

BOFAXE

The U.S. v. the Rest of the World

How the recent attempts to reinstall sanctions against Iran undermine the Security Council (II)

— The main legal questions at stake relate to the correct interpretation of the term ‘JCPOA participant state’ and whether the U.S. is still able to trigger the snapback mechanism despite its withdrawal from the JCPOA. Although the State Department’s interpretation might seem convincing at first sight, I would argue that it misconstrues the meaning of ‘JCPOA participant state.’ First, the U.S. relies on a very literal reading of paragraph 10. However, the use of the adjective ‘participant’ in paragraphs 11 and 12 clarifies that only states which actively partake in the JCPOA framework can trigger the snapback mechanism. Moreover, paragraphs 11 and 12 are binding decisions of the Council under article 41 of the Charter, while paragraph 10 is merely an ‘encouragement.’ Interestingly, it encourages the ‘JCPOA participants’ “to resolve any issues [...] through the procedures specified in the JCPOA”.

This also points to the fact that the U.S. ignored the procedural requirement to exhaust all means of dispute settlement under the JCPOA (i.e. consultations with the Joint Commission) which bars the U.S. from invoking the snapback mechanism.

Moreover, it is contradictory that the U.S. claims to still be a JCPOA participant although it did not act as such for over two years. This behavior goes against the civil law principle of *venire contra factum proprium non valet* – according to which a state is precluded from contradicting its own unilateral statements and actions to construe a legal claim (PCIJ, *Factory at Chorzow (Merits)*, 31; ICJ, *Arbitral Award Made by the King of Spain on December 23 1906*, 213; ICJ, *Temple of Preah Vihear (Merits) (Dissent of Judge Spender)*, 143).

Additionally, the JCPOA is a reciprocal agreement, under which Iran reduces its nuclear activities for sanctions relief from other states. By withdrawing from the deal and reimposing sanctions the U.S. one-sidedly stopped performing its obligations and thus created the circumstances in which Iran’s violations occurred. For the U.S. to make a legal claim arising from its own wrongful conduct violates the principle of clean hands which is derived from the notion of equity and the Roman law maxim *ex iniuria ius non oritur* (PCIJ, *Diversion of Water from the Meuse (Individual Opinion by Mr. Hudson)*, 77).

Relying on a reasonable interpretation of resolution 2231, procedural requirements of dispute settlement, and the general principles of legitimate expectations and clean hands, I conclude that the U.S. cannot claim to be a participant state of the JCPOA anymore and is therefore not able to activate the snapback mechanism. To put it bluntly: you can’t have your cake and eat it – not even if you are the United States.

By unilaterally reimposing sanctions, the U.S. violates its obligations under paragraph 7 of resolution 2231 in connection with articles 25, 41, and 48 of the UN Charter. This is a troubling result, because Iran manifestly violates the JCPOA and had an actual participant state made a notification, the Security Council would have been compelled to reinstate its sanctions. In the end, both Iran and the U.S. are breaching resolution 2231.

Potential impact on proceedings before the ICJ

The latest U.S. sanctions came on the same day the ICJ concluded hearings on preliminary objections in the case concerning *Alleged Violations of the 1955 Treaty of Amity (Iran v. U.S.A.)*. In its application from 2018 Iran claims that U.S. sanctions violate the 1955 Treaty while the U.S. argues that its measures are covered by exceptions. So far, the case only concerns sanctions from 2018, but there is a chance that Iran’s counsel may try to use the U.S.’ violation of resolution 2231 as support for its argument that the U.S. is pursuing a vindictive sanctions policy without regard for international law.

Still, in the provisional measures order the Court seemed careful to maneuver around controversial issues such as the legal status of the JCPOA and its relationship to resolution 2231. If the ICJ dismisses America’s preliminary objections, we can expect a narrow judgment focused on the 1955 Treaty. However, it will be interesting to see if the Court will nevertheless address the elephant in the room and make any determinations regarding the JCPOA and resolution 2231.

A security dilemma in the Security Council

Iran and the U.S. are both manifestly violating resolution 2231. While the U.S. is throwing sanctions at everyone, many states fear that Iran could become a dangerous arms dealer and spark an arms race in the Middle East. The Council needs to act now and bring both nations back into compliance with resolution 2231, otherwise an escalation of the tensions in the Middle East is unavoidable. Problematically, we observe a security dilemma in which the actors’ interests make cooperation hard if not impossible without an external intervention: Iran has no interest in complying without U.S. sanctions relief, Russia and China want to reinforce Iran as a regional power, President Trump wants to use a strict Iran policy as leverage for his re-election, and the European states are afraid of Iran abandoning the JCPOA altogether.

Despite their worries, the best solution at the moment would be if the EU participants trigger the snapback mechanism and reimpose the UN sanctions because Iran violates the JCPOA which is a global security risk. They should also urge the next U.S. administration to re-join the JCPOA and return to the pre-2018 situation. Right now, inaction is only worsening the security dilemma. Since the Iran-deal is already in jeopardy, there is little to lose by strictly enforcing it.

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