-Appointment at the WTO: A 'Legitimacy Crisis'?" *EJIL: Talk!*, online: <https://bit.ly/2JiBI4q>; "United States Blocks Reappointment of WTO Appellate Body Member" (2016) 110:3 AJIL 573; see also John Brinkley, "Trump Is Quietly Trying to Vandalize the WTO," *Forbes* (27 November 2017); Kirtika Suneja, "US Blocking Appointment to Key WTO Body, Trump May Soon Be the Only Winner in Any Trade Dispute," *Economic Times* (6 March 2018). However, for criticism of the WTO Appellate Body, see Arthur E Appleton, "Judging the Judges or Judging the Members? Pathways and Pitfalls in the Appellate Body Appointment Process" in Leïla Choukroune, ed, *Judging the State in International Trade and Investment Law: Sovereignty Modern, the Law and the Economics* (Singapore: Springer, 2016) 11.

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undermining of the *North American Free Trade Agreement*[4] and the North Atlantic Treaty Organization,[5] trade wars with China, Canada, and the European Union (EU),[6] and withdrawal from the United Nations Educational, Scientific and Cultural Organization,[7] the *Paris Agreement*,[8] and the United Nations (UN) Human Rights Council.[9] The United States (as well as Russia and China) may be willing to replace multilateralism with bilateral dealings where they can leverage their strengths. However, this is not an option for weaker actors (not to mention idealists believing in international law and economic cooperation as vehicles of peaceful cooperation). Paradoxically, American policy serves as a cure for the "rally 'round the flag" syndrome, forcing others to unite against the long-term instability it causes.

The presidential memorandum of 8 May 2018 is the best example of the challenges and opportunities created by the US stance.[10] By virtue of this document, President Trump withdrew from the *Joint Comprehensive Plan of Action* (*JCPOA*), an agreement with Iran concluded in Vienna by the five permanent members of the United Nations Security Council (UNSC) as well as Germany and the EU.[11] The bottom line of the deal was Iran's commitment to limit its nuclear program (including reductions in the number and quality of centrifuges for the purpose of uranium enrichment, limits on uranium stockpiles, and restraints on the use and development of the Arak reactor) in exchange for the suspension and possible eventual termination of UN, US, and EU sanctions against it.

[4] *North American Free Trade Agreement*, 17 December 1992, 32 ILM 289, 605 (1993) [*NAFTA*]; "NAFTA: 'Single Worst Deal Ever Approved'" *BBC News* (27 September 2016), online (video): <https://bbc.in/2uRWCN2>; Phil Levy, "Trump's NAFTA Withdrawal Threat Is Real," *Forbes* (22 January 2018).

[5] Alex Ward, "Trump Said 'NATO Is As Bad As NAFTA.' That's Scary," *Vox* (28 June 2018), online: <https://bit.ly/2N77LC3>. Joe Sommerlad, "Why Is Donald Trump So Hostile to NATO and Are His Claims Justified?" *The Independent* (11 July 2018).

[6] Bob Bryan, "Trump's Trade War Is about to Kick into High Gear," *Business Insider* (13 June 2018); Joe Gamp, "US Trade War: Trump Launches Five WTO attacks on EU, China, Mexico, Canada and Turkey," *Express* (16 July 2016).

[7] US Department of State, *Press Statement: The United States Withdraws from UNESCO* (2017).

[8] *Paris Agreement*, 12 December 2015, Can TS 2016 No 9 (entered into force 4 November 2016); Michael D Shear, "Trump Will Withdraw US from Paris Climate Agreement," *New York Times* (20 January 2018).

[9] Laura Koran, "US Leaving UN Human Rights Council: 'A Cesspool of Political Bias'," *CNN* (20 June 2018).

[10] White House, *National Security Presidential Memorandum 11: Ceasing United States Participation in the Joint Comprehensive Plan of Action and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon* (8 May 2018) [NSPM-11].

[11] *Joint Comprehensive Plan of Action*, UN Security Council Resolution 2231(2015) (14 July 2015), Annex A [*JCPOA*].

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According to International Atomic Energy Agency (IAEA) reports, Iran has complied with its commitments.[12] Nevertheless, the United States terminated the agreement, breaching, at least, its withdrawal procedure requirements. It also violated the UNSC's unanimous endorsement of the *JCPOA*, provided in Resolution 2231(2015).[13] The United States even considered the option of a military strike against Iran.[14] Given the prevailing view that the *JCPOA* was the greatest step towards a peaceful resolution of the Iranian challenge in decades, and the lack of US coordination with its allies, the EU has been left with just one option: countering the American sanctions. Although the EU will try to do its best with a blocking statute,[15] the unique position of the United States as a key jurisdiction in the settlement of international payments[16] may effectively cripple any economic cooperation with Iranian entities, including deals where none of the

[12] International Atomic Energy Agency, *Iran Is Implementing Nuclear-related JCPOA Commitments, Director General Amano Tells IAEA Board* (2018), online: <https://bit.ly/2raKfur>.

[13] United Nations Security Council Resolution 2231, UN Doc S/RES/2231 (2015) (14 July 2015).

[14] Dion Nissenbaum, "White House Sought Options to Strike Iran," *Wall Street Journal* (14 January 2019), online: <https://on.wsj.com/2Clg09b>.

[15] EC Regulation 2271/96 Protecting against the Effects of the Extra-Territorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom, 29 November 1996, OJ L309. Under the Regulation's Annex on relevant non-European Union (EU) legislation, the EU obliges its entrepreneurs to notify the Commission about extraterritorial consequences of the US sanctions (art 2). EU persons are prohibited from complying with such measures (art 5), and foreign court judgments or administrative decisions adopted on their basis are rendered void in the EU (art 4). Finally, European entrepreneurs are entitled to recover damages caused by the application of sanctions (art 6). Damages are to be recovered from "the natural or legal person or any other entity causing the damages or from any person acting on its behalf or intermediary," which actually makes it unclear who should be thus liable for actions of the US government. Also, since the United States could impose sanctions against EU actors that violate the secondary sanctions, the EU did not want to act to the detriment of its own citizens. Accordingly, the Commission may authorize a partial or full waiver of the non-compliance duty (art 5). Taken together, the blocking statute is more of a political signal than an instrument that will actually neutralize the US sanctions.

[16] When parties to a transaction wish to transfer assets between banks (money, securities), the financial institutions involved may rely upon two electronic transfer systems: in "real time" (that is, on a gross basis) or by the end of the working day (on a net basis). Most regular payments are batched with other transactions throughout the day and, by its end, cleared and settled. Here, the settlement is cheaper but requires time. Alternatively, in real-time gross settlement (RTGS) systems, individual transactions (gross, without netting) are final and irrevocable (that is, settled immediately). RTGS systems are typically used for high-value transactions or transactions that need to be settled immediately. Because of the liquidity necessary to operate such a settlement system, and, hence, the settlement and credit risks involved, RTGS systems are operated by central banks as the issuers of currency. In international payments, transactions may involve settlement by more than one RTGS system (for example, TARGET2 operated by the European Central Bank or

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parties comes from, or operates in, the United States. This situation gives rise to a series of questions concerning the international legality of the US investment sanctions.

I argue that the Iranian sanctions situation has all the potential for becoming a landmark case for international investment, financial, and trade law. Most importantly, it traps the International Court of Justice (ICJ) — already seized of the issue by virtue of an Iranian application to the court — in a gilded cage, both providing it with the opportunity to rule upon the legality of the US sanctions as well as imposing major legal and political burdens upon it should it refuse to do so. Further international ligation and/or arbitration before other international dispute settlement venues may ensue, resulting from either Iranian or third-party applications.

This article begins with a general outline of the US sanctions regime. Subsequently, it offers a normative analysis of US bilateral commitments towards Iran. Both the issues of their status under international law — that is, whether they constitute treaties within the meaning of the international law of treaties — and possible substantive breaches are addressed. I focus on the *JCPOA*, the *Treaty of Amity, Economic Relations, and Consular Rights* between the United States and Iran[17] and the ICJ claim thereunder, and relevant multilateral regimes — in particular, International Monetary Fund (IMF) law, Organisation for Economic Co-operation and Development (OECD) Liberalisation Codes, and the WTO's *General Agreement on Trade in Services* (*GATS*).[18] Having established that the United States has

Fedwire of the US Federal Reserve). This means high-value bank transfers denominated in US dollars will require settlement by Fedwire. At the same time, thanks to a SWIFT number, participants in Fedwire can transfer payments directly (non-member banks can do so through a US bank or another foreign bank that is a Fedwire participant), which gives a huge advantage to US currency-denominated international payments, due to the sheer number of participants. Although some other jurisdictions aspire to become an international settlement currency (notably the Euro and Chinese renminbi), and electronic funds transfers are ever more available to consumers, the dominant position of the US dollar has not been undermined. By imposing, "for systematic violation of US sanctions," a fine of some US $9 billion on BNP Paribas (and some other banks) and prohibiting the bank from accessing the US settlement systems (Fedwire and Chip), the United States has already showed that it will not hesitate to use this leverage. At the time, some argued that the abuse of this measure could be decisive for renouncing the US dollar as an international clearing currency or the establishment of offshore settlement facilities, but, even in the latter case, the "underlying transactions would still need to be settled in New York." Frances Coppola, "Fedwire: The US Dollar in International Payments," *American Express* (2016), online: <https://amex.co/2HjvtKI>.

[17] *Treaty of Amity, Economic Relations, and Consular Rights*, 16 June 1957, 284 UNTS 93 [*Treaty of Amity*].

[18] *General Agreement on Trade in Services*, 15 April 1994, 1869 UNTS 183 (entered into force 1 January 1995) [*GATS*].

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likely committed *prima facie* violations of its treaty obligations, I turn to the key question of exceptions, focusing on the state of necessity and essential security clauses. I also briefly address the most pertinent procedural aspects of the possible international litigation. I conclude with general remarks concerning the likely contribution of this case to the development of international law.

This is the first article to discuss the risks of normative spillover should there be overly lenient acceptance of the United States's arbitrary reliance on the state of necessity and essential security exceptions. The article also constitutes a pioneering attempt to take a streamlined approach to addressing these issues across various branches of international economic law, as there is hardly any case law available. In doing so, the article makes doctrinal and theoretical contributions that can have consequences for the development of public international law related to necessity and essential security clauses. This in turn will be of the utmost importance for either shielding the increasingly challenged multilateral architecture of public international law or furthering its fragmentation. In my concluding remarks, I mention the issue of limiting Iran's capacity to issue sovereign debt instruments. However, due to space constraints, this article does not cover the legality of the US sanctions under customary international law[19] or general international law, including the law of state responsibility.[20]

The Old–New Regime of US Sanctions against Iran

By virtue of the *JCPOA*, states agreed to lift nuclear-related sanctions on Iran and provide additional benefits in exchange for temporary constraints on its uranium enrichment program and abstention from any activities relating to nuclear fuel reprocessing. The *JCPOA*, as an element of President Barack Obama's legacy, was rejected by his successor Donald Trump. Trump "[has] been very clear about [his] opinion of that deal. It gave Iran far too much in exchange for far too little" and issued an ultimatum to the US Congress and the EU (!) to rectify the situation ("to fix the terrible flaws of the Iran nuclear deal").[21] After less than half a year, Trump decided to withdraw from the *JCPOA*. According to National Security Presidential Memorandum 11 (NSPM-11),

[19] On secondary sanctions under customary international law, see Jeffrey Meyer, "Second Thoughts on Secondary Sanctions" (2009) 30:3 U Pa J Intl L 905.

[20] See generally Laura Picchio Forlati & Linos-Alexandre Sicilianos, *Les sanctions économiques en droit international. Economic sanctions in interntional law* (Leiden: Nijhoff, 2004); Marcin J Menkes, *Stosowanie sankcji gospodarczych: analiza prawnomiędzynarodowa* (Toruń: Wydawnictwo Adam Marszałek, 2011).

[21] White House, *Statements and Releases: Statement by the President on the Iran Nuclear Deal* (12 January 2018).

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[s]ince the *JCPOA*'s inception, ... Iran has only escalated its destabilizing activities in the surrounding region … [and] has publicly declared it would deny the IAEA access to military sites in direct conflict with the *Additional Protocol* to its *Comprehensive Safeguards Agreement* with the IAEA. In 2016, Iran also twice violated the *JCPOA*'s heavy water stockpile limits. This behaviour is unacceptable, especially for a regime known to have pursued nuclear weapons in violation of its obligations under the *Treaty on the Non-Proliferation of Nuclear Weapons*.[22]

Most importantly, section 3 of NSPM-11 reintroduced sanctions, notably those provided for by the *National Defense Authorization Act for Fiscal Year 2012*, the *Iran Sanctions Act* of 1996, the *Iran Threat Reduction and Syria Human Rights Act* of 2012, and the *Iran Freedom and Counterproliferation Act* of 2012.[23]

Accordingly, the State and Treasury Departments triggered 90- and 180-day wind-down periods before the re-imposition of sanctions.[24] The Office of Foreign Assets Control (OFAC) expected that by 4 November 2018, all of the US nuclear-related sanctions that had been lifted under the *JCPOA* would be re-imposed and fully effective. Accordingly, on 6 August 2018, the president issued the New Iran Executive Order 13846, thus re-imposing the previous measures.[25] The first group of sanctions (imposed in August 2018) included services related to:

[22] NSPM-11, *supra* note 10.

[23] *National Defense Authorization Act for Fiscal Year 2012*, Pub L No 112-81 (2011); *Iran Sanctions Act*, Pub L No 104-172, 110 Stat 1541 (1996), as amended through Pub L No 114–277 (2016) [*Iran Sanctions Act*]; *Iran Threat Reduction and Syria Human Rights Act of 2012*, Pub L No 112–158; *Iran Freedom and Counterproliferation Act of 2012*, Pub L No 112-239 (2013).

[24] US Department of the Treasury, *Frequently Asked Questions Regarding the Re-Imposition of Sanctions Pursuant to the May 8, 2018 National Security Presidential Memorandum Relating to the Joint Comprehensive Plan of Action (JCPOA)* (2018).

[25] *Reimposing Certain Sanctions with Respect to Iran*, New Iran Executive Order 13846, 6 August 2018. By virtue of this order, the president re-imposed relevant provisions of Executive Order 13574 of 23 May 2011 (superseded by) Executive Order 13590 of 20 November 2011 (relating to the development of petroleum resources); Executive Order 13622 of 30 July 2012 (financial sanctions on foreign financial institutions found to have knowingly conducted or facilitated any significant financial transactions); and Executive Order 13645 of 3 June 2013, which had been revoked by Executive Order 13716 of 16 January 2016 (*inter alia*, concerning transactions involving the rial). Consistent with guidance issued by the Department of the Treasury on 8 May 2018, the New Iran executive order re-imposes specified sanctions relating to Iran following relevant wind-down periods — that is, on or after 7 August 2018 or 5 November 2018, depending on the activity involved. Furthermore, the new Iran executive order revokes Executive Orders 13716 and 13628 and continues, in effect, the sanctions authorities provided for in those executive orders. The new Iran executive order also broadens the scope of certain provisions contained in those executive orders (see US Department of the Treasury, *supra* note 24, notably questions 601, 621.)

1. the purchase or acquisition of US dollar banknotes by the government of Iran;
2. Iran's trade in gold or precious metals;
3. the sale, supply, or transfer to or from Iran of graphite, raw or semi-finished minerals such as coal, and software for integrating industrial processes;
4. significant transactions related to the purchase or sale of Iranian rials or the maintenance of significant funds or accounts outside the territory of Iran denominated in rials; and
5. the purchase, subscription to, or facilitation of the issuance of Iranian sovereign debt.

Three months later, sanctions were broadened to include services related to:

6. Iran's port operators and shipping and shipbuilding sectors;
7. petroleum-related transactions, including the purchase of petroleum, petroleum products, or petrochemical products from Iran;
8. transactions by foreign financial institutions with the Central Bank of Iran and designated Iranian financial institutions;
9. specialized financial messaging services to the Central Bank of Iran and Iranian financial institutions;
10. underwriting services, insurance, or reinsurance; and
11. Iran's energy sector.

To the "extent reasonably practicable," the secretary of state was also directed to shift the financial burden of unwinding any transaction or course of dealing primarily onto Iran or the Iranian counterparty.

NSPM-11 "does not ... create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person," which corresponds directly with the above-mentioned provisions of the EU blocking statute.[26] For the purposes of this article, what seems most interesting in substantive terms are the following points. First, by virtue of section 8 of Executive Order 13846, the United States has imposed a prohibition on any US-owned or US-controlled foreign entity from knowingly engaging[27] in any transaction, directly or indirectly, with the Iranian government, or any person subject to its jurisdiction, if such a transaction would be covered by certain executive orders (prohibiting, *inter alia*, trade and other dealings with, and investment in, Iran, and blocking property of the government of Iran and Iranian financial institutions) or any regulation issued pursuant to the

[26] NSPM-11, *supra* note 10, s 6(c).

[27] The *Iranian Financial Sanctions Regulations*, 31 CFR, pt 560 [*IFSR*], provides statutory definitions of "US financial institutions, foreign financial institutions, [engaging] knowingly, significant [transaction or financial service]."

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foregoing (including the *Iranian Transactions and Sanctions Regulations* (*ITSR*)) if the transaction were engaged in by a US person or in the United States.[28] Civil penalties for the US-owned or US-controlled foreign entity's violation, attempted violation, conspiracy to violate, or causing of a violation of section 8 shall apply to a US person who owns or controls such an entity to the same extent that they would apply to a US person for the same conduct.

Second, by virtue of the *Comprehensive Iran Sanctions, Accountability, and Divestment Act* of 2010, in relation to the *ITSR*, the sanctionable activities of a foreign financial institution include:

- facilitating the efforts of the government of Iran to acquire or develop weapons of mass destruction (WMD) or delivery systems for WMD or to provide support for terrorist organizations or acts of international terrorism;
- facilitating the activities of a person subject to financial sanctions pursuant to UNSC Resolutions 1737, 1747, 1803, or 1929 or any other UNSC resolution that imposes sanctions with respect to Iran;
- engaging in money laundering, or facilitating efforts by the Central Bank of Iran or any other Iranian financial institution, to carry out either of the facilitating activities described above; or
- facilitating a significant transaction or transactions or providing significant financial services for: (1) the Islamic Revolutionary Guard Corps (IRGC) or any of its agents or affiliates whose property and interests in property are blocked pursuant to the *International Emergency Economic Powers Act* (*IEEPA*) or (2) a financial institution whose property and interests in property are blocked pursuant to the *IEEPA* in connection with Iran's proliferation of WMD, Iran's proliferation of delivery systems for WMD, or Iran's support for international terrorism.[29]

In April 2019, Trump designated the IRGC as a foreign terrorist organization (FTO), which entailed travel and economic sanctions. The IRGC has been described as "the Iranian government's primary means of directing and implementing its global terrorist campaign."[30] It was the first time that the United States had ever named a part of a foreign government a FTO. In the same month, it was declared that the United States would end its waiver program for third-state importers of Iranian oil and possibly impose related sanctions.[31] Designating the IRGC as a FTO resulted, in June 2019, in the US Treasury sanctioning the Persian Gulf Petrochemical Industries

[28] *Ibid.*

[29] *Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010*, Pub L 111–195, 124 Stat 1312; *International Emergency Economic Powers Act*, Pub L 95–223, 91 Stat 1626 (1977).

[30] White House, *Statement from the President on the Designation of the Islamic Revolutionary Guard Corps as a Foreign Terrorist Organization* (8 April 2019).

[31] Lesley Wroughton & Humeyra Pamuk, "U.S. to End All Waivers on Imports of Iranian Oil, Crude Price Jumps," *Reuters* (2019), online: <https://reut.rs/2VjbIKK>.

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Company and a network of thirty-nine associated companies for financially supporting the revolutionary guard.

Two questions ensue. First, did the United States undertake legally binding commitments not to impose sanctions against Iran applicable to the case at hand? Second, how does the answer to the first question impact on the legality of the US sanctions?

JCPOA

LEGAL STATUS

The *JCPOA* was concluded in Vienna on 14 July 2015. This detailed, 159-page document concluded two years of negotiations between Iran and the permanent members of the UNSC (China, France, Russia, the United Kingdom, and the United States), Germany, and the EU. The *JCPOA* parties thus realized the aim of the interim framework agreement (the *Joint Plan of Action* concluded by Iran, the permanent members of the UNSC, and Germany[32]), which called for the relief of sanctions in exchange for limitations on the Iranian nuclear program.[33] Whereas the substantive provisions of the *JCPOA* are analyzed below, the initial question in terms of legal consequences of possible breaches thereof is the normative status of the agreement under international law — namely, is it a treaty in the sense of Article 2(1)(a) of the *Vienna Convention on the Law of the Treaties* (*VCLT*)[34] or a political agreement with respect to the United States? Only the violation of a treaty would give grounds for international legal responsibility.

The decisive factor in this respect is the intent of the negotiating parties to create legal obligations governed by international law. As explained by the International Law Commission's (ILC) special rapporteur on the law of treaties, such an intent does not automatically stem from "couch[ing the agreement] in the form usually given to binding agreements," emphasizing its formal character by including adherence provisions, or even "a State reserv[ing] for itself the right to determine both the existence and the extent of the obligation undertaken by it. … On the other hand the absence of a true treaty relationship, notwithstanding the formality and the solemnity of the instrument, may be apparent from the terms, the

[32] *Joint Plan of Action*, 24 November 2013, online: <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jpoa.pdf>.

[33] For a comprehensive overview of the *JCPOA*'s provisions, see Arms Control Association, *The Joint Comprehensive Plan of Action (JCPOA) at a Glance* (Washington, DC: Arms Control Association, 2018), online: <https://bit.ly/2rrNekO>.

[34] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) [*VCLT*]. For the purposes of this article, I assume that the relevant provisions of the *VCLT* reflect customary treaty law; hence, it can also be used in respect of the United States and Iran, notwithstanding their ratification status.

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designation and the history of the instrument in question."[35] Accordingly, even though the designation of the agreement is not conclusive for its legal character, as confirmed by the definition of a treaty under Article 2(1)(a) of the *VCLT*, the designation of the *JCPOA* as a "plan" makes one hesitate before attaching legal significance to its provisions.

Looking at its provisions, one is tempted to acknowledge its mixed political and legal character. In accordance with the preamble, the *JCPOA* "includes ... reciprocal commitments."[36] However, while the Iranian commitments are clear, those of the other parties resemble soft obligations — for example, the "*JCPOA* will produce the comprehensive lifting of all UN Security Council sanctions as well as multilateral and national sanctions related to Iran's nuclear programme."[37] Although this implies an obligation to act in good faith (duty of effort),[38] the parties to the *JCPOA* did not have the capacity to undertake a legal obligation to the effect that the UNSC or the international community would lift sanctions (specific result). In the alternative, the *JCPOA* could consist of a political agreement with a letter of intent (notably with respect to UNSC decisions): "The E3/EU+3 and Iran commit to implement this *JCPOA* in good faith … and to refrain from any action inconsistent with the letter, spirit and intent of this *JCPOA* that would undermine its successful implementation."[39]

These considerations, however, seem to have only limited impact upon the United States's legal position. Expected opposition from Congress compelled the Obama administration to state explicitly from the very beginning that the *JCPOA* was not legally binding — that is, it was neither a treaty nor an executive agreement.[40] The issue was debated hotly in 2015. Yet, despite some early controversies,[41] which were mainly of a constitutional character, the secretary of state was very clear, *inter alia*, while participating in a Senate hearing on the ongoing *JCPOA* negotiations, that the United States did not have any intention of undertaking legally binding

[35] Hersch Lauterpacht, "Report of the Special Rapporteur (A/CN.4/63)" [1953] 2 ILC Yearbook 90 at 96–98; Arnold Duncan McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1986) at 6.

[36] *JCPOA*, *supra* note 11, preamble, para i.

[37] *Ibid* at para v.

[38] Lauterpacht, *supra* note 35 at 96–98.

[39] *JCPOA*, *supra* note 11, preamble, para viii.

[40] A distinction important from the domestic, constitutional law perspective. Marci Hoffman, "Treaties and International Agreements," *Berkley Law Research Guide* (19 June 2013), online: <https://bit.ly/2XVo4ax>.

[41] See literature provided by Michael Ramsey, "Does the Iran Deal Bind the Next President?," *Originalism Blog* (15 September 2015), online: <https://bit.ly/2KKzE50>.

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obligations.[42] If that was not enough, the United States did not express formal consent to be bound by the putative treaty (as codified in Article 11 of the *VCLT*),[43] as the *JCPOA* has not been signed.[44] Even the cumulative effect of treaty provisions, unilateral declarations, and other unilateral acts, acquiescence, estoppel, and legitimate expectations does not automatically entail a legally binding obligation.[45]

Accordingly, breaches of the *JCPOA* per se may give grounds for retorsion or political sanctions against the United States, but this would not amount to internationally wrongful acts, even though one could argue that a claim of rights (that is, the United States calling upon Iran to respect the agreement) entails corresponding duties.[46] The above considerations are not conclusive as to the legal character of the agreement with respect to its other parties. However, the *JCPOA*'s provisions have also been unanimously endorsed by the UNSC in Resolution 2231(2015), which "urged" its full implementation on the timetable established therein. The resolution "underscores" that UN member states are obliged to accept and carry out the UNSC's decisions in accordance with Article 25 of the *Charter of the United Nations* (*UN Charter*).[47] Hence, whatever the normative status of the *JCPOA* per se in respect of the United States, its normative content has been transformed into a legally binding act of the UNSC. The United States may be bound by either or both formal sources at the same time.[48]

PROCEDURAL ISSUES

On procedural grounds, the United States has violated both the *JCPOA* and Resolution 2231(2015). In accordance with paragraph 36 (on the dispute resolution mechanism) of the *JCPOA*, if the United States "believed that Iran was not meeting its commitments under this *JCPOA*," the United States "could refer the issue to the Joint Commission for resolution." Further,

[42] Felicia Schwartz, "Iran Nuclear Deal, If Reached, Wouldn't Be 'Legally Binding,' Kerry Says," *Wall Street Journal* (12 March 2015), online: <https://on.wsj.com/2m8SKU9>.

[43] Joel Gehrke, "State Department: Iran Deal Is Not 'Legally Binding' and Iran Didn't Sign It," *National Review* (2015), online: <https://bit.ly/2ru7PTe>.

[44] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, Judgment on Jurisdiction and Admissibility, [1994] ICJ Rep 112.

[45] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)*, [2018] ICJ Rep 153.

[46] Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol 1 (Cambridge, UK: Grotius, 1986) at 8, 67.

[47] *Charter of the United Nations*, 26 June 1945, 1 UNTS 15 (entered into force 24 October 1945).

[48] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, [1986] ICJ Rep 14 [*Nicaragua*].

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[a]fter Joint Commission consideration, [the United States] could refer the issue to Ministers of Foreign Affairs, if it believed the compliance issue had not been resolved. … After Joint Commission consideration … either the complaining participant or the participant whose performance is in question could request that the issue be considered by an Advisory Board. … If the issue still has not been resolved to the satisfaction of the complaining participant, and if the complaining participant deems the issue to constitute significant non-performance, then that participant could treat the unresolved issue as grounds to cease performing its commitments under this *JCPOA* in whole or in part and/or notify the UN Security Council that it believes the issue constitutes significant non-performance.

Accordingly, while the finding of the Joint Commission and Advisory Board as to whether Iran committed an act of significant non-performance would not have been binding upon the United States, the United States should have followed the prescribed steps and notified the UNSC.

By virtue of Resolution 2231(2015), the *JCPOA* participants are "encouraged" to resolve any issues arising with respect to its implementation commitments through the procedures specified in the *JCPOA*.[49] The UNSC "expressed its intent" to address possible complaints by the *JCPOA* participants about significant non-performance. More importantly, the resolution contains a snapback provision; in case of significant non-performance of commitments under the *JCPOA*, all UN sanctions would be automatically re-imposed within thirty days, unless the UNSC affirmatively decided otherwise.[50] Some argue that the United States thus lost the right to trigger this snapback.[51]

Given the fact that the United States is a permanent member of the UNSC, compulsory enforcement of the *JCPOA* or Resolution 2231(2015) by the UN seems improbable. At the same time, in such capacity, the United States enjoys both the greatest privileges and responsibilities for the maintenance of international peace and security, which constitutes a normative context for interpretation of other international law obligations, including the duty of cooperation and the good faith principle.

SUBSTANTIVE ISSUES

In substantive terms, the *JCPOA* stipulates that the United States will cease the application of the sanctions listed in the Annex to the *JCPOA* and will continue to do so.[52] The list of sanctions to be lifted covers

[49] Resolution 2231(2015), *supra* note 13 at para 10.

[50] *Ibid* at para 11.

[51] Jean Galbraith, "The End of the Iran Deal and the Future of the Security Council Snapback," *Opinio Juris* (9 May 2018), online: <https://bit.ly/2KUVPSY>.

[52] *JCPOA*, *supra* note 11 at para 2.1, in conjunction with Annex II, para 4.

nineteen categories. Such sanctions should also not apply to non-US persons.[53] The re-imposed US sanctions (discussed earlier) therefore contradict the *JCPOA*'s provisions concerning transactions with listed individuals and entities, the Iranian rial, the provision of US banknotes to the government of Iran, bilateral trade limitations on Iranian revenues held abroad, Iranian sovereign debt, services associated with the above categories, and gold and other precious metals.[54] As stated above, Resolution 2231(2015) urges full implementation of the *JCPOA*.[55] In the UNSC's linguistic practice, this not only denotes a legally binding obligation but also is considered an even stronger expression than "calls upon" or "requests."[56]

The Iran–US *Treaty of Amity, Economic Relations, and Consular Rights*

Legal status

Despite four decades of antipathy between the two countries, starting with the 1979 hostage crisis and punctuated by some 3,900 arbitration cases before the Iran–US Claims Tribunal[57] and two pending ICJ cases[58] (three counting the US counterclaim), the United States declared its withdrawal from the 1957 *Treaty of Amity, Economic Relations, and Consular Rights* (*Treaty of Amity*)[59] only in October 2018.[60] As no further statements or documents relating to this declaration are publicly available (it is expected to take effect on 3 October 2019), the *Treaty of Amity* remains in force at least for one year from its formal denunciation. In other words, it is binding for the purposes of the ICJ proceedings and possibly other treaty challenges.

[53] *Ibid* at paras 7.1–7.2.

[54] *Ibid* at paras 4.1.1–4.1.5, 4.1.7, 4.5.1.

[55] Resolution 2231(2015), *supra* note 13 at para 1.

[56] UN Department of Global Communications, "Drafting Resolutions," online: *Model United Nations* <https://bit.ly/2CiMIIX>.

[57] Estimate by Stephen Wiles, "Iran-US Claims Tribunal" *Harvard Law School Research Guide* (4 December 2018), online: <https://bit.ly/2uDYb1o>.

[58] *Certain Iranian Assets (Islamic Republic of Iran v United States of America)*, Preliminary Objections (13 February 2019), online: <https://www.icj-cij.org/files/case-related/164/164-20190213-JUD-01-00-EN.pdf>; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America)*, "Application Instituting Proceedings Submitted by Islamic Republic of Iran" (16 July 2018), online: <https://www.icj-cij.org/files/case-related/175/175-20180716-APP-01-00-EN.pdf>.

[59] *Treaty of Amity*, *supra* note 17.

[60] Edward Wong & David E Sanger, "U.S. Withdraws from 1955 Treaty Normalizing Relations with Iran," *New York Times* (26 November 2018).

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PROCEDURAL ISSUES

In light of the United States's withdrawal from the compulsory jurisdiction of the ICJ in 1986, the key enabling factor for the proceedings is the recognition by both parties to the *Treaty of Amity* of the jurisdiction of the ICJ over issues relating to the interpretation or application of the treaty by virtue of its Article XXI(2). This jurisdictional basis has already been accepted by the ICJ in the *Oil Platforms* case.[61]

SUBSTANTIVE ISSUES

Under the *Treaty of Amity*, re-imposition of sanctions on internationally contested grounds does not contribute towards peace and sincere friendship.[62] It also, *prima facie,* violates:

- fair and equitable treatment of Iranian nationals and companies, the prohibition of unreasonable discrimination and effective enforcement of contractual rights, as far as the impact of sanctions upon investors could have been unfair or even, "in rare circumstances" of "more radical measures," could amount to a regulatory taking or indirect expropriation;[63]
- Iranians' right to conduct their activities in the United States upon terms no less favourable than other enterprises of whatever nationality engaged in similar activities, including those deemed necessary or incidental to the effective conduct of their affairs;[64]
- the prohibition on import and export restrictions or embargoes;[65] and, most importantly,
- the prohibition on restrictions on the making of payments, remittances, and other transfers of funds to or from the territories of the other high contracting party and exchange restrictions.[66]

The *Treaty of Amity* does not preclude the application of measures regulating the flow of gold or silver or measures relating to fissionable materials.[67]

[61] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America),* Preliminary Objections, Judgment, [1996] ICJ Rep 803.

[62] *Treaty of Amity*, *supra* note 17, art I.

[63] *Ibid*, art IV(1); Giorgio Sacerdoti, "The Application of BITs in Time of Economic Crisis: Limits to Their Coverage, Necessity and the Relevance of WTO Law" in Pia Acconci et al, eds, *General Interests of Host States in International Investment Law* (Cambridge, UK: Cambridge University Press, 2014) 3 at 6–7.

[64] *Treaty of Amity*, *supra* note 17, art IV(4).

[65] *Ibid*, art VIII(2).

[66] *Ibid*, arts VII(1)–(3).

[67] *Ibid*, arts XX(1)(a) (that is, part of sanction no. 2 listed above), XX(1)(b).

The United States could try to claim "customary grounds of a non-commercial nature" to justify import and export restrictions and, for the transfers restrictions, rely upon approval from the IMF.[68] In light of the violation of UNSC Resolution 2231(2015), however, the former seems unlikely (the most likely necessity exception is discussed below). The latter would most likely be based on the security interests exception, which is also contained in the *Treaty of Amity*.[69]

Multilateral Treaty Regimes

IMF

Given that both the United States and Iran are members of the IMF, its law is relevant in assessing US primary and secondary sanctions ("monetary restrictions" from the IMF's perspective).[70] Although the principal purpose of the IMF's *Articles of Agreement* is not to protect foreign investments per se, the goals of the promotion of exchange stability and assistance in the establishment of a multilateral system of current payments indirectly shield certain investment flows.[71] Fund members are generally prohibited from imposing restrictions on making payments and transfers for current international transactions and tampering with the exchange rates system.[72] In terms of restrictions on current international transactions,

- current transactions are financial flows not for the purposes of capital transfers;[73] most importantly, they include payments for economic contracts, including financial services; and
- the prohibition on limiting current transactions covers "making" (rather than receiving) payments — that is, the outflow of US payments for Iranian goods or services in this context.

[68] *Ibid*, arts VIII(4), VII(1)(b).

[69] *Ibid*, art XX(1)(d).

[70] On the controversy concerning the broadening of US jurisdiction to conduct outside the United States of foreign residents of the United States and foreign businesses controlled by US interests, to transactions outside the United States involving goods and technology of US origin, and to conduct outside the United States that merely has effects within the United States for the purposes of secondary sanctions (extraterritorial application of sanctions, exorbitant jurisdiction), see Nicholas Davidson, "U.S. Secondary Sanctions: The U.K. and EU Response" (1998) 27 Stetson L Rev 1425.

[71] *Articles of Agreement of the International Monetary Fund*, 27 December 1945, 2 UNTS 39 [*Articles of Agreement*].

[72] *Ibid*, arts VIII(2)(a), VIII(3).

[73] Restrictions upon the latter are not prohibited under International Monetary Fund (IMF) law, which, however, cannot be abused to circumvent provisions concerning current transactions. *Articles of Agreement*, *supra* note 71, art VI(3).

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A measure will be considered a restriction if its effect is to harness actual flows — that is, if it limits "the availability or use of exchange as such."[74] To this extent, NSPM-11 is clearly more than a mere regulation of financial flows.

As for the prohibition on exchange restrictions, it covers all measures that affect "the availability or use of exchange as such."[75] The IMF considers illegal, in particular, measures such as restrictions on payments for imports, restrictions for payments for services, and limits on usage of foreign currency accounts.[76] Accordingly, while the United States, as a member of the IMF, remains free to prohibit certain transactions with Iran and Iranian nationals, it shall not prevent payments for such contracts. Whereas the United States could not claim the most frequently used Article VIII(2)(a) exception for reasons related to the balance of payments (and financial assistance), restrictions imposed for security reasons are presumed legal unless otherwise declared by the IMF.[77]

These provisions are obviously relevant with respect to primary sanctions — that is, those sanctions concerning US–Iran transactions (notably sanctions 1–7 and 11, listed earlier). Additionally, activities involving most persons from the OFAC's specially designated nationals list — that is, persons identified as meeting the definitions of the terms "government of Iran" or "Iranian financial institution" — will also be subject to secondary sanctions beginning November 2018.[78]

My subsequent remarks on the essential security interests exception are of the utmost relevance in this context. But, for now, one should also acknowledge the importance of IMF decisions on the US restrictions for scrutiny under the OECD's Liberalisation Codes and the WTO's *GATS* framework.[79]

[74] IMF Executive Board, Decision no 1034-(60/27) (1 June 1960).

[75] *Ibid.*

[76] IMF, *Annual Report on Exchange Arrangements and Exchange Restrictions* (2016) at 22–23.

[77] IMF Executive Board, Decision no 144-(52/51) (14 August 1952).

[78] By virtue of secondary sanctions, the sanctioning state (here, the United States) exerts economic pressure upon third-state entities in order to discourage the latter from dealings with the sanctioned state (here, Iran). Formally, secondary sanctions are addressed to domestic bodies and prohibit them from business dealings with third-state entities cooperating with the sanctioned state. The most important leverage here is composed of US financial institutions, including settlement systems of US dollar-denominated international payments. As mentioned above, depriving one from access to the US financial market may have major implications for any internationally active entity. US Department of the Treasury, *supra* note 24 at 6–7.

[79] *GATS* does not affect rights and duties under the *Articles of Agreement*, notably when restrictions on capital transactions are adopted at the request of the IMF, "provided that a Member shall not impose restrictions on any capital transactions inconsistently with its specific commitments" (*GATS*, *supra* note 18, art XI(2)). Aside from this substantive link to the IMF's *Articles of Agreement*, there is a procedural link in cases of serious BoP difficulties, monetary reserve problems or foreign exchange arrangements. *General Agreement*

OECD's liberalisation codes

In addition to its IMF obligations, the United States is also a member of the OECD. As such, it is bound by the *Code of Liberalisation of Capital Movements* (*CMC*) and the *Code of Liberalisation of Current Invisible Operations* (*CIOC*).[80] This means that it is obliged to eliminate restrictions on current invisible transactions (that is, services) and transfers[81] and to progressively abolish restrictions on movements of capital to the extent necessary for effective economic cooperation.[82] In terms of economic sanctions, more important is that under both regimes member states are bound by the standstill clause — that is, a prohibition on the introduction of new barriers.

The *CMC* and the *CIOC* are important in two respects: on the one hand, in terms of secondary sanctions against other OECD member states and their nationals and, on the other hand, possibly also with respect to Iran,

on Tariffs and Trade 1994, 15 April 1994, 1867 UNTS 187 (entered into force 1 January 1995), art XV(2) [*GATT*]; *GATS*, *ibid*, art XII. By virtue of the article, WTO members are obliged to (1) consult on said matters with the IMF; (2) accept IMF statistical and factual findings; and (3) accept the determination of the IMF as to whether the action in question in exchange matters is in accordance with the IMF *Articles of Agreement*. In practice, the cooperation is not, however, full or automatic. WTO dispute settlement panels at the very least shield their right to make an autonomous determination (e.g., *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WTO Doc WT/DS56/R, Panel (25 November 1997) at paras VI.B.3.297–305; *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WTO Doc WT/DS90/R, Panel (6 April 1999) at paras V.490–91; *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WTO Doc WT/DS302/R, Panel (26 November 2004) at paras VII.139–41). See "Cooperation between the IMF and the WTO," Background Document 2 in S Schadler, L Hui Tan & Y Seok-Hyun, *IMF Involvement in International Trade Policy Issues* (Washington, DC: IMF, 2009) 58 at paras 12–21. In addition, the OECD Liberalisation Codes do not alter the obligations undertaken by virtue of the IMF *Articles of Agreement*, or other multilateral international agreements (common Article 4). *A contrario,* should the IMF consider restrictions legitimate in light of member state obligations, it would create a corresponding presumption under the codes. Yet, one should not forget that the IMF Executive Board, which would hear any complaint on the US restrictions, adopts decisions in accordance with the weighted distribution of voting power.

[80] OECD, *Code of Liberalisation of Capital Movements*, Doc No OECD/C(61)96 (12 December 1961) [*CMC*]; OECD, *Code of Liberalisation of Current Invisible Operations*, Doc No OECD/C(61)95 (12 December 1961) [*CIOC*].

[81] *CIOC*, *supra* note 80, art 1(a): "Members shall eliminate between one another, in accordance with the provisions of Article 2, restrictions on current invisible transactions and transfers, hereinafter called 'current invisible operations.' Measures designed for this purpose are hereinafter called 'measures of liberalisation.'"

[82] *CMC*, *supra* note 80, art 1(a): "Members shall progressively abolish between one another, in accordance with the provisions of Article 2, restrictions on movements of capital to the extent necessary for effective economic co-operation. Measures designed to eliminate such restrictions are hereinafter called 'measures of liberalisation.'"

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as the members of the OECD are said to have extended the benefits of the codes to all IMF members.[83] At the same time, it should be acknowledged that, formally speaking, the codes are not treaties but, rather, legally binding resolutions of the international organization. In substantive terms, the scope of application of the *CMC* and the *CIOC* is considerably broader than the IMF *Articles of Agreement*, as they include:

- all capital transactions — that is, all long- and short-term capital movements and direct investments;
- both inward and outward transactions; and
- services — that is, invisible transactions, which cover the supply of services to residents by non-resident service providers and vice versa (including banking and finance, insurance, and private pensions).

There is no doubt that NSPM-11 constitutes a restrictive measure.[84]

The only exception possibly available to the United States is, again, protection of its security interests.[85] The United States did not submit reservations to the *CMC* and the *CIOC*, which is of major importance for the legal assessment of the NSPM-11 regime. Although a comprehensive comparison of the investor protections under the IMF and OECD regimes is beyond the scope of this article, one should reiterate at this point that the *CMC* and the *CIOC* liberalize not only international transfers but also underlying transactions (unlike the IMF's *Articles of Agreement*). Also, unlike the IMF's *Articles of Agreement*, the *CMC* and the *CIOC* also liberalize inward investments by non-residents.

GATS

Iran is not yet a member of the WTO (Iran's working party was established on 26 May 2005), and the United States is merely a signatory to the *VCLT*, and so the relevance of US commitments under WTO law to US–Iran relations cannot be assessed even in light of Article 18 of the *VCLT* relating to the legal effects of treaties prior to their entry into force. Those commitments, however, could be important in terms of secondary

[83] *CMC*, *supra* note 80, art I(d); *CIOC*, *supra* note 80, art I(d). In accordance with the Liberalisation Codes, members shall endeavour to extend the measures of liberalisation to all members of the IMF. Numerous OECD publications of a non-binding character (leaflets, websites, and so on) contain statements that this has occurred. However, I was unable to obtain any documents from the IMF legal department confirming that such acts have taken place or, more importantly, their scope.

[84] Organisation for Economic Co-operation and Development (OECD), *OECD Codes of Liberalisation: User's GUIDE 2008* (2007) at 23.

[85] *CMC*, *supra* note 80, art 3; *CIOC*, *supra* note 80, art 3.

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sanctions.[86] Here, analysis *in abstracto* is difficult within the limited scope of this article. Although NSPM-11 effectively aims to prevent trade both in goods (petroleum is considered as such for the purposes of WTO law) and services as well as in precious metals and Iranian currency, its direct objects in terms of secondary sanctions are mostly services related to such transactions. Accordingly, NSPM-11 seems to fall predominantly within the ambit of *GATS* rather than the *General Agreement on Tariffs and Trade* (*GATT*).[87]

GATS only applies to services and service suppliers of any other member. This means that *GATS*'s application to US secondary sanctions is limited to the consumption by US persons of services provided by third-state persons or also, at best, to obstacles to service flows between two foreign states (notably when financial institutions active in the United States refuse to settle transactions). However, *GATS* does not limit the United States's right to prevent its own persons from providing services abroad or to foreigners.

NSPM-11's secondary sanctions against third-state nationals, both with respect to services provided to US consumers and between foreign states, could be assessed in light of the general obligation of most-favoured-nation (MFN) treatment as well as specific obligations — that is, in accordance with the US Schedule of Commitments — on market access.[88] Additionally, with respect to preventing service flows from a foreign state to the United States, sanctions could violate the national treatment standard.[89] In terms of an alleged MFN violation, it seems necessary to acknowledge that the United States is not discriminating on a nationality basis (in other words, secondary sanctions can apply on a non-discriminatory basis to any foreign person involved in designated transactions with Iran). Arguably, however, even if that was sufficient to justify MFN restrictions, sanctions may nevertheless be discriminatory *de facto* since the actual number of states that have managed to establish a business link with Iran (following the lifting of sanctions) remains limited.

Prima facie, the most likely sanctions to violate *GATS* are those secondary sanctions that relate to significant transactions with the Iranian rial (sanction 4), Iranian sovereign debt (sanction 5), financial relations with the Central Bank of Iran and designated Iranian financial institutions (sanctions 8 and 9), and underwriting services, insurance, or reinsurance (sanction 10). Here, the applicable law could vary from case to case.

[86] On the legality under WTO law of US secondary (Iranian) sanctions adopted in 2012, see S Singh, "WTO Compatibility of United States' Secondary Sanctions Relating to Petroleum Transactions with Iran," Centre for WTO Studies, Indian Institute of Foreign Trade, Working Paper CWS/WP/200/1 (28 June 2012).

[87] *GATT*, *supra* note 79.

[88] *GATS*, *supra* note 18, arts II, XVII.

[89] *Ibid*, art XVII.

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The United States is also a party to the WTO's *Understanding on Commitments in Financial Services*, which stipulates more robust liberalization.[90] Hence, the applicable law would either be *GATS* together with the Annex on Financial Services and schedule of financial services commitments (including the US MFN exemptions, notably concerning insurance and banking services — that is, the fifth protocol to *GATS*) or the *Understanding on Commitments in Financial Services* (with respect to persons from another state party to the understanding).

Similar to the *GATT*, *GATS* also includes public order and essential security interests exemptions.[91] As for the former, the WTO's Dispute Settlement Body (DSB) would be unlikely to take a deferential approach.[92] At this point, it is worth acknowledging that unlike the *GATT*'s essential security interests exception,[93] *GATS* obliges members to inform the Council for Trade in Services about security-related measures "to the fullest extent possible." Accordingly, even if the *GATS* clause is self-judging, the United States should comply with the procedural requirements applicable to the adoption of secondary measures against third states.[94]

Essential Security Interests, State of Necessity, and Economic Sanctions

The foregoing analysis has established that the United States has likely committed *prima facie* violations of binding legal commitments under the *JCPOA* as espoused by UNSC Resolution 2231(2015), the *Treaty of Amity*, as well as the IMF's *Articles of Agreement*, the OECD's Liberalisation Codes, and the WTO's *GATS*. However, each of these commitments is subject to well-recognized exceptions. This section of the article, therefore, focuses on the applicability of those exceptions.

National security appertains to the very essence of, or is indispensable for, statehood. Accordingly, the international legal system must acknowledge states' particular powers in this regard. This is reflected in the notion of the inherent right of self-defence, as enshrined in Article 51 of the *UN Charter*, and the self-judging formulation of the majority of treaty clauses

[90] *Understanding on Commitments in Financial Services*, WTO Doc LT/UR/U/1 (15 April 1994).

[91] *GATS*, *supra* note 18, arts XIV(a), XIV*bis*(1).

[92] Anne van Aaken & Jürgen Kurtz, "Prudence or Discrimination? Emergency Measures, the Global Financial Crisis and International Economic Law" (2009) 12:4 J Intl Econ L 859 at 873.

[93] Such a duty does not appear in the text of document, even though it has been accepted in the organization's practice.

[94] And yet it seems that a procedural breach not only does not entail legal responsibility but also does not have legal importance for the purposes of sanctions legality analysis.

concerning essential security interests.[95] For this reason, the international community, including dispute settlement bodies, tends to show particular caution when faced with an alleged breach of international obligations stemming from essential security concerns. At the same time, security interest clauses cannot constitute a blanket justification for violation of international law. The subsistence of international law hinges upon maintaining a fragile equilibrium between respecting a state's right to its security and preventing the very same norm from becoming a device for destroying the legal system it is supposed to stabilize. This split is well reflected in investment arbitration case law with regard to economic emergencies; certain tribunals have ruled that the protections of bilateral investment treaties (BITs) should be upheld even in such times of emergency, when they are most needed, while others have taken the view that such occasions are when a government's discretionary policy powers must be given precedence.[96]

As for the clauses themselves, they assume a spectrum of approaches in defining whether, and to what extent, a state's freedom to use them is restricted or not. Under Article XX(d) of the Iran–US *Treaty of Amity*, the parties reserve their right to apply measures "necessary to fulfil [their] obligations ... for the maintenance or restoration of international peace and security, or necessary to protect [their] essential security interests."[97] Beyond the legally uncontentious possibility of claiming a security exception with respect to military establishments and fissionable and fusionable materials, Article XIV*bis* (1)(b)(iii) of *GATS* stipulates that a member can also take any actions "which it considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations." Also, common Article 3(ii) of the OECD's *CMC* and *CIOC* shields a state's right to take any action "which it considers necessary for the protection of its essential security interests." Finally, the IMF's *Articles of Agreement* do not contain an explicit security interests exception; however, by virtue of a legally binding interpretation, the Executive Board has acknowledged that security matters fall outside the substantive scope of the *Articles of Agreement*. As a result, payment restrictions on such grounds are presumed legal unless otherwise declared by the IMF.[98]

[95] Susan Rose-Ackerman & Benjamin Billa, "Treaties and National Security" (2008) 40 NYU J Intl L & Pol 437.

[96] Sacerdoti, *supra* note 63 at 9.

[97] See K Yannaca-Small, "Essential Security Interests under International Investment Law" in OECD, ed, *International Investment Perspectives: Freedom of Investment in a Changing World* (Paris: OECD, 2007); United Nations Conference on Trade and Development, *The Protection of National Security in IIAs* (2009).

[98] IMF Executive Board, Decision no 144-52/51 (14 August 1952).

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Starting from the last of these regimes, the IMF not only tends to abstain from becoming involved in strict political–security issues; it is even argued that it could continue financial support to a state sanctioned by other international organizations, including the UN.[99] Over the years, certain states have widely relied on a *de facto* security exception, notably the United States with respect to Iran (as well as Libya and Panama).[100] So far, the IMF has not considered itself directly bound by UNSC resolutions and has not questioned the application of such an exception. If the IMF were to approve a US claim that it is acting pursuant to its security interests, it would quasi-automatically shield the legality of exchange restrictions and current account controls under other treaties; notably, the WTO would likely defer to the IMF's decision,[101] even though the IMF's qualification of a measure as an exchange restriction[102] does not preclude the possibility that the WTO would see it as a trade restriction subject to its own purview.[103] And, yet, even in the case of self-judging financial necessity clauses

[99] William E Holder, "The Relationship between the International Monetary Fund and the United Nations" in Robert E Effros, ed, *Current Legal Issues Affecting Central Banking*, vol 4 (Washington, DC: IMF, 1997) 16 at 22.

[100] Annamaria Viterbo, *International Economic Law and Monetary Measures* (The Hague: Edward Elgar, 2012) at 172–74.

[101] In accordance with *GATS*, *supra* note 18, art XI(2): "Nothing in this Agreement shall affect the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement, provided that a Member shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article XII or at the request of the Fund." During consultations concerning contested measures, the WTO could apply by analogy art XII(5)(e), which regulates consultation concerning, *inter alia*, payments or transfers in the event of serious balance-of-payments and external financial difficulties or threat thereof. In such a case, "all findings of statistical and other facts presented by the International Monetary Fund relating to foreign exchange, monetary reserves and balance of payments, shall be accepted and conclusions shall be based on the assessment by the Fund of the balance-of-payments and the external financial situation of the consulting Member." However, in the event of a WTO claim against the US sanctions against Iran it is hardly imaginable that the US could make a valid case based on balance-of-payments reasons.

[102] From the IMF perspective, a measure constitutes an exchange restriction when it "involves a direct governmental limitation on the availability or use of exchange as such:" IMF Executive Board Decision no 1034-(60/27) (1 June 1960).

[103] The distinction methodology was addressed in 1952 in *Greece – Increase of Import Duties on Products Included in Schedule XXV*, Case G/27 (3 November 1952) at 51. No conclusion was reached at the time. In 1891, another panel decided that "unlike the IMF — [*GATT* contracting parties] have never formally decided how to distinguish between trade and exchange controls. ... Their approach has been to examine particular restrictive measures affecting trade independent of the form that these measures took." GATT Committee on Balance-of-Payments Restrictions, *Consultation with Italy (Deposit Requirement*

in international financial law (where the burden of proof is seemingly easier to satisfy), scholars support the view that it is not an arbitrary declaration but, rather, one where the legitimate efficiency and fairness interests of the non-violating party ought to be considered.[104] Given that the actual losses will be incurred by private actors, "at bottom is the question of risk allocation and determining who should bear the burden in situations of unforeseen events."[105]

As for the OECD codes and *GATS*, both clauses contain the threshold of what the state "considers" necessary for its security. There is no relevant OECD case law in this respect. The first WTO panel report dealing with the related issue under the *GATT* was circulated in April 2019 in proceedings instituted by Ukraine in *Russia – Traffic in Transit*.[106] The Ukrainian claim regarded bans and restrictions on traffic in transit by road and rail, from Ukraine, across Russia, and destined for Central Asia. Russia argued that the measures were among those "which it considers necessary for the protection of its essential security interests" (Article XXI(b) of the *GATT*) in response to an international relations emergency in 2014 that posed a threat to Russia's essential security interests. Furthermore, Russia argued that, since the provision is to be interpreted as self-judging, it should be immune from any scrutiny by WTO dispute settlement bodies.[107]

The panel concluded that the clause "which it considers" in the chapeau of Article XXI(b) does not extend to the determination of the circumstances

for Purchases of Foreign Currency). Background Paper by the Secretariat, Doc BOP/W/51 (25 September 1981) at 5, para 14, online: <https://bit.ly/2NIZyU1>. And yet in 2004, a subsequent panel withdrew from the autonomous approach, stating that "since Article XV:9 of the GATT exempts exchange restrictions measures that are applied in accordance with the Fund Articles, from obligations under other Articles of the GATT, the guiding principle that the IMF prescribed as the criterion for the determination of what constitutes an 'exchange restriction' should be respected by this Panel. Therefore, the Panel should apply this criterion in its evaluation of the measure before it." *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, Panel, WTO Doc WT/DS302/R (26 November 2004) at para 7.132. See further, on IMF–World Trade Organization (WTO) cooperation in this respect (comprehensive papers, albeit dating from before the last quoted panel report), WTO, *WTO Provisions Relevant to the Relationship between Trade and Finance and Trade and Debt: Note by the Secretariat*, Doc WT/WGTDF/W/3 (21 June 2002), online: <https://bit.ly/2OcidZs>; DE Siegel, "Legal Aspects of the IMF/WTO Relationship: The Fund's Articles of Agreement and the WTO Agreements" (2002) 96:3 AJIL 561.

[104] Federico Lupo-Pasini, *The Logic of Financial Nationalism: The Challenges of Cooperation and the Role of International Law* (Cambridge, UK: Cambridge University Press, 2017) at 134.

[105] Andrea Bjorklund, "Emergency Exceptions to International Obligations in the Realm of Foreign Investment: The State of Necessity and Force Majeure as Circumstances Precluding Wrongfulness," UC Davis Legal Studies Research Paper (2007) at 99.

[106] *Russia – Traffic in Transit (Complaint by Ukraine)*, WTO Doc WT/DS512/R, Panel (2019).

[107] *Ibid* at para 7.57.

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described in each subparagraph. In other words, while there is greater discretion in determining the scope of measures considered necessary for the protection of essential security interests, the existence of factual circumstances, such as whether measures are taken "in time of" an "emergency in international relations," must be objectively established.[108] Such a limitative interpretation was justified, in the panel's view, in light of both the object and purpose of the treaty as well as the lack of consistent practice claiming broad discretion under Article XXI(b), which could be treated as an interpretative agreement between states parties to the *GATT*.[109] Further, the negotiation history confirmed this textual and contextual interpretation: "[T]here is no basis for treating the invocation of Article XXI(b)(iii) of the *GATT 1994* as an incantation that shields a challenged measure from all scrutiny." [110] In addition to rejecting the Russian argument (alleging a lack of jurisdiction in a dispute pertaining to national security), the panel also rejected the United States's assertion — as an intervening party — that reliance on Article XXI(b) is "non-justiciable"; both arguments relied on the false "self-judging" nature of the provision.[111]

Yet, while the circumstances described in subparagraphs (i) to (iii) of Article XXI(b) (including the alleged emergency in international relations and whether the impugned measures were taken "in time of" such emergency) refer to objective facts and operate as "limitative qualifying clauses,"[112] the panel deferred to a great extent to the defendant-state's assessment with regard to the chapeau of the article (that is, what constitutes an essential security interest and what protective measures are necessary to protect it.) The panel's reticence to apply a strict standard of review reached its peak when it found that, while it was impossible to state what security interests Russia had actually referred to, it could not be said that Russia did so in an obscure or indeterminate manner.[113] Even more intriguingly, while the panel recognized the existence of a good faith obligation when defining essential security interests and linking them to the contested measures, it was very careful to state that potential international responsibility of the defendant state for the state of emergency did not fall within its purview.[114]

Accordingly, in this first case where an international tribunal was called upon to rule on an essential security interests claim by a permanent member of the UNSC (to justify its *prima facie* illicit acts in a situation to which

[108] *Ibid* at paras 7.77, 7.101.

[109] *Ibid* at para 7.82.

[110] *Ibid* at para 7.100.

[111] *Ibid* at para 7.103.

[112] *Ibid* at paras 7.65, 7.70–7.71.

[113] *Ibid* at paras 7.136–7.137.

[114] *Ibid* at paras 7.121, 7.133, 7.138.

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it had contributed), members of the panel made a considerable effort to avoid taking a hard line. While the specific circumstances under which such a defence can be applied have to clear an objective standard, the panel left huge discretionary freedom to states with regard to the chapeau of the article.

The other most promising opportunities for a WTO panel to clarify the nature of the essential security interests clause will arise in three cases concerning the embargo on Qatar, against the United Arab Emirates, Bahrain and Saudi Arabia.[115] The Bahrain and Saudi Arabia cases are still in the consultation phase, but, in the United Arab Emirates case, the panel has already been formed.

There is, however, a vast literature concerning the *GATT* security interests exception.[116] The prevailing view seems to consider the clause as being self-judging.[117] As a result, the WTO's DSB is unlikely to review the legality of the invocation of such exception, even if the plausibility of a security claim seems *prima facie* doubtful. At the same time, it seems significant to note that essential security interests — in the *GATT* preparatory works — were conceived as pertaining to classical military security and not to commercial matters, "as the only guarantee against abuse."[118] In terms of *GATS* — aside from the notification requirement — more problematic is the timing of the sanctions — namely, the existence of an emergency in international relations. The emergency must obviously be directly related to the contested measure, and, in this particular case, one could argue that either there is none or that the emergency is actually caused by the US actions, hence precluding reliance on the exception (*ex injuria jus non oritur*).

[115] *United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WTO Doc WT/DS526/3, Constitution of Panel (2018); *Bahrain – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WTO Doc WT/DS527/1, Request for Consultations (2017); *Saudi Arabia – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WTO Doc WT/DS528/1, Request for Consultations (2017).

[116] Robert P Alford, "The Self-Judging WTO Security Exception" (2011) 3 Utah L Rev 697; Łukasz Gruszczyński & Marcin J Menkes, "Legality of the EU Trade Sanctions Imposed on the Russian Federation under WTO Law" in Karolina Wierczyńska et al, eds, *The Case of Crimea's Annexation under International Law* (Warsaw: Scholar, 2017) 237 and the literature therein. Andrew D Mitchell & Caroline Henckels, "Variations on a Theme: Comparing the Concept of 'Necessity' in International Investment Law and WTO Law" 14:1 Chicago J Intl L 93.

[117] Michael P Malloy, "Reconciling Political Sanctions with Globalization and Free Trade. Où Est Votre Chapeau? Economic Sanctions and Trade Regulation" (2003) 4:2 Chicago J Intl L 371.

[118] UN Economic and Social Council, *Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, UN Doc E/PC/T/A/SR/33 (24 July 1947) at 3, online: <https://bit.ly/2Am4cFY>.

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When it comes to the obscure normative significance of the clause under the OECD's *CMC* and *CIOC*, the OECD Investment Committee has explicitly stated that the security clause should be applied only in "exceptional situations,"[119] which was subsequently reiterated in a committee clarification stressing that the article is not to be used as an escape clause.[120] The *CMC* and the *CIOC* do not contain any compulsory dispute resolution mechanisms, and their enforcement is predominantly limited to an opaque peer review process.[121]

Perhaps the most problematic for the United States could be the first challenge, under the Iran–US *Treaty of Amity*. Here, the security clause contains a more objective criterion, although some argue that an essential security defence in international investment law[122] may be raised only when national security interests are at stake.[123] The Argentinian financial crisis provided a testing ground for arbitral application of similar essential security clauses.[124] According to some arbitral tribunals addressing that crisis, essential security could be equated with the necessity defence under customary international law (discussed later in this article);[125] others have held

[119] *OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: User's Guide* (Paris: OECD, 2003).

[120] OECD Investment Committee, "Public Order and Essential Security Interests under the OECD National Treatment Instrument" in *National Treatment of Foreign-Controlled Enterprises* (Paris: OECD, 2005).

[121] Marcin J Menkes, "Rule of Law in International Monetary and Financial Law: New(ish) Solution and Old Mistakes" (2019) Eur YB Intl Econ L [forthcoming].

[122] Essential security clauses in international investment law sometimes are contained in a broader clause on non-precluded measures, which also encompass other public interest emergencies.

[123] William J Moon, "Essential Security Interests in International Investment Agreements" (2012) 15:2 J Intl Econ L 481.

[124] Subsequently quoted cases (*CMS Gas Transmission Co v Argentine Republic, Sempra v Argentine Republic, LG&E v Argentine Republic, Enron Corp Ponderosa Asset, LP v Argentine Republic*) are all based on the US–Argentina bilateral investment treaty (BIT) of 1991. The relevant passage of art XI is phrased like the US–Iran treaty: "This Treaty shall not preclude the application by either Party of *measures necessary for* … the Protection of its own essential security interests" [emphasis added]. Only *LG&E* absolved Argentina of international responsibility on the basis of art XI.

[125] Under this approach, even the Argentinian financial crisis of 2001–02 was declared to fall short of an essential security threat that would amount to a state of necessity, as it "did not result in total economic and social collapse." *CMS Gas Transmission Co v Argentine Republic*, ICSID Case No ARB/01/08, Award (12 May 2005) at paras 88, 359; see also *Sempra v Argentine Republic*, which found that "the Treaty provision is inseparable from the customary law standard insofar as the definition of necessity and the conditions for its operation are concerned, given that it is under customary law that such elements have been defined." *Sempra Energy International v Argentine Republic*, ICSID Case No Arb/02/16, Award (28 September 2007) at para 376.

that non-precluded measures (NPMs) related to necessity are something separate.[126] However, under both approaches,[127] essential security can also be claimed in the case of an (economic) emergency. In *Enron v Argentine Republic*, the tribunal declared that the NPM provision at issue there was not self-judging since "the Treaty would be deprived of any substantive meaning."[128] In other words, although the normative content of these provisions is not specified, and one may argue whether essential security covers only military matters or also economic distress, this is not to say that states enjoy a discretionary power to claim this exemption at will.

The *Treaty of Amity* language is also mirrored in the subsequent US 2004 Model BIT, which expressly states that it is self-judging; yet all arbitral tribunals under the International Centre for Settlement of Investment Disputes (ICSID) interpreting this provision have ruled that this is not so.[129] Furthermore, the *Treaty of Amity* dispute has already been submitted to the ICJ, the same judicial organ that considered the essential security defence in *Military and Paramilitary Activities in Nicaragua*.[130] There, the defence claimed by the United States was on the basis of the 1956 US–Nicaragua *Treaty of Friendship, Commerce and Navigation*, whose Article XXI in relevant part is identical to the one at hand.[131] The United States argued

[126] In *LG&E v Argentine Republic*, the tribunal recognized a state of necessity, as the situation involved a "fatal emergency" and a "total collapse of the Government and the Argentine State." *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No Arb/02/1, Decision on Liability (3 October 2006) at paras 227–29, 231. In *Continental Casualty v Argentine Republic*, the tribunal ruled that "[art XI] is not necessarily subject to the same conditions of application as the plea of necessity under general international law" and eventually accepted Argentina's defence. *Continental Casualty Co v Argentine Republic*, ICSID Case No Arb/03/9, Award (5 September 2008) at para 167.

[127] Even though the four cases are assessed as "deeply problematic: not only is the reasoning seriously flawed, but the four ICSID Tribunals' rulings also lack consistency even in the face of identical factual circumstances." W Burke-White, "The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System" (2008) 3:1 Asian J WTO & Intl Health L & Pol'y 199, online: <https://ssrn.com/abstract=1140628>.

[128] *Enron Corp Ponderosa Asset, LP v Argentine Republic*, ICSID Case No Arb/01/3, Award (22 May 2007) at para 332. Also confirmed by the *Sempra* Annulment Committee since "not even in the context of *GATT* Article XXI is the issue considered to be settled in favor of a self-judging interpretation, and the very fact that such article has not been excluded from dispute settlement is indicative of its non-self-judging nature." *Sempra*, *supra* note 125, Decision on the Argentine Republic's Application for Annulment of the Award (29 June 2010) at para 384.

[129] Sacerdoti, *supra* note 63 at 11.

[130] *Nicaragua*, *supra* note 48.

[131] *Treaty of Friendship, Commerce and Navigation* (with Protocol), 21 January 1956, 367 UNTS 3 (entered into force on 24 May 1958) [*Treaty of Friendship*]. By virtue of art XXI(1)(d) of the *Treaty of Friendship*, states reserve their right to non-precluded measures necessary to protect essential security interests.

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at the time that "the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States."[132] While acknowledging that "the concept of essential security interests certainly extends beyond the concept of an armed attack,"[133] the court did not consider Nicaragua's aggression in Central America to be an essential security threat. And, yet, the threat at the time appeared incomparably more tangible than in the Iranian case (to say nothing of the repercussions of Trump's actions on the international peace process).

More directly related to the US–Iranian treaty controversy, the ICJ's judgment in *Oil Platforms* was based on the very same treaty. In this case, the United States defended itself by referring to Article XX on Non-Precluded Measures of the *Treaty of Amity*. The factual basis of that case involved mining and other attacks on US flagged or owned vessels, which was still deemed insufficient for the purposes of claiming self-defence.[134] If the United States considers the security clause under the *Treaty of Amity* too narrow,[135] it could attempt a defence under the customary norm of necessity.[136] Yet, in accordance with the *Draft Articles on the Responsibility of States* necessity clause,[137] (1) the US sanctions would have to be the only

[132] Executive Order 12,513, 50 Fed Reg 18,629 (1985).

[133] *Nicaragua, supra* note 48 at para 224.

[134] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States ofAmerica*), Merits, [2003] ICJ Rep 161 at para 78.

[135] As one scholar has shown, there are three interpretative methods in the jurisprudence on the relationship between treaty clauses and the customary plea of necessity: confluence, *lex specialis*, and primary-secondary applications of norms. J Kurtz, "Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis" (2010) 59:2 ICLQ 325. To the contrary, one author has vigorously argued that in light of art 31 of the *VCLT* (treaty interpretation), "neither text, context, subsequent agreement nor practice of the parties to the U.S.-Argentina BIT support the use of the customary norm as an interpretive tool." D Desierto, "Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties" (2010) 31:3 U Pa J Intl L 827.

[136] Whereas the International Law Commission's *Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc A/56/83 (3 August 2001) [*ARSIWA*] are now considered an authoritative reflection of customary international law, some actually questioned whether they should not be treated instead as arguments *de lege ferenda*. S Heathcote, "Est-ce que l'état de nécessité est un principe de droit international coutumier?" (2007) 1 Rev b dr Intern 53.

[137] *ARSIWA*, *supra* note 136, art 25: "1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and, (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity."

way to safeguard US security; (2) the Iranian threat would have to amount to a grave and imminent peril; (3) the US reaction could not seriously impair the essential interests of the international community; and (4) the United States could not have contributed to the situation of necessity. One can hardly imagine that the United States could satisfy all four elements of this test, although some will question whether the *Draft Articles* actually reflect customary law in this respect or whether they should be applied to international investment law.[138]

The ILC has acknowledged that

> [t]he plea of necessity is exceptional in a number of respects. Unlike consent (art. 20), self-defence (art. 21) or countermeasures (art. 22), it is not dependent on the prior conduct of the injured State. Unlike *force majeure* (art. 23), it does not involve conduct which is involuntary or coerced. Unlike distress (art. 24), ... necessity consists not in danger to the lives of individuals in the charge of a State official but in a grave danger either to the essential interests of the State or of the international community as a whole.[139]

Moreover, the ILC goes on to conclude that

> [necessity] arises where there is an irreconcilable conflict between an essential interest, on the one hand, and an obligation of the State invoking necessity, on the other. These special features mean that necessity will only rarely be available to excuse the non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse.[140]

The ILC observes that "stringent conditions … before any such plea is allowed … mirror[] the language of article 62 of the 1969 *Vienna Convention* dealing with fundamental changes of circumstances."[141] The peril must be "objectively established and not merely apprehended as possible."[142] Finally, even if an international court or tribunal accepted a justification based on essential security interests or a state of necessity, private investors claiming violation of investment treaty rights at the very least could rely upon MFN clauses to invoke more favourable protection standards.

In the end, the wording of the security interests clauses *prima facie* may provide an easy way out of a legal assessment for the United States. Yet this

[138] Robert D Sloane, "On the Use and Abuse of Necessity in the Law of State Responsibility" (2012) 106:3 AJIL 447.

[139] *ARSIWA*, *supra* note 136, art 25, paras 1–3.

[140] *Ibid.*

[141] *Ibid*, art 25, para 14.

[142] *Ibid*, art 25, para 15.

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case is special in many respects because it concerns a permanent member of the UNSC. In different circumstances, that would mean that the United States could avail itself of its veto power. However, the UNSC unanimously adopted a resolution endorsing the *JCPOA*, and the IAEA has confirmed Iran's compliance with the plan. Violation of the *JCPOA*'s explicit procedural norms — which allows for quasi-automatic termination of the agreement — constitutes an act of outright disregard for the UNSC, the *UN Charter*, and the post-war peace project; for what could be of greater importance than nuclear security and support of terrorism by a nuclear state? How could the United States claim the benefit of a security interests clause if, in accordance with the IAEA's assessment of compliance with the *JCPOA*, it is the one damaging the peace process? Accordingly, even by the most lenient standard of the OECD codes and *GATS*, if self-judging security interests clauses have any normative significance,[143] it would have seemed unlikely that the United States would pass the legal threshold of acting in good faith – at least until the *Russia – Traffic in Transit* panel report discussed above.[144] Now the WTO may have improved the United States's chances before specialized tribunals such as those dealing with economic matters, but this puts even greater pressure upon the ICJ in the case lodged there by Iran.

Procedural Aspects

At least in the ICJ's *Treaty of Amity* case, and possibly also in the case of investment arbitrations should such claims be filed, the infamous obscurity of the applicable rules of evidence — free assessment of evidence bound only by the prohibition of arbitrary action[145] — could play in favour of the defendant.

burden of proof

Whereas the general principle that the party putting forward a material contention bears the burden of establishing it does not seem to be

[143] As confirmed by the ICJ, self-judging clauses both have a normative component and do not bar jurisdiction. *Djibouti v France*, [2008] ICJ Rep 177; see also Stephan Schill & Robyn Briese, "'If the State Considers': Self-Judging Clauses in International Dispute Settlement" (2009) 13 Max Planck YB United Nations L 61; Diane A Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* (Leiden: Brill, 2012).

[144] Good faith has been recognized as a normative requirement under the chapeau of *GATT* art XX in *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R, Appellate Body (2007) at para 215. One can argue, however, that the United States has been consistent in its insistence on the self-judging nature of the WTO essential security clause. Raj Bhala, "National Security and International Trade Law: What the GATT Says, and What the United States Does" (2014) 19:2 U Pa J Intl L 263.

[145] Robert Kolb, *The Elgar Companion to the International Court of Justice: Elgar Companions to International Courts and Tribunals* (Cheltenham, UK: Edward Elgar, 2014) at 234.

a controversial element of ICJ procedure,[146] two points may nevertheless prove contentious during the proceedings. First, the notion of judicial notice of the law (*jura novit curia*) lies in contrast to the foregoing principle of the burden of proof, which is applicable to questions of fact. While considering the legal status of commitments under the *JCPOA*, the court will be faced with the question of consent to be bound. While the existence of consent is a question of fact, its extent and, hence, interpretation of the scope of the agreement are questions of law.[147] Second, as the United States claims that Iran continues to pose an actual threat to its security through a nuclear armaments program, the latter will have to prove a negative fact. As stated by the ICJ in *Military and Paramilitary Activities in Nicaragua*, "[t]he evidence or material offered by Nicaragua in connection with the allegation of arms supply has to be assessed bearing in mind the fact that, in responding to that allegation, Nicaragua has to prove a negative."[148] Accordingly, the court may decide to shift, or at least soften, the burden of proof.[149]

FACT FINDING

Not only may the facts of the case be far from undisputed, but it also seems most likely that they will be heavily disputed given the opposition between the parties to the proceedings. The ICJ may be thus faced with a "documentary overload" consisting of complex scientific and technological information.[150] One can argue that "the ultimate purpose of international adjudication is not establishing facts, or truths, or even The Truth, but rather to settle the dispute. … Establishing facts does not necessarily lead to the settlement of the underlying dispute."[151] This can limit, *inter alia*, the court's readiness to rely upon expert opinions. Paradoxically, the probable lack of factual grounds for the US claims in such a highly politicized dispute may lead the court to be deferent to the disputing states: "[W]ell-reasoned judgments based in the law rather than decided on technical issues of fact have traditionally been perceived as … somehow

[146] *Ibid* at 235.

[147] *Ibid* at 238–40.

[148] *Nicaragua*, *supra* note 48 at para 147.

[149] Although see the criticism, by one of the judges sitting on the case, of the court's reactive approach to fact finding. Stephen M Schwebel, "Three Cases of Fact-Finding by the International Court of Justice" in Stephen M Schwebel, ed, *Justice in International Law: Selected Writings* (Cambridge, UK: Cambridge University Press, 1994) 125.

[150] James Gerard Devaney, *Fact-Finding before the International Court of Justice* (Cambridge, UK: Cambridge University Press, 2016) at 4–5.

[151] Cesare PR Romano, "The Role of Experts in International Adjudication" in Société française pour le droit international, dir, *Le droit international face aux enjeux environnementaux: Colloque d'Aix-en-Provence* (Paris: Editions A Pedone, 2010) 181 at 182–83.

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less offensive to the State party on the wrong end of the judgment."[152] In particular, the court is generally reluctant to draw negative inferences from a refusal to produce requested evidence. Together with a reluctance to engage in fact-finding, this may contribute to what one commentator has dubbed a reactive approach to the evidence.[153]

STANDARD OF PROOF

Against this backdrop, the ICJ will have to decide the standard of proof applicable to the case at hand. Here, there is significant doubt as to whether the ICJ will adhere to the common law tradition of an objective standard of proof based on probability or to the more subjective civil law approach.[154] Not only have the judges never explicitly espoused any particular standard in this respect, but they have also not demonstrated a consistent approach in the ICJ's case law either.[155] The court "has applied the most inconsistent standards of proof, mostly without devoting any in-depth rational consideration to the matter."[156]

Typically, the ICJ has aligned with "proof by a preponderance of the evidence" (or balance of probabilities).[157] The court could derive the standard of proof from Article 53(2) of its statute, as it did in *Corfu Channel*, where it ruled that charges of exceptional gravity require proof "by conclusive evidence … requiring a degree of certainty."[158] But, even in this seminal judgment, the court spoke of standards such as "free from any doubt"[159] and "decisive legal proof."[160] A number of other variations suggest adherence to the

[152] Devaney, *supra* note 150 at 7, 39–41.

[153] *Ibid* at 14–72.

[154] See Brendan Plant & Anna Riddell, *Evidence before the International Court of Justice* (London: British Institute of International Comparative Law, 2009) at 124–25; Angela del Vecchio, *Le parti nel processo internazionale* (Milano: Giuffrè, 1975) at 205–12.

[155] Fitzmaurice, *supra* note 46 at 126–29; Luigi Fumagalli, "Evidence before the International Court of Justice: Issues of Fact and Questions of Law in the Determination of International Custom" in Nerina Boschiero et al, eds, *International Courts and the Development of International Law* (The Hague: TMC Asser Press, 2013) 137; Manfred Lachs, "Evidence in the Procedure of the International Court of Justice: Role of the Court" in Bola A Ajibola, Emmanuel G Bello & Tashim O Elias, eds, *Essays in Honour of Judge Tashim Olawale Elias*, vol 1: *Contemporary International Law and Human Rights* (Dordrecht: Martinus Nijhoff, 1992) 265.

[156] Kolb, *supra* note 145 at 251.

[157] Peter Tomka & Vincent-Joël Proulx, "The Evidentiary Practice of the World Court," NUS Law Working Paper Series 26 (2015) at 10.

[158] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)*, Merits, [1949] ICJ Rep 4 at 17 [*Corfu Channel*]. *Statute of the International Court of Justice*, 26 June 1945, 33 UNTS 993 (entered into force 31 August 1965).

[159] *Corfu Channel*, *supra* note 158 at 14.

[160] *Ibid* at 16.

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preponderance of evidence standard.[161] But the court also implied it could also apply any another standard, whether the other classical approach of proof "beyond reasonable doubt," employed on several occasions, or some other variations (for example, sufficiency, conclusiveness).[162] Hence, even accepting a variable standard of proof – reflecting the importance of the matter to be proven[163] – the question remains whether it will be sufficient for Iran, as a plaintiff, to meet the relatively low threshold of *prima face* proof showing a negative fact (that it did not conduct an inherently secret nuclear program) in order to shift the burden to the United States. Or, since the dispute concerns international responsibility for a wrongful act and the alleged conduct concerns the plaintiff's jurisdiction, will the court require a substantially higher standard of proof from Iran? Whichever the court deems appropriate, both parties will remain obliged to cooperate towards the peaceful settlement of the dispute.[164]

Concluding Observations

There are a number of reasons why the US sanctions against Iran could and should foster the development of international economic law with regard to the necessity (non-precluded measures) doctrine as well as contribute to the stability of (or further undermine) the multilateral legal order. Due to differences in the mandates of various international dispute settlement bodies, and reticence with respect to scrutinizing matters pertaining to national security, the procedural order of events may prove crucial for how this case will be remembered. On 16 July 2018, Iran filed a claim against the United States before the ICJ for violation of the 1955 *Treaty of Amity*. This was a legally and politically obvious move; while President Trump continues to tarnish the international reputation of the United States and undermine multilateralism, Iran suddenly has taken the position of a law-abiding member of the international community.[165] As argued above, from the Iranian perspective, a claim before the ICJ under the *Treaty of Amity* seems the most promising legal avenue. From a broader perspective, depending on how the crisis and the court case unfold, the ICJ may deliver a judgment in time for Iran and its entrepreneurs to rely upon it before other dispute settlement venues — for instance, the IMF and/or investment arbitration bodies. The case may also be important for

[161] Plant & Riddell, *supra* note 154 at 127.

[162] *Ibid* at 127–30.

[163] *Ibid* at 132–37.

[164] Chittharanjan Felix Amerasinghe, *Evidence in International Litigation* (Leiden: Martinus Nijhoff, 2005) at 96–117.

[165] There is yet another ICJ case pending between the two states, following the institution of proceedings in 2016 for the alleged violation of Iranian immunity from jurisdiction.

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other states and, even more so, for private entities from third states who may be unwilling to antagonize the United States politically.

In substantive terms, I have argued that the US primary and secondary sanctions *prima face* violate US obligations under the IMF's *Articles of Agreement*, the OECD Liberalisation Codes, and the WTO's *GATS*. Depending on the states in question, secondary sanctions could also violate provisions of relevant BITs.[166] For instance, French groups Total and PSA (manufacturers of Peugeot and Citroën) very quickly declared that they would withdraw from Iran because of the US secondary sanctions.[167] In each of these cases, the decisive factor will be the availability of the essential security interests exception and/or the customary plea of necessity. In general international law as well as in financial, investment, and trade rules, the normative content of such clauses is vague, especially when they are phrased as self-judging provisions. Not surprisingly, courts and tribunals have been cautious when dealing with such matters. Some argue that treaty necessity carve-outs should not be conflated with the customary plea of necessity,[168] while others warn against mixing both regimes.[169]

However, no matter how flexible these provisions are, there must be a red line somewhere in order not to render all international obligations practically unenforceable. The ICJ constitutes the most authoritative forum for resolving this dilemma. At the same time, the mastermind behind the entire situation, President Trump, gives all indications that, even if exculpated this time, he will resort to the same method again. In 2019, Trump's policies had already resulted in six attacks against commercial ships in the Strait of Hormuz, allegedly by Iranian armed forces, and the downing of a US drone by the IRGC.[170] From this perspective, the case is a gilded cage for the ICJ, which must accept the honour of pronouncing itself upon the matter.

Paradoxically, what could be playing in the United States's favour is Trump's consistency in disparaging long-standing allies and flattering traditional rivals. Having imposed protective tariffs on imports from the EU,

[166] Notably, the French and German interests could be at stake and both would be subject to treaty protection, under the 1956 Germany–US *Treaty of Friendship, Commerce and Navigation*, 29 October 1954, US Government Printing Office (1955), and the 1822 France–US *Treaty of Navigation and Commerce*, 6 February 1778 (1774–89) Journals of the Continental Congress 12. Jack Ewing & Stanley Reed, "European Companies Rushed to Invest in Iran: What Now?" *New York Times* (9 May 2018).

[167] "Le constructeur automobile PSA prépare son retrait d'Iran," *Le Monde* (5 June 2018).

[168] Van Aaken & Kurtz, *supra* note 92.

[169] Sloane, *supra* note 138.

[170] Michael R Gordon, Sune Engel Rasmussen & Siobhan Hughes, "U.S. Planned Strike on Iran after Downing of Drone but Called Off Mission," *Wall Street Journal* (21 June 2019), online: <https://on.wsj.com/2FEITzj>.

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Canada, and Mexico for security reasons,[171] while launching a charm offensive towards, *inter alia*, Russia, the narrative of changing strategic alliances gains credibility. And, yet, even though no adjudicative body requested to assess the legality of the US sanctions against Iran would enjoy jurisdiction over US foreign policy at large, this article has hinted at the havoc wreaked by Donald Trump on international law. Judicial leniency or deference in this context would likely further threaten the subsistence of international law, for which a court or tribunal taking such an approach would have to bear its share of responsibility.

While balancing the United States's and other stakeholders' rights in this case, one could hope that some form of proportionality test could be applied to invocation of the essential security clause.[172] This would be particularly interesting with regard to sanctions limiting Iran's capacity to issue sovereign debt. While this article does not deal with the legality of the US sanctions under general international law per se, it seems necessary to single out the financial sanctions measures for two reasons. On the one hand, New York and English law are the two most important legal orders under which sovereign bonds are currently issued. On the other hand, access to international capital markets may be vital for state budgeting powers, which are a core sovereign prerogative. Taken together, not only may the US financial sanctions be much more severe than other measures, but, since they interfere with Iran's sovereignty, the proportionality threshold should also be arguably higher for this measure.

If subsequent procedures are initiated before the IMF and the OECD, it would be an even more interesting case of entering uncharted normative waters. From the investment arbitration perspective, a ruling on NPMs could contribute to the consolidation of the legitimacy of international investment law. Legitimacy could also play a role in the ICJ's case if the analysis focuses on customary international law and the law of treaties, for one could argue that the same reasons that led judges to take a restrictive approach in the *Nuclear Tests* cases could compel them to take a firm stance here.[173]

[171] White House, *President Donald J. Trump Approves Section 232 Tariff Modifications* (2018).

[172] I thus subscribe to the conclusions formulated, with respect to necessity in international investment law, in Lorenza Mola, "International Investment Arbitration and Serious Economic Crises: Lessons Learned in the Argentinean Crisis of 2000–2001" in Attila Tanzi et al, eds, *International Investment Law in Latin America / Derecho Internacional de las Inversiones en América Latina* (Leiden: Martinus Nijhoff, 2016) 370. On advantages and risks related to the proportionality analysis, see also Benedict Kingsbury & Stephan W Schill, "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest: The Concept of Proportionality" in Stephan W Schill, ed, *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010) 75. The authors also compare the normative vagueness of the necessity exception to the (in)famous indirect expropriation test of "I will know it when I see it" in investment arbitration.

[173] *Nuclear Tests (Australia v France)*, [1974] ICJ Rep 253; *Nuclear Tests (New Zealand v France)*, [1974] ICJ Rep 457.

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Finally, it is also worth considering the situation in a broader perspective. On the one hand, the US sanctions concern a state that, due to its long isolation, is not a party to certain fundamental treaty bodies, starting with the WTO. On the other hand, the case may constitute a testing ground for US efforts to undermine multilateralism. Should the US sanctions prove effective, President Trump is likely to rely on unilateralism even more willingly, to the benefit of the principal challenger of the post-Cold War global order — Russia. However, should the EU or its investors be able to pierce the sanctions with a blocking statute and the recently established European mechanism for financing trade with Iran,[174] calls for the protection of multilateralism without the United States will gain critical credibility. While, even in this scenario, Trump may declare success in his efforts to curtail allies' free-riding on multilateral cooperation, this seems the least of current worries.

[174] Francois Murphy, "Iran Hopes Trade Channel Skirting U.S. Sanctions Will Work Within Weeks," *Reuters* (6 March 2019), online: <https://reut.rs/2u8gDiG>.

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