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The Dispute Resolution Mechanism that Could Lead to the Snap Back of Iranian Sanctions

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Amid the celebrations that accompanied the conclusion on 14 July 2015 of the Joint Comprehensive Plan of Action (JCPOA) between the E3/EU+3 (China, France, Germany, Russia, the UK and the U.S., with the EU Commission) and Iran, few observers paid attention to the Dispute Resolution Mechanism (DRM) embedded in two paragraphs, ¶¶ 36 and 37, in the 104-page long treaty. Why should they? The JCPOA was rightly heralded as a tribute to multilateral diplomacy, crowning 12 frustratingly long years of roller-coaster meetings between the foreign ministers of France, Germany and the UK (the E3) and their Iranian counterpart (see prior posts here and here). All the elements of drama were met by adding the back-channel meetings secretively held in Muscat starting in 2013 between U.S. and Iranian envoys, leading to the happy denouement. Particularly complex in its multi-tiered conception, the DRM was thought better shelved in the museum of useless international law artifacts. You seldom bother to read the law on divorce when you are about to be wed. Interest was resurrected when the E3 foreign ministers published their joint statement on 14 January 2020, denouncing Iran's breach of the JCPOA in freeing itself from the agreed restrictions on enrichment-related matters, and referring the breach to the DRM.

Unprecedented in the history of diplomacy, the five successive steps of the DRM involve some degree of circuitousness reflecting the tedious negotiation by skillful Iranian diplomats, with frequent about turns by their hierarchy seeking to keep a constant pressure.

- The first step starts with a party to the JCPOA referring to the Joint Commission its claim that the other side is not meeting its treaty commitments. A standing body comprised of representatives of the E3/EU+2 (the U.S. withdrew from the treaty on 8 May 2018) and Iran, the Joint Commission meets on a quarterly basis or at the request of a participant to the JCPOA. It is coordinated by the EU High Representative for Foreign Affairs and Security Policy, and works subject to the UN rules of confidentiality. The Joint Commission would have 15 days to resolve the issue, but can extend that time period by consensus. The JCPOA does not indicate the number of extensions or their duration. The reference in the JCPOA to good faith efforts in carrying out the dispute resolution process comes handy to limit potential abuse. If a participant considers that the Joint Commission has not resolved the issue, that participant can refer that issue to the foreign ministers of the countries party to the JCPOA.
- That would start the second step of the DRM. The ministers would have a further 15 days to resolve the issue, again extendible by consensus. As an alternative, or in parallel through a second step *bis*, a participant can refer the issue to an Advisory Board consisting of three

members: one appointed by each participant in the dispute and a third independent member. The Advisory Board is expected to provide a non-binding opinion on the issue within 15 days.

- At the term of this 15+15-day process, if the issue is not resolved, the Joint Commission gets a second chance to reconsider within five days its previous resolution in light of the opinion of the Advisory Board. At the end of this third step, an unsatisfied participant is entitled to cease performing its commitments under the JCPOA.
- However, the DRM does not end at that stage; a fourth step starts, where the unsatisfied participant may notify the UN Security Council that it considers the issue to be a *significant non-performance*.
- That notification triggers the final fifth step where the Security Council will have 30 days to vote on a resolution to continue the sanctions lifting, failing which all the old Security Council resolutions that had been terminated as a result of the JCPOA (1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1835 (2008), 1929 (2010) and 2224 (2015)) would be re-imposed by the end of the 30th day following the adoption of the Security Council's sanction resolution, unless the Council decides differently. The EU would likely follow up with the restoration of its restrictive measures on Iran in the wake of those ordered by the Security Council.

In addition to being complex, the DRM is also uncertain. This is due both to prolongations that may be decided by each body entrusted with the successive DRM steps and to the contingency of the voting process within the Security Council where a majority of 9/15 is required for the resolution, even where the Permanent 5 abstain from using their veto power. Unlike arbitral panels, none of the bodies that are entrusted with the successive stages of the DRM are neutral as they comprise the very parties to the JCPOA, including the party that referred the other party in breach to the DRM. While the Advisory Board might offer minimal neutrality if the third member appointed from a neutral country acts as an umpire, it only renders non-binding opinions. But then there is little point in seeking further comparison either with the Iran-U.S. Claims Tribunal established on 19 January 1981 in the Algiers Declarations, or with the U.N. Compensation Commission established pursuant to Security Council resolution 687 (1991) after the first Gulf War. The first, an arbitral system, and the second, a quasi-arbitral one, comprised neutral panels empowered to render binding decisions. The DRM is but a diplomatic channel, established as an official framework to keep an open dialogue between the participants before the matter is brought back before the U.N. Security Council.

Regardless of the merit of Iran's arguments in relation to the frustration of the JCPOA, it is required to go through the tiered process set out in the DRM. Multi-tiered dispute resolution mechanisms are commonplace in international treaties and in contracts alike. They require the parties either to negotiate in good faith to resolve their dispute, to participate in mediation or conciliation proceedings, or to abide by other procedural steps prior to initiating arbitral or court proceedings. They aim to spare the parties the time and cost of proceedings if the dispute could be resolved amicably. Non-compliance with the tiered process may lead to the preclusion of the defaulting party's bringing subsequent proceedings. If arbitrators or judges disregard the noncompliance by a party with the preliminary steps to bringing its action, their decision could be annulled. Being required to go through a tiered dispute system is not meant to lead to a dead-end. Where the participant evidences its good-faith efforts to exhaust those stages being met by frustrating, dilatory means by the other party, fairness requires to consider the obligation as being met and the matter ripe to move to the next phase. Iran has done none of that. Its successive announcements starting in May 2019, and culminating on 5 January 2020, that it would cease meeting an increasing number of its commitments under the JCPOA amounts to remedying a

wrong through one's own chosen means, outside established legal processes. This goes counter both to Iran's agreed undertaking in the JCPOA and to elementary rule of law considerations.

For now, Iran's reaction consists of denying the legal basis for the reference by the E3 to the DRM. Iran would need more cogent arguments in law to challenge the JCPOA. They could possibly revolve around the alleged frustration of the treaty because of the other participants' nonperformance, or its freeze until all participants reciprocally resume the performance of their respective undertakings. There is an arguable case that the U.S. withdrawal from the treaty outside the international law process devised for that purpose and its restoring its sanctions on Iran may amount to a breach. However, the JCPOA is a multilateral treaty in which Iran affirmed that it will under no circumstances ever seek, develop or acquire any nuclear weapons. That statement was embedded in Security Council Resolution 2231 (2015) that issued the JCPOA as an international law instrument. Importantly, that statement was made to the benefit of, and relied upon by, the E3/EU+3 (now 2) and is not affected by the U.S. withdrawal from the treaty. There cannot be any plausible argument of Iran that the EU has breached its undertakings under the JCPOA as all of the EU restrictive measures against Iran have been terminated.

Understandably, Iran feels frustrated that the economic relief it expected of the JCPOA has not materialized. The EU has allowed Belgian-based SWIFT, the world's leading provider of secure financial messaging services, to disconnect Iranian banks of its network on 12 November 2018. This in effect prevents Iran from making or receiving payments through normal banking channels with a disastrous impact on its population and its trade. Similarly, French-incorporated INSTEX, a special purpose vehicle initially established by the E3, later joined by Belgium, Denmark, Finland, the Netherlands, Norway and Sweden, aiming to facilitate trade between Europe and Iran, is far from the comprehensive payment netting mechanism that some have imagined. The fear of U.S. secondary sanctions, contrasted with the relative comfort that a breach of the EU Blocking Regulation is unlikely to result in any meaningful sanctions by the member states of their own economic operators, have resulted in virtually no use of INSTEX so far. Absent entries recorded on the credit column of the offset account, no equity will be available for INSTEX's Iranian counterpart STFI to pay Iranian potential exporters to the EU. INSTEX is not even licensed as a bank in France. It is little more than a Meetic-type database proposing to match European exporters/importers with their Iranian counterparts. While the EU can certainly do more to rebalance the deal after the U.S. withdrew, it can hardly be faulted for not meeting Iran's expectations where no undertakings feature to that effect in the JCPOA. In any event, for those potential arguments to be admissible, Iran needs to put them forward within the DRM itself.

In parallel to starting a DRM process, Iran could contemplate seeking an advisory opinion on the state of the JCPOA from the International Court of Justice, the principal judicial organ of the United Nations. Because the advisory procedure is only available to international organisations, it could be contemplated that the International Atomic Energy Agency (IAEA) petitions the ICJ for an opinion since the IAEA is mandated in the JCOA to monitor and verify the application of the treaty. Iran knows well the road to the ICJ. On 13 February 2019, the Court ruled that Iran's claims against the U.S. for its violation of the 1955 Treaty of Amity between the two countries by imposing sanctions on Iran are admissible. The ICJ is still to rule on the merits, but at least Iran has abided by the dispute resolution mechanism in its amity treaty with the U.S. It must do the same under the DRM. A positive opinion by the ICJ can but enhance its chance if the matter is referred to the Security Council. Hopefully, common sense will prevail before that ultimate escalation.

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