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## The New Era of Doing Business with Iran: Iran's International Commercial Transactions and Global Security

John Changiz Vafai  
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# THE NEW ERA OF DOING BUSINESS WITH IRAN: IRAN'S INTERNATIONAL COMMERCIAL TRANSACTIONS AND GLOBAL SECURITY

**John Changiz Vafai\***

## **ABSTRACT**

On January 17, 2016, in a statement following his signing of the Joint Comprehensive Plan of Action (JCPOA) with Iran, President Obama addressed that country's people, stating that "yours is a great civilization, with a vibrant culture that has so much to contribute to the world – in commerce, and in science and the arts." While the former U.S. President's evaluation of the Iranian people's greatness is indisputable, there are questions concerning doing business with Iran which transcend conventional legal issues and commercial problems.

Given the juxtaposition of Iran's duopolistic government

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structure and ideologically oriented decision-making processes, questions arise as to what extent multinational corporations, including U.S. companies, should reasonably expect to conduct commercial transactions with that country. Specific issues arise related to Iranian banks, international credit recognition, terms of payment, and the conceptual legality of interest in Iran. In addition, more practical issues arise related to the governing law of contract and proper dispute resolution mechanisms. Furthermore, U.S. regulatory constraints limit the efficacy of certain contracts between Iran and U.S. companies. This article attempts to illustrate the structural, legal and operational issues concerning doing business with Iran and, where possible, means for mitigating such issues.

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## Introduction

After the lifting of some international sanctions against Iran in the beginning of 2016,<sup>1</sup> President Hasan Rohani of Iran embarked on a commercial offensive to major Western European countries.<sup>2</sup> In a tour that was unprecedented in Iran's post-revolutionary history, Rohani peddled across Europe for trade deals in France, Italy, and the United Kingdom, and opened new cultural communications with the Vatican.<sup>3</sup> On March 23, 2016, as Iranians celebrated their time-honored ancient tradition of Nowruz,<sup>4</sup> the exuberance of some international companies, zealously expecting to resume their business with Iran, was floating the halls of commerce.

The media have generally trumpeted the Joint Comprehensive Plan of Action (JCPOA),<sup>5</sup> the agreement between Iran and its negotiating E3/EU+3 countries (China, France, Germany, Russia, the United Kingdom, and the United States, with the High Representative of the European Union for Affairs and Security Policy), as a great success concerning the lifting of sanctions "in their entirety" against the Islamic

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<sup>1</sup> See Rick Gladstone, *With Iran Nuclear Deal Implemented, What Happens Next?*, N.Y. TIMES, Jan. 17, 2016, at A12.

<sup>2</sup> Saeed Kamali Dehghan, *Hassan Rouhani in first Europe visit by Iranian president in 16 years*, THE GUARDIAN (Jan. 25, 2016, 2:00 PM), <https://www.theguardian.com/world/2016/jan/25/hassan-rouhani-in-first-europe-visit-by-iranian-president-in-16-years>.

<sup>3</sup> See *id.*; see also Elisabetta Povoledo, *Pope Francis and Hassan Rouhani of Iran Discuss Mideast Unrest*, N.Y. TIMES, Jan. 27, 2016, at A10.

<sup>4</sup> Nowruz is a spring festival that "plays a significant role in strengthening the ties among peoples based on mutual respect and the ideals of peace and good-neighbourliness." See G.A. Res. 64/253, at 2 (May 10, 2010) (recognizing March 21 as "the International Day of Nowruz").

<sup>5</sup> Joint Comprehensive Plan of Action, July 14, 2015, <http://www.state.gov/documents/organization/245317.pdf> [hereinafter JCPOA]; see also JCPOA Annex I – Nuclear-related measures, July 14, 2015, <http://www.state.gov/documents/organization/245318.pdf> [hereinafter JCPOA Annex I]; JCPOA Annex II – Sanctions Related Commitments, July 14, 2015, <http://www.state.gov/documents/organization/245320.pdf> [hereinafter JCPOA Annex II]; JCPOA Annex II – Attachments, July 14, 2015, <http://www.state.gov/documents/organization/245319.pdf> [hereinafter JCPOA Annex II Attachments]; JCPOA Annex III – Civil Nuclear Cooperation, July 14, 2015, <http://www.state.gov/documents/organization/245322.pdf> [hereinafter JCPOA Annex III]; JCPOA Annex IV – Joint Commission, July 14, 2015, <http://www.state.gov/documents/organization/245323.pdf> [hereinafter JCPOA Annex IV]; JCPOA Annex V – Implementation Plan, July 14, 2015, <http://www.state.gov/documents/organization/245324.pdf> [hereinafter JCPOA Annex V].

Republic of Iran.<sup>6</sup> The JCPOA has been “billed as a once in a generation opportunity,” and proponents of the deal claim that “Iran is the biggest new market to reenter the global economy in decades.”<sup>7</sup> In January 2016, President Obama stated that the nuclear agreement with Iran “contains the most comprehensive inspection and verification regime ever negotiated to monitor a nuclear program.”<sup>8</sup> As a result of this accord, Iran may obtain access to billions of dollars of impounded funds.<sup>9</sup> Some have estimated the amount at \$100 billion, resulting in a financial windfall to Iran. In proportional terms, that would be equivalent to the United States receiving \$4.2 trillion.<sup>10</sup> The amount of money released to Iran, if measured in today’s dollars, would be the approximate equivalent to the amount spent by the U.S. government on the Marshall Plan, which covered 17 European countries over a period of four years after World War II.<sup>11</sup> Similarly, in January of 2016, British trade officials were quick to stretch their sense of economic exuberance, predicting more than one trillion dollars of investment in Iran over the course of

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<sup>6</sup> See, e.g., *A Safer World, Thanks to the Iran Deal*, N.Y. TIMES, January 18, 2016, at A20; *Don’t Let Iran’s Progress on the Nuclear Deal Go to Waste*, N.Y. TIMES, July 5, 2016 at A22; *Tear up the Iran nuclear deal? Then what?*, CHI. TRIB. (Apr. 7, 2016), <http://www.chicagotribune.com/news/opinion/editorials/ct-iran-nuclear-obama-trump-cruz-edit-0408-jm-20160407-story.html>; *Iran deal is better than no deal at all*, BOS. GLOBE (July 15, 2015), <https://www.bostonglobe.com/opinion/editorials/2015/07/14/iran-deal-better-than-deal-all/bvOdH4HaVOK2QqAUEnS9qM/story.html>; Emily Ekins, *Survey: 58% of Americans Favor Iran Nuclear Agreement, but Worry about Its Efficacy*, CATO INST. (July 20, 2015), <https://www.cato.org/blog/survey-58-americans-favor-iran-nuclear-agreement-worry-about-its-efficacy>.

<sup>7</sup> *The Over-Promised Land*, THE ECONOMIST, Apr. 23, 2016, at 57-58.

<sup>8</sup> Gary Bauer, *Reports Of The Iran Nuclear Deal’s Success Are Greatly Exaggerated*, DAILY CALLER, <http://dailycaller.com/2016/07/18/reports-of-the-iran-nuclear-deals-success-are-greatly-exaggerated/> (last visited Jan. 24, 2017).

<sup>9</sup> See Rick Gladstone, *Value of Iran Sanctions Relief is Hard to Measure*, N.Y. TIMES, Aug. 6, 2015, at A12 (reporting wide variances in the precise amount: “Estimates of the sum that could become available to Iran range from \$29 billion to as much as \$150 billion.”).

<sup>10</sup> Ilan Berman, *Trump and Iran: What the Next Administration Can Do*, FOREIGN AFFAIRS (Nov. 15, 2016), <https://www.foreignaffairs.com/articles/united-states/2016-11-15/trump-and-iran> (published by the Council on Foreign Relations).

<sup>11</sup> *Id.*



a decade, with at least one plutocrat heralding Iran as “a new region to conquer.”<sup>12</sup>

This article will show that news of the “complete” demise of sanctions against Iran is greatly exaggerated.<sup>13</sup> Since the lifting of international sanctions against Iran, there is mass confusion in the United States—and particularly in Iran itself—as to the particular kinds of trade deals into which Iran can enter. Neither party distinguishes between the lifting of *certain* U.S. nuclear-based sanctions pursuant to the JCPOA, and other sanctions that still remain in place. What is underreported in the media and other news coverage is the fact that U.S. sanctions against Iran still exist related to human rights abuses, missiles, and support for terrorism.<sup>14</sup>

In addition to the lack of clarity as to which sanctions were lifted, there are two additional types of barriers to international trade. First, there exist a number of significant policy barriers to trade with Iran in the United States concerning the gross violations of internationally recognized human rights.<sup>15</sup> Second, there are potent ideological obstructions, extra-constitutional institutions, and legal barriers within Iran itself. These forces will likely continue to impede and obstruct commercial development and business dealings with Iran.

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<sup>12</sup> Berman, *supra* note 10 (quoting “an imperial-minded boss of a French luxury-goods firm”).

<sup>13</sup> See Mark Twain, *Chapters from My Autobiography*, 1906 N. AMER. REV. 160 (relating that upon hearing of his demise, “[Twain] said – ‘Say the report is greatly exaggerated.’”).

<sup>14</sup> See Gladstone, *supra* note 1 (noting that certain American sanctions “remain in force”); see also NIAC, Tyler Cullis, *Iran Sanctions after the JCPOA: Terrorism, Human Rights, Conventional Weapons and Ballistic Missiles Sanctions*, NATIONAL IRANIAN AMERICAN COUNCIL (July 22, 2015), <https://28d0so13ppai3ijpls45gl2s4gb-wpengine.netdna-ssl.com/wp-content/uploads/scorecard///Sanctions-After-JCPOA1.pdf> (last visited Jan. 24, 2017). Eighteen years prior to signing the JCPOA, on December 10, 1998, President Clinton issued the first Presidential Proclamation concerning the U.S. commitment to protect human rights in the international arena; See Exec. Order No. 13107, 3 C.F.R. § 234 (Dec. 10, 1998).

<sup>15</sup> See 22 U.S.C. § 2340(d)(1) (defining the term “Gross Violations of Internationally Recognized Human Rights”). Eighteen years prior to signing the JCPOA, on December 10, 1998, President Clinton issued the first Presidential Proclamation concerning the U.S. commitment to protect human rights in the international arena. See Proclamation 7158-Human Rights Day, Bill of Rights Day, and Human Rights Week, 1998, <http://www.presidency.ucsb.edu/ws/?pid=55385>.

The legal complexities of the new Iranian commercial agreements with Europe and China, particularly in the field of banking and international finance, remain unknown, unresolved, or under-estimated. Such complexities are mainly derived from three elements: (1) the ideological discourse within Iran concerning money and banking (amongst other things); (2) the financial policy of the Western banks, long established to cope with the widespread perception of Iran's ideologically motivated conduct abroad; and (3) impediments created by the United States laws, court decisions, and executive orders in order to cope with acts of terrorism. In fact, while Iran was in the midst of changing its previous public policy on international trade and was actively seeking to utilize banking and other financing facilities through international channels, the Financial Action Task Force ("FATF"), a global standard-setting financial organization for combating financing the acts of terrorism and money laundering, issued a public statement indicating that:

The FATF remains particularly and exceptionally concerned about Iran's failure to address the risk of terrorist financing and the serious threat this poses to the integrity of the international financial system. . . The FATF continues to urge jurisdictions to protect against correspondent relationships being used to bypass or evade counter-measures and risk mitigation practices and to take into account ML/FT risks when considering requests by Iranian financial institutions to open branches and subsidiaries in their jurisdiction. Due to the continuing terrorist financing threat emerging from Iran, jurisdictions should consider the steps already taken and possible additional safeguards to strengthen existing ones.<sup>16</sup>

Here, the FATF's purpose was to urge members of all jurisdictions to advise their financial institutions of the Islamic Republic of Iran's policies regarding financing acts of terrorism in the Middle East.<sup>17</sup> In fact, since 2009, the Office of Foreign

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<sup>16</sup> Public Statement, FINANCIAL ACTION TASK FORCE (Feb. 19, 2016), <http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/documents/public-statement-february-2016.html> [hereinafter FATF Public Statement – 19 February 2016].

<sup>17</sup> Mark Hosenball, *Anti-money laundering body urges more scrutiny of Iran, North Korea*, REUTERS (Feb. 19, 2016), <http://www.reuters.com/article/us-iran-economy-moneylaundering-idUSKCN0VS2LM>.

Assets Control ("OFAC"), the Treasury's sanctions enforcement office, has imposed fourteen billion dollars in fines to those companies that have been dealing with Iran.<sup>18</sup> Paradoxically, the U.S. Treasury has been unable to define the benchmarks that the Islamic Republic has to meet in order to regain access to the American banking or financial system.<sup>19</sup> It is because of such issues that the Central Bank of Iran Governor Valiollah Seif has contemptuously stated that "[t]he European banks do not have the courage to work with Iran because of the financial penalties the U.S. has imposed in the past."<sup>20</sup>

In terms of Iran's access to the international banking system and global financial institutions, the more serious issue has been Iran's logistical difficulties in obtaining international credit for various investment projects.<sup>21</sup> In this respect, the most important and globally adopted banking system is the Society for Worldwide Interbank Financial Telecommunication ("SWIFT"), a cooperative that runs the international financial messaging system among the banks.<sup>22</sup> Currently, SWIFT, a member owned industry cooperative, manages the worldwide cross-border payment instructions between banks.<sup>23</sup> After the imposition of the sanctions in Iran, SWIFT facilities were cut off and some of the most powerful organizations, outside of the official ministries that function as extra-constitutional establishments in Iran, frequently resorted to money laundering or bartered commodity trades with certain countries.<sup>24</sup> Upon the

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<sup>18</sup> *The Over-Promised Land*, *supra* note 7, at 58.

<sup>19</sup> *See id.*

<sup>20</sup> *Iran CBI chief visits US, complains of sanctions*, IRAN OIL GAS NETWORK (Apr. 16, 2016), <http://www.iranoilgas.com/news/details?id=15824&title=Iran+CBI+chief+visits+US,%20+complains+of+sanctions>.

<sup>21</sup> KENNETH KATZMAN, CONGR. RESEARCH SERV., RS20871, IRAN SANCTIONS 9, 57 (2016) (noting Iran's investment needs, particularly in the petroleum sector, where "onshore oil fields are in need of substantial investment" due to technology largely not upgraded since the 1990s; noting further that "[s]ome experts estimated in 2015 that sanctions relief under the JCPOA might return Iran to nearly double-digit growth in the first year if Iran uses the sanctions relief mostly to try to rebuild its civilian economy").

<sup>22</sup> *See About Us*, SWIFT, <https://www.swift.com/about-us> (last visited Jan. 24, 2017).

<sup>23</sup> Katy Burne, *Swift Finds Evidence of Second Malware Attack*, WALL ST. J. (May 12, 2016, 10:50 PM), <http://www.wsj.com/articles/swift-finds-evidence-of-second-malware-attack-1463102215> ("On average, [SWIFT] handles 25 million messages each day.").

<sup>24</sup> Tom Arnold & Jonathan Saul, *Iranians exasperated as U.S. sanctions*

*rapprochement* between Iran and the 5+1 countries, one question remains unanswered – by loosening the sanctions, how will the new commercial overtures towards Iran work *vis-à-vis* the ideological and social impediments installed for decades in that country?

Part I of this article discusses the JCPOA agreement between Iran and the 5+1 countries, which has legitimized the Islamic Republic of Iran's undertaking of international commercial transactions with certain European countries, and, eventually, with the United States. Part I also discusses the existing legal impediments in the United States concerning doing business with Iran. These include, but are not limited to, legal barriers that still exist with respect to doing business with Iran, such as the Terrorism Risk Insurance Act [hereinafter TRIA], the President's executive order prohibiting business interactions with certain countries that are on the list of aiding and abetting terrorists or acts of terrorism, and Iran's present status as a terrorist aider and abettor under the Foreign Sovereign Immunities Act.<sup>25</sup> In this respect, this article will discuss the current U.S. policy concerning doing business with countries perceived to be involved in acts of terrorism. In particular, Part I will deal with the April 20, 2016 Supreme Court decision concerning Bank Markazi, the Central Bank of Iran.<sup>26</sup>

Part II discusses the issues related to the constraints and limitations of banking in Iran as a financial conduit in international business. This part will also discuss the ideological impediments related to interest rates and a legal subterfuge to overcome such impediments. Part III engages the post-sanctions trade agreements concluded between the Islamic Republic of Iran and international bodies on the one hand, and between it and several European countries on the other. In this part, issues concerning the international financial transactions affecting

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*frustrate deal making*, REUTERS (Mar. 22, 2016), <http://www.reuters.com/article/us-iran-trade-finance-idUSKCN0WO1Y3> ("In recent weeks SWIFT, the global payments network, has reconnected several Iranian banks to its system, allowing them to resume cross-border transactions with foreign banks four years after they were cut off.").

<sup>25</sup> See 22 U.S.C. § 8772 (2016) (making certain assets subject to attachment in aid of execution on terrorism-related judgments against Iran).

<sup>26</sup> See *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016) (Ginsburg, J.).

Iran's trade with European countries will be discussed. Part IV relates issues concerning Iranian international commercial transactions and global security concerns, and the development of quasi-banking institutions in Iran; in addition, Part IV provides an overview of the standing of Iran's banking system to engage in international financial transactions. Part V discusses Iran's recent sanction-free investments and commercial agreements with foreign companies. Part VI addresses the dispute resolution mechanism between Iran and foreign commercial companies. Part VII addresses the governmental structure and unique decision-making processes in Iran that affect foreign corporations that intend to undertake commercial transactions in that country. Such issues relate to the role and functions of the extra-constitutional institutions active within Iran. Finally, Part VIII discusses Iran's integration in the international trade community and the impact of the regional organizations concerning commercial transactions with Iran.

This article will show the impact of the extra-constitutional institutions in the Islamic Republic of Iran as institutional impediments that severely diminish Iran's capability to ostensibly participate in, and benefit from, its international commercial transactions. The extra-constitutional institutions—a vestige of the Islamic Revolution of 1979 in Iran—are the non-governmental organizations that are effectively nonfunctional: they do not function under the auspices of the President or any other body recognized or mandated by Iran's Constitution to engage in economic, business, administrative, or policy making activities. These institutions are engaged in ideological, military, investment and commercial activities throughout the Islamic Republic of Iran. In this respect, one may say that Iran has a dual system of government.<sup>27</sup> The post-sanction investment and commercial agreements between Iran and several European countries, particularly France and Italy, have significant commercial and legal implications. These agreements, in the long run, will have

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<sup>27</sup> See EMANUELE OTTOLENGHI, *THE PASDARAN, INSIDE IRAN'S ISLAMIC REVOLUTIONARY GUARD CORPS* 41-59 (2011); *see also* SAEID GOLKAR, *CAPTIVE SOCIETY: THE BASIJ MILITIA AND SOCIAL CONTROL IN IRAN* 151-74 (2015).

a pivotal impact not only on commercial policies, but also on the ideological posture of the Islamic Republic in the Middle East.<sup>28</sup>

### I. Demise of the Regime of Sanctions

Since the revolution of 1979, Iran's transnational investments and official commercial activities with Western countries, especially the United States, have been sporadic at best. Iran's investments and assets continue to be subjected to the utmost national and international judicial scrutiny.<sup>29</sup> Various trade restrictions, particularly Congressional sanctions enforced by the Department of the Treasury, rendered nearly all commercial transactions with Iran to be in violation of U.S. law.<sup>30</sup> Furthermore, the Department of State, through the Office of Economic Sanctions Policy Implementation ("OESPI"), has enforced effective sanction programs that handicap access to the U.S. for corporations engaging in commercial transactions in Iran. While the act of lifting the sanctions against Iran has abolished certain prohibitions concerning doing business with the Islamic Republic, it also creates continued complexities in the international community.<sup>31</sup> These complexities fall into

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<sup>28</sup> In terms of modifying sanctions, this article addresses the issues related to Iran's policy with respect to proliferation of nuclear energy. This article does not discuss other issues affecting sanctions against the Islamic Republic, *i.e.* Iran's policy with respect to human rights as well as international terrorism.

<sup>29</sup> For instance, the United States Supreme Court granted a writ of certiorari to review certain issues related to Iran's banking assets in the United States. The writ of certiorari was granted by the Supreme Court on October 2015. *Bank Markazi v. Peterson*, No. 14-770, 2015 U.S. LEXIS 7643 (U.S. Nov. 30, 2015). On April 20, 2016, the Supreme Court issued its decision concerning this case. *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016). Iran has instituted proceedings before the International Court of Justice ["ICJ"] against the United States concerning sanctions and the *Bank Markazi* decision. *See generally* Press Release, International Court of Justice, Iran Institutes Proceedings Against the United States with Regard to a Dispute Concerning Alleged Violations of the 1955 Treaty of Amity (June 15, 2016) (on file with author), <http://www.icj-cij.org/docket/files/164/19032.pdf>.

<sup>30</sup> *See generally* CONGRESS AND THE NATION 2009–2012, VOLUME XIII: POLITICS AND POLICY IN THE 111TH AND 112TH CONGRESSES (CQ Press 2014); Trading with the Enemy Act, 50 U.S.C.A. §§ 1–44; International Emergency Economic Powers Act, 50 U.S.C.S. § 1701 ("IEEPA"); Iran and Libya Sanctions Act of 2006 ("ILSA"). On September 30, 2006, the title of the Act was renamed to the "Iran Sanctions Act" ("ISA").

<sup>31</sup> *See infra* Part IV and accompanying text.

primarily two categories: (1) the convoluted division of powers in Iran, mainly reflected in centers of decision-making (including issues related to international commercial transactions); and (2) the conflicting goals established by organizations—both international and within the United States, that are concerned with doing business with Iran.

A review of the investment and commercial agreements between Iran and international commercial companies will be perfunctory without a brief reference to the agreement reached between the 5+1 countries and Iran, and the ideological point of view of banking and interests in the Islamic Republic of Iran.

#### *A. Parameters Concerning Iranian Sanctions Relief*

On July 14, 2015, the 5+1 countries and the Islamic Republic of Iran agreed on the JCPOA, which ensured the signatory nations that the nuclear program of the Islamic Republic will be exclusively peaceful.<sup>32</sup> In terms of the timing of the JCPOA accord, one scholar adroitly observed that “[w]hile the United States and its allies must achieve their core goals — effectively and dependably blocking Iran’s path to a nuclear bomb — in any compromises they make, they need to remember, too, that getting a deal itself could be a game-changer in Iranian politics.”<sup>33</sup> There was a general accord between Iran on the one hand and the 5+1 countries on the other. Based on a verification by the International Atomic Energy Agency (“IAEA”), Iran had implemented the key nuclear-related obligations specified in the JCPOA on July 14, 2015, when the 5+1 countries finally agreed to lift the nuclear-related sanctions on the Islamic Republic of Iran (“5+1 Agreement”). Consequently, the international community marked January 16, 2016 as “Implementation Day.”<sup>34</sup> Following Implementation Day, the next crucial

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<sup>32</sup> See GUIDANCE RELATING TO THE LIFTING OF CERTAIN U.S. SANCTIONS PURSUANT TO THE JOINT COMPREHENSIVE PLAN OF ACTION ON IMPLEMENTATION DAY, U.S. DEP’T TREASURY (Jan. 16, 2016), [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/implement\\_guide\\_jcpoa.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/implement_guide_jcpoa.pdf) [hereinafter U.S. TREASURY GUIDANCE REPORT] (noting that October 18, 2015 marked the “Adoption Day” of the JCPOA, in which the agreement came into effect).

<sup>33</sup> Vali R. Nasr, *A Nuclear Deal, Now or Never*, N.Y. TIMES (Oct. 21, 2014), <https://www.nytimes.com/2014/10/22/opinion/vali-nasr-a-nuclear-deal-now-or-never.html>.

<sup>34</sup> See Thomas Erdbrink, *In Tehran, Iranians Play Down Milestone*, N.Y.

milestone in the JCPOA will be “Transition Day,” an event scheduled to occur eight years from Adoption Day, or upon a report from the Director General of the IAEA Board of Governors, and parallel to the United Nations Security Council (“UNSC”), stating that the IAEA has reached the conclusion that “all nuclear material in Iran remains in peaceful activities,” whichever date is earlier.<sup>35</sup> The U.S. Government has sought to terminate or modify certain statutory provisions and to remove the individuals and corporations from the Treasury Department OFAC’s Specially Designated Nationals and Blocked Persons List (“SDN List”) provided this process bears fruit.<sup>36</sup> Iran’s President Rohani considered the 5+1 agreement as evidence that Iran “has a big power called the power of diplomacy.”<sup>37</sup> In reference to the conclusion of the nuclear deal, the Iranian President stated that:

After 12 years of steadfastness and resistance as well as patience and sacrifice and also martyrdom of a number of nuclear scientists and on account of indefatigable efforts of our nuclear scientists, diplomats, politicians, lawyers as well as the economic officials of the country, today we are at a turning point.<sup>38</sup>

As a result of the accord between the 5+1 countries and Iran, the United States lifted nuclear-related sanctions on significant Iranian products and services.<sup>39</sup> However, it is important to

TIMES (Jan. 16, 2016), <http://www.nytimes.com/2016/01/17/world/middleeast/iran-implementation-day-nuclear-sanctions.html> (noting “[t]he low-key reception given [to] ‘implementation day’” within Iran).

<sup>35</sup> The White House, *The Iran Nuclear Deal: What you need to know about the JCPOA*, at 88, [https://www.whitehouse.gov/sites/default/files/jcpoa\\_what\\_you\\_need\\_to\\_know.pdf](https://www.whitehouse.gov/sites/default/files/jcpoa_what_you_need_to_know.pdf) [hereinafter “What you need to know about the JCPOA”]; see also *id.* at Appendix, Key Excerpts of the Joint Comprehensive Plan of Action (JCPOA), at 4.

<sup>36</sup> See U.S. TREASURY GUIDANCE REPORT, *supra* note 32.

<sup>37</sup> See Barbara Slavin and Laura Rozen, *Obama, Rouhani Hail Diplomacy as Americans Fly Home*, AL-MONITOR (Jan. 17, 2016), <http://www.al-monitor.com/pulse/originals/2016/01/obama-rouhani-praise-diplomacy-americans-freed-iran-us.html> (contextualizing the statement and noting Rouhani’s concomitant assurances that Iran would not use the resources unfrozen from the deal for hostile purposes).

<sup>38</sup> See *President Rouhani’s speech on the day of the conclusion of the 5+1 Agreement*, ETTELA’AT, January 13, 2016, at P.1.

<sup>39</sup> David E. Sanger, *Iran Complies with Nuclear Deal; Sanctions Are Lifted*, N.Y. TIMES (Jan. 16, 2016), <http://www.nytimes.com/2016/01/17/world/middleeast/iran-sanctions-lifted-nuclear-deal.html>.



indicate that the removal of the sanctions by the United States was on a case-by-case basis and not categorical.<sup>40</sup> This has been the main cause of confusion in Iran and the major source of complaint by the Iranian officials.<sup>41</sup> These complaints are also shared by the European and South American companies who were under the impression that lifting the sanctions under the JCPOA would result in “free trade” with Iran.

To understand the limits of free commercial transactions between Iran and the U.S., it is important to distinguish between nuclear-based and terrorism-based sanctions. Generally, under the JCPOA, foreign banks and companies may engage in commercial transactions with Iran without violating the nuclear weapons-based sanction laws.<sup>42</sup> However, the United States’ primary embargo concerning terrorism-based sanctions remains in place under existing statutory laws and executive orders.<sup>43</sup> The policies behind these sanctions largely relate to Iran’s reputed activities involving state-sponsored terrorism, disregard of basic human rights, extrajudicial killings, aircraft sabotage, and torture. Several statutes address these terrorist activities and their consequences.<sup>44</sup> The JCPOA exclusively addresses nuclear-based sanctions, and not those sanctions based on claims as to Iran’s terrorism or human rights violations. In commercial terms, the U.S. Department of State’s

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<sup>40</sup> See U.S. TREASURY GUIDANCE REPORT, *supra* note 32.

<sup>41</sup> See *The Over-promised Land*, *supra* note 7 (“It was better when sanctions were still in place,’ grumbles a wheat merchant, who traded with American suppliers (OFAC approved) throughout the sanctions era. ‘At least the banks then knew what they could and couldn’t do. Now the lawyers, not the bankers, are making decisions, and nothing is moving.’”).

<sup>42</sup> JCPOA, *supra* note 5, at ¶¶ 19(ii), 21(i); see also JCPOA Annex II, *supra* note 5.

<sup>43</sup> See, e.g., Iran Threat Reduction and Syrian Human Rights Act, 22 U.S.C. § 8772 (2012); Blocking Property of the Government of Iran and Iranian Financial Institutions, Exec. Order No. 13,599, 77 Fed. Reg. 6659 (Feb. 5, 2012). As of January 25, 2017, Executive Order 13,599 remains in effect.

<sup>44</sup> See, e.g., 28 U.S.C. § 1605(A); Terrorism Risk Insurance Act of 2002, Pub. L. No. 107–297, 116 Stat. 2337 (amending the Foreign Sovereign Immunities Act). Throughout the past two decades, U.S. laws have facilitated the means and ways of compensation for U.S. citizens damaged by the conduct of terrorist groups, sponsored, or assisted, by a sovereign country. See, e.g., the International Emergency Economic Powers Act (“IEEPA”), 50 U.S.C §§ 1701–1707; Terrorism Risk Insurance Act, Pub. L. No. 107–297, 116 Stat. 2322 (2002) (current version at 12 U.S.C. § 248, 15 U.S.C. § 6701, and 28 U.S.C. § 1610).

Office of Iran Nuclear Implementation clarified that “the United States has no objection to foreign banks engaging with Iranian banks and companies as long as those banks and companies are not on our sanction list for non-nuclear reasons.”<sup>45</sup> Most importantly, in April 2016, in a case related to the attachment of the Central Bank of Iran’s assets in the United States, the U.S. Supreme Court approvingly put its judicial seal with respect to the power of the U.S. President, in cases related to terrorism.<sup>46</sup>

The confusion and frustration with respect to commercial transactions with Iran, after lifting the JCPOA-related sanctions, is not limited to Iran’s common marketplace, colloquially referred to as the “bazaar.”<sup>47</sup> The bazaar’s frustration is also felt in the halls of large European companies where executives anticipate the opportunity to do business with Iran.<sup>48</sup> In a statement addressed to the senior executives of some of Europe’s largest banks, the U.S. Secretary of State indicated that “we want to make it clear that legitimate business which is clear under the definition of the [JCPOA] agreement, is available to banks as long as they do their normal due diligence and know who they are dealing with. They are not going to be held to some undefined and inappropriate standard.”<sup>49</sup> Nevertheless, having been punished by the Treasury Department’s OFAC office in the past, European banks have been cautious in opening credit for Iran.<sup>50</sup> For example, HSBC

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<sup>45</sup> Steve Mull, *Letters to the Editor*, ECONOMIST, May 7, 2016, <http://www.economist.com/news/letters/21698215-letters-editor>.

<sup>46</sup> See Bank Markazi, 136 S. Ct. at 1310.

<sup>47</sup> See ARANG KESHAVARZIAN, *BAZAAR AND STATE IN IRAN: THE POLITICS OF THE TEHRAN MARKETPLACE* 39-44 (Cambridge Univ. Press 2007).

<sup>48</sup> See Matthew Spivack, *What to Know About Doing Business in Iran*, HARV. BUS. REV. (May 5, 2016), <https://hbr.org/2016/05/what-to-know-about-doing-business-in-iran> (noting the hesitancy of European banks to provide capital for business ventures, despite strong European interest in business development in Iran); see also Ben Morris, *Iran: Business Eyes New Opportunities*, BBC NEWS (Jan. 20, 2016), <http://www.bbc.com/news/business-35344179>.

<sup>49</sup> Felicia Schwartz & Margot Patrick, *U.S. Secretary of State John Kerry Meets with European Bankers in Iran-Business Push*, WALL ST. J., (May 12, 2016), <http://www.wsj.com/articles/kerry-meets-with-european-bankers-in-iran-business-push-1463045793>.

<sup>50</sup> See e.g., Fabio Benedetti Valentini & Ladane Nasseri, *Europe’s Banks Are Staying Out of Iran*, BLOOMBERG (May 2, 2016, 11:00 PM), <http://www.bloomberg.com/news/articles/2016-05-03/europe-s-banks-haunted-by-u-s-fines-forgo-iran-deals-amid-boom> (noting a record fine paid by BNP

bank “has shunned business with Iran to meet its pledge to follow U.S. standards on sanctions and anti-money-laundering as part of its 2012 deferred prosecution agreement with the Justice Department.”<sup>51</sup>

In an attempt to reduce the confusion concerning determination as to which trade items are exempt from sanctions restrictions, the classification below is a simple—albeit incomplete—categorization of major items and activities that are allowed for investment and commercial transactions, services, and activities as a result of the lifting of sanctions:

- Banking and financial services;
- Energy, petrochemical, shipping, shipbuilding;
- Automotive sectors;
- Iran’s port operations;
- Commercial insurance, reinsurance, and underwriting service;
- Iran’s commercial activities in precious metals including gold, raw, or semi-finished metals such as aluminum and steel and coal; and
- Software in connection with activities that are consistent with JCPOA and the provision of associated services for each of the above mentioned categories.<sup>52</sup>

The United States government removed individuals and entities listed in the JCPOA from the SDN List, the so-called FSE List (Foreign Sanctions Evaders), and the NS-ISA list (non-SDN Iran Sanctions Act List).<sup>53</sup> Further, pursuant to its commitments under the JCPOA, the U.S. terminated certain,

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Paribas as a major factor); *Standard Chartered hit by \$300m in Iran fines*, BBC NEWS (Dec. 10, 2012), <http://www.bbc.com/news/business-20669650> (reporting, in 2012, that Standard Chartered agreed to pay a total of \$670 million to settle complaints brought by the U.S. federal government as well as New York State authorities for commercial dealings with its Iranian clients); *US fines Deutsche Bank \$258m for working with Iran*, BBC NEWS (Nov. 4, 2015), <http://www.bbc.com/news/world-us-canada-34726690>. As a result of these fines, international banks have expressed continuous caution in doing business with Iran. See Jonathan Saul & Thomas Atkins, *Global banks to steer clear of Iran until sanctions finally go*, REUTERS (July 16, 2015), <http://www.reuters.com/article/iran-business-banks-idUSL5N0ZW3SC20150716>.

<sup>51</sup> Schwartz & Patrick, *supra* note 49.

<sup>52</sup> See U.S. Treasury Guidance Report, *supra* note 32; 31 C.F.R. § 560 (2016); see also Morris, *supra* note 48.

<sup>53</sup> See U.S. TREASURY GUIDANCE REPORT, *supra* note 32.

but not all, executive orders which would preclude doing business with Iran.<sup>54</sup>

With respect to investments and commercial transactions, the following sanctions were lifted: (1) sanctions on Iran's energy and petrochemical sectors; (2) sanctions on transactions with Iran's shipping and shipbuilding sectors and port operators; (3) sanctions on Iran's trade in gold and other precious metals; (4) sanctions on trade with Iran in graphic, raw or semi-finished metals such as aluminum and steel, coal, and software for integrating industrial processes, in connection with activities that are consistent with the JCPOA; and (5) sanctions on the sale, supply, or transfer of goods and services used in connection with Iran's automotive sector.<sup>55</sup>

There were also certain commercial services and activities allowed subject to special conditions. Three categories of activities, which would otherwise be prohibited under the Iranian Transactions and the Sanctions Regulations will be treated as a special category.<sup>56</sup> These transactions are allowed provided that they do not involve individuals and entities on the SDN List and are also consistent with the provisions of the JCPOA as well as United States laws.

### *B. Iran's Terrorism-Based Sanctions and U.S. Courts*

Contrary to common belief, commercial and banking sanctions adopted in the U.S. against Iran are not exclusively derived from the perceived activities of Iran concerning proliferation of nuclear products which could be used for production of nuclear weapons. Following the aftermath of the 1983 bombing in Beirut, which killed 241 members of the U.S. Marine Corps, and similar victims of terrorist attacks attributed to Iran, the United States adopted various statutory laws and executive orders imposing diverse economic (including banking) sanctions against Iran.<sup>57</sup> In particular, the Central Bank of Iran

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<sup>54</sup> See JCPOA Annex II, *supra* note 5, ¶ 5; JCPOA Annex V, *supra* note 5, ¶ 17.1.

<sup>55</sup> JCPOA Annex II, *supra* note 5, ¶ 4.7.

<sup>56</sup> 31 C.F.R. § 560.210 (2016).

<sup>57</sup> See Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 853 (codifying criminal long-arm jurisdiction, including for inchoate acts, related to similar terrorist activities at 18 U.S.C. § 2331);

has argued that seizure of the Bank's assets under the camouflage of the U.S. statutory laws or President's executive orders, are unconstitutional and in violation of the separation of powers.<sup>58</sup> In its April 2016 decision, the U.S. Supreme Court supported the position that the President's act, concerning the attachment of the assets belonging to the Central Bank of Iran, was constitutional.<sup>59</sup>

Therefore, in the United States, unlike most European countries, the justification for maintaining trade sanctions against Iran primarily rests on Iran's perceived policy in support of terrorism. Such justification is delineated by statutory laws and presidential executive orders.<sup>60</sup> The *Bank Markazi* Court's majority opinion was clear in its support of the statutory provision that permitted the executive branch to seize the Central Bank of Iran's assets, and rejected the argument that such acts will be the usurpation of power by the executive in violation of the separation of powers.<sup>61</sup> The Supreme Court was unequivocal that the President may adopt a policy for prohibition of doing business with Iran. Further, the *Bank Markazi* majority opinion unequivocally stated that, "American nationals . . . may seek 'money damages . . . against a foreign state for personal injury or death that was caused by' acts of

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Bank Markazi, 136 S. Ct. at 1326–27 (noting the historical background and procedural interests giving rise to such legislation); Justin Jory, *Anti-Terrorism Legislation: A Constitutional Problem*, 17 *BYU L. REV.* 35, 36 (2006) (noting the enactment of a long-arm statute in the 1983 bombing's aftermath). Iran has vigorously denied awareness of, or participation in, the bombing or instigating Hezbollah to participate in aiding or abetting the acts of terrorism related to the 1983 bombing event. See Thomas Erdbrink, *U.S. Ruling Over Compensation for '83 Beirut Bombing Riles Iran*, *N.Y. TIMES*, Apr. 28, 2016, at A7 ("Iranian officials have repeatedly denied responsibility, however, and they accuse the United States of using the pretext of an attack to steal money that is rightfully theirs."). Other terrorist acts, such as the Lockerbie Bombing, have contributed to jurisdiction over state-sponsored terrorist acts occurring abroad applicable to the *Bank Markazi* case. See Flatow Amendment, Pub. L. No. 104-208, 110 Stat. 3009-172 (1996) (codified at 28 U.S.C. § 1605) (creating "Civil Liability for Acts of State Sponsored Terrorism").

<sup>58</sup> Peterson v. the Islamic Republic of Iran, 515 F. Supp.2d 25, 36 (D.D.C. 2007).

<sup>59</sup> Bank Markazi, 136 S. Ct. at 1329.

<sup>60</sup> See, e.g., Brett Stephens, *Truth Catches the Iran Deal*, *WALL ST. J.* (July 12, 2016), <http://www.wsj.com/articles/truth-catches-the-iran-deal-1468278677>.

<sup>61</sup> Bank Markazi, 136 S. Ct. at 1329.

terrorism, including ‘torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support’ to terrorist activities.<sup>62</sup>

Thus, the Supreme Court addressed two issues in its sweeping opinion: first, with respect to the Act of State Doctrine, the Court would maintain the validity of the suits against foreign sovereigns (an exception to the doctrine) for the purpose of “compelling Iran to abandon efforts to acquire a nuclear weapons capability” that “can be effectively achieved through a comprehensive policy that includes economic sanctions. . .”<sup>63</sup> Moreover, courts have taken the position that the Act of State Doctrine does not apply where the executive and legislative branches grant express jurisdiction over terrorist acts or attempted acts to the judiciary.<sup>64</sup> Thus, in *Bank Markazi*, the President’s seizure of the Central Bank’s assets was justifiable because the funds were used in “support for terrorism,” and were not under the negotiated terms of the 5+1 Agreement.<sup>65</sup> The statutory justification for the President’s authority was Section 8772 of the “Iran Threat Reduction and Syria Human Rights Act of 2012.”<sup>66</sup> In his vigorous and impassioned dissenting opinion, Chief Justice John Roberts stated that Section 8772 “strips the Bank [Markazi of Iran] of any protection that federal law, international law, or New York State law might have offered against respondents’ claims. That is without any analogue or precedent.”<sup>67</sup>

The President’s executive order disrupts individuals and corporations engaging in the financial support network for

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<sup>62</sup> *Id.* at 1317 (quoting 28 U.S.C. § 1605(a)(1)).

<sup>63</sup> See Iran Threat Reduction and Syria Human Rights Act, Pub. L. No. 112-158, 126 Stat. 1214, § 101 (2012) (the relevant language is codified at 22 U.S.C. § 8711).

<sup>64</sup> See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 421-24, *superseded by statute on other grounds*, 22 U.S.C. § 2370(e)(2) (Act of State Doctrine derives from judicial concern that “passing on the validity of foreign acts of state may hinder rather than further this country’s pursuit of goals both for itself and for the community of nations as a whole in the international sphere.”); *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 55 (D.D.C. 2000) (declining to apply the Act of State Doctrine where Congress and the Executive use “the threat of legal action in the courts as an instrument of foreign policy” by designating Iraq as a terrorist state).

<sup>65</sup> *Bank Markazi*, 136 S. Ct. at 1317, 1329.

<sup>66</sup> 22 U.S.C. § 8772.

<sup>67</sup> *Bank Markazi*, 136 S. Ct. at 1336 (Roberts, C.J., dissenting).

terrorists and terrorist organizations by “blocking property and prohibiting transactions with persons who commit, threaten to commit or support terrorism.”<sup>68</sup> The order is derived from the terrorism exception to the jurisdictional immunity of a foreign state statute in which “money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support” to terrorists activities.<sup>69</sup>

As a result of *Bank Markazi*, Congress and the executive branch can make legal and policy decisions concerning foreign assets. As Chief Justice John Roberts stated, “hereafter, with this court’s seal of approval, Congress can unabashedly pick the winners and losers in particular pending cases. [The majority’s] decision will indeed become a ‘blueprint for extensive expansion of the legislative power’ at the judiciary’s expense.”<sup>70</sup> The Supreme Court does not directly discuss the question of sanctions against Iran. However, it supports the authority concerning the right of the victims of terrorist activities to sue a foreign government and its political subdivision, particularly where the executive branch acts *in tandem* with Congress.<sup>71</sup> Therefore, Iranian assets, including commercial assets, could be within the legal orbit of U.S. law.

Among the sanctions that remain in place are U.S. trade embargoes against Iran concerning reputed acts of terrorism and basic human rights violations; these sanctions persist even after Iran’s acquiescence to the JCPOA Agreement and its renunciation of activities related to nuclear weaponry.<sup>72</sup> As a

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<sup>68</sup> Exec. Order No. 13224, 66 Fed. Reg. 49,079 (Sep. 23, 2001).

<sup>69</sup> 28 U.S.C. § 1605A(a)(1) (2008).

<sup>70</sup> *Bank Markazi*, 136 S. Ct. at 1338 (Roberts, C.J., dissenting).

<sup>71</sup> See Yishal Schwartz, *Bank Markazi v. Peterson: Implications for Separation of Power*, LAWFARE (Apr. 26, 2016), <https://www.lawfareblog.com/bank-markazi-v-peterson-implications-separation-power> (commenting that “*Bank Markazi* . . . stands as an affirmation of Congressional power in foreign policy. But the affirmation comes with a warning: without the President standing alongside Congress, the Court may not be so deferential.”).

<sup>72</sup> See, e.g., Frequently Asked Questions Relating to the Lifting of Certain U.S. Sanctions Under the Joint Comprehensive Plan of Action (JCPOA) on Implementation Day, U.S. DEP’T TREASURY (Jan. 16, 2016), [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa\\_faqs.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_faqs.pdf) (last updated June 8, 2016) [hereinafter U.S. Treasury JCPOA FAQ]; Katherine Bauer, *One Year Post-JCPOA, Not Post-Sanctions*, WASH. INST. (July 13, 2016),

result, U.S. corporations are subject to certain prohibitions that enjoin them from engaging in business transactions with Iran or its governmental subdivisions.<sup>73</sup> Thus, the fundamental question remains: To what extent will Iran be able to engage in meaningful international trade on a global level?

Iran's global commercial and investment relations must be divided into two categories: Iran's commercial relationship with U.S. companies, and commercial transactions outside of the United States. As to the first category, under *Bank Markazi*, Iranian financial institutions remain persons whose property and interests may be subject to executive order or legislative decree.<sup>74</sup> In the absence of an exemption or an authorization by OFAC, sanctions blocking property and interests in property of most Iranian individuals and corporate entities will continue.<sup>75</sup> In addition, non-U.S. persons (corporate or actual) are most

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<http://www.washingtoninstitute.org/policy-analysis/view/one-year-post-jcpoa-not-post-sanctions> (reporting on sanctions imposed on Iran related to its ballistic missile activities, trade with Iran, and private airline Mahan Air's activities "on behalf of the Qods Force of Iran's Islamic Revolutionary Guard Corps.").

<sup>73</sup> 50 U.S.C. § 4605(j); see also 18 U.S.C. § 2332d; 31 C.F.R. § 596.310; U.S. Treasury JCPOA FAQ, *supra* note 72; see also generally Buhm Suk Baek, *Economic Sanctions Against Human Rights Violations*, Cornell Law School Inter-University Graduate Student Conference Papers, Paper 11 (2008), [http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1039&context=lps\\_clap](http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1039&context=lps_clap). These trade sanctions may be enforced on U.S. persons in case of a foreign country's association with acts of terror. Further, Iran could be subject to sanctions on account of human rights violations. See, e.g., Press Release, U.S. DEPT TREASURY, Treasury Sanctions Iranian Security Forces for Human Rights Abuses (June 9, 2011), <https://www.treasury.gov/press-center/press-releases/Pages/tg1204.aspx>; Press Release, Fact Sheet: New Executive Order Targeting Iranian Officials Responsible for or Complicit in Serious Human Rights Abuses (Sep. 30, 2010) (reporting U.S. imposition of sanctions on Iran for "sustained and severe violation of human rights.") The reference was human rights abuses during the re-election campaign by Mr. Ahmadinejad the former President of Iran. See Robin Wright, *U.S. Sanctions for Human Rights Abuses*, Iran Primer, U.S. Inst. of Peace (Oct 11, 2010), <http://iranprimer.usip.org/resource/us-sanctions-human-rights-abuses> (claiming that such abuses included "arrest, killing, torture, blackmail and rape."). See also Press Release, United States Commission on International Religious Freedom, *USCIRF Applauds Obama Human Rights Sanctions on Iran* (Sep. 29, 2010), <http://www.uscifr.gov/news-room/press-releases/uscifr-applauds-obama-human-rights-sanctions-iran>. Under U.S. law, U.S. nationals may file suits against state sponsors of terrorism in U.S. courts. See *Bank Markazi*, 136 S. Ct. at 1317; see also 28 U.S.C. § 1605A.

<sup>74</sup> *Bank Markazi*, 136 S. Ct. at 1317; see also 31 C.F.R. § 560.211 (2016).

<sup>75</sup> See generally U.S. TREASURY GUIDANCE REPORT, *supra* note 32.



likely also prohibited from knowingly engaging in conduct that would seek to evade U.S. restrictions on transactions or dealings with Iran, or that cause the export of products or services from the United States to the Islamic Republic of Iran.<sup>76</sup>

Any U.S. prohibition concerning trade with Iran will not apply as a sweeping generalization. It seems more likely that for each transaction, a permit should be requested from the regulatory agencies,<sup>77</sup> such as post-Implementation Day OFAC-issued statements and licenses authorizing the conduct of business with specific Iranian entities. Accordingly, OFAC has implemented a case-by-case licensing and authorization system for individuals and entities seeking to sell, export, re-export, lease or transfer to Iran commercial passenger aircraft, and related parts and services, for exclusively commercial passenger aviation.<sup>78</sup>

The lifting of nuclear-related sanctions has removed some of the conceptual and legal impediments to conducting business with Iran. However, such a limited removal of sanctions serves little practical benefit without legal and policy reforms in Iran's financial and banking fields. Moreover, Iran's future adherence to fundamental principles of conduct of business globally, as provided by international organizations, such as the Organization for Economic Cooperation and Development ("OECD"), is another important requirement. In any international transaction, joint venture, foreign investment, or purchase agreement, the role of the host government concerning its payment guarantees, depository functions, and credit recognition by international banks is key to successful integration into the global marketplace.

Finally, several other factors play a vital role in any commercial agreement between a country and international

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<sup>76</sup> See Barnes & Thornburg LLP, *Legal Alert, International Trade Law – Sanctions on Iran Lifted – but not for Most U.S. Companies* (Jan. 2016), <http://www.btlaw.com/files/Uploads/Documents/2016%20Alerts/Alert%20-%20Sanctions%20on%20Iran%20Lifted%20-%20But%20Not%20for%20Most%20U.S.%20Companies.pdf> (last visited Jan. 24, 2017).

<sup>77</sup> See *id.*

<sup>78</sup> U.S. Treasury JCPOA FAQ, *supra* note 72; see also Maryam Jazini Dorcheh, *Status of U.S. Sanctions after Implementation of Iran Deal*, N.Y. L.J. (Mar. 2, 2016), [http://www.newyorklawjournal.com/id=120275106030\\_9/Status-of-US-Sanctions-After-Implementation-of-Iran-Deal](http://www.newyorklawjournal.com/id=120275106030_9/Status-of-US-Sanctions-After-Implementation-of-Iran-Deal).

corporation, including the interest on the funds, inter-banking financial communications, and the degree of recognition of the host country's national banks in the international community. Bank Markazi is Iran's central bank, and the largest in the Middle East. In any investment and commercial transaction between Iran and its American or European corporate partners, participating Iranian banks, especially Bank Markazi, will play a pivotal role. With respect to the post-sanction commercial agreements that Iran has entered into, there are significant legal issues and barriers in which the Central Bank of Iran is directly involved.

The post-sanction investment and commercial agreements between Iran and several European countries, especially France and Italy, have significant commercial and legal implications. In the long run, these agreements will have pivotal impact on political posture and policy position of the Islamic Republic in the Middle East. By signing sizeable commercial agreements with international companies from France, Italy, China, and (eventually) the United States, Iran has opened a gate for provocative and intellectually challenging questions concerning the Islamic Republic's concept of interest and banking, the role of the extra-constitutional economic institutions upon Iran's international trade, and the looming impediments caused by institutional irregularities practiced by extra-constitutional organizations in that country.

### *C. Iran's Banking Assets in the United States and the Opinion of the U.S. Supreme Court*

#### 1. Sovereign Immunity under U.S. Law

Contrary to the commonly accepted view, commercial transactions between Iran and U.S. companies will be hampered unless the current legal encumbrances facing the Islamic government of Iran are resolved. Unlike the United States and most of the Western European countries, the operation of the banking system in Iran is highly centralized in the sense that the banking system operates as part of a ministry or a

government bureaucracy.<sup>79</sup> Historically, Bank Melli was the National Bank of Iran.<sup>80</sup> Even now, it remains an integral part of the executive branch and a de facto governmental bureaucracy.<sup>81</sup>

Consistent with this tradition, Bank Markazi, now the Central Bank of Iran, follows the Islamic Republic government's policies economically as well as in reflecting such policies upon the banks throughout the world. At one point, the head of the Central Bank of Iran, addressing the European Banking Congress in reference to the nuclear deal, stated that "this is the reason our government put forth such a substantial effort in dialogue with the 5+1 [ostensibly a non-banking issue] in order to reconstruct its relationship with the international community."<sup>82</sup> Thus, as a governmental body, the Central Bank often presents the position of the Islamic Republic of Iran with respect to economic policy.

Considering the above structure and pattern of executive operation, it is safe to say that the Central Bank of Iran is an executive body of the Islamic government of Iran. Based on this assumption, the Central Bank of Iran, pursuant to U.S. law, should be treated as an integral system of the Islamic Republic of Iran. This assumption places the Central Bank of Iran as a

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<sup>79</sup> See Ardalan Sayami, *Iranian Banks Under Sanctions: Government Looking Towards Foreign Banks*, PAYVAND.COM (July 7, 2010), <http://www.payvand.com/news/10/jul/1063.html> ("Ever since banks in Iran were nationalized by the government and brought under its direct control, the executive branch sees it as its right to intervene in the most detailed aspects of banking operations while those who deposit money into banks and constitute its main donors, do not have any rights in electing bank managers. The result is the absence of independence of the Central Bank from the executive branch of government.").

<sup>80</sup> *History of Bank Melli Iran*, BANK MELLI IRAN, <http://www.bmi.ir/En/BMIHistory.aspx> (last visited Jan. 24, 2017) (reporting that Bank Melli, as the first Iranian commercial bank, was established in 1928; it began to gather momentum in strengthening the economic structure and development of Iran and suspension of foreign banks' licenses. Also reporting that Bank Melli was instrumental in channeling credits for Iran's productive activities).

<sup>81</sup> *Id.*

<sup>82</sup> *Iranian and European Banks Prepared to Re-Establish Banking Relationships*, Central Bank of The Islamic Republic Of Iran, CENTRAL BANK OF THE ISLAMIC REPUBLIC OF IRAN (Nov. 21, 2015), <http://www.cbi.ir/show-item/13926.aspx>, (speech by Dr. Seif, the Governor of the Central Bank of the Islamic Republic of Iran addressing European Banking Congress).

political instrumentality, subjecting it to customary policies and conventional rules of international law.

Under international law, governments and other international legal persons enjoy certain immunities from the exercise of jurisdiction, including litigation, with respect to their official acts.<sup>83</sup> However, this type of immunity does not generally apply in the event of domestic prosecutions of foreign officials for most international crimes.<sup>84</sup> The concept of sovereign immunity has been traditionally established in U.S. courts.<sup>85</sup> In the United States, suits against the government by foreign entities require the consent of the United States.<sup>86</sup> Such consent, by statute, in cases of tort or contract claims, would include suits concerning violations of international obligations.<sup>87</sup> Moreover, jurisdictional requirements limit tribunals in cases involving sovereign immunity.<sup>88</sup> Chief Justice Marshall's Supreme Court opinion in *The Schooner Exchange v. McFaddon*, rendered in 1812, established that a foreign property that entered or otherwise existed in the United States "must be considered as having come

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<sup>83</sup> See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3, ¶ 75 (Joint Separate Opinion of Judges Higgins, Kooijmans, and Buerghenthal, noting that "... immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system."); Prosecutor v. Blaškić, Case No. IT-95-14-AR108, Objection to the Issue of Subpoena Duces Tecum, ¶ 38 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997), (noting the well-established customary norm that state officials "are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of the State."), <http://www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html>.

<sup>84</sup> See generally *R. v. Bow Street Stipendiary Magistrate et. al.* [1999] 3 AC 97 (HL) (former head of state not immune with respect to acts committed under his administration that violated the Convention Against Torture).

<sup>85</sup> See e.g., *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812).

<sup>86</sup> See *Lane v. Pena*, 518 U.S. 187, 192 (1996) ("To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims.").

<sup>87</sup> See *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 268 (D.D.C. 2004). ("[N]ot only does precedent instruct that a waiver of sovereign immunity must be explicit but it also teaches that such immunity cannot be implied unless a government has "indicated its amenability to suit" even for the most heinous of crimes against international law."), (citing *Princz v. Fed. Republic of Ger.*, 26 F.3d 1166, 1168 (D.C. Cir. 1994)).

<sup>88</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 907, at n.2 (AM. LAW INST. 1987); see also *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.”<sup>89</sup> The denial of such immunity by another state may create a claim for violation of international law.<sup>90</sup>

Under the original and classic international law, jurisdictional immunity was regarded as absolute; a state could invoke immunity irrespective of the nature of its sovereign activities.<sup>91</sup> At times, U.S. courts have refused to grant relief under the doctrine of sovereign immunity even though such sovereign may not have been recognized by the United States.<sup>92</sup> In one case, the state court held, in part, that “our courts . . . may not bring a foreign sovereign before our bar, not because of comity, but because he has not submitted himself to our laws. Without his consent he is not subject to them.”<sup>93</sup> Justice Marshall was an unwavering defender of sovereign immunity. In *McFaddon*, he famously pronounced that “[t]he jurisdiction of the nation, within its own territory is necessarily exclusive and

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<sup>89</sup> *McFaddon*, 11 U.S. at 147.

<sup>90</sup> *See id.*; *cf.* Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment, 2012 I.C.J., ¶¶ 57-58 (Feb. 3) (while “[e]xceptions to the immunity of the State represent a departure from the principle of sovereign equality,” the denial of immunity itself is procedural, rather than substantive, in nature).

<sup>91</sup> *See Jurisdictional Immunities of the State*, I.C.J. Reports 2012, ¶¶ 56-57; *cf. id.* ¶ 59 (noting that “many States . . . now distinguish between *acta jure gestionis* [commercial acts], in respect of which they have limited the immunity which they claim for themselves and which they accord to others, and *acta jure imperii* [public governmental acts].”). The United States has also adopted this distinction. *See* 28 U.S.C. § 1605; *see also* Letter from Jack B. Tate, Acting Legal Adviser, Dep’t of State, to Philip B. Perlman, Acting Att’y Gen., Dep’t of Justice (May 19, 1952), in 26 DEPT ST. BULL. 984 (1952) [hereinafter Tate Letter] (“[T]he immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).”).

<sup>92</sup> *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 439 (1964) (recognizing Cuba as a foreign sovereign in U.S. courts despite the severance of diplomatic relations between the U.S. and Cuba; ruling that “the act of state doctrine proscribes a challenge to the validity of [a] Cuban expropriation decree” and thus precludes the exercise of jurisdiction over that decree).

<sup>93</sup> *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 234 N.Y. 372, 376 (1923); *see also* LOUIS HENKIN ET AL., INTERNATIONAL LAW, CASES AND MATERIALS 262–263 (2d ed. 1987).

absolute. It is susceptible of no limitation, not imposed by itself.”<sup>94</sup>

Following this time-honored concept of foreign sovereign immunity, the United States has (with certain exceptions beyond the scope of this writing), traditionally adopted the Foreign Sovereign Immunities Act as the cornerstone of its foreign policy concerning the treatment of the assets owned by, or connected to, a foreign sovereign state.<sup>95</sup>

## 2. The Terrorism Exception to Sovereign Immunity

In the wake of the 9/11 terrorist attacks, the United States passed TRIA, a significant amendment to the Foreign Sovereign Immunities Act.<sup>96</sup> Under TRIA, victims of terrorism are allowed to litigate against countries as designated by the U.S. government to be State Sponsors of Terrorism.<sup>97</sup> After Hezbollah was reportedly involved in the 1983 bombing of the Beirut Marine compound, President Reagan added Iran to the list of state sponsors of terrorism.<sup>98</sup> As such, the U.S. government classifies the Islamic Republic of Iran as a sponsor of acts of terrorism and subject to TRIA, which creates an exception to the Foreign Sovereign Immunity Doctrine. TRIA’s exception is codified as follows:

Notwithstanding any other provision of law, and except as provided [in this law], in every case in which a person has obtained a judgment against a terrorist party is not immune . . . or for which a terrorist party is not immune under [the law] . . . the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party), shall be subject to execution or attachment in aid of execution, in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.<sup>99</sup>

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<sup>94</sup> McFaddon, 11 U.S. at 136; *see also* Henkin, *supra*, note 85 at 891-979.

<sup>95</sup> 28 U.S.C. §§ 1330, 1441(d), 1602 et seq. (1976).

<sup>96</sup> Terrorism Risk Insurance Act of 2002, *supra* note 44.

<sup>97</sup> *See id.* at § 201; *see also* 28 U.S.C. § 1610(a)(7) (2012) (referencing the terrorism exception under 28 U.S.C. § 1605A).

<sup>98</sup> SANCTIONS AGAINST IRAN: A GUIDE TO TARGETS, TERMS, AND TIMETABLES 3 (Gary Samore ed. 2015) [hereinafter Belfer Center Report].

<sup>99</sup> 28 U.S.C. § 1610(b)(2)(A) (2012).

Separately, Section 1610(g) of TRIA extends the exception to the tradition of enforcing foreign sovereign immunity by permitting attachment in aid of an execution of a judgment entered. That exception provides that:

[T]he property of a foreign state against which a judgment is entered under Section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution upon that judgment as provided in this section, regardless of the level of economic control over the property by the government of the foreign state.<sup>100</sup>

This significant exception provides pivotal facilitation in attaching specific foreign property, such as the real property in which a member of a terrorist group has a fee simple ownership, and restricts movement of any property in which Iran or its instrumentalities have an interest. The only requirement for courts to allow attachment or execution of property is evidence that the property in question is held by a foreign entity that is in fact an agency or instrumentality of the foreign state against which the Court has entered judgment.<sup>101</sup> Under this definition, the Central Bank of Iran is an instrumentality of Iran, and its transactions and assets in the United States are subject to the TRIA exception to sovereign immunity.

## II. U.S. Supreme Court v. Iran's Nuclear Deal Accord

As a result of the Supreme Court's decision in *Bank Markazi*, JCPOA notwithstanding, commercial relations between the U.S. and the Islamic Republic of Iran will remain substantially limited. In its decision, the majority not only endorsed the exceptions to the Act of State Doctrine, but also enhanced the President's power to limit commercial acts of a foreign state's financial and commercial agencies in the United States.<sup>102</sup> Specifically, the Supreme Court asserted, "the

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<sup>100</sup> 28 U.S.C. § 1610 (g)(1)(A) (2012).

<sup>101</sup> *Estate of Heiser v. Islamic Republic of Iran*, 807 F.Supp.2d 9 (D.D.C. 2011); *see also* *Peterson v. Islamic Republic of Iran*, 627 F.3d. 1117, 1123, n. 2 (9th Cir. 2010).

<sup>102</sup> *Bank Markazi*, 136 S. Ct. at 1310 (approving Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8772 concerning Sovereign

Executive has historically made case specific sovereign immunity determinations to which courts have deferred.”<sup>103</sup> Therefore, considering the sweeping authorization granted to the executive branch by the Supreme Court, the executive branch (through the Department of the Treasury) may continue to seize assets deposited with Citibank by the Central Bank of Iran, and may distribute such assets among the victims of the alleged acts of terrorism.<sup>104</sup>

So, what impact does the Supreme Court’s decision in *Bank Markazi* have on the JCPOA accord? To answer this question, we must first examine the relevant provision of the U.S. law with respect to commercial transactions with Iran. The Iran Threat Reduction and Syria Human Rights Act of 2012 makes available a post-judgment execution of a set of banking assets held ultimately by Citibank of New York on behalf of the Central Bank of Iran for over 1,000 victims of terrorist acts allegedly sponsored by Iran.<sup>105</sup> In 2012, the President signed Executive Order 13,599, which directly addressed the question of assets claimed by the Central Bank of Iran.<sup>106</sup> The order explicitly states that:

[I]n light of the deceptive practices of [Bank Markazi] . . . To conceal transactions of sanctioned parties . . . [a]ll property and interests in property of the Government of Iran including [Bank Markazi], that are in the United States . . . Or that are or hereafter come within the possession or control of any United States person . . . are blocked.<sup>107</sup>

In *Bank Markazi*, the Supreme Court was unequivocal that based on Congressional authorization, American nationals “may file suit against state sponsors of terrorism in the courts of the United States.”<sup>108</sup> The Supreme Court in *Bank Markazi*, decidedly ascertained that the victims of terrorism are authorized to, “seek money damages . . . against a foreign state for personal injury or death that was caused by acts of terrorism including torture, extra-judicial killing, aircraft sabotage,

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Immunity determination).

<sup>103</sup> *Id.* at 1317.

<sup>104</sup> *See id.*

<sup>105</sup> 22 U.S.C § 8772 (2012).

<sup>106</sup> Exec. Order No. 13,599, 77 Fed. Reg. 6659 (Feb. 5, 2012).

<sup>107</sup> Exec. Order No. 13,599, 77 Fed. Reg. 6659 (Feb. 5, 2012).

<sup>108</sup> *Bank Markazi*, 136 S. Ct. at 1317 (citing 28 U.S.C. § 1605(a) (2008)).



hostage taking, or the provision of material support to terrorist activities.”<sup>109</sup>

The decision of the Supreme Court has resulted in blocking \$1.75 billion of the assets belonging to the Central Bank of Iran in the United States. It is, however, estimated that the total assets of the Central Bank of Iran in the United States may be over \$30 billion.<sup>110</sup>

In light of *Bank Markazi*, the TRIA exception to the Sovereign Immunity Doctrine remains operative.<sup>111</sup> Thus, the Central Bank of Iran and its blocked assets in the United States remain subject to restrictions imposed by TRIA.<sup>112</sup> Under such circumstances, the Sovereign Immunity Doctrine, with respect to Iran, remains non-operative in the United States.<sup>113</sup> Therefore, future commercial agreements between Iran and U.S. corporations will be hampered by the operation of the exception to the Sovereign Immunity Doctrine or executive orders.

The *Bank Markazi* decision may have considerable impact on another major Middle Eastern country – Saudi Arabia. That country has a history of asserting the Act of State Doctrine as a defense in civil litigation.<sup>114</sup> A legislative transgression against Saudi Arabia began on May 17, 2016, when the U.S. Senate passed a bill authorizing the U.S. Government to sue Saudi

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<sup>109</sup> *Id.*

<sup>110</sup> See Matt Pearce, *Where are Iran's billions in frozen assets, and how soon will it get them back?*, L.A. TIMES (Jan. 20, 2016), <http://www.latimes.com/world/middleeast/la-fg-iran-frozen-assets-20160120-story.html> (reporting that according to the estimates by Professor Nader Habibi of Brandeis University, the total Iranian bank assets in the United States are approximately \$30 billion; further reporting that Iran's Central Bank Chief, Valiollah Seif, has indicated the Central Bank's assets in the U.S. to be approximately \$32 billion).

<sup>111</sup> *Id.*

<sup>112</sup> Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi, 556 U.S. 366, 374 (2009) (observing that TRIA permits “a person with a terrorism-related judgment to attach an asset . . . provided the asset [is] a ‘blocked asset’”).

<sup>113</sup> See *Bank Markazi*, 136 S. Ct. at 1317, citing 28 U.S.C. § 1605(a).

<sup>114</sup> See, e.g., UNC Lear Servs., v. Kingdom of Saudi Arabia, 581 F.3d 210, 214 (5th Cir. 2009) (contract-related claims); Spectrum Stores Inc. v. Citgo Petroleum Corp., 632 F.3d 938, 956 (5th Cir. 2011) (claims of price-rigging by OPEC nations, including Saudi Arabia, barred on both political question and act of state doctrine theories); Peterson v. Royal Kingdom of Saudi Arabia, 332 F. Supp. 2d 189, 201 (D.D.C. 2004).

Arabia in U.S. court regarding 9/11 acts of terrorism.<sup>115</sup> In *Bank Markazi*, the Supreme Court affirmed the lower court's decision granting an exception to the Act of State Doctrine based on the specific acts related to the claims of terrorism and abuse of human rights by the government of Iran.<sup>116</sup> However, other legislative tools not exclusively limited to claims against Iran exist, including the International Emergency Economic Powers Act (hereinafter "IEEPA").<sup>117</sup> Therefore, there is no justification for the Senate's legislative act based on seemingly political grounds. The President has adequate ammunition to deal with situations like these, such as the IEEPA or the President's executive orders. The overzealous Senate bill to abandon the framework provided by the Act of State Doctrine has serious political consequences. Saudi Arabia has various monetary deposits in the United States of about \$750 billion in treasury, securities and other assets. Saudi Arabia has indicated that in the event this bill becomes law, it might begin selling off these assets.<sup>118</sup>

Immunity of foreign countries against judgments of legislative powers is a facet of *acta jure imperii*, a principle that foreign courts cannot judge the liability of a nation state for acts and omissions in the exercise of the nation state's authority.<sup>119</sup> Thus, under international law, the U.S. Congress is operating in a position of judgment with respect to the official governmental acts of a foreign country.<sup>120</sup> Such a position runs counter to

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<sup>115</sup> Justice Against Sponsors of Terrorism Act, S. 2040, 114th Cong. (2015) (as introduced in the Senate, Sept. 16, 2015) [hereinafter JASTA].

<sup>116</sup> See *Bank Markazi*, 136 S. Ct. at 1329.

<sup>117</sup> 91 Stat. 1625, 50 U.S.C. § 1570 (2015).

<sup>118</sup> Mark Mazzetti, *Senate Passes Bill Exposing Saudi Arabia to 9/11 Claims*, N.Y. TIMES (May 17, 2016), <http://www.nytimes.com/2016/05/18/us/politics/senate-passes-bill-that-would-expose-saudi-arabia-to-legal-jeopardy-over-9-11.html>.

<sup>119</sup> See Tate Letter, *supra* note 91.

<sup>120</sup> See David Gaukrodger, *Foreign State Immunity and Foreign Government Controlled Investors*, OECD 18-27 (OECD Working Papers on International Investment No. 02, 2010) (noting the limitations on execution and adjudication that is the general practice of most states, and favors immunity from jurisdiction and execution as a customary norm with respect to *acta jure imperii*). While immunity from jurisdiction is distinct from immunity from execution, an execution against State property generally requires a link between the property and the original claim. See 28 U.S.C. § 1610(a)(2).

generally established norms of international law.<sup>121</sup> Saudi Arabia's alleged involvement relates to 28 pages of the 9/11 Commission Report released by the House Intelligence Committee.<sup>122</sup> However, such allegations are far from clear and this matter should not be treated haphazardly. As Lee Hamilton and Thomas Kean, the authors of the 9/11 Commission Report, have adroitly reacted to the news of the Senate's bill, "[a]ccusations of complicity in that mass murder from responsible authorities are a grave matter . . . Such charges should be levied with care."<sup>123</sup> Thus, the *Bank Markazi* decision should not be interpreted by sweeping generalizations and indiscriminate standards of judgment; in light of foreign policy discretions, it may not prove to be universally applicable.

The extra-constitutional institutions under the present system of social order in Iran are organizations which are not part of the official body of the government.<sup>124</sup> Nevertheless, these organizations function as semi-governmental entities.<sup>125</sup> Whether the extra-constitutional institutions of Iran should be subject to the acts of foreign states such as the United States is an important question. According to the late Professor McDougal, "the competences over individuals achieved by states under . . . [p]rimary principles of jurisdiction are not lessened by certain secondary allocations of competence under such

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<sup>121</sup> See Gaukrodger, *supra* note 120.

<sup>122</sup> Jim Sciutto, Ryan Browne & Deirdre Walsh, *Congress releases secret '28 pages' of alleged Saudi 9/11 ties*, CNN (July 15, 2016, 10:44 PM), <http://www.cnn.com/2016/07/15/politics/congress-releases-28-pages-saudis-9-11/>.

<sup>123</sup> See Thomas Kean & Lee Hamilton, *Flashback - 28 pages reveal nothing new: 9/11 Commission chairmen*, USA TODAY (Apr. 27, 2016), <http://www.usatoday.com/story/opinion/2016/04/27/911-report-28-pages-saudi-arabia-kean-hamilton/83597386/>; see also Carol Giacomo, *A Warning About the Secret 9/11 Pages*, N.Y. TIMES: TAKING NOTE BLOG (Apr. 27, 2016), <http://takingnote.blogs.nytimes.com/2016/04/27/a-warning-about-the-secret-911-pages/>.

<sup>124</sup> See Mehran Kamrava & Houchang Hassan-Yari, *Suspended Equilibrium in Iran's Political System*, 94 MUSLIM WORLD 495, 508-512 (2004) (noting the presence of "informal power centers" in Iran that are "under the control of the Supreme Leader, that exert considerable power." These include "Representatives of the Leader," pervasive in state organs, including universities; *Bonyads*, "powerful public enterprise foundations tasked with specific economic functions," including charity or veterans' affairs; Friday Prayer Imams; and the Special Court for the Clergy).

<sup>125</sup> *Id.*

doctrines as those of act of state and sovereign immunity.”<sup>126</sup> In other words, the state courts will not, or should not, deny their own jurisdiction with respect to the acts of foreign states disregarding certain fundamental principles of international law or state laws, i.e., laws concerning terrorism. It seems that this view has been adopted where the targeted acts are within the category of “state sponsored acts of terrorism.” According to the Supreme Court,

American nationals may file suit *against state sponsors* of terrorism in the courts of the United States . . . Specifically, they may seek “*money damages . . . against a foreign state* for personal injury or death that was caused by” acts of terrorism, including “torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support.”<sup>127</sup>

Thus, to qualify as acts by “state sponsors of terrorism” under the prohibitive language of *Bank Markazi*, such acts must be either undertaken directly by the state, or by state-sponsored or state-directed organizations. As a result, the illicit acts undertaken by an unaffiliated non-state party (e.g., private corporate entities of Iran) would likely not be acts directed by the government of Iran, and the terrorism exception statutes would not apply.

It is conceivable that based on *Bank Markazi* (coupled with the statutory laws and accompanying President’s executive orders), the Revolutionary Guards Corps of Iran (“IRGC,” “Sepah Pasdaran Engelabeh Islami” or “Pasdaran”) may qualify as a “state sponsored organization.”<sup>128</sup> However, the extent to which the Revolutionary Guards are constitutionally within the orbit of the government of Iran is an open question. Under the Constitution of the Islamic Republic of Iran.

The Islamic Revolutionary Guards Corps, organized in the early days of the triumph of the Revolution, is to be maintained so that it may continue its role of guarding the Revolution and

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<sup>126</sup> MYRES S. MCDUGAL, HAROLD D. LASSWELL, & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 216 (Yale Univ. Press 1977).

<sup>127</sup> See *Bank Markazi*, 136 S. Ct. at 1317 (emphasis added).

<sup>128</sup> RUHOLLAH KHOMEINI, [KASHF AL-ĀSRĀR] [UNVEILING OF SECRETS] 65, (Sherkat Ketab 1943). Today the mission of charity is a comparatively insignificant part of the IRGC’s vast scheme of activities. See generally GOLKAR, *supra* note 27.

its achievements. The scope of the duties of these corps and areas of its responsibility . . . to be determined by law. . .<sup>129</sup>

A strict textual reading does not indicate whether or not this organization is part of a constitutional governmental branch in the Islamic Republic of Iran. This question was not addressed in the fact-finding District Court in *Bank Markazi*, and consequently, it did not come under judicial inquiry or part of the discussion in the appellate phase of the case in either the Court of Appeals or the Supreme Court of the United States.<sup>130</sup>

The official activities of the IRGC could be divided into three basic categories; military, economic, and ideological. It must be noted that neither the vast military nor the extensive economic institutions, functioning under the network of the IRGC, are subject to any official government ministry or bureaucracy.<sup>131</sup> In terms of its military activities, the IRGC has its own Navy, Army, and Air Force. These are separate military entities that do not report to the President. In the past, the IRGC's military, when necessary, has entered into defense arrangements with other countries. For example it has undertaken to acquire vessels including military speedboats from Italy.<sup>132</sup> The IRGC also has a record of contacting other countries such as South Africa, Austria, and Pakistan to bolster its military strength or for social wellness such as combating drug epidemics.<sup>133</sup> Moreover, the IRGC, through its Quds Force, maintains a combination of militarily and ideologically related activities.<sup>134</sup>

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<sup>129</sup> ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] 1368 [1989] (Iran), art. 150. At present, the vast and intertwined network of the activities of the Revolutionary Guards far exceed the targeted singular original constitutional mission as the "Guardians of the Revolution."

<sup>130</sup> See *Peterson v. Islamic Republic of Iran*, No. 10-CIV-4518, 2013 WL 1155576 (May 20, 2013).

<sup>131</sup> See CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN, art. 110 (delineating that the Leader shall appoint the Commander in Chief of the "Pasdaran," or Revolutionary Guards).

<sup>132</sup> See Giulio Meotti, *The Rome-Tehran Axis*, WALL ST. J. (Jan. 14, 2010 4:27 PM), <http://www.wsj.com/articles/SB10001424052748703510304574625620914295450> (reporting Italian Boat Manufacturer FB Design's admission that it "regularly sold design and technology to the Iranian secret services").

<sup>133</sup> See EMANUELE OTTOLENGHI, *THE PASDARAN: INSIDE IRAN'S ISLAMIC REVOLUTIONARY GUARD CORPS* 50–53 (FDD Press 2011).

<sup>134</sup> See Dexter Filkins, *The Shadow Commander*, NEW YORKER (Sept. 30,

The military branch of the IRGC is a dynamic force driven by transformative military technologies.<sup>135</sup>

The IRGC also has vast economic power, exemplified by its active participation in economic activities throughout Iran. Estimates suggest that the IRGC controls a total of 25% to 40% of Iran's gross domestic product (GDP).<sup>136</sup> According to a report by the Department of the Treasury to the U.S. Congress, the IRGC has historically undertaken a coordinated campaign to sell Iranian oil to evade international sanctions. In fact, the Treasury Department reported that at one point, the IRGC was "Iran's most powerful economic actor dominating many sectors of the economy including energy. . ."<sup>137</sup> The Treasury Report went to the extreme in that it called the National Iranian Oil Company (NIOC) "an agent or affiliate of Iran's Islamic Revolutionary Guards Corps". In order to coordinate Iran's oil policy during the sanction period, the IRGC has supervised the management of Iran's production and exports of petroleum and petroleum product; according to the Department of the

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2013), <http://www.newyorker.com/magazine/2013/09/30/the-shadow-commander> (reporting that the Quds force has become "an organization with extraordinary reach, with branches focused on intelligence, finance, politics, sabotage, and special operations . . . divided between combatants and those who train and oversee foreign assets").

<sup>135</sup> See Michael Knights, *Rising to Iran's Challenge: GCC Military Capability and U.S. Security Co-operation*, Washington Institute for Near East Policy, at ix (June 2013), [https://www.washingtoninstitute.org/uploads/Documents/pubs/PolicyFocus127\\_Knights.pdf](https://www.washingtoninstitute.org/uploads/Documents/pubs/PolicyFocus127_Knights.pdf). The IRGC's military is a major countervailing force in the Persian Gulf vis-à-vis the Gulf Co-operation Council (GCC).

<sup>136</sup> OTTOLENGHI, *supra* note 133, at 43; see also *Entering the Iranian Market: Opportunities and Risks*, KPMG, at 4 (Jan. 2016), <https://home.kpmg.com/content/dam/kpmg/pdf/2016/02/Entering-the-Iranian-Market-Opportunities-and-Risks-KPMG.pdf> ("Some estimates suggest the IRGC controls a third of the country's GDP, using holding companies and 'bonyads', charitable organisations that carry tax-exempt status and are involved in an array of consumer goods production."). Based on the last available figures Iran's GDP in 2014 was approximately \$425.33 billion. In 2011 it reached \$592 billion. See World Bank – Iran, Islamic Rep., [WORLD BANK.ORG](http://data.worldbank.org/country/iran-islamic-rep?view=chart), <http://data.worldbank.org/country/iran-islamic-rep?view=chart> (last visited Jan. 24, 2017).

<sup>137</sup> Press Release, U.S. DEP'T TREASURY, Treasury Submits Report to Congress on NIOC and NITC (Sept. 24, 2012), <https://www.treasury.gov/press-center/press-releases/Pages/tg1718.aspx> [hereinafter NIOC and NITC Press Release]. The Department of the Treasury's report was issued as a result of requirements provided in The Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRSHA). See 22 U.S.C. § 8773.

Treasury, in one case Iran's Islamic Assembly (the Parliament) approved the appointment of a high-ranking military official of the IRGC, Brigadier General Rostam Qasemi, to serve as Iran's Minister of Petroleum.<sup>138</sup> One of the major activities of the IRGC is to secure contractual bids for trade and development of Iran's infrastructure.<sup>139</sup> The IRGC undertakes its bidding and construction activities mainly through an organization called Khatam-al-Anbia, both an engineering firm and one of Iran's leading industrial contractors.<sup>140</sup> Khatam-al-Anbia has 812 subsidiaries throughout Iran and has about 40,000 employees. It has reportedly 1/17,000 no-bid contracts primarily in the energy sector, and has also won a \$1.2 billion contract to build a line on the Tehran Metro.<sup>141</sup> At times, there are no substantive and genuine bidding for the sister companies of the IRGC.<sup>142</sup> According to an expert writing in the United States Institute of Peace, over the course of 25 years, "the Guards [have become] Iran's largest economic force."<sup>143</sup>

The extra-constitutional organizations in Iran are not limited to the IRGC. The ideological activities of the IRGC include a vast umbrella of organizations. Under this institutional umbrella, there is an expansive array of organized groups covering charitable and ideological foundations.<sup>144</sup> These agencies function through subsidiary companies and enterprises as diverse as spreading propagation of piety, combating against

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<sup>138</sup> See NIOC and NITC Press Release, *supra* note 137.

<sup>139</sup> *Id.* ("Prior to his appointment, Qasemi was the commander of Khatam Al-Anbia, a construction and development wing of the IRGC that generates income and funds operations for the IRGC.").

<sup>140</sup> See IRGC Campaign, UNITED AGAINST NUCLEAR IRAN, <http://www.unitedagainstnucleariran.com/irgc> (last visited Jan. 24, 2017). The name "Khatam-al-Anbia" references the "Seal of the Prophets." In Islam, the Prophet Mohammed is revered as the last prophet. See KORAN, *Al-Ahzab*, 33:40.

<sup>141</sup> See UNITED AGAINST NUCLEAR IRAN, *supra* note 140.

<sup>142</sup> See Parisa Hafezi, *Iran's Elite Guards to Gain Regional Economic Power in Post-Sanction Era*, REUTERS (Jan. 19, 2016), <http://www.reuters.com/article/us-iran-sanctions-guards-insight-idUSKCN0UX2M3>.

<sup>143</sup> Alireza Nader, *The Revolutionary Guards*, THE IRAN PRIMER, United States Institute of Peace, [http://iranprimer.usip.org/sites/default/files/Military\\_Nader\\_Revolutionary%20Guards.pdf](http://iranprimer.usip.org/sites/default/files/Military_Nader_Revolutionary%20Guards.pdf) (updated as of August 2015).

<sup>144</sup> See FREDERIC WEHREY ET AL., *THE RISE OF THE PASDARAN: ASSESSING THE DOMESTIC ROLES OF IRAN'S ISLAMIC REVOLUTIONARY GUARDS CORPS* 56-64 (RAND Corp. 2009), [http://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND\\_MG821.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND_MG821.pdf).

immoral decorum, blasphemous or sinful conducts, and holding unethical gatherings and ceremonies in private homes. Their activities also include policing the propriety of individuals' appearance in public, and behavior against public pieties and moral or Islamic virtues.<sup>145</sup>

There are several other entities in the same category, although they are not a match to the IRGC in terms of their economic power, political authority and social command.<sup>146</sup> These extra-constitutional entities are not within the jurisdiction of any ministry and act independent from the official bureaucracy of the government. According to a study by the RAND Corporation:

Rather than framing the IRGC as a purely military organization marked by mafia-type economic tendencies and a homogeneous ideological outlook, this monograph has surveyed its broad ranging roles in Iranian society and its emerging internal divisions. Our analysis underscores that the twin poles of commonly held assumptions about the IRGC are both incorrect.

The IRGC is neither a corrupt gang nor is it a firebrand revolutionary vanguard with the aim of exporting Iran's revolution across the region.

Rather, its vested and increasing interests in the country's economy make it an increasingly conservative force rather than a radical one.<sup>147</sup>

*Bank Markazi* does not address whether the plaintiffs' §1605A claim may properly attach assets belonging to "non-governmental" or extra-constitutional entities. Instead, the main focus of the Supreme Court in *Bank Markazi* was the constitutionality of the statutes and certain executive powers concerning limitations to, and exceptions on, the sovereign

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<sup>145</sup> See *id.* The functions related to maintaining public morality and virtues are the responsibility of an associate organization called the Basij. See GOLKAR, *supra* note 27, at 1-69 for a history of the Basij and its activities.

<sup>146</sup> These organizations include the Office of the Great Leader, the Office of the command of Imam Khomeini under the Supervision of the Leader, the Council of Cultural Revolution and a few other establishments. See LAURA SECOR, CHILDREN OF PARADISE THE STRUGGLE FOR THE SOUL OF IRAN 35-36, 109 (Riverhead Books 2016) for the factions in Revolutionary Guards during the early days in the Islamic Revolution.

<sup>147</sup> WEHREY ET AL., *supra* note 144, at 92.



immunity derived from the Act of State Doctrine.<sup>148</sup> Therefore, in a commercial agreement between a U.S. corporation and a non-state Iranian corporate entity, certain assets under an extra-constitutional entity's control may be within a plaintiff's reach under *Bank Markazi*.

### III. Ideological and Legal Constraints Related to Banking in Iran

The post-sanction international commercial transactions engaged in by Iran do not enjoy the same creditworthiness as is customary in most transnational commercial transactions. Some of these limitations are internal, and as time passes, they will be curtailed, if not eliminated. Limitations with respect to international commercial transactions facing Iran can be divided into two parts: First, the ideological, structural and operational issues concerning Iran's banking policy, and second, constraints as a matter of public policy.

With respect to the first limitation, the Central Bank of Iran does not enjoy prerequisite independence in dealing with the inflationary economy of the country. According to a report by the International Monetary Fund ("IMF"), "While a decade of financial and economic isolation has taken its toll on the country's banking system, populist policies under former president Mahmoud Ahmadinejad . . . have left the country undercapitalized with a high percentage of non-performing loans—as high as 20 percent, according to some estimates."<sup>149</sup>

In a joint annual meeting between the IMF, the World Bank Group, and Iranian representatives, Ali Tayyeb Nia, Iran's Minister of Economic Affairs and Finance, indicated without hesitation that as a result of President Rohani's reformist policies, the "inflation rate has decreased from 40% in September 2013 to 21% in September 2014," with less than 20% inflation projected for subsequent years.<sup>150</sup> In Iran, the most

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<sup>148</sup> See *Bank Markazi*, 136 S.Ct. at 1310.

<sup>149</sup> Aaron Arnold, *The Real Threat to the Iran Deal: Tehran's Banking System*, THE DIPLOMAT (Mar. 22, 2016), <http://thediplomat.com/2016/03/the-real-threat-to-the-iran-deal-tehrans-banking-system/>.

<sup>150</sup> Dr. Ali Tayyeb Nia, Iran's Minister of Economics, Governor of the Bank for the Islamic Republic of Iran, Governor's Statement No. 7 at the 2014 Annual Meeting of the International Monetary Fund World Bank Group (Oct. 10, 2014), <https://www.imf.org/external/am/2014/speeches/pr07e.pdf>.

significant categories in the consumer pricing index are primarily housing, electricity, gas and other fuels, totaling 29% of the consumer price index.<sup>151</sup>

Nevertheless, the overall fiscal deficit in 2015 declined from 2.25% of the GDP to 1.25% of the GDP, thanks to largely eliminating the popular, but economically pernicious, subsidies policy adopted during the presidency of Mr. Ahmadinejad.<sup>152</sup>

#### A. Islamic Ideology Concerning Interest

In a pure Islamic banking system, interest is categorically forbidden.<sup>153</sup> Therefore, capital enhancement through usury is a strictly forbidden practice.<sup>154</sup> Nevertheless, unlike engaging in usury, it must be noted that trading has been permitted in Islam.<sup>155</sup> Ayatollah Khomeini, the founder of the Islamic Revolution of Iran, has condemned usury as included in the category of “[t]he lascivious and immoral acts including the shameful act of unveiling women, dancing and swimming of young girls and boys, drinking alcoholic beverages and engaging in usurious business.”<sup>156</sup>

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<sup>151</sup> See *Iranian Inflation Rate*, TRADING ECONOMICS, <http://www.tradingeconomics.com/iran/inflation-cpi> (last visited Jan. 24, 2017).

<sup>152</sup> See IMF, *2015 Article IV Consultation-Press Release; Staff Report; and Statement by the Executive Director for the Islamic Republic of Iran*, Annual Report 2015, Report No. 15/349, at 6 (Dec. 2015), <https://www.imf.org/external/pubs/ft/scr/2015/cr15349.pdf> [hereinafter IMF 2015 Iran Report].

<sup>153</sup> See KORAN, *Al-Baqara*, 2:276 (“God does not bless usury, and he causes charitable deeds to prosper, and God does not love any ungrateful sinner”). Based on the prohibitive *Surat* of the Koran, and various pronouncements of the Islamic theologians, interest on money is categorically forbidden.

<sup>154</sup> KORAN, *Al-Baqara*, 2:278 (“O, you who believed be careful of [your duty to] God and relinquish what remains [due] from usury, if you are believers.”) KORAN, *Al-Emran*, 4:130 (“O you who believed do not devour usury, making it double and the readable and be careful of [your duty] to God that you may be successful.”); KORAN, *Al-Nisa*, 4:161 (“Taking usury though indeed they were forbidden and devouring the property of people falsely and we have prepared for the unbelievers from among them a painful chastisement.”); KORAN, *Ar-Rom*, 30:39 (“And whatever you lay out as usury, so that it may increase in the property of man, it shall not increase [its value] with God.”).

<sup>155</sup> KORAN, *Al-Bagharah*, 2: 275 (“Those who engage in Riba [interest] will not stand on the Day of Resurrection . . . whoever receives an admonishment from his Lord and then stops engaging in usury shall not be punished for the past conduct . . . but whoever returns [to usury] are the dwellers of the fire.”).

<sup>156</sup> KHOMEINI, *supra* note 128, at 65 (translated by the author).

Some Iranian clerics have considered interest as merely an exchange of money for money, selling the present cash to a long term or predetermined time of calendar days.<sup>157</sup> According to Ayatollah Ali Khamenei, the Leader of the Islamic Republic, if parties to monetary transactions undertake such transactions in order to escape the prohibited nature of the interest and, in reality, the transaction is to gain interest, it would be considered “haram” (forbidden).<sup>158</sup> According to an Iranian professor from Beheshti School of Law, “[t]he outcast nature of interest in Islam is definitive and is not subject to doubt or debate.”<sup>159</sup> In some jurisdictions outside Iran, a 12% annual interest rate may be acceptable. However, this view is rejected by Iranian clerics. That is, no matter how small the rate of interest is, it would be considered as an additional mandatory exchange and thus becomes taboo.

### *B. Treatment of Interest under the Law of Iran*

The prohibition of interest on banking and monetary transactions in Iran is not confined to debates by the interested groups, participants in Islamic mosques and seminaries, or participants in meetings of ecclesiastical deliberations. The issue of giving or taking interest in Iran has indeed more temporal and serious consequences. Twenty-eight years after the Islamic Revolution, the Criminal Code of Iran was amended to reflect the clerical prohibition concerning interest. The amended law squarely and directly addresses the issue of giving or taking interest. The Criminal Code of Iran, under the title of “Bribery, Interest and Fraudulent Conduct,” among other actions punishable by law, addresses the question of giving or taking interest. Article 595 of the Criminal Code, ratified by the Islamic National Assembly is as follows:

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<sup>157</sup> See Ayatollah Makarem Shirazi, *Banking Transactions from the Perspective of the Shia Ayatollahs*, Institute of Monetary Research of the Central Bank of Iran, at 206 (2008).

<sup>158</sup> See *FAQ*, THE OFFICE OF THE SUPREME LEADER, GRAND AYATOLLAH SAYYID ALI HOSSEINI KHAMENEI, <http://www.leader.ir/tree/index.php?catid=38> (last visited Jan. 24, 2017).

<sup>159</sup> See MOHAMMED SOLTANY, *BANKING LAW* 2d Ed. 39 (Mizan Legal Foundation 2015).

Any agreement between two, or among several, individuals based on any agreement including purchase, borrowing money or exchange of money, and alike, to buy, borrow, accept [money] and alike, with the condition of receiving additional sums for [re]payment, will be considered as usury and [therefore,] a criminal conduct. Persons who commit such acts, whether the receiver or the payer of such interest, shall be convicted to between six months to three years' incarceration and up to 74 lashes as well as payment of sums equal to the amount of interest, as [his/her] financial punishment.<sup>160</sup>

Thus, according to the Islamic Criminal Code of Iran, giving or taking interest is statutorily a criminal offense and punishable by law.

The statutory and Sharia-based prohibitions notwithstanding, the banking business in Iran is thriving. Presently in Iran, approximately 75% of adults have a bank account, and some Iranian banks are considerably large.<sup>161</sup> In fact one study shows that five of the largest Iranian banks are among the top 1,000 banks in the world. Further, Iran's banks hold over a third of the total Islamic banking assets globally.<sup>162</sup> The middle class and the ordinary people, despite such pungent and stern prohibition of interest-based transactions, are routinely engaged in interest generating banking.

So how, despite the fierce and torrential religious and legal prohibition on giving or taking interest, have the Iranian banks been able to provide interest to depositors? Of course, both the religious taboo and the legal prohibitions concerning interest operate. Under the patrimonial system, such acts are considered to be elements of corrupt behavior. However, the answer to the interest bearing corrupt conduct, otherwise forbidden by law, could also be found in the patrimonial code of conduct.

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<sup>160</sup> MAJMU'AH QAVANINI JAZAI [CODE OF CRIMINAL LAWS], art. 595 [1996] (Iran) (translated by the author).

<sup>161</sup> MOHAMMAD R. JAHAN-PARVAR, *THE PRACTICE OF CENTRAL BANKING IN THE ISLAMIC REPUBLIC OF IRAN: IS THERE ROOM FOR REFORM?* 8 (2013), [http://www.li.com/docs/default-source/future-of-iran/the-future-of-iran-\(economy\)-the-practice-of-central-banking-in-the-islamic-republic-of-iran-is-there-room-for-reform-pdf.pdf?sfvrsn=2](http://www.li.com/docs/default-source/future-of-iran/the-future-of-iran-(economy)-the-practice-of-central-banking-in-the-islamic-republic-of-iran-is-there-room-for-reform-pdf.pdf?sfvrsn=2).

<sup>162</sup> See *Top 1000 World Banks*, THE BANKER, <http://www.thebanker.com> (last visited Aug. 21, 2016).

*C. Judicial Accommodations Concerning Interest*

To overcome the prohibitive position of the Islamic Criminal Code of Iran, one might attempt to classify a banking transaction as something else. The most common classification for an Iranian banking transaction is a “partnership.” There is no prohibition, religious or under the law, for a bank in Iran to enter into a legitimate and lawful “partnership agreement” with its client; the depositor. In a partnership, the bank will pay a fixed amount of funds to the depositor (the partner). Classifying transactions as a “partnership” provides a platform for ordinary banking transactions, and the depositor will, theoretically participate in a “partnership” scheme by depositing partnership-based cash. The partnership scheme is best illustrated as follows:

1. The depositor (D) provides funds in the bank and, thereby, becomes a partner in a fictitious business project (such as construction or investment, etc.).
2. The bank (B) collects capital (accumulation of funds received from various depositors such as D) to the hypothetical project. (It may be that the bank will provide a loan to a de facto business entity or, alternatively, will wait until a suitable business entity could be found).
3. The depositor (D), under the rubric of partnership, becomes a de jure partner of the construction project.
4. Periodically, the depositor (D) receives a fixed amount of funds from the bank as the depositor's share of profit in such partnership agreement.
5. The depositor's right over the periodical payments is not, (in theory only), based on the “percentage” of the interest to be paid by the bank. Such pattern of payment would be: a) against the principles of Islamic law; and b) in violation of the Islamic Criminal Code of Iran.
6. The Bank will periodically pay a fixed amount of funds to the depositor. In reality, however, such fixed amount will be equal to the otherwise pre-arranged percentage that the Government of Iran and the Central Bank of Iran have

determined at the time to be the monetary interest for the country.<sup>163</sup>

In applying the above-mentioned scheme, banks can engage normal interest paying financial institutions without exposing themselves to religious constraints or the punitive action as provided in the Criminal Code. According to *Business Monitor International*, “[t]heoretically, the Iranian banks are Islamic institutions. In practice, earnings rates and other metrics are dictated by the government – and not necessarily according to commercial needs. The Iranian banks are not generally regarded as Islamic institutions by the rest of the Islamic world.”<sup>164</sup>

In the above scenario, the payment to the depositor of the funds by the bank is based on a perceived profit received by the customer of the bank in a *de jure* partnership. Unlike genuine partnerships, however, such income is fixed. Therefore, the parties (the bank and the depositor) effectively designate the depositor as a *de jure* partner who shares in the profits associated with the perceived partnership.

It must be noted that due to a hyper-inflationary economy, interest rates in Iran in the recent past have reached 16.2% to 19.7% annually.<sup>165</sup> Depositors use the high interest rate as an attempt to escape from the diminishing value, and purchasing power, of the Iranian Riyal. According to one observer, “Iran is one of a handful of countries that have sustained double-digit inflation for over three decades. Zimbabwe and Venezuela are among the other members of this group.”<sup>166</sup> Despite the high returns on deposited funds with *de facto* interest rates, it has not worked well. According to a Coface report issued in March 2016, a European economic research group, the Iranian banking sector is primarily dominated by state-owned banks.<sup>167</sup>

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<sup>163</sup> MAJMU’AH QAVANINI JAZAI [CODE OF CRIMINAL LAWS], art. 595 (translated by the author).

<sup>164</sup> Business Monitor International, Iran Commercial Banking Report, Q1 2014, at 9 (on file with the author).

<sup>165</sup> See IMF 2015 Iran Report, *supra* note 152, at 10.

<sup>166</sup> JAHAN-PARVAR, *supra* note 161, at 3.

<sup>167</sup> The Group Mediterranean and Africa Economists, *Iran: Sharp Turn Ahead, Drive Carefully*, COFACE, 9 (Mar. 2016), <http://www.coface.com/News-Publications/Publications/Iran-sharp-turn-ahead-drive-carefully> [hereinafter Coface 2016 Iran Report] (stating that “[t]he Iranian banking sector is dominated by state-owned banks. Six of the largest are commercial banks (the main one being Bank Melli) and five are specialised banks. Iranian banks operate

Another problem with the Iranian banking operation is that it competes with unlicensed individuals (Havaleh) and financial institutions. These individuals and businesses act on the basis of mutual trust, and can absorb up to 16% of deposits in some cases. However, the ability of the banking system in Iran to meet the rising post-sanction financial needs associated with the expected growth is questionable. The contribution made by the financial institutions to the economy's growth via banking credit "is not efficient and is heavily controlled by the authorities."<sup>168</sup> As one expert has observed, "[r]eal interest rates that remain negative for extended periods typically herald flight of capital, a perennial feature. Capital owners are reluctant to commit to long term investment. In short, it [has resulted] in the misallocation of resources and loss in economic efficiency."<sup>169</sup>

#### *D. Customary Requirements for Commercial Transactions with Iran*

Considering the above, as will be seen later, despite the relative and moderate resumption of certain transactions between Iran and a few countries, the channels of credit in the United States will not be readily available to Iran. According to the U.S. Export-Import Bank ("U.S. Exim Bank"), "Iran is still closed to [U.S.] companies. President Obama [had] made enormous progress but in terms of trade, it's still closed. I don't know what the future is but they're still registered as state-sponsored terrorism."<sup>170</sup>

In many cases, the sources of credit for international commercial transactions are not different from credit for national transactions. They involve the prerequisite banking credit and security similar to those normally found in

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according to Islamic principles. The strengthening of sanctions and 2012 and the exclusion of Iranian banks from the international trading system have enfeebled the banking sector. Their profitability remains low and the return on assets was estimated at only 1% in 2012/2013.").

<sup>168</sup> *Id.*

<sup>169</sup> JAHAN-PARVAR, *supra* note 161, at 8.

<sup>170</sup> Melodie Michel, *Who will finance Iran's €40bn of deals with Europe?*, GLOBAL TRADE REVIEW (Mar. 2, 2016), <http://www.gtreview.com/news/mena/who-will-finance-irans-e40bn-of-deals-with-europe/> (statement of Fred Hochberg, Chairman of the U.S. Exim Bank). The U.S. Exim Bank has also been a longtime supporter of Boeing, a U.S. Company. *See id.*

transactions that do not cross-national borders. Commercial transactions with Iran will require various forms of contractual arrangements, credit facilities and financial security. Many of these instrumentalities are normally operative and available in transnational commercial agreements as well as in transactions that do not cross-national borders.

A commercial or investment transaction with Iran will require the basic sales agreement between the seller country and Iran, and Iran's application for letter of credit with its corresponding bank in Iran. Any transaction with Iran will involve the following:

- a) The letter of credit whereby the Iranian bank will commit itself to the European or American company on certain conditions. The letter of credit will probably be forwarded through the seller's bank which will act as agent.
- b) The contract for shipping the products to Iran (usually in the form of a bill of lading).
- c) The contract for insurance of the cargo.
- d) The security interests in the products Iran is buying (in case the Iranian buyer is borrowing from the domestic bank to pay for the products).
- e) A bill of exchange forwarded by the seller with the bill of lading.

In any transnational commercial transaction, the seller performing such a transaction would rely on the buyer's creditworthiness, as established by the respective banks. Due to the absence of any active commercial relationship between Iran and European or American sellers in recent memory, such sellers may prefer to use their own financing arrangements related to the commercial transaction. For example, a French seller may borrow money on the strength of its own financial and credit history. To add to the complexity of the transaction, there are a number of legal requirements and regulatory regimes on the part of the Western European companies concerning tariffs and customs, shipping contracts, the power of the banks to issue letters of credit, and parameters for financing international commercial transactions. Significant issues related to conflict of laws may emerge between the Western corporate partners and entities operating within the Islamic Republic of Iran.



#### IV. Iran's International Commercial Transactions and Global Security Issues

As a result of the JCPOA, Iran is permitted to engage in limited commercial transactions with the international community.<sup>171</sup> Further, European banks are able to release at least 100 billion dollars of Iranian funds.<sup>172</sup> Iranian banks will have access to the Society for Worldwide Interbank Financial Telecommunications ("SWIFT") network. Access to SWIFT will enable Iran to transfer funds across the global electronic banking system.<sup>173</sup> Despite the post-JCPOA facilities available to the Islamic Republic, however, Iran could still face problems and difficulties in the conduct of its international commercial transactions.

##### *A. Iran's Position with Respect to International Financial Organizations.*

The main impediments to Iran's international banking transactions are not because of the prohibition of money interest under the laws of Iran,<sup>174</sup> nor are they due to the strict Islamic treatment of interest.<sup>175</sup> Rather, Iran's main obstructions with

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<sup>171</sup> See JCPOA, *supra* note 5, ¶¶ 19, 21.

<sup>172</sup> Matt Pearce, *Iran's Frozen Money has Begun to Thaw*, L.A. TIMES (Jan. 20, 2016), <http://www.latimes.com/world/middleeast/la-fg-iran-frozen-assets-20160120-story.html> (reporting a statement made to the U.S. Congress by David S. Cohen, former Undersecretary of Treasury for Terrorism and Financial Intelligence).

<sup>173</sup> Patrick M. Connorton, *Tracking Terrorist Financing Through Swift: When U.S. Subpoenas and Forgery Privacy Law Collide* 76 FORDHAM L. REV. 283, 287 (reporting that SWIFT was founded in 1973 with a group of 239 banks from 15 countries, and that the founding banks hoped to create "a shared worldwide data processing and communications link and a common language for international financial transactions."). SWIFT is an internationally recognized identification code used by banks for global funds transfers, and is used for international financial transactions among the member banks worldwide. Without the membership in SWIFT, financial messages by banks could not be transferred promptly and securely. With thousands of member organizations all over the globe, Swift provides instructions to financial institutions. Virtually "every major commercial bank, as well as brokerage houses, fund managers and the stock exchanges, use its services." See Eric Lichtblau and James Risen, *Bank Data Shifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1.

<sup>174</sup> MAJMU'AH QAVANINI JAZAI [CODE OF CRIMINAL LAWS], art. 595 [1996] (Iran).

<sup>175</sup> See KORAN, *Al-Baqara*, 2:276.

respect to international banking operations are derived from its pursuit of two-dimensional policy concerning international banking transactions.<sup>176</sup> While making a considerable effort to establish customary financial relations with a global banking system, the Central Bank of Iran is simultaneously constrained with the pursuit of ideologically oriented financial policies started since the 1979 Revolution.<sup>177</sup> These policies primarily relate to claims concerning money laundering and terrorist financing. On May 17, 2016, for the first time after the Islamic Revolution of 1979, and in an overall and on-the-scene examination of the banking policy and operation of Iran, the IMF Deputy made the following announcement concerning Iran's international banking policy:

Two important priorities for the short term relate to the banking system. First, it will be critical to begin restructuring banks – both at their operational level and their high level of non-performing loans . . . Second, given the difficulties for Iranian banks in reintegrating to the international financial system, the authorities should persevere with strengthening the framework for anti-money laundering and combating the financing of terrorism (AML/CFT), which should be critical to facilitate such reintegration.<sup>178</sup>

Thus, in order for Iran to conduct international trade with the help of the international banking system, there is a crucial need to reform those policies concerning money laundering and

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<sup>176</sup> Najmeh Bozorgmehr, *Iran's 'outdated' banks hamper efforts to rejoin global economy*, FT.COM (Jan. 19, 2016), <http://on.ft.com/1ZK0ko0> (reporting that "Iran's lenders — most of which are nominally private but affiliated to state bodies — have long operated with low capital adequacy requirements and inadequate regulatory and supervisory mechanisms. They were further weakened by the policies of [Mahmoud Ahmadinejad], who forced them to provide cheap loans to small businesses and the poor, as well as the sanctions.").

<sup>177</sup> See Ebrahim Hosseini-Nasab & Yousef Shabbani Balanchi, *Government Banking and Economic Growth in Iran*, 8 IRANIAN ECON. REV. 23, 26-30 (2003) (providing an overview of the Central Bank's efforts and Iranian government policies with respect to banking); see also Sima Motamen-Samadian, *The Role of Government in the Iranian Banking System*, 2001-11, in IRAN AND THE GLOBAL ECONOMY: PETRO POPULISM, ISLAM AND ECONOMIC SANCTIONS (Parvin Alizadeh & Hassan Hakimian eds., 2014).

<sup>178</sup> Press Release, Statement by Mr. David Lipton, First Deputy Managing Director of the IMF, at the Conclusion of his Visit to Iran, No. 16/224 (May 17, 2016), <https://www.imf.org/en/News/Articles/2015/09/14/01/49/pr16224>. Mr. Lipton was the first senior IMF official to visit Iran since the 1979 Islamic Revolution.

financing international groups that Western states consider to be security risks.<sup>179</sup> Established in 1989 by the G7 Heads of the States or governments and the President of the European Commission, the Financial Action Task Force (“FATF”) is a global anti-terrorism and anti-money-laundering financial watchdog that observes the financial activities of various countries with respect to their contribution to terrorism degrading global security.<sup>180</sup> The Islamic Republic of Iran is a member state of the FATF. However, a major banking and credit-related problem facing the Islamic Republic of Iran concerns its international transactions with the world community in general, and the FATF in particular, such as the periodical policy declarations that the FATF requires.

The FATF issued a public statement in early 2016 concerning the Islamic Republic of Iran:

The FATF reaffirms its call on members and urges all jurisdictions to advise their financial institutions to give special attention to business relationships and transactions with Iran, including Iranian companies and financial institutions. . . . The FATF urges Iran to immediately and meaningfully address its . . . deficiencies, in particular by criminalising terrorist financing and effectively implementing suspicious transaction reporting requirements.<sup>181</sup>

Thus, a major impediment to Iran’s international trade is political in nature. Although Iranian oil—and, to a lesser extent, agricultural goods—will return to the global market, and foreign financial institutions, banks, and corporations will legally be able to renew business with the Islamic Republic of Iran, several key restrictions, which started in 1983, remain potent. These restrictions are associated with Iran’s reported state-sponsored acts of terrorism, its weapons program, and its human rights

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<sup>179</sup> See Stuart Levey, *Kerry’s Peculiar Message about Iran for European Banks*, WALL ST. J. (May 12, 2016), <http://www.wsj.com/articles/kerrys-peculiar-message-about-iran-for-european-banks-1463093348>. Mr. Levey was the former Under Secretary for Terrorism and Financial Intelligence of Treasury.

<sup>180</sup> The G7 Heads of State is an informal block of industrialized democracies composed of the United States, France, Germany, Italy, Canada, the United Kingdom and Japan. Until 2014 Russia was a member of the Group (then termed the G8). However, after the annexation of Crimea in March 1998 Russia’s membership was suspended.

<sup>181</sup> FATF Public Statement – 19 February 2016, *supra* note 16.

violations.<sup>182</sup> Further, embargo-related restrictions prohibiting the export of arms and missiles to Iran for a period of five years and eight years, respectively, will remain operative, and must be enforced by all members of the United Nations.<sup>183</sup>

The main issue concerning Iran's standing in gaining the trust of the international community regards the perception of international financial organizations concerning Iran's perspectives on global security. Iran's perception with respect to global security is substantially different from—and at times opposes—the notions generally accepted in the U.S. and Western European countries. Further, from the perspective of Western corporations, Iran's extra-constitutional establishments, associated with its vast and constraining domestic financial network, add to the complexity of conducting trade with Iran.<sup>184</sup>

For these reasons, international financial organizations have taken a cautionary approach in advising their members concerning the Islamic Republic's policies in obtaining credit to engage in commercial transactions with Western banks. Particularly, the FATF's strategy towards Iran has been incremental in a manner befitting its nature as an international

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<sup>182</sup> See Jay Solomon, *Shift Clouds Iran Nuclear Deal*, June 26, 2015, WALL ST. J., at A9. In 1995, the United States ended all U.S. investments in Iran, including investments related to oil and gas, and exporting U.S. goods to Iran. These sanctions are expected to survive, the JCPOA notwithstanding. See *Iran Sanctions and the Implementation of the JCPOA: Lots of Changes, but Little Impact on U.S. Businesses?*, MCGUIREWOODS (Jan. 20, 2016), <https://www.mcguirewoods.com/Client-Resources/Alerts/2016/1/Iran-Sanctions-Implementation-JCPOA.aspx> (“notwithstanding the news stories describing the lifting of sanctions, very little has changed for most U.S. businesses.”). Exceptions to such sanctions include sale of civilian aircraft to, and import of goods including pistachios, rugs, and caviar from Iran. See U.S. Treasury JCPOA FAQ, *supra* note 72.

<sup>183</sup> See *The Implications of Sanctions Relief Under the Iran Agreement: Statement before the Senate Committee on Banking, Housing and Urban Affairs*, 113th Cong. 3 (2015) (statement from the Hon. Juan Zarate, Senior Adviser to the Center for Strategic and International Studies), [https://csis-prod.s3.amazonaws.com/s3fs-public/legacy\\_files/files/attachments/ts150805\\_Zarate.pdf](https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/attachments/ts150805_Zarate.pdf). See [www.Chamber-International.com](http://www.Chamber-International.com).

<sup>184</sup> See generally OTTOLENGHI, *supra* note 27, at 41-59. The extra-constitutional establishments in Iran are entities that are independent of, and separate from, the governmental bureaucracy. The most powerful of such organizations is the Islamic Revolutionary Corps (IRGC) which was created during the Iranian Revolution of 1979 and received its constitutional legitimacy under Article 150 of the Constitution of the Islamic Republic.

financial police watchdog. The FATF has urged its members “to monitor their financial institutions such as the banks to give special attention to their business relationships and transactions with Iran,” including Iranian companies and financial institutions.<sup>185</sup>

Following the agreement between Iran and the 5+1 countries, the Islamic Republic has undertaken a commitment to an “Action Plan” concerning anti-money laundering in international trade, as well as financing entities engaged in international terrorism.<sup>186</sup> As a result, on June 24, 2016, the FATF announced that it would welcome Iran’s adoption of “high-level political commitment” to a plan to address “its strategic AML/CFT deficiencies.”<sup>187</sup> Thus, the Paris-based organization amended its previous restrictions on Iran’s international banking and issued the following recommendations:

The FATF . . . has suspended counter measures for 12 months in order to monitor Iran’s progress in implementing the Action Plan. If the FATF determines that Iran has not demonstrated sufficient progress in implementing the action plan at the end of that period, FATF’s call for counter-measures will be reimposed. If Iran meets its commitments under the Action Plan in that time period, the FATF will consider next steps in this regard.<sup>188</sup>

### *B. Quasi-Banking Institutions in Iran*

Traditionally, Iran’s quasi-banking organizations were small financial companies that engaged in lending money to the demanding market.<sup>189</sup> The individuals and financial institutions engaged in the business of lending money have developed a considerable network of quasi-banking activities for two

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<sup>185</sup> FATF Public Statement – 19 February 2016, *supra* note 16.

<sup>186</sup> See *Iran: six months after sanctions relief – a briefing for financial institution clients*, ASHURST LLP, (July 29, 2016), <https://www.ashurst.com/en/news-and-insights/legal-updates/iran-six-months-after-sanctions-relief/>.

<sup>187</sup> Public Statement, FINANCIAL ACTION TASK FORCE (June 24, 2016), <http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/documents/public-statement-june-2016.html>.

<sup>188</sup> *Id.*

<sup>189</sup> See IMF, *Islamic Republic of Iran—Selected Issues Paper*, Country Report No. 04/308, at ¶ 61 (Sept. 2004), <https://www.imf.org/external/pubs/ft/scr/2004/cr04308.pdf> (detailing certain quasi-banking practices in Iran, including those engaged in by *Bonyads*).

reasons. The first reason was the impact of sanctions, coupled with an inability of Iranian institutions engaged in traditional banking business to utilize financial connections, such as SWIFT, that were associated with Western banks.<sup>190</sup> The second reason was related to the financial need for a banking system by the extra-constitutional organizations in Iran. The extra-constitutional entities in Iran have the clout of both companies and agencies, and “their release from financial curbs could of itself help ease return of swathes of the economy to the mainstream of world trade.”<sup>191</sup> These extra-constitutional organizations have developed a vast network of business throughout the country. Doing business in capital-incentive activities such as imports/exports, building infrastructure, and developing ports and airports would, inevitably, require banking services by traditional banks. These organizations, in the absence of a traditional banking system, or in order to expand their economic activities to yet another sector, engaged in the banking business, or quasi-banking activities.<sup>192</sup> Although sanctions imposed on Iran’s economy were not the only reason for the development of the quasi-banking system in Iran, sanctions played a considerable role in their expansion.

It is unclear if these Iranian extra-constitutional organizations will be allowed to do business with U.S. and Western European countries in the wake of the JCPOA agreement. One example of such an organization is Mehr Bank. Mehr was an umbrella firm, which included Mehr Housing Development and Investment Company, Mehr Ayandeh-e Neghar Commerce and Services Company, and Tadbirgaran-e Atiyeh Iranian Investment Company. These subsidiaries originally operated as somewhat separate entities, but later ballooned into a holding conglomerate that engaged in buying and selling ship, truck, and industrial equipment.<sup>193</sup>

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<sup>190</sup> See ABDELALI JBILI, VITALI KRAMARENKO & JOSÉ BAILÉN, *ISLAMIC REPUBLIC OF IRAN: MANAGING THE TRANSITION TO A MARKET ECONOMY* 21 (2007) (“Informal finance [in Iran] is common with high rates of return, reflecting lack of access to bank financing by small and medium-size enterprises.”).

<sup>191</sup> Babak Dehghanpisheh and Yeganeh Torbani, *Firms linked to Revolutionary Guards to win sanctions relief under Iran deal*, REUTERS (Aug. 9, 2015), <http://www.reuters.com/article/iran-nuclear-sanctions-idUSL5N10G1TD20150809>.

<sup>192</sup> See JBILI, KRAMARENKO, & BAILÉN, *supra* note 190, at 20–21.

<sup>193</sup> GOLKAR, *supra* note 27, at 163.

Tadbirgaran-e-Atiyeh was initially involved primarily in accounting and financial services.<sup>194</sup> Following an annual growth of 70% to 80% within a period of five years, Mehr Finance and Credit Institution was upgraded to Mehr Bank. Today, Mehr Bank has an expansive network of reportedly 700 branches throughout Iran.<sup>195</sup>

As a result of their association with organizations such as the IRGC, and through a systematic financial *modus operandi*, these corporate entities have organized a virtual and high-volume banking operation within Iran.<sup>196</sup> However, these institutions did not have any legitimate global banking qualifications and were not recognized by the major banking associations, credit organizations, or credit-setting institutions of the world.<sup>197</sup> The FATF was unequivocal that “[i]f Iran fails to take concrete steps to continue to improve its CFT regime, the FATF will consider calling on its members and urging all jurisdictions to strengthen counter measures in June 2016.”<sup>198</sup> As a result, the FATF has given a window of opportunity to Iran, its banks and its financial organizations to perform within the norms established by the international financial community. This will enable Iran to conduct banking and financial transactions at an international level. As a result, in conducting its international commercial transactions, Iran’s banks and financial institutions will have access to credit, and will use such credit to enable Iran to attract investment and conduct trade at a global level. Presently, however, the suspension of the FATF’s banking and credit recognition counter measures against Iran is temporary, and their continuation will depend on Iran’s business conduct within those spheres. That means adherence to international norms concerning money laundering, unofficial banking transactions, and cash transfers of money across international borders to finance ideologically oriented clienteles.

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<sup>194</sup> *Id.*

<sup>195</sup> GOLKAR, *supra* note 27, at 163; *see also* *The Islamic Revolutionary Guards Establish Own Bank*, RADIO ZAMANEH (Aug. 24, 2010), <http://www.zamaneh.com/enzam/2009/09/iran-revolutionary-guards.html>.

<sup>196</sup> GOLKAR, *supra* note 27, at 163 (noting that “Mehr Bank has an expansive network of more than seven hundred branches throughout the country.”).

<sup>197</sup> *See* FATF Public Statement – 19 February 2016, *supra* note 16.

<sup>198</sup> *Id.*

*C. Money Laundering Act of Iran*

The FATF has major concerns with respect to money-laundering across international banking borders. Every year since 2007, the Basel Institute, a Geneva-based non-profit organization, has evaluated the money-laundering activities of various countries around the globe.<sup>199</sup> Iran remains one of the highest money-laundering countries in the region and beyond.<sup>200</sup> Nevertheless, Iran has anti-money-laundering legislation which precludes money laundering among individuals and financial corporate entities. That legislation defines money laundering as:

- a) Acquisition, possession, keeping or using the proceeds from illegal activities with the knowledge that they have been acquired . . . through a criminal offence.
- b) Change, exchange or transfer of proceeds with the intention of hiding their illegal origin . . .
- c) Hiding or covering up the real nature, origin, source, location, movement, displacement, or possession of proceeds obtained . . . as a result of an offence.<sup>201</sup>

Violators of the Money Laundering Act will “be sentenced to a fine of one fourth of the value of the proceeds of the crime which should be deposited into the public Revenues Account with the Central Bank of the Islamic Republic of Iran.”<sup>202</sup> Further, the violator must return assets of the original money, “and the proceeds derived from the crime comprising the original assets and the profits thereof.”<sup>203</sup>

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<sup>199</sup> See *Annual Reports*, BASEL INST., [https://www.baselgovernance.org/about\\_us/annual\\_reports](https://www.baselgovernance.org/about_us/annual_reports) (last visited Jan. 24, 2017).

<sup>200</sup> *Basel AML Index 2016 Report*, BASEL INST. 4 (July 27, 2016), [https://index.baselgovernance.org/sites/index/documents/Basel\\_AML\\_Index\\_Report\\_2016.pdf](https://index.baselgovernance.org/sites/index/documents/Basel_AML_Index_Report_2016.pdf) (including Iran among the “10 highest risk countries in the 2016 Basel AML Index”); see also Samuel Rubinfeld, *Iran Remains Atop Money-laundering Index*, WALL ST. J.: RISK AND COMPLIANCE J. (Aug. 18, 2015, 12:01 PM), <http://blogs.wsj.com/riskandcompliance/2015/08/18/iran-remains-atop-money-laundering-index/>.

<sup>201</sup> QANUNI SHSTSHWI POOL [Anti-Money Laundering Act of the Islamic Republic of Iran], 1386 [Jan. 22, 2008], art. 2 (Iran), [https://www.unodc.org/tldb/pdf/Islamic\\_Republic\\_of\\_Iran\\_Anti-money\\_Laundering\\_Law.pdf](https://www.unodc.org/tldb/pdf/Islamic_Republic_of_Iran_Anti-money_Laundering_Law.pdf).

<sup>202</sup> *Id.* art. 9.

<sup>203</sup> *Id.*



*D.Standing of Iran's Banking System to Engage in  
International Financial Transactions*

Despite Iran's seemingly reasonable anti-money-laundering legislation, the money-laundering activities in Iran have been among the highest in the world. According to the 2015 edition of the money-laundering index, Iran was amongst the highest risk countries with respect to money-laundering along with Afghanistan, Tajikistan, Mozambique, Ethiopia and a few others.<sup>204</sup> The sources for such findings consist of the World Bank, the World Economic Forum, and FATF.<sup>205</sup> In light of a fairly progressive anti-money-laundering legislation in Iran, why does the Islamic Republic retain a high score of money-laundering and violations in international banking transactions comparable to Afghanistan, Uganda, and Cambodia?

One reason for such classification is the existence of the Unlicensed Financial Institutions ("UFI"), vastly active in Iran. According to a report by the IMF, the use of UFI in Iran is highly prevalent to a point that enforcing agreements between the Central Bank of Iran and commercial banks has been difficult "due to weak bank balance sheets and competition from unlicensed financial institutions."<sup>206</sup> According to the IMF, "[s]ix UFIs reportedly represent 15% of deposits" in Iran.<sup>207</sup> Thus, Iran's UFIs are a reason for its prevalent high domestic interest rates. Further, the UFIs are the cause of high money-laundering and non-performing loans.<sup>208</sup>

Iran's efforts to expand domestic and international trade could be hampered if it fails to eliminate these prevalent UFIs. However, despite the inhospitable financial environment prevailing in Iran throughout the past decade and prior to the JCPOA, the Central Bank of Iran reasonably cooperated with

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<sup>204</sup> See *Basel AML Index 2016 Report*, *supra* note 200, at 4.

<sup>205</sup> *Basel AML Index 2016 Report*, *supra* note 200, at 12-13. To assess a country's money-laundering risk the AML index assigns each country a score on a 0 to 10 scale based on a framework that aggregates and weighs data received from the international organizations.

<sup>206</sup> IMF 2015 Iran Report, *supra* note 152, at 6.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 26.

the Swiss International Finance with respect to the repayment of its loans.<sup>209</sup> In fact, Swiss banking authorities have indicated that Switzerland is “keen to expand its banking relations with Iran in post-sanction era and provide the Iranian banking system with consultations in the areas of training, technical and legal issues as well as finance.”<sup>210</sup>

*E. Organizational Constraints on the Central Bank of Iran, Impeding Banking Transactions in International Trade*

One of the main problems that U.S. companies transacting with Iran may face in the future is identifying Iran as a sovereign government with the Central Bank of Iran. The U.S. may have to determine the identity of the Iranian bank as an alter ego of the Islamic government of Iran. Therefore, it is important to know to what extent, if at all, the Central Bank of Iran is an institutionally independent agency (e.g. similar to the Federal Reserve Bank in the U.S.), separate and independent from the government of Iran in terms of its fiscal policy.

The seemingly independent commercial banks in Iran do not enjoy the relative independence that their counterpart Western banking institutions do. In fact, the Central Bank of Iran, like a state-owned organization, is institutionally subject to constraints by the executive branch.<sup>211</sup> Thus, in terms of administrative hierarchy, the Central Bank of Iran functions more like the U.S. Treasury Department. As an expert in Iranian banks has stated, “[t]he chairman of the BMI (the Central Bank of Iran) serves at the pleasure of the Iranian President. Administratively, BMI is an extension of the office of

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<sup>209</sup> Press Release, Central Bank of the Islamic Republic of Iran, Iran and Switzerland to Cooperate in AML and Combating Financing Terrorism (Mar. 1, 2016), <http://www.cbi.ir/showitem/14403.aspx>.

<sup>210</sup> *Id.*

<sup>211</sup> BERTELSMANN STIFTUNG, BTI 2014 - IRAN COUNTRY REPORT (2014), [https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2014/pdf/BTI\\_2014\\_Iran.pdf](https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2014/pdf/BTI_2014_Iran.pdf) (“the central bank is not an independent institution, as the banking interest rate is often set by the government”); *see also* JACOB ENGWERD ET AL., GOVERNMENT AND CENTRAL BANK INTERACTION UNDER UNCERTAINTY: A DIFFERENTIAL GAMES APPROACH (2016), [https://pure.uvt.nl/ws/files/11022577/2016\\_012.pdf](https://pure.uvt.nl/ws/files/11022577/2016_012.pdf) (concluding that “in the Iranian economy . . . [the] government acts as leader and central bank acts as follower”).

the President and largely subservient to the Ministry of Treasury and Economic affairs. . . ."<sup>212</sup>

Organizationally, the Monetary Committee of the Central Bank of Iran is the highest body in the Central Bank to decide on monetary policies of Iran. One of the members of this high-ranking committee is in fact the General Prosecutor (Attorney General) of the Islamic Republic of Iran who must, by constitutional mandate, be a member of the clergy.<sup>213</sup>

As a result of the structural composition of the banks and the state control of the Central Bank, the executive branch of the government could directly and unabashedly exert its monetary, banking and fiscal policies on the Central Bank. Because of the state controlled nature of Iran's Central Bank, the U.S. plaintiffs in *Bank Markazi* were able to successfully argue that the Central Bank of Iran was an instrumentality of the executive branch of Iran. Therefore, the assets of the Central Bank could be used as a partial redemption of plaintiffs' damages.<sup>214</sup> In the case, Bank Markazi conceded, and the Supreme Court did not dispute, that the bank holds equitable title over the amount it deposited with Citibank.<sup>215</sup>

There are a number of powerful monetary organizations in Iran that are affiliated with extra-constitutional organizations in that country.<sup>216</sup> In practice, these organizations act like banking institutions.<sup>217</sup> Their corporate charters enlist such institutions as banks.<sup>218</sup> It was partially because of these issues that Jack Lew, the U.S. Secretary of Treasury during the Obama

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<sup>212</sup> JAHAN-PARVAR, *supra* note 161.

<sup>213</sup> Monetary and Banking Law of Iran, approved Tir 18, 1351 (July 9, 1972), at art. 18, [www.cbi.ir/page/2234.aspx](http://www.cbi.ir/page/2234.aspx). Under the current Constitution of Iran, the Chief Justice of Iran, who is appointed by the Leader, would retain his office for five years. While in office, the Chief Justice is also able to sit on the Board of the Central Bank of Iran. See GIBBERT H. FLANZ, NICHOLAS M. NIKAZMERAD, & CHANGIZ VAFAI, *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* (Oceana Publications 1980).

<sup>214</sup> Peterson, 627 F.3d. at 1123, n. 2.

<sup>215</sup> Bank Markazi, 136 S. Ct. at 1321.

<sup>216</sup> See Jennifer Rubin, *How Obama's deal would make the West complicit in funding terrorism*, WASH. POST (Aug. 11, 2015), <https://www.washingtonpost.com/blogs/right-turn/wp/2015/08/11/how-obamas-deal-would-make-the-west-complicit-in-funding-terrorism/>.

<sup>217</sup> *Id.*

<sup>218</sup> GOLKAR, *supra* note 27, at 163-64 ("Different forms of the Basij's Involvement in the Economy.").

Administration, was asked by the Senate Financial Services Committee, “are you considering permitting Iranian banks to clear transactions in dollars with the U.S. banks or foreign financial institutions including offshore clearing houses?”<sup>219</sup> The Treasury Secretary was relentless that “the Iranian banks will not be able to clear U.S. dollars through New York . . . [or] hold correspondent account relationships with U.S. financial institutions or enter into financing arrangements with U.S. banks.”<sup>220</sup> Nevertheless, as a result of the JCPOA agreement, 23 major Iranian banks formerly designated as financing the proliferation of nuclear and ballistic missiles and related activities are no longer under any international restriction in their financial transactions.<sup>221</sup> The funds of many Iranian banks that are languishing in banks outside of Iran, unable to be used because of the global sanctions, can now successfully transfer billions worth of their assets from one banking jurisdiction to another. For example, after the demise of the sanctions, Iran successfully transferred “billions worth of assets from banks in South Korea and Japan to banks in Germany and the United Arab Emirates.” According to one expert, the lifting of nuclear sanctions “will probably free up only about \$30 billion worth of assets.”<sup>222</sup>

However, Iranian banks require significant recapitalization. The IMF has made the following recommendations concerning strengthening the Iranian banks:

1. The reintegration of the domestic financial system into the global economy, lowering transaction costs and reducing the size of the informal sector.
2. Better detection of illegal proceeds, including those related to tax evasion and corruption.
3. Adoption of a comprehensive CFT law that properly criminalizes terrorist financing (TF), and contains mechanisms

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<sup>219</sup> Mark Dubowitz & Jonathan Schanzer, *More Dollars for the Ayatollahs*, WALL ST. J. (Mar. 28, 2016), <http://www.wsj.com/articles/more-dollars-for-the-ayatollahs-1459551754>.

<sup>220</sup> *Id.*

<sup>221</sup> See JCPOA Annex II Attachments, *supra* note 5. Bank Saderat was the only major Iranian bank that, because of its facilitation of financing terrorist groups, remained on the prohibitive list. See Rubin, *supra* note 216 (noting that Bank Saderat will also be de-listed in eight years under the JCPOA).

<sup>222</sup> Pearce, *supra* note 110.

for the implementation of United Nations Security Council resolutions related to terrorism and (TF).<sup>223</sup>

The capability or willingness of Middle Eastern banks to monitor terrorist financing is of particular concern to Western banking and security authorities.<sup>224</sup> The Paris-based Financial Action Task Force has indicated that it “remains particularly and exceptionally concerned” about, what it called, the Islamic Republic of Iran’s “failure to address the risk of terrorist financing and the serious threat this poses to the integrity of the international financial system.”<sup>225</sup> The government of Iran has a direct position in policing monetary transactions in that country.<sup>226</sup> Nevertheless, the U.S. Secretary of the Treasury during the Obama Administration announced, based on the authority of Section 311 of the Patriot Act, that he found “reasonable grounds exist for concluding that the Islamic Republic of Iran’s account is of ‘primary money laundering concern’ which would require the domestic financial institutions and agencies in the United States to take certain ‘special measures’ against the primary money laundering concern.”<sup>227</sup>

Under the JCPOA, on Implementation Day, foreign banks can engage with Iranian banks and companies.<sup>228</sup> However, as far as the U.S. government is concerned, it lifted nuclear-related secondary sanctions against Iran and certain non-U.S. persons.<sup>229</sup> In order to meet the requirements of the Department

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<sup>223</sup> See IMF 2015 Iran Report, *supra* note 152, at 18.

<sup>224</sup> See TOM KEATINGE, IDENTIFYING FOREIGN TERRORIST FIGHTERS: THE ROLE OF PUBLIC-PRIVATE PARTNERSHIP, INFORMATION SHARING AND FINANCIAL INTELLIGENCE ix-x (2015), [https://www.icct.nl/wp-content/uploads/2015/07/OP-FININT\\_web\\_low-res.pdf](https://www.icct.nl/wp-content/uploads/2015/07/OP-FININT_web_low-res.pdf) (recommending enhancement of cooperation between governmental agencies and banks to enhance monitoring of terrorist financing activities); ELIAS BLUM, MARTEN LINDBERG & FLORIAN SCHAURER, *OSINT Report 2/2011*, 9 (2011), <http://www.css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pdfs/OSINT-Report-2-2011.pdf> (“Because of the lack of regulation and monitoring in most Arab states, it is difficult to trace money flows and detect illegal movements if the funds are transferred through the Islamic banking system.”).

<sup>225</sup> FATF Public Statement – 19 February 2016, *supra* note 16.

<sup>226</sup> *Anti-money laundering body urges more scrutiny of Iran, North Korea*, REUTERS (Feb. 19, 2016), <http://www.reuters.com/article/us-iran-economy-moneylaundering-idUSKCN0VS2LM>.

<sup>227</sup> 31 U.S.C. § 5318A.

<sup>228</sup> See JCPOA, *supra* note 5, ¶¶ 19(ii), 21(i).

<sup>229</sup> See U.S. TREASURY GUIDANCE REPORT, *supra* note 32, at 4 n.7. (“For

of State, the Central Bank of Iran, as an ombudsman for the private banks in that country, must ensure that client organizations are not engaged in transfer of money to or from terrorist organizations. However, given the organizational structure and work pattern of the some of the Iranian banks, it is highly unlikely that the Central Bank of Iran would easily be in a position to monitor the nature of the activities of each bank and police its financial transactions.

#### *F. Iran's Access to SWIFT and Related Developments*

SWIFT is a globally recognized banking communication system.<sup>230</sup> With over 11,000 financial companies worldwide, it allows the member companies to communicate and transfer finance.<sup>231</sup> From March of 2012 through February of 2016, the Central Bank of Iran and fifteen other major banks in that country were banned from using SWIFT's inter-banking communication system.<sup>232</sup>

Throughout the regime of the economic sanctions, Iran's government has had a problem with communication and creditworthiness with respect to its banks. The practical problem that Iranian banks faced was accepting the credibility of these banks by the international banking community. After

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the purpose of this guidance, the term 'non-U.S. person' means any individual or entity excluding any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States."). However, an entity that is owned or controlled by a real or corporate U.S. person, and established or maintained outside of the United States is eligible to participate in transactions or activities subject to the sanctions removed under the JCPOA, provided that such person is authorized by the OFAC to engage in transactions with Iran. *See id.*; *see also* U.S. Treasury JCPOA FAQ, *supra* note 72.

<sup>230</sup> *Discover SWIFT: Messaging and Standards*, SWIFT.COM, <https://www.swift.com/about-us/discover-swift/messaging-standards> (last visited Jan. 24, 2017) (SWIFT's messaging services are trusted and used by more than 11,000 financial institutions in nearly 200 countries and territories around the world.).

<sup>231</sup> *Id.*

<sup>232</sup> *See* Rick Gladstone & Stephen Castle, *Global Network Expels as Many as 30 of Iran's Banks in Move to Isolate Its Economy*, N.Y. TIMES (Mar. 16 2012), <http://www.nytimes.com/2012/03/16/world/middleeast/crucial-communication-network-expelling-iranian-banks.html>; *Iranian banks reconnected to SWIFT network after four-year hiatus*, REUTERS (Feb. 17, 2016), <http://www.reuters.com/article/us-iran-banks-swift-idUSKCN0VQ1FD>.

2012, Iranian banks were almost entirely deprived of, and disconnected from, the Belgium-based SWIFT.<sup>233</sup> A SWIFT, also known as a Bank Identifier Code ("BIC"), is an international bank code that identifies particular banks worldwide.<sup>234</sup> Approved by the International Organization for Standardization ("IOS"), the network of SWIFT related organizations do not require a specific format for commercial transactions.<sup>235</sup> The identification of accounts and the type of transaction is based on the agreement between the contractual parties.<sup>236</sup> Thus, in any transnational commercial transaction, the role of the banks associated with such transactions is vital. The SWIFT code is also applied when banks engage in transferring money between their sister-institutions.<sup>237</sup> For example, in order for a bank in the purchasing company of Iran to transfer funds to a seller in a European country, the respective banks of the contracting parties must have a credible SWIFT account.<sup>238</sup> At times, some buyers of Iranian crude oil, such as China, reportedly resorted to paying for its Iranian oil in Chinese currency, the Yuan.<sup>239</sup> In some cases, Iran and its buyer of the crude oil have bypassed the banking system by surreptitiously selling oil for gold.<sup>240</sup> In international oil transactions, attempting to use gold or apply barter procedures is inefficient and does not meet the requirements of modern banking transactions.<sup>241</sup> Using precious

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<sup>233</sup> Gladstone & Castle, *supra* note 232.

<sup>234</sup> See Discover SWIFT: Messaging and Standards, *supra* note 230.

<sup>235</sup> Discover SWIFT: Messaging and Standards, *supra* note 230.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> See Charles Recknagel, *Explainer: How Does A SWIFT Ban Hurt Iran?*, RADIO FREE EUROPE RADIO LIBERTY (Aug. 22, 2016), [http://www.rferl.org/content/explainer\\_how\\_does\\_swift\\_ban\\_hurt\\_iran/24518153.html](http://www.rferl.org/content/explainer_how_does_swift_ban_hurt_iran/24518153.html).

<sup>239</sup> Dan Collins, *Rise of the Petro Yuan*, FIN. SENSE (Apr. 15, 2012), <http://www.financialsense.com/contributors/dan-collins/rise-petro-yuan>.

<sup>240</sup> *Dollar Power: America is using the dollar to hurt Iran, would it work?*, ECONOMIST, June 23, 2012, at 76; see also Alfred Adask, *Iran to Sell Crude Oil for Gold*, ADASK'S LAW (Jan. 24, 2012), <https://adask.Wordpress .com/2012/01/24/iran-to-sell-crude-oil-for-gold/>.

<sup>241</sup> See JONATHAN ETON AND MARK GERSOVITZ, POOR-COUNTRY BORROWING IN PRIVATE FINANCIAL MARKETS AND THE REPUDIATION ISSUE 12 (Princeton Univ. 1981), [https://www.princeton.edu/~ies/IES\\_Studies/S47.pdf](https://www.princeton.edu/~ies/IES_Studies/S47.pdf) (noting that "[d]espite these alternatives, it is still probably true that smoothing through international borrowing has benefits and that exclusion from this option represents a penalty").

metal also lends itself to significant corrupt practices by the governments as well as outside institutions.<sup>242</sup>

As a result of the JCPOA, major Iranian banks have reconnected to the SWIFT network. The SWIFT country manager, Onur Ozan, announced that “Swift has completed the on-boarding process for [the Iranian] banks” and that, “[w]e will continue to work with the remainder of the entities that have applied rejoin SWIFT to ensure their smooth reconnection.” Iranian banks reconnected to the SWIFT network after a four year hiatus.<sup>243</sup> The SWIFT limitation on the Iranian banks, though considerably improved, is not complete, since the JCPOA does not repeal all EU sanctions on Iranian banks; as a result, those banks are unable to use SWIFT, which otherwise provides financial facilitation to those Iranian banks that remain listed under EU regulations.<sup>244</sup> The major reason for such disconnect is that SWIFT is incorporated under the laws of Belgium and has to comply with related EU codes.<sup>245</sup> On their own, neither SWIFT nor the IOS could claim authority to make decisions concerning sanctions or lifting a banking embargo.<sup>246</sup> Further, decisions on the legitimacy of financial transactions, such as reinstalling sanctions, rest within the financial institutions handling them and national authorities legally in control of banking transactions. Nevertheless, SWIFT’s global transaction network has reconnected a number of Iranian banks to its system, allowing these delisted banks to resume transactions with foreign financial organizations.<sup>247</sup>

Considering the tumultuous nature of the recent inter-banking financial transactions, the vast majority of countries active in international financial transactions have adopted some

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<sup>242</sup> *Id.*

<sup>243</sup> *Iranian banks reconnected to SWIFT network after four-year hiatus*, *supra* note 232.

<sup>244</sup> Press Release, SWIFT, Update: Iran Sanctions Agreement (Jan. 17, 2016), [https://www.swift.com/insights/press-releases/update\\_iran-sanctions-agreement](https://www.swift.com/insights/press-releases/update_iran-sanctions-agreement).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* As soon as the use of SWIFT by Iran started, Germany’s Henkek, one of the largest household and personnel care manufacturing companies in the world, purchased 30% of the detergent producing Iranian company for a value of around 51 million Euros. *See 51 Million Euro of Iranian Firm’s Shares Sold Via SWIFT*, PAYVAND (May 5, 2016), <http://www.payvand.com/news/16/may/1025.html>.



form of anti-terrorism policies. Until early 2016, Iran did not have such laws in its books. Such legislative omission indicated the lack of seriousness and resolve on the part of Iran's decision makers to combat terrorism. Whatever the reason, it resulted in the denial of Iran's access to SWIFT and consequently to active transnational banking transactions commensurable with Iran's substantial needs for economic development.

On March 5, 2016, Iran's Council of Guardians, which has the authority for judicial review, approved the earlier legislative draft passed by the Islamic National Assembly, entitled "Combating the Financing of Terrorism" ("CFT").<sup>248</sup> The Central Bank of Iran played a major role in drafting and presenting this bill with the Ministry of Finance and Economic Affairs.<sup>249</sup>

#### *G. Agreement Between the Central Bank of Iran and Coface State Guarantees*

The Coface Group is a global credit insurance system operating throughout the world.<sup>250</sup> The primary function of Coface is to provide insurance to companies engaged in international transactions against the possible risk of financial default by their clients.<sup>251</sup> With the support of approximately

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<sup>248</sup> See Press Release, Central Bank of the Islamic Republic of Iran, Ratification of the Law of Combating the Financing of Terrorism (CFT) (Mar. 8, 2016), <http://www.cbi.ir/showitem/14423.aspx>.

<sup>249</sup> The Central Bank of Iran has played a major role in drafting this Act as well as the Anti-Money Laundering Act and their ratification by the Islamic Assembly, as well as the Council of Guardians (COG). Iran's original anti-money laundering bill was drafted by the government in 2010 but underwent a torturous path. In 2011, it was rejected by the Council of Guardians. See Mohammed Affianian, *Anti-money Laundering Law Passed*, FIN. TRIB. (Mar. 9, 2016), <https://financialtribune.com/articles/economy-business-and-markets/37983/anti-money-laundering-law-passed>. The Council of Guardians is constitutionally authorized to exercise judicial review over the acts approved by the Islamic Assembly. QANUNI ASSAASSI IRAN [IRANIAN CONSTITUTION] 1906, art. 91.

<sup>250</sup> See Liz Alderman, *Wary Foreign Businesses Step Back From Greece*, N.Y. TIMES, June 16, 2012, at B1 (naming Coface as one of "the world's largest import-export insurers"); Fabio Benedetti-Valentini, *Coface Warns 2016 Profit Dented by Higher Emerging-Market Claims*, BLOOMBERG (July 5, 2016), <http://www.bloomberg.com/news/articles/2016-07-04/coface-warns-2016-profit-dented-by-higher-emerging-market-claims>.

<sup>251</sup> See Alderman, *supra* note 250; Paul Sullivan, *Protecting Your Business, and Your Bank Account, in Case Clients Don't Pay*, N.Y. TIMES, Mar. 19,

4500 employees,<sup>252</sup> Coface functions in both developed and developing countries; as of 2014, the company had a direct presence in 67 countries, with delivery guarantees in nearly 200 countries.<sup>253</sup> Periodically, Coface makes assessments of a country's risk for about 160 countries in the world.<sup>254</sup>

Considering the importance of a reliable insurance system, it would have been extremely difficult for Iran and its corporate contractual partners, both in Europe and elsewhere, to embark on a new phase of international commercial transactions without having reliable insurance coverage for commercial risks. Thus, in transatlantic commercial transactions of late January 2016 by President Hasan Rohani, a contractual agreement was reached between the parties. The Central Bank of Iran and Coface State Guarantees acting on behalf of the government of France, entered into the export credit insurance agreement.<sup>255</sup> More importantly, this agreement encompassed fees due by Iran, and Coface State Guarantees on behalf of the government of France received dues in the field of export credit insurance.<sup>256</sup> The Coface agreement was an effective way for restoring commercial transactions between France and Iran. In particular, French companies will be able to negotiate with Iran, knowing that the contractual obligations of the parties will be guaranteed for the medium and long-term projects in compliance with the customary rules of international commercial transactions.<sup>257</sup>

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2016, at B4 (quoting a Coface executive: "We can say we know this buyer and you shouldn't ship, or we know this buyer and, yes, you can ship \$500,000.").

<sup>252</sup> *Our Organisation*, COFACE, <http://coface.com/Group/Our-organisation> (last visited Jan. 24, 2017).

<sup>253</sup> *Our History*, COFACE, <http://coface.com/Group/Our-history> (last visited Jan. 24, 2017).

<sup>254</sup> *Economic Studies*, COFACE, <http://www.coface.com/Economic-Studies-and-Country-Risks> (last visited Jan. 24, 2017).

<sup>255</sup> *Iran Central Bank, French Credit Insurer Agree on Debt Settling*, SPUTNIK (Jan. 30, 2016, 3:17 PM), <http://sptnkne.ws/cH6W>.

<sup>256</sup> *Iran Central Bank*, *supra* note 255; (during the sanctions period, the government of France blocked these assets).

<sup>257</sup> *Id.* (noting that "France and Iran signed a batch of 20 trade and construction agreements on Thursday during Rouhani's visit").

## V. Iran's Sanction-Free Investments and Commercial Agreements with Foreign Companies

### A. *Investment and Commercial Agreements with French Companies*

France and Iran opened a new chapter in their relations as France's President Hollande pronounced: "I want this relationship to be useful, useful to our two countries, useful to the region . . . [and] to the world."<sup>258</sup> These pronouncements were made during the two-day visit of his guest, President Hasan Rohani, to France. Some 30 agreements were signed between the government of Iran and French companies.<sup>259</sup> The French export bank, Companies Francoise d' Assurance pour le Commerce Exte'rieur, agreed that, if necessary, it would guarantee French investments in Iran.

The agreements between France and the Islamic Republic of Iran encompass various commercial fields including the: (1) purchase of petroleum; (2) purchase of civil aviation fleet; (3) purchase of passenger cars and buses; and (4) expansion or renovation of Iranian airports. Of these commercial transactions, the agreement between Iran and Total, the French international oil company, may be the most consequential in terms of its overall impact in Iran's future global transactions with the Western world. According to the Minister of Oil of Iran, this agreement encompasses exploration and exploitation of Iran's South Azadeghan oilfield, which it shares with Iraq.<sup>260</sup> Total would be "studying its participation in the (development of) the oilfield."<sup>261</sup> The main question concerning Iran's agreement with Total is what is the nature of the French company's commercial transaction with Iran?

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<sup>258</sup> *Iran and France Sign Major Trade Deals*, VOA NEWS (Jan. 28, 2016, 4:18 PM), <http://www.voanews.com/content/iran-president-hails-turn-in-french-iranian-relations/3166571.html>.

<sup>259</sup> Lara Marlowe, *'New Chapter' as France and Iran Reach Trade Agreements*, IRISH TIMES (Jan. 29, 2016), <http://www.irishtimes.com/news/world/europe/new-chapter-as-france-and-iran-reach-trade-agreements-1.2514274>.

<sup>260</sup> *Total and Iran Sign South Azadegan Agreement - Press TV*, REUTERS (Mar. 24, 2016), <http://uk.reuters.com/article/uk-total-iran-agreement-idUKKCNOWQ2E1>.

<sup>261</sup> *Id.*

The highlights of the Memorandum of Understanding (“MOU”) between Total and the National Iranian Oil Company (“NIOC”) most likely include the following:

1. Preliminarily, Total will purchase up to 200,000 barrels of crude oil per day from Iran.<sup>262</sup>
2. Upon Iran’s request, these sales will be in Euros. This request follows an Iranian policy that promotes the reduction of the Islamic Republic’s obligations to, and financial dependence on, the U.S. dollar with respect to its international creditors.<sup>263</sup>
3. The French party may, if needed, provide the NIOC with technical assistance.<sup>264</sup>

The details of the MOU between Total and NIOC have not yet been publicly announced.<sup>265</sup> Nevertheless, it is clear that Iran seeks to gain access to the European market demand for crude oil.<sup>266</sup> In this respect Iran, in a relatively short period of time, would be able to successfully compete with both Saudi Arabian and Russian crude oil. Further, Iran would have access to the modern Western European oil technology to mend its petrochemical industry such as Nouri Petrochemical

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<sup>262</sup> Matthew Dalton & Inti Landauro, *Iran to Sign Oil Deal With France’s Total*, WALL ST. J. (Jan. 28, 2016), <http://www.wsj.com/articles/iran-to-sign-oil-deal-with-frances-total-1453988040>.

<sup>263</sup> Charles Kennedy, *Iran Signs Oil Deal With Total, Deal Done In Euros*, OILPRICE.COM (Feb. 8, 2016), <http://oilprice.com/Energy/Energy-General/Iran-Signs-Oil-Deal-With-Total-Deal-Done-In-Euros.html>; see also Nidhi Verma, *Exclusive - Iran Wants Euro Payment for New and Outstanding Oil Sales – Source*, REUTERS (Feb. 5, 2016), <http://uk.reuters.com/article/uk-oil-iran-exclusive-idUKKCNOVE1P9> (reporting that “Iran wants to recover tens of billions of dollars it is owed by India and other buyers of its oil in euros and is billing new crude sales in euros, too, looking to reduce its dependence on the U.S. dollar following . . . sanctions relief.”).

<sup>264</sup> See *Iran-France oil contract to take effect Feb 16*, PRESSTV (Feb. 6, 2016), <http://www.presstv.ir/Detail/2016/02/06/448917/Iran-France-Italy-Total-Eni-NIOC-Zangeneh> (reporting Oil and Gas Minister Bijan Zangeneh’s statement that “Iran plans to provide this French company with necessary data for studies.”).

<sup>265</sup> *Iran, France’s Total Sign Confidential Oil Deal: Zangeneh*, PRESSTV (Mar. 24, 2016), <http://www.presstv.com/Detail/2016/03/24/457396/Iran-France-Total-Bijan-Zangeneh-South-Azadegan-Oilfield>.

<sup>266</sup> See Anthony Dipaola & Angelina Rascouet, *Iran Seeks Oil Barter as European Buyers Face Banking Hurdles*, BLOOMBERG (Feb. 25, 2016), <http://www.bloomberg.com/news/articles/2016-02-25/iran-seeks-oil-barter-deals-as-european-buyers-face-bank-hurdles>.

Complex.<sup>267</sup> The MOU is also important because it shows Iran's willingness to invite U.S. international oil companies for cooperation with the NIOC, and it is an indirect reference for U.S. international companies to enter into business rapprochement with various Iranian governmental corporations. In fact, Iran's Minister of Oil reportedly stated that the Iranian government has "no problem with the presence of American companies in Iran. But it is the American government which is creating restrictions for these companies."<sup>268</sup>

In addition to Total, the car manufacturer PSA Peugeot-Citroën has entered into various agreements with the Islamic Republic of Iran.<sup>269</sup> Prior to the sanctions, both companies were trading partners with Iran. Peugeot-Citroën has agreed to invest \$450 million with its counterpart in Iran, Iran's Khodro Corporation, to modernize an automobile factory in Iran.<sup>270</sup> According to the joint venture agreement, the two companies plan to contractually cooperate in modernizing Iran's largest car factory.<sup>271</sup> The new products of this factory will enter into the Iranian market by mid-2017.<sup>272</sup> The initial production target of the joint venture company is planned to be 200,000 vehicles a year.<sup>273</sup> The PSA has indicated that it would sign a final agreement with SAIPA, Citroën's partner in Iran, before the imposition of sanctions.<sup>274</sup>

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<sup>267</sup> See Maryam Rahmanian, *Nouri Petrochemical Complex in Assalouyeh, Iran*, UPI (Jan. 27, 2011), [http://www.upi.com/News\\_Photos/view/upi/a66837a26fb834094509223c86c4385c/Nouri-Petrochemical-Complex-in-Assalouyeh-Iran/](http://www.upi.com/News_Photos/view/upi/a66837a26fb834094509223c86c4385c/Nouri-Petrochemical-Complex-in-Assalouyeh-Iran/) (noting that the complex, "founded in 1964, is the second largest producer and exporter of petrochemicals in the Middle East").

<sup>268</sup> *Iran Open to Oil Output Freeze in the Future*, PRESS TV (Nov. 15, 2015, 6:30 AM), <http://www.presstv.com/Detail/2016/03/13/455426/Iran-oil-exports-sanctions>.

<sup>269</sup> Jason Chow, *Peugeot Signs Car Deal With Iran Khodro*, WALL ST. J. (Jan. 28, 2016, 8:11 AM), <http://www.wsj.com/articles/peugeot-signs-car-deal-with-iran-khodro-1453972892>; Matthew Dalton, *Peugeot Signs Joint Venture to Make Citroëns in Iran*, WALL ST. J. (July 21, 2016, 11:46 AM), <http://www.wsj.com/articles/peugeot-signs-joint-venture-to-make-citroens-in-iran-1469115995>.

<sup>270</sup> Chow, *supra* note 269.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*; see also Dalton, *supra* note 269 (reporting that a "substantial part of the Citroën models is expected to be launched in Iran in 2018").

The Iran–France joint venture is planned to produce modern Peugeot models with estimated investment of \$436 million over five years. Moreover, Airbus has agreed to sell approximately 127 aircraft to Iran Air, and Alstom will complete the Tehran metro lines. Iran’s government also intends to build a second terminal at Imam Khomeini Airport by entering into a planning agreement with the French companies of Bouygues and Aero Ports de Paris (“ADP”).<sup>275</sup>

As for the aviation fleet, Iran has concluded a major agreement to purchase over 100 airliners from Airbus Group in a deal totaling approximately \$27 billion.<sup>276</sup> This includes 45 medium haul planes, as well as the world’s largest passenger plane, the A380. The deal also covers new aircraft orders, and according to Airbus, “a complete package of cooperation in the civil aviation sector.”<sup>277</sup> In early 2017, the Airbus agreement with Iran finally materialized.<sup>278</sup> Iran’s agreement with France’s Airbus Group is one of the major post-JCPOA success stories in international commercial agreements between the Islamic Republic and its European trade partners.

The agreements between Iran and respective French companies are intended to renovate the severely dilapidated industries in certain areas such as air and surface transportation systems. For example, Iran’s civil aviation fleet numbers 140 aircraft with an average age of approximately 25 years, and Iran reportedly has “one of the world’s worst air safety records.”<sup>279</sup> Finally, after approximately four decades,

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<sup>275</sup> Marlowe, *supra* note 259.

<sup>276</sup> See *Iran to buy 118 Airbus aircraft worth \$25 billion*, DAILY MAIL (Jan. 28, 2016, 1:15 PM), <http://www.dailymail.co.uk/wires/afp/article-3421382/Iran-buy-118-Airbus-aircraft-worth-25-billion.html>.

<sup>277</sup> *Id.*

<sup>278</sup> See Tim Hether, *Iran Air takes delivery of first Airbus jet post-sanctions*, REUTERS (Jan. 11, 2017), <http://in.reuters.com/article/iran-aircraft-id-INKBN14V1LX>; see also Press Release, *Iran Air takes delivery of its first of 100 Airbus aircraft*, Airbus (Jan. 11, 2017), <http://www.airbus.com/presscentre/pressreleases/press-release-detail/detail/iran-air-takes-delivery-of-its-first-of-100-airbus-aircraft/>; *Iran Accepts First Airbus Passenger Jet*, RADIO FREE EUROPE (Jan. 8, 2017), <http://www.rferl.org/a/iran-accepts-first-airbus-airliner/28220058.html> (reporting that Iran has ordered approximately 200 commercial airliners, including 80 from U.S. producer Boeing).

<sup>279</sup> *Airbus Says Iran Has Capacity for its Largest Aircraft*, THE IRAN PROJECT (Jan. 31, 2016), <http://theiranproject.com/blog/2016/01/31/airbus-says-iran-has-capacity-for-its-largest-aircraft/>.

from the Islamic Revolution of Iran, on January 8, 2017, Airbus announced that “technical acceptance” of the first plane to Iran’s flagship state-owned carrier, Iran Air, was completed thus effectively marking the transfer of ownership of the planes to the Islamic Republic of Iran.<sup>280</sup> Because the international financial channels between Iran and various European countries are not yet completely normalized, the contractual parties have agreed to use a different source of financing transactions that enjoy priorities.<sup>281</sup> That is, until the reopening of export credit agencies’ credit coverage to the Islamic Republic of Iran, certain banks in Italy and the Netherlands will likely reopen letters of credit with non-designated Iranian banks. In the long run, and as a more reliable financial solution, Coface will likely be working with Iran and European financial institutions involved in Iranian–European transactions.<sup>282</sup>

### *B. Investment and Commercial Agreements with Italian Companies*

Italy has actively sought negotiations with Iran in order to initiate the expansion of the commercial and investment agreements in that country.<sup>283</sup> Almost immediately after the JCPOA agreement was signed, the Italian investment development mission composed of 57 Italian oil and gas companies, active in the fields of engineering, equipment supply, refining, and extraction are “ready for investment agreements with Iranian partners.”<sup>284</sup> Further, the Italian food producing

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<sup>280</sup> Asa Fitch & Robert Wall, *Tehran Begins to Revamp Air Fleet*, WALL ST. J., Jan. 9, 2017, January 9, 2017, A6, Col.6. According to an Iranian official, the Iran-France commercial agreement was “a first step towards restoring the prestige of the civil aviation sector in the region.” Chris Johnston, *Airbus signs \$25bn deal to sell 118 planes to Iran*, BBC NEWS (Jan. 28, 2016), <http://www.bbc.com/news/business-35434483> (statement of Farhad Parvaresh, the CEO of Iran Air).

<sup>281</sup> Bozorgmehr Sharafedin & Tim Hepher, *Iran says reaches deal to acquire Boeing planes*, REUTERS (Jun 14, 2016), <http://www.reuters.com/article/us-iran-transportation-boeing-idUSKCN0Z01QZ>.

<sup>282</sup> See *Iran Central Bank, French Credit Insurer Agree on Debt Settling*, *supra* note 255.

<sup>283</sup> Mirren Gidda, *Iranian President Rouhani Visits Italy, France to Boost Economic Ties*, NEWSWEEK (Jan. 25, 2016, 4:29 AM), <http://www.newsweek.com/iran-president-rouhani-visits-italy-france-business-ties-419027>.

<sup>284</sup> *Iran, Italy ink agreements on transportation, energy*, XINHUA NEWS

companies announced that they might be willing to undertake direct investments in the Islamic Republic of Iran.<sup>285</sup> On January 2016, Danieli, a major European steel company, entered into a total of four major agreements with Iranian commercial entities, worth approximately \$18.4 billion. The main agreements between the two contractual parties included the following: (1) a pipeline contract with Saipem, Italian oil services group, worth approximately \$4–5 billion; (2) various contractual agreements between Iran and Italian steel firm Danieli, amounting to \$6.1 billion; and (3) an agreement between Iran and infrastructure firm Condotte d'Acqua worth approximately \$4.3 billion. These agreements are primarily related to developments in steel and the mineral sector.<sup>286</sup> The overture by President Rohani was enthusiastically positive as he stressed that Iran's market "offers Italian and European investors the opportunity to establish themselves in the entire region."<sup>287</sup>

Iran's major agreement with the Italian partners was in the area of oil and gas.<sup>288</sup> In a memorandum of understanding signed between the Italian ENI Oil Company and National Iranian Gas Export Company, the parties agreed to work on exploration, exploitation, and development of natural gas resources in Iran.<sup>289</sup> However, Matteo Renzi, the former Prime Minister of Italy, whose country was a major European beneficiary of the JCPOA accord, acknowledged during his post-JCPOA visit to

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(Feb. 10, 2016), [http://news.xinhuanet.com/english/2016-02/10/c\\_135087227.htm](http://news.xinhuanet.com/english/2016-02/10/c_135087227.htm).

<sup>285</sup> *Id.*

<sup>286</sup> Steve Scherer & Massimiliano Di Giorgio, *Italy's Danieli to sign \$4 billion in agreements with Iran: government source*, REUTERS (Jan. 25, 2016), <http://www.reuters.com/article/us-iran-europe-danieli-c-idUSKC N0V3128>.

<sup>287</sup> *Iran, Italy sign up to \$18.4bn contracts*, IRAN PROJECT (Jan. 26, 2016), <http://theiranproject.com/blog/2016/01/26/iran-italy-sign-up-to-18-4bn-contracts/>.

<sup>288</sup> See Nasser Karimi, *Iran and Italy Sign Several Deals During Visit by PM Renzi*, AP: THE BIG STORY (Apr. 12, 2016, 2:40 PM), <http://bigstory.ap.org/article/0a37f20a0a0045dd9ca74196456d68cf/iran-and-italy-sign-several-deals-during-visit-pm-renzi>.

<sup>289</sup> See *Iran, Italy ink 6 MoUs, Agreements*, IRAN-BUSINESS NEWS (Apr. 13, 2016), <http://www.iran-bn.com/2016/04/13/iran-italy-ink-6-mous-agreements/>; *Iran and Italy sign cooperation agreements on energy*, ENERDATA (Apr. 14, 2016), [http://www.enerdata.net/enerdatauk/press-and-publication /energy -news-001/iran-and-italy-sign-cooperation-agreements-energy\\_36818.html](http://www.enerdata.net/enerdatauk/press-and-publication /energy -news-001/iran-and-italy-sign-cooperation-agreements-energy_36818.html).



Iran that the main issue would be bank credits.<sup>290</sup> These bank credits, consisting of establishing banking links and opening credit lines, were emphasized by the Italian party as “key to strong economic and trade flourishing.”<sup>291</sup>

### *C. Investment and Commercial Agreements with German Companies*

Since Iran started its industrial modernization program over 100 years ago, German companies have been the traditional investment and commercial partners of Iran in various business transactions. After the JCPOA, a representative of Siemens indicated: “We have a close dialogue with the Iranian government and local partners in the area of infrastructure, energy and technology. We have been active in Iran for 150 years . . . and we have never left the country.”<sup>292</sup> Thus post-JCPOA, Iran has sought various German companies’ cooperation with the Islamic Republic. There are also reports that Iran’s National Petrochemical Company (“NPC”) is negotiating with investors from Germany who “have expressed their readiness to invest €4 to €8 billion in petrochemical projects” in Iran.<sup>293</sup>

### *D. Iran’s Transactions with the United States*

#### *1. Iran’s Commercial Transactions with U.S. Corporations*

With a population of approximately 80 million, including a large generation composed of educated, middle class young people with a vigorous demand for travel after decades of isolation, Iran represents one of the few remaining untapped world markets for multinational corporations, such as Boeing,

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<sup>290</sup> *Iran, Italy ink 7 agreements as Renzi visits Tehran*, TEHRAN TIMES (Apr. 13, 2016), <http://www.tehrantimes.com/news/300555/Iran-Italy-ink-7-agreements-as-Renzi-visits-Tehran>.

<sup>291</sup> *Id.*

<sup>292</sup> See Andrew Ward, *Iran opens talks with Siemens and Rolls-Royce on energy investment*, FT.COM (July 17, 2016), <http://www.ft.com/cms/s/0/270ada6c-4a87-11e6-b387-64ab0a67014c.html#axzz4HzbWIjvr>.

<sup>293</sup> *German Chemical Firms First to Fund Iran Petchem Projects*, IRAN DAILY (Feb. 1, 2016), <http://www.iran-daily.com/News/136083.html>.

Royal Dutch Shell, and Airbus.<sup>294</sup> Historically, the U.S.–Iranian commercial relationship has been vibrant.<sup>295</sup> Prior to the Islamic Revolution, American exporters sold annually \$3.7 billion worth of products to Iran.<sup>296</sup> Iran also exported annually \$2.9 billion worth of Iranian products to the United States.<sup>297</sup> In general, exports from the United States to a foreign country are subject to, and governed by, Export Administration Regulations (EAR).<sup>298</sup> The EAR are issued by the Department of Commerce’s Bureau of Industry and Security (BIS).<sup>299</sup>

After the JCPOA accord, some U.S. companies began taking preliminary steps toward engagement with Iran. The Boeing Company, a Delaware corporation, is one of the most noteworthy U.S. companies engaged in such negotiations.<sup>300</sup> In early 2016, Iran expressed interest in purchasing 737 jets and 777 long-range planes from the Chicago-based manufacturer.<sup>301</sup> Commercial aircraft sales to Iran currently fall into a special permitted category of post–JCPOA regulations. The U.S. Treasury’s Office of Foreign Assets Control (“OFAC”) has provided a “Statement of Licensing Policy” (“SLP”), under which U.S. and non-U.S. persons, including corporate entities, may request specific authorization from OFAC to engage in transactions “for the sale of commercial passenger aircraft and

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<sup>294</sup> See *Iran, with an educated populace of 80 million, becomes a potentially major aviation force*, CAPA (June 1, 2016), <http://www.centreforaviation.com/analysis/iata-iran-with-an-educated-populace-of-80-million-becomes-a-potentially-major-aviation-force-282989>. For more on Iran’s agreement with Royal Dutch Shell, see Monavar Khalaj, Andrew Ward, & Anjli Raval, *Shell signs provisional oil and gas deal with Iran*, FIN. TIMES (Dec. 7, 2016), <https://www.ft.com/content/fa879b24-bc8c-11e6-8b45-b8b81dd5d080>.

<sup>295</sup> See *Iran, the United States and a Political Seesaw*, NYTIMES.COM, <http://www.nytimes.com/interactive/2012/04/07/world/middleeast/iran-time-line.html> (last visited Jan. 24, 2017) (“Far from a monolithic relationship, Iran and the United States have spent as many decades as friends as they have as enemies.”).

<sup>296</sup> Kenneth Gilpin, *Iran-U.S. Trade Up from 1980 Plunge*, N.Y. TIMES, Dec. 26, 1983, at D4.

<sup>297</sup> *Id.*

<sup>298</sup> See 15 C.F.R. § 730.1.

<sup>299</sup> *Id.*

<sup>300</sup> Jon Ostrower & Robert Wall, *Boeing Meets with Iranian Airlines to Discuss Jets, Aircraft Services*, WALL ST. J., Apr. 12, 2016, at A2.

<sup>301</sup> *Id.*

related parts and services to Iran.”<sup>302</sup> According to the special licensing provision:

As of Implementation Day of the JCPOA, specific licenses may be issued on a case-by-case basis to authorize U.S. persons and, where there is a nexus to U.S. jurisdiction, non-U.S. persons to (1) export, re-export, sell, lease, or transfer to Iran commercial passenger aircraft for exclusively civil aviation end-use, (2) export, re-export, sell, lease, or transfer to Iran spare parts and components for commercial passenger aircraft, and (3) provide associated services, including warranty, maintenance, and repair services and safety-related inspections, for all the foregoing, provided that licensed items and services are used exclusively for commercial passenger aviation.<sup>303</sup>

Licenses issued under the SLP are designed to ensure that aircraft sold to Iran will not be resold to any person on the Treasury Department’s sanctions list.<sup>304</sup> Prior to leaving office, the Obama Administration reportedly agreed that Boeing could enter into negotiations with select Iranian carriers.<sup>305</sup> Under present conditions, however, the Boeing deal may be highly complex for a number of reasons, including questions regarding potential dual-use of commercial equipment sold under the agreement, the potential impact that dual-use could have on U.S. national security, intellectual property concerns, and the deal’s conformity with the JCPOA accord.

## 2. The Dual Use Contractual Agreements- Sale of Aircraft to Iran

Under the International Emergency Economic Powers Act (IEEPA), any U.S. license application to sell dual use items to Iran is reviewed under a presumption of denial.<sup>306</sup> Accordingly,

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<sup>302</sup> Office of Foreign Asset Control, Statement of licensing policy for activities related to the export or re-export to Iran of commercial passenger aircraft and related parts and services, U.S. DEP’T TREASURY (Jan. 16, 2016), [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/lic\\_pol\\_statement\\_aircraft\\_jcpoa.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/lic_pol_statement_aircraft_jcpoa.pdf).

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> Ostrower & Wall, *supra* note 300.

<sup>306</sup> 22 C.F.R. § 126.1; *see also* KENNETH KATZMAN, CONG. RESEARCH SERV., RS20871, IRAN SANCTIONS 4 (2016), <https://fas.org/sgp/crs/mideast/RS20871.pdf> (noting that the Export Administration Act, continued by IEEPA, requires “a presumption of denial of any license applications to sell

any licenses to sell aircraft to Iran will be contingent on their exclusive use for commercial aviation purposes. Therefore, in any commercial agreement, such as the sale of aircraft to Iran, significant operational issues concerning surveillance and reliability will arise. Such operational issues are not *per se* related to enforcement of the Boeing contract, and may only become apparent during or after the contract's implementation. This is because some of Iran's extra-constitutional institutions may have aided and abetted acts of terrorism while camouflaging as commercial or charity organizations.

One such company is Mahan Air, a private Iranian airline company which is engaged in the customary commercial airline business of transporting passengers, but has also reportedly participated in operations to carry weapons and paramilitaries through various Iranian cities to a suspected IRGC hub in Abadan, Iran, and from there to their ultimate destination: Damascus.<sup>307</sup> Mahan Air is owned by a 'charity' establishment, Mol-Al-Movahedin Charity Institute, which the U.S. has linked to the IRGC.<sup>308</sup> Predictably, the U.S. Treasury Department has designated Mahan Air as a Specially Designated National ("SDN") on account of its "providing financial, material and technological support to the Islamic Revolutionary Guard Corps'-Quds Force."<sup>309</sup> Specifically, the Treasury Department

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dual use items to Iran.").

<sup>307</sup> Armin Rosen, *This Iranian airline is one of the Assad regime's lifelines*, BUS. INSIDER (Oct. 13, 2015), <http://www.businessinsider.com/this-iranian-airline-is-one-of-the-assad-regimes-lifelines-2015-10> (last visited Jan. 24, 2017) (reporting the statement of Emanuele Ottolenghi, Senior Fellow at the Foundation for Defense of Democracies, that at times the flights take place unannounced, and do not broadcast their actual destination).

<sup>308</sup> Press Release, U.S. DEP'T TREASURY, Treasury Sanctions Supporters of Iran's Ballistic Missile Program and Terrorism-Designated Mahan Air (Mar. 24, 2016) <https://www.treasury.gov/press-center/press-releases/Pages/jl0395.aspx> [hereinafter Mahan Air Sanctions Press Release] (reporting that "Mahan Air was previously designated in October 2011 pursuant to E.O. 13224 for providing financial, material, and technological support to the IRGC-Qods Force (IRGC-QF). The IRGC-QF was previously designated on October 25, 2007 pursuant to E.O. 13224 for its support to numerous terrorist groups."); Anna Mahjar-Barducci, *Terror Air: Airlines Providing Material Support for Terrorists*, GATESTONE INST. (Dec. 7, 2011), <https://www.gatestoneinstitute.org/2563/airlines-support-terrorists>.

<sup>309</sup> Press Release, U.S. DEP'T TREASURY, Treasury Designates Iranian Commercial Airline Linked to Iran's Support for Terrorism, <https://www.treasury.gov/press-center/press-releases/Pages/tg1322.aspx>; see also Omar S. Bahir

sanctioned nine aircraft associated with Mahan Air in March of 2015 on the grounds that the airline company helped the IRGC to “ferry operatives, weapons, and funds in support of the [Syrian President] Asad regime,” an identification which would presumably make it “more difficult for Iran to use receptive practices to try to evade sanctions.”<sup>310</sup>

These dual-use issues create additional complexities with respect to day-to-day operational issues; it is difficult to make a clear distinction between the usual operations of a traditional ‘state-owned’ company and a ‘private’ company when each is engaged in the same line of commercial activities. On March 24, 2016, OFAC designated Mahan Air as an entity in support of Iran’s ballistic missile program.<sup>311</sup> Shortly thereafter, a bill was submitted in Congress “[t]o prohibit the Secretary of the Treasury from authorizing certain transactions by a U.S. financial institution in connection with the export or re-export of a commercial passenger aircraft to the Islamic Republic of Iran.”<sup>312</sup> This bill attempted to “prohibit U.S. financial institutions from facilitating the sale of commercial aircraft to Iran,” thereby preventing planes from falling into the wrong hands, and would provide conditions for engaging in such transactions with Iranian entities.<sup>313</sup> However, once Boeing sells its planes to Iran, it will be very difficult, if not impossible, for the U.S.-based company to engage in effective and workable surveillance with respect to any relationship between state-owned Iran Air and privately owned carriers that may conceivably employ their aircraft for a dual-use purpose.

These security hazards concerning Boeing’s transactions with Iran are compounded by the fact that even if the Trump Administration and the Treasury Department were able to undo the Boeing deal, there would nevertheless be similar

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and Eric Lorber, *Boeing’s Art of the Iran Deal: How to Use Civilian Aircraft to Pressure the Regime*, FOREIGN AFFAIRS (Aug. 28, 2016), <https://www.foreignaffairs.com/articles/iran/2016-08-28/boeings-art-iran-deal>; see also Paul Bucala, *Here’s How Iranian Airlines Are Violating Sanctions*, NAT’L INTEREST (July 14, 2016), <http://nationalinterest.org/blog/the-buzz/heres-how-iranian-airlines-are-violating-sanctions-16958>.

<sup>310</sup> Sohrab Ahmari, *The Mullahs’ Syrian Airlift Gets a Boost*, WALL ST. J., Dec. 17, 2016, at A15 (quoting the U.S. Treasury Department).

<sup>311</sup> Mahan Air Sanctions Press Release, *supra* note 308.

<sup>312</sup> H.R. 5711, 114th Cong. (2016).

<sup>313</sup> *Id.*

outstanding transactions between Iran and the French aircraft manufacturing company Airbus. Airbus, the world's second largest plane maker after Boeing, has entered into an agreement with the Islamic Republic of Iran to deliver 100 planes to Iran Air.<sup>314</sup> This contract is valued at over \$18 billion. In mid-January of 2017, the first of 100 planes that Iran expected to receive through its landmark deal with Airbus landed in Iran's airport.<sup>315</sup> The introductory French deliveries of the aircraft to Iran notwithstanding, the United States could use its leverage in order to contain the Airbus contract to complete the transaction. Even though Airbus is a European company, it could be subject to, and impacted by, U.S. regulatory restrictions.<sup>316</sup> For example, OFAC regulations concerning transactions with Iran could easily be reapplied or reinterpreted.<sup>317</sup> In addition, the Treasury Department could choose to broaden the SDN list.<sup>318</sup> These regulations could somewhat restrict foreign corporate entities doing business with Iran.

Further, in a practical sense, Airbus needs to cooperate with Boeing. Airbus jets contain many American parts and technology that are subject to American export controls.<sup>319</sup> In fact, prior to entering into its agreement with Iran, Airbus

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<sup>314</sup> Robert Wall, *Jet Deals with Iran to Test Trump Policies*, WALL ST. J., Dec. 23, 2016, at B1.

<sup>315</sup> "Historic Day" as Iran's first Airbus jet lands in Tehran, PRESSTV <http://www.presstv.ir/Detail/2017/01/12/505915/Historic-Day-as-Iran-lands-first-Airbus-jet> (last visited Jan. 24, 2017).

<sup>316</sup> See John P. Barker & Michael E. Ginsberg, *Managing Compliance with U.S. Treasury Department OFAC Obligations: Even If Your Business Is Exclusively Outside the U.S.*, 5 GLOBAL TRADE & CUSTOMS J 183 (2010), <http://files.arnoldporter.com/kluwer%20-%20ofac.pdf> ("The regulations define the term "subject to U.S. jurisdiction" to include U.S. citizens, U.S. residents, corporations and other organizations organized under the laws of the U.S., and corporations or other organizations owned or controlled by U.S. citizens or corporations and other organizations organized under the laws of the U.S.").

<sup>317</sup> See 31 C.F.R. § 560.101 ("Differing foreign policy and national security circumstances may result in differing interpretations of similar language among the parts of this chapter.").

<sup>318</sup> Barker & Ginsberg, *supra* note 316, at 184 ("OFAC can and will impose sanctions on non-U.S. companies, including, if the violations are sufficiently severe, adding a company to the Specially Designated Nationals (SDNs) list and thereby severely limiting trade with the U.S.").

<sup>319</sup> See Wall, *supra* note 314.

received a general approval from the U.S. Treasury.<sup>320</sup> Therefore, in the event that Iran Air did not, or could not, adhere to the strict commercial terms of the agreement between Iran Air and Airbus, OFAC could review the original permit of Airbus and decide whether or not American suppliers could continue delivering parts or technical equipment to Airbus. Admittedly, this is not a perfect solution, and it is conceivable that after Airbus and/or Boeing effectuate delivery, Iran's extra-constitutional entities could use a number of American or French planes (or available local aircraft) for restricted non-commercial purposes.

### 3. The Iran-Boeing Contract and U.S. National Security Considerations

Despite the inclusion of Treasury Department provisions concerned with preventing major Iranian companies from using Western aircraft for anything other than strictly commercial activities, enforcement or policing of such provisions once the aircraft reach Iran will prove a complex task. The Iran-Boeing deal and similar contracts create three issues related to the U.S. national security: First, it is not clear how a U.S. company, such as Boeing, could reasonably or reliably surveil operational activities within Iran to ensure that an impermissible commingling of finances will not take place during or after a given subject transaction. Second, given the nature of the airline business, it would not be practical—much less possible—for an American company, such as Boeing, to monitor activities taking place in a foreign country, much less the day-to-day operations of ordinary passengers and persons potentially subject to OFAC controls. Third, it would be impossible for a U.S. company to engage in systematic monitoring, intelligence surveillance, or classifications with respect to cargo—much less passengers' luggage—to determine intent to engage in activities that are illegal under U.S. law.

Iran's perceived reputation in the United States as a state sponsor of terrorism has resulted in the creation of substantial obstacles to financial investment and trade with it or its *alter ego* entities. As long as this perception exists, Iran will be subject

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<sup>320</sup> *Id.*

to intermittent restrictions to international credit facilities and financing for products and services that international financial organizations could otherwise provide. For example, the U.S. Exim Bank is unlikely to make financial guarantees for any sale of U.S. export products to Iran while Iran is listed as a state sponsor of terrorism.<sup>321</sup>

#### 4. Intellectual Property Protection Issues

Another issue of concern in contemporary international transactions is the protection of intellectual property.<sup>322</sup> Iran has enacted the “Patents, Industrial Designs and Trademarks Registration Act” to provide such protections.<sup>323</sup> However, this law provides rather weak oversight for intellectual property. According to one study by U.S. based advocacy group “Property Rights Alliance,” Iran ranked 111th out of 131 countries for intellectual property safeguards.<sup>324</sup> Under the “Patents, Industrial Designs and Trademarks Registration Act”, the owner of intellectual property has the privilege to certain rights against infringement, including the following:

- a) The exploitation of the patented invention in Iran by persons other than the owner of the patent shall require the agreement of the latter. Exploitation of a patented invention includes any of the following acts:
  - 1) If the patent has been granted for a product:
    - i)making, exporting and importing, offering for sale, selling or using;
    - ii)stocking such product for the purpose of offering for sale, selling or using;
  - 2) If the patent has been granted with respect of a process:
    - i)using the process;

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<sup>321</sup> Wall, *supra* note 314 (reporting that even while representatives of Boeing were negotiating with Iran, Fred Hochberg, the Chairman of the Exim Bank stated that: “we are not stepping into Iran.”).

<sup>322</sup> See Gerald J Mossinghoff, *The Importance of Intellectual Property Protection in International Trade*, 7 B.C. INT’L & COMP. L. REV. 235 (1984).

<sup>323</sup> QANUNEH SABT EKHTERA’AT, TARHHAYEH SAN’ATI VA ‘ALAEM TEJARI [Patents, Industrial Designs and Trademarks Registration Act] 1386 [2008] (Iran), [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=197776](http://www.wipo.int/wipolex/en/text.jsp?file_id=197776).

<sup>324</sup> See Cyrus Amir Mokri and Hamid Biglari, *A Windfall for Iran? The End of Sanctions and the Iranian Economy*, 94 FOREIGN AFFAIRS 25, 28 (2015).



- ii) doing any of the acts referred to in paragraph (a) (1) of the present Article in respect of a product obtained directly by means of the process.
- b) The owner of the patent shall, subject to subsection c) thereof and Article 17 [of this Act], have the right to institute court proceedings against any person who performs any of the acts referred to in paragraph (a) above and infringes the patent rights or performs any other acts which will result in infringement of his rights.<sup>325</sup>

As to Iran's commercial transactions abroad, U.S. concerns with the concept of intellectual property are broadly two-dimensional; they concern both national security issues and the value of the intellectual property, in the traditional legal sense, to the owner (e.g. a corporate entity). Challenges to the valuation of aircraft transactions will be of great significance with respect to not only the sale of aircraft or other manufactured products to Iran, but also to technical procedures employed in exploration, exploitation, and production of oil and natural gas with the assistance of foreign companies. In this respect, Iran has laws that may reasonably protect relevant intellectual property. For instance, the "Act for Protection of Authors', Composers' and Artists' Rights" protects "any technical work, innovation and initiation."<sup>326</sup> In terms of its international obligations concerning intellectual property, Iran has signed and ratified the Stockholm Convention Establishing the World Intellectual Property Organization of July 1967.<sup>327</sup> Moreover, Iran has included the WIPO Convention in its compilation of the articles of its civil code.<sup>328</sup>

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<sup>325</sup> QANUNEH SABT EKHTEA'AT, TARHHAYEH SAN'ATI VA 'ALAEM TEJARI [Patents, Industrial Designs and Trademarks Registration Act] 1386 [2008], art. 15 (Iran), [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=197776](http://www.wipo.int/wipolex/en/text.jsp?file_id=197776).

<sup>326</sup> See QANUNI HEMAYAT HUQUQ MUALEFYN VA MUSENEFAN W HONARMANDAN [Act for Protection of Authors', Composers' and Artists' Rights] 1348 [1970], art. 10 (Iran), [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=197798](http://www.wipo.int/wipolex/en/text.jsp?file_id=197798).

<sup>327</sup> Convention Establishing the World Intellectual Property Organization ("WIPO"), July 14, 1967, 21 U.S.T. 1770, 828 U.N.T.S. 3 [hereinafter WIPO Convention]. The WIPO Convention was amended on October 2, 1979, and entered into force on June 1, 1984.

<sup>328</sup> See Golamreza Hojati Ashrafi, Complete Compilation of Laws and Regulations of Civil Law.

For purposes of the Iran-Boeing deal, Iran's most relevant international intellectual property obligations could be derived from its indirect relationship with the World Trade Organization (WTO).<sup>329</sup> Iran is not a member of the WTO, partly as a result of U.S. objections and veto power.<sup>330</sup> Nevertheless, in the absence of Iran's accession to an effective internationally bonded intellectual property obligation, a somewhat viable alternative for Boeing and Airbus could be:

1. Conducting independent investigations for the purpose of collecting intelligence that will ensure that Iran Air is engaged exclusively in the business of commercial transportation;
2. Conducting periodic intellectual property audits;
3. Limiting disclosures by Boeing or Airbus concerning intellectual property rights;
4. Ensuring, to the extent possible, that state-owned Iran Air will not sell or lease its aircraft to privately owned Mahan Air, or other private airlines, such as Iran Aseman Airline Company, without adequate security surveillance;
5. Ensuring that Iran Air will not fly its aircraft to politically or strategically volatile regions (such as Syria, Yemen, Libya, certain parts of Iraq, and North Korea);
6. Ensuring in the contract that Iran will not transfer or allow a real or corporate person to have access to the intellectual property owned by Boeing; and
7. Ensuring that Iran Air will not allow other airlines such as Mahan Air or Iran Aseman Airlines to use Iran Air's aircraft, parts, or equipment.<sup>331</sup>

Boeing and Airbus could also provide contractual stipulations for snap inspections or remote real-time surveillance in various cities in which Iran Air provides passenger, flight, or cargo services.

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<sup>329</sup> For the role of the WTO as to the member countries' obligations on intellectual property see: Frank X Curci, *Protecting Your Intellectual Property Rights Overseas*, 15 *Transnat' Law* 15, 28 (2002).

<sup>330</sup> See Maysam Bizaer, *Long road ahead for Iran's bid to join World Trade Organization*, AL-MONITOR (Aug. 2, 2016), <http://www.al-monitor.com/pulse/originals/2016/08/iran-world-trade-organization-wto-accession-bid.html>.

<sup>331</sup> Omar S. Bahir and Eric Lorber, *Boeing's Art of the Iran Deal: How to Use Civilian Aircraft to Pressure the Regime*, FOREIGN AFFAIRS, Aug. 28, at 16.

Considering the vastly different Iranian and U.S. governmental structures and division of governmental powers with respect to the enforcement of contractual obligations, these measures are admittedly difficult to enforce.<sup>332</sup> Further, there is no reference in the JCPOA accord that would compel Iran to follow specific principles with respect to signatory countries' patent and intellectual property laws in effectuating its investment and commercial agreements with the 5+1 countries.

Moreover, there is no provision granting JCPOA signatories the right of inspection with respect to any technology transferred to Iran based on signatory states' commercial agreements with Iran. Nevertheless, in the absence of a viable alternative with respect to intellectual property protection by the 5+1 countries, the provisions, as indicated above, are the only viable requirements which could probably be monitored to any degree through remote legal control. In addition, Boeing and Airbus could contractually stipulate that they will provide services, spare parts, know-how, and training to Iran Air, if Iran Air reciprocates with certain contractual and security assurances.

Another issue concerning post-sanction trade with Iran that could attenuate some of these security issues relates to the use of U.S. currency in the international market. The dominant status of the U.S. dollar in global commercial transactions makes it a medium of exchange between bartered commodities among nations.<sup>333</sup> Thus, the U.S. dollar is frequently used in transactions between two countries to set a price-evaluation for

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<sup>332</sup> See Wagdy Sawahel, *Iran's New Law On IP Protection Moves It Onto International Stage*, INTELL. PROP. WATCH (June 13, 2008), <http://www.ip-watch.org/2008/06/13/irans-new-law-on-ip-protection-moves-it-onto-international-stage/> (relating key provisions of Iran's 2008 intellectual property law; reporting that "[t]he Iranian law has attempted to harmonise itself with existing laws and practices to the extent possible . . . But there are some fundamental differences that cannot be removed, such as nullifying IPR protection when a public interest matter arises."). An important problem for a foreign contractual party in Iran may be the pressures that the foreign company might sustain from extra-constitutional institutions or on account of corrupt practices.

<sup>333</sup> See Bradley Klapper and Matthew Lee, *Officials: US considers easing ban on dollars to help Iran*, AP (Mar. 31, 2016), <http://bigstory.ap.org/article/d527c4f64b464801a2ed4573a13b4627/officials-us-mulls-new-rules-dollars-help-iran>.

products or services.<sup>334</sup> In this respect, the availability of the dollar to Iranian banks is of vital interest.<sup>335</sup>

The influence and enforcement power of the United States government lies in its predominance in the world financial system. Thus, in the event that an unforeseeable security issue appears on the horizon, a congressional act could conceivably prevent U.S. banks from providing credit for the Iran-Boeing deal. These contingencies are not ordinary commercial provisions, and should only be used as a last resort. Further, as noted above, OFAC could revoke Boeing's license to sell aircraft to Iran.<sup>336</sup>

##### 5. U.S. Aspirations Under the JCPOA Accord

The JCPOA accord does not deal with questions other than Iran's obligations with respect to production of nuclear substances at the weaponry level. Nevertheless, the accord was intended to be a prelude for a broader rapprochement between Iran on the one hand and major political and economic powers of the world on the other. For the Western signatories to the accord, this meant (or so they hoped) that Iran would review its policies with respect to two major complaints on part of the United States and other major Western powers: First, the question of Iran's policies on human rights and second the question as to claims by the European countries and specifically the U.S. with respect to perceived acts of extrajudicial killings. The parties to the JCPOA accord understood that Iran and other negotiating partners of that accord, would live up to their international commitments. The Department of State has emphasized that "the government of Iran's actions beyond the nuclear issue, including its destabilizing activities in the Middle East and its human rights abuses at home [including] Iran's support for terrorist groups like Hizballah, . . . are at odds with U.S. interests, and pose fundamental threats to the region and beyond."<sup>337</sup> However, in the United States the defensive policies

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<sup>334</sup> See *id.*

<sup>335</sup> *Id.*

<sup>336</sup> See Bart Jansen, *House to debate blocking loans for Boeing sale to Iran*, USA TODAY (Nov. 10, 2016, 3:56 PM), <http://www.usatoday.com/story/news/2016/11/10/house-debate-boeing-plane-sale-iran/93601314/>.

<sup>337</sup> Iran's Recent Actions and Implementation of the JCPOA, Testimony

adopted through courts and judicial proceedings have been more effective than the forces expressed through other means. Under the current law, and the Supreme Court decision, U.S.-based assets owned by the Iranian government, including those owned by the Central Bank of Iran, are likely to be available to U.S. judgment creditors for post-judgment execution.<sup>338</sup> This could include any assets present in the U.S. for the purchase of manufactured items, such as aircraft.

#### 6. Iran's Security-Based Transactions with the United States—The Saga of the Heavy Water Trade

Unlike the commercial transactions between Iran and a number of European countries, the U.S.–Iran post-sanction rapprochement started with primarily a security based agreement. Iran and the U.S. entered into a seemingly commercial transaction with a different goal far from commercial motif. On April 22, 2016, the Obama Administration entered into an agreement in Vienna whereby the U.S. agreed to purchase 32 tons of heavy water (a material that is used to cool uranium) from Iran.<sup>339</sup> The fundamental question is what was the reason for the United States to volunteer in purchasing the heavy water from Iran? The justification for such transaction was, “to aid Iranian trade internationally by allowing Iran to do business normally conducted in dollars while abiding by U.S. laws that block Tehran’s use of the American financial system.”<sup>340</sup>

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of Thomas A. Shannon Jr., Undersecretary for Political Affairs, Before the Senate Foreign Relations Committee, Washington D.C., U.S. DEPT STATE (Apr. 5, 2016), <https://www.state.gov/p/us/rm/2016/255510.htm>. The United States relaxed restrictions on commercial aircraft sales to Iran Air, which remains a state-owned company. See Seyed Fatemeh Alaei and Annette Andersson, Masters’ Thesis, Privatization: What we learn from failure - A case study of Iran Air (2014), [hv.diva-portal.org/smash/get/diva2:732837/fulltext01.pdf](http://hv.diva-portal.org/smash/get/diva2:732837/fulltext01.pdf). Iran Air’s “de-listing” by the U.S. Treasury Department, and the ensuing sale of the aircraft to Iran, would otherwise be subject to Iran Air’s activities within the framework of the existing U.S. laws. See 31 C.F.R. § 560.206(a)(1).

<sup>338</sup> Bank Markazi, 136 S. Ct. at 1329.

<sup>339</sup> Jay Solomon, *U.S. to Buy Material Used in Iran Nuclear Program*, WALL ST. J. (Apr. 22, 2016, 7:16 PM), <http://www.wsj.com/articles/u-s-to-buy-material-used-in-iran-nuclear-program-1461319381>. Heavy water is a material that can be used to cool uranium in a process to produce plutonium and mass-destruction substances.

<sup>340</sup> *Id.*

The heavy water transaction policy of the Obama Administration was ill-advised at best and otherwise misguided. Based on the Joint Comprehensive Plan of Action, with respect to the generation of the heavy water substance, the Islamic Republic of Iran agreed that:

Iran plans to keep pace with the trend of international and technological achievement relying on light water for its future power and research with enhanced international cooperation including assurance of supply of necessary fuel. There will be no additional heavy water reactors or accumulation of heavy water in Iran for 15 years.<sup>341</sup>

Based on the JCPOA accord, Iran agreed to cap its stockpile of uranium at a maximum of 300 kilograms (661 pounds) for a period of 15 years.<sup>342</sup> Further, the JCPOA caps Iran's stockpile of heavy water at 130 metric tons (143.3 U.S. tons).<sup>343</sup> However, any purchase of this heavy water stockpile by another state would be tantamount to creating a market for Iran's heavy water as an ordinary commodity. By purchasing this material, the United States has effectively encouraged Iran, as a supplier, to entertain future offers, for profit, of its heavy water in the international market.<sup>344</sup> By purchasing heavy water, and thereby creating market demand for it, the United States has enabled the creation of a market price mechanism for the very substance—plutonium—that the 5+1 countries were trying to curtail. This directly contradicts an avowed purpose of the nuclear deal, namely, “to prevent Iran from producing sufficient fissile material for a nuclear weapon.”<sup>345</sup> Therefore, by purchasing heavy water from Iran, the Obama Administration provided recurring market demand for such material. If purchasing heavy water from Iran was a prudent policy, then

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<sup>341</sup> The White House, Key Excerpts of the Joint Comprehensive Plan of Action (JCPOA), <https://www.whitehouse.gov/the-press-office/2015/07/14/key-excerpts-joint-comprehensive-plan-action-jcpoa>.

<sup>342</sup> JCPOA Annex I, *supra* note 5, at ¶ 14.

<sup>343</sup> JCPOA Annex I, *supra* note 5, at ¶ 14.

<sup>344</sup> Solomon, *supra* note 339 (quoting U.S. Energy Secretary Ernest Moniz: “That will be a statement to the world: You want to buy heavy water from Iran, you can buy heavy water from Iran. It’s been done. Even the United States did it.”).

<sup>345</sup> What you need to know about the JCPOA, *supra* note 35, at 26.

the Obama Administration should have applied the same policy by purchasing weaponry level uranium from Iran.

Further, under the rules established by the International Atomic Energy Agency, “the government [of Iran] shall establish and maintain a governmental, legal and regulatory framework within which all aspects of decommissioning . . . can be planned and carried out safely.”<sup>346</sup> The purpose of such de-commissioning of the facilities was to eliminate the possibilities of violation of the United Nations rules concerning nuclear energy including radioactive waste and heavy water emanating from unsupervised facilities.

Nevertheless, the “heavy water” transaction with Iran was not based on commercial considerations on the part of the United States. It was a strategically based exchange to protect a broad accord reached during the negotiations with Iran. It meant to legalistically, and within the framework of the JCPOA, enable Iran to enter into investment and trade agreements with Western countries. Under the terms of the JCPOA, Iran should maintain supplies of heavy water tons to a particular degree.<sup>347</sup> Thus, the U.S. agreed on purchasing the “surplus” heavy water from Iran for \$8.6 million. It was agreed that within a few weeks from the signing of the agreement, the heavy water would be shipped, under the supervision of the Atomic Energy Organization of Iran, to the Oak Ridge National Laboratory in Tennessee.

Therefore, the heavy water deal was not a genuine commercial arm’s length transaction. The United States entered into the heavy water agreement for ostensibly security reasons. That is, not finding a purchaser that might be acceptable to the United States, the government of Iran may undertake to sell the heavy water to unreliable buyers. However, there was a clear signal on part of the Obama Administration that the interested

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<sup>346</sup> Int’l Atomic Energy Agency [IAEA], *IAEA Safety Standards, Decommissioning of Facilities*, No. GSR Part 6 (2014), <http://www-pub.iaea.org/MTCD/publications/PDF/Pub1652web-83896570.pdf>.

<sup>347</sup> Solomon, *supra* note 339 (reporting that under the agreement reached between the 5+1 countries and Iran, the Islamic Republic agreed to maintain its heavy water below 130 tons during the initial years of the agreement, and under 90 tons thereafter).

American companies could purchase heavy water from Iran on a regular basis.<sup>348</sup>

The heavy water deal was a state-to-state strategic transaction with a very heavy political overtone. The U.S. Government undertook to facilitate the purchase of heavy water, out of fear that Iran will make the product available to the wrong people. Historically, Iran has undertaken transactions related to atomic energy products.<sup>349</sup> The purchase of heavy water by the United States from Iran was a defensive strategy rather than a deal based on commercial interest.<sup>350</sup> There is yet another view for the heavy water transaction. That is, for the United States to use Iran's heavy water substance as an item of commerce. According to one observer, the Obama Administration's strategy with respect to the nuclear agreement with Iran was an "effective investment in Tehran's nuclear program through the purchase of excess heavy water from Iranian reactors."<sup>351</sup> The Obama Administration's decision to purchase heavy water from Iran was a failed strategy. It made the purchase of heavy water from Iran into an authentic arm's length transaction in a competitive market. Worse, the fact is that buying heavy water from Iran encourages it to supply more heavy water as an ordinary commodity, reproducing heavy water in significant quantities and continuing to sell it to foreign markets.

The "commercial" transaction between the United States and Iran with respect to heavy water was a failed strategy. A few months after the completion of the first heavy water sale and shipment of the substance to the United States, the Chairman of the IAEA's Board of Directors, on November 9, 2016, announced that Iran's inventory of heavy water exceeded 130

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<sup>348</sup> Solomon, *supra* note 339, at A7 (reporting that Secretary Moniz had indicated that the U.S. government would make only one purchase of the heavy water which could be used to stimulate fissile reactions inside nuclear reactors. However, the Secretary indicated that "American companies could emerge as regular buyers of the material in the future.").

<sup>349</sup> For example, in the past, the Islamic Republic has sold low-enriched uranium to Kazakhstan and Russia. See David Sanger and Andrew Kramer, *Iran Hands Over Stockpile of Enriched Uranium to Russia*, N.Y. TIMES, Dec. 29, 2015, at A4.

<sup>350</sup> Solomon, *supra* note 339 (reporting that Republican leaders criticized the Department of Energy's purchase of the Iranian heavy water and accused the Obama Administration that it was essentially subsidizing Iranian nuclear program).

<sup>351</sup> Berman, *supra* note 10.



metric tons.<sup>352</sup> In his report, the Director General of the IAEA announced on October 25, 2016 that “the Agency verified that Iran’s stock of heavy water had reached 130 metric tons [and that] the Director General expressed concerns related to Iran’s stock of heavy water to the Vice President of Iran and President of the Atomic Energy Agency of Iran, HE Ali Akbar Salehi.”<sup>353</sup> Moreover, On November 8, 2016, the IAEA verified that Iran’s stock of heavy water had reached 130.1 metric tons.<sup>354</sup>

The original heavy water deal was intended to be a one-time arrangement in order to lift the remaining barrier on the way to reaching the JCPOA agreement with Iran. Apparently, such view was a misconceived notion by the United States and its European allies. As the subsequent events indicated, after the discovery of the production by Iran of the heavy water substance for the second time, the Iranian representative at the International Atomic Energy Agency expressed the view that “as far as the additional quantity of heavy water is concerned, Iran’s sole obligation, based on the JCPOA accord, was to offer the [additional] substance in international markets.”<sup>355</sup> The Director of the IAEA has stated that it’s important that in the future Iran would refrain from such transactions so that the confidence of the international community as to the enforcement of the JCPOA, which is the test of truthfulness of Iran, shall maintain.<sup>356</sup>

Another problem with the heavy water issue is that neither Iran, the United States, the IAEA, nor the European Union, which oversees the implementation of the JCPOA accord, had clearly defined what they count as “unrecoverable” material - uranium that is genuinely impossible to separate out and redeploy.<sup>357</sup> The heavy water buyback would also lengthen Iran’s

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<sup>352</sup> See Int’l Atomic Energy Agency [IAEA], *Verification and Monitoring in the Islamic Republic of Iran in Light of United Nations Security Council Resolution 2231*, at 2, IAEA Doc. GOV/2016/55 (Nov. 9, 2016), <https://www.iaea.org/sites/default/files/16/11/gov2016-55.pdf> (Report by Director General Yukia Amano).

<sup>353</sup> *Id.* at 2.

<sup>354</sup> *Id.*

<sup>355</sup> Statement by Reza Najafi, Representative of Iran in the IAEA, [www.ParsTV.com](http://www.ParsTV.com), Nov. 18, 2016. [hereinafter Najafi Statement] (translated from Farsi by the author).

<sup>356</sup> Najafi Statement, *supra* note 355.

<sup>357</sup> Lawrence Norman, *West Attempts to Fortify Iran Deal*, WALL ST. J.,

so-called “breakout” time that is the time that would be needed to accumulate enough material to produce one nuclear weapon were it to quit or violate the deal.<sup>358</sup> Nevertheless, it is highly improbable that, in the absence of any judicial recourse, the United States and other signatory countries of the JCPOA could maintain a reliable surveillance of, or self-restraint by, Iran with respect to commercial transactions on heavy water substance. According to Yokio Amono of the IAEA, Iran has indicated a willingness to reduce its heavy water stockpile.<sup>359</sup>

#### 7. U.S. Commercial Transactions with Iran that Remain Prohibited

Contrary to the general impression prevailing in Iran, U.S. sanctions against public and private corporations in Iran are still largely in place. As far as the U.S. is concerned, there may be investment or trade activities in the future between U.S. companies and Iranian corporations, but these will be subject to the limitations established by the U.S. Department of the Treasury.

The first of these limitations comes in the form of banking restrictions. Sanction control applies to major Iranian banks including the Central Bank of Iran and important private banks, and joint ventures with foreign banks are restricted in their international banking transactions. For over a decade the United States has forced foreign banks to refrain from doing business with Iran and has cut off Iranian banks’ activities with the United States.<sup>360</sup> The restrictive list also includes banks that

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Nov. 25, 2016, at 1.

<sup>358</sup> *Id.*

<sup>359</sup> Lawrence Norman, *U.N. Presses Iran to Follow Accord*, WALL ST. J., Nov. 18, 2016, at A9.

<sup>360</sup> Harvard Kennedy School, Belfer Center for Science and International Affairs, *Sanctions Against Iran: a Guide to Targets, Terms and Timetables. Addendum to Decoding the Iran Nuclear Deal*, at 18 (June 2015), <http://belfer-center.ksg.harvard.edu/files/Iran%20Sanctions.pdf>. The major Iranian banks sanctioned by the United States include: Bank Markazi, (the Central Bank of Iran) Bank Mellat, Bank Saderat, Bank Melli; the Housing Bank of Iran (Bank Maskan); Export Bank (Bank Saderat); Agricultural Bank (Bank Keshavarzi); Army Bank (Bank Sepah); and the Bank of Commerce (Bank Tejarat). *Iran, What You Need to Know About U.S. Economic Sanctions: An overview of O.F.A.C. Regulations involving Sanctions against Iran*, U.S. DEP’T TREASURY

were originally established to assist groups with ideological purposes but are presently engaged in primarily normal banking business. Banks that are on the sanction list include ones established as a result of a joint venture between Iranian and foreign banks.<sup>361</sup> The second limitation consists of oil companies including the National Iranian Oil Company (“NIOC”), Naft Iran (the “Iran Oil”), NAFT Iran Inter-trade Company (“Naft-Iran”), NICO, Iran Petrochemical Commercial Company, Iran Petrochemical Trading Company, and Iran Petrochemical Commercial Company.

The third limitation consists of mining companies including Iranian Mines and Mining Industries Development and Renovation Organization. The fourth limitation is steel companies and companies engaged in heavy industrial activities such as Ahvaz Steel Commercial and Technical Service GMBH-ASCOTEC, and Metal & Mineral Trade. The fifth limitation is the service companies, including Iran Insurance Company (“Bimeh Iran”). Finally, the sixth limitation consists of the Iranian companies with branches abroad including Iranian Oil Company (UK).<sup>362</sup>

#### *E. U.S. Sanctions Against Iran—A Misguided Policy*

After the U.S. rapprochement with Iran concerning Iran’s adherence to the nuclear-based weapons restrictions, continuation of strictly commercial sanctions against Iran is

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(Jan. 23, 2012), <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/iran.pdf> (cataloguing “persons determined to be the Government of Iran” and clarifying financial activities related to Iran that are prohibited by the Department of the Treasury).

<sup>361</sup> See, e.g., Tom Arnold & Bozorgmehr Sharafedin, *Small Banks Help Iran Slowly Restore Foreign Financial Ties*, REUTERS (June 15, 2016), <http://www.reuters.com/article/iran-banks-idUSL8N19637F> (reporting on German Iranian Trade Bank, Europäisch-Iranische Handelsbank AG). Europäisch-Iranische Handelsbank AG is a joint venture between Iranian and German banks.

<sup>362</sup> This is only a sample list naming a few, though significant, companies in Iran. For a comprehensive list of Iranian companies sanctioned by the U.S. Government: See *JCPOA-related Designation Removals, JCPOA Designation Updates, Foreign Sanctions Evaders Removals, NS-ISA List Removals; 13599 List Changes*, U.S. DEP’T TREASURY (Jan. 16, 2016), [https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/updated\\_names.aspx](https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/updated_names.aspx).

confusing and, at times, an exercise in futility. Consider the following examples.

### 1. U.S. Shares in Foreign Companies

There are numerous foreign companies in which U.S. persons, real or juridical, own corporate or partnership shares. It is unclear whether such foreign corporations will be subject to the Treasury Department's regulatory rules.

Consider Alibaba Group Holding, Ltd., a China-based international telecommunications company. Originally, Yahoo, an American computer company, owned an approximately 20% share of Alibaba. Under the strict interpretation of the U.S. Treasury guidelines, Yahoo was unable to enter into any business agreement with an Iranian corporation. Yahoo could, however, have achieved the same goal through Alibaba by providing the necessary manpower and capital to its corporate partner in China and thus, through the Chinese partner, could have participated vicariously in business with Iranian companies.

### 2. Internal Transactions and Opaque Deals among Commercial Entities in Iran

The post-Islamic revolution business atmosphere in Iran, personified by the customary process of decision-making at the vertical level, has made policy decisions for large companies a part of Iran's governmental strategy. Under such a scheme, profits made by Company A, as a result of an international commercial agreement, may be shared by Company B. It must be added that there are no antitrust laws or per se illegality concerning price-fixing or market division in Iran. Thus, an accord between a U.S. corporation and a non-sanctioned Iranian company may indeed benefit the sanctioned Iranian company as well. The following example shows the inter-company transactions that could obfuscate the internal transactional deal between two companies, defeating the very purpose of the sanction applied to a target company. As indicated earlier in mid-2016, Iran Air, the largest Iranian air passenger company, requested to purchase 80 new commercial planes from Boeing to rejuvenate its aging aircraft. According to the Department of the Treasury, another Iranian airline company, "Mahan Air," has

been on the sanction list of the Treasury Department's OFAC for a number of years for air lifting terrorist groups or participation in terrorist activities. Thus, in addition to the Iranian company, on March 24, 2016 the Treasury Department sanctioned those companies who were accomplices to Iranian Mahan Air.<sup>363</sup>

The proposed Boeing-Iran Air deal has been sharply criticized on the grounds that "once the planes are in Iran, there would be no way to prevent the regime's Revolutionary Guards [IRGC] from using them for airlifts to support Syria's President Bashar Assad and Lebanese Hezbollah."<sup>364</sup> As a result, a transaction which is meant to be strictly commercial, might lead into a non-commercial activity, prohibited by the U.S. laws and regulations.

It is frequently said that if Iran violates main conditions of the JCPOA, the U.S. will be able to "snapback" sanctions. This is not a realistic observation. Snapping back the past sanctions could "jeopardize billions of dollars of unpaid contracts to American and European companies and banks."<sup>365</sup>

### 3. The U.S. Tax Policy *vis-à-vis* the Treasury's Sanctions Policy

The 35% U.S. federal corporate tax is the highest among the developed countries of the world. There is a natural incentive on the part of the U.S. global companies against repatriation of capital and profits to the U.S. One of the implications of the U.S. punitive tax policy is for the U.S. companies to sell their interests to foreign corporations to do business abroad. For example, according to a report by Ernst and Young's Business Roundtable, a 25% U.S. corporate tax rate "would have prevented foreign purchases of 1300 U.S. companies."<sup>366</sup>

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<sup>363</sup> See Press Release, *Treasury Sanctions Supporters of Iran's Ballistic Missile Program and Terrorism-Designated Mahan Air*, U.S. DEP'T TREASURY (Mar. 24, 2016), <https://www.treasury.gov/press-center/press-releases/Pages/jl0395.aspx>.

<sup>364</sup> See Emanuele Ottolenghi & Mark Dubowitz, *The Boeing Sale to Iran Runs into Turbulence*, WALL ST. J. (July 13, 2016), <http://www.wsj.com/articles/the-boeing-sale-to-iran-runs-into-turbulence-1468363087>. See also notes 307, 308 and accompanying text.

<sup>365</sup> *Id.*

<sup>366</sup> James Carter & Ernest Christian, *Why Foreign Buyers are snapping*

Further, the high U.S. tax of large corporations has resulted in an increase in the so-called corporate tax inversions, creating incentives for U.S. firms to buy foreign companies and transfer capital abroad where rates are lower “and the territorial system is employed.”<sup>367</sup> Some of this money, directly or indirectly, will end up in business transactions with emerging countries like Iran which is in dire need of expanding its commerce and repairing its long neglected infrastructure.

U.S. corporations, as a partner or shareholder in foreign corporations, may be liable pursuant to the punitive sanction regulations of the Treasury Department. Liability will depend on the degree of the U.S. person’s participation in the foreign corporation. If the U.S. person (real or juridical) has a controlling share of the foreign corporate entity, then the U.S. partner will be subject to the sanction-related restrictions provided by the Department of the Treasury. In this situation, the Treasury Department’s rules apply not only to U.S. corporations, but also to those foreign corporations in which the U.S. person (corporate or real) has a controlling interest. Furthermore, the prohibition will include any transfer of funds through the U.S. financial system or activities that would require special license under the U.S. Export Administration Regulations (“EAR”).

#### *F. Transactions with Asian and African Countries*

##### 1. China

Iran has announced a “new era” of cooperation with China, and has signed a number of large contracts with that country. One of these contracts includes the construction of two nuclear plants in southern Iran. The trading volume between Iran and China is expected to rise to \$600 billion within the next decade (this is over a tenfold increase from the \$55 billion trade in recent years).<sup>368</sup>

Iran also has an ambitious plan to expand its railroad. The expansion would include building the “silk rail” which is aimed at reaching China by the railroad connection. Iran’s grandiose

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*up U.S. Companies*, WALL ST. J. (May 16, 2016), <http://www.wsj.com/articles/why-foreign-buyers-are-snapping-up-u-s-companies-1463345130>.

<sup>367</sup> *Id.*

<sup>368</sup> See Coface 2016 Iran Report, *supra* note 167.

plan would cost the Islamic Republic \$28 billion. Further, Iran is planning “to spend \$20 billion on roads and \$50 billion on upgrading the country’s Shah-era air fleet and \$7 billion on airports.”<sup>369</sup>

Ambitiously, China has reportedly agreed to contribute to the construction of an internal rail from the capital city of Tehran to the city of Mashhad – a \$2 million loan.<sup>370</sup> Mashhad is the city in which the eighth Shia Imam is buried, and many devout Iranians go there for pilgrimage. Nevertheless, the nature of the relationship between China and Iran is primarily business.

## 2. Japan

Iran has proposed to purchase a total of 25 planes, Mitsubishi Regional Jets, from Mitsubishi Company. The value of this contract is estimated to be \$500 million. Most of the planes are to be provided to Iran Aseman Airlines. Mitsubishi aircraft is also planning to provide Iran with its regional passenger jets that are currently under development. Iran Air may also purchase 80-70 seat Mitsubishi Regional Jets for domestic routes.<sup>371</sup>

## 3. South Africa

South Africa was the first African country with a plan to embark upon the post-JCPOA commercial agreements with Iran. Iran and South Africa both seek relative commercial freedom in doing business with African and Asian countries. Thus, South Africa’s President Jacob Zuma and President Rohani entered into a trade agreement worth \$8 billion to be carried out by 2020.<sup>372</sup>

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<sup>369</sup> *Joining the Dots: Some Treats Ahead for Railway Enthusiasts*, THE ECONOMIST (Apr. 2, 2015), <http://www.economist.com/news/middle-east-and-africa/21695765-some-treats-ahead-railway-enthusiasts-iranu2019s-new-continent-spanning>.

<sup>370</sup> *Joining the Dots*, *supra* note 369.

<sup>371</sup> *Iran’s Aseman Airline to get Mitsubishi Planes*, PAYVAND NEWS (July 21, 2016), <http://www.payvand.com/news/16/jul/1118.html>.

<sup>372</sup> This is a substantial increase in trade between two countries which stood at about \$350 million in 2015. There were reportedly 180 members of the delegations of South Africa accompanying President Zuma. *South Africa’s Trade with Iran to Rise to \$8B; President Zuma*, PAYVAND NEWS (Apr. 24,

*G. Availability of Credit for Investment and Commercial Transactions with Iran, an Environment of Relative Credibility*

Iran's recourse to the international credit system is a *sine qua non* condition for the implementation of its international commercial and investment agreements with Western countries. In particular, Iran's access to SWIFT was vital to enable that country's banks and other financial institutions to establish a credible financial communication with the Western financial world. Further, the cooperation of a few companies to open credit with non-member Iranian banks is also significant. Nevertheless, several factors precipitated the provision of direct credit to Iran including: (1) the substantial need of Iran to repair and expand its infrastructure; (2) Iran's requirements to renew its commercial activities in the international world market; (3) Iran's political stability represented by a relatively moderate government; (4) Iran's relatively protective statutory laws supporting trade and eventually investment; and (5) willingness of the European companies to enter a market that until now has been practically closed to them (except through extra-constitutional commercial practices).

However, the availability of SWIFT and Coface banking instruments would only facilitate financial transactions among the banks and financial institutions involved in doing business between foreign companies and Iran. Such facilities would not per se create credit. As a result, some governments in Europe initiated providing credit directly to Iran. Availability of such credit will enable the Islamic Republic, or its state corporations, to purchase directly from a given source.

Thus, in early April 2016, the Cassa Depositi e Prestiti, Italy's state financing agency, has agreed to issue €4 billion in credit lines to Iranian public entities in order to enable the Iranian partners to fund certain infrastructure projects such as highways and railways. However, this credit is not directly and exclusively available to Iran. The Italian corporations, in partnership with Iran, will be involved in the project's development and receive a certain portion of such credit from the creditor. There will also be an additional 800 million pounds

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2016), <http://www.payvand.com/news/16/apr/1119.html>.



in funding which will be allocated among the Italian companies doing business in Iran.<sup>373</sup> Cassa Depositi e Prestiti is one of the largest European state financing agencies and controls more than 350 billion pounds of assets.<sup>374</sup> The significance of providing credit to Iran cannot be underestimated. When sanctions were the governing policy of Western countries, a substantial portion of Iran's foreign commercial transactions were in cash. There were also bartered transactions between Iran and countries such as China, Pakistan and a few others. It is for the first time that Iran, through the provision of financial allowance by the Italian Sace, is able to have access to an advance credit. As an Iranian banker commented on the Italian deal, this could be the most substantial development in resuming trade between Iran and Europe after the JCPOA.<sup>375</sup>

It is highly likely that, given the competitive nature of international commercial banking in Western Europe, Italy's initiative in offering credit directly to Iran could be emulated by other banks in Europe. Iran has a long history of doing business with Germany, Belgium and Austria. Therefore, it is conceivable that Belgium's KBC Group, NV, Germany's DZ Bank, and Austria's Erste Group Bank AG, may soon join Iran's small group of creditors. Until the international financing organizations' complete resumption of the credit system, relatively small regional banks located in Italy, the Netherlands and Germany have reopened letters of credit with non-designated Iranian banks. The reopening of export credit agencies' coverage for Iran will assist facilitating the necessary credits in which the corresponding banks in Iran will be involved. Particularly, for products which Iran needs immediate replacement, the selling companies have agreed to cooperate with Iran until the credit channels become functional. For example, in regard to the purchase of a large number of new airplanes to renew its fleet, Airbus has agreed to accept the Iranian credit.<sup>376</sup>

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<sup>373</sup> Najmeh Bozorgmehr, *Italy Extends \$5 Billion Credit Line and Export Guarantees to Iran*, FIN. TIMES (Apr. 12, 2016), <https://www.ft.com/content/aac121ae-00c2-11e6-99cb-83242733f755>.

<sup>374</sup> *Id.*

<sup>375</sup> Najmeh Bozorgmehr, *supra* note 373.

<sup>376</sup> See Ostrower & Wall, *supra* note 300 (reporting that enforcement of a substantial number of these airplanes would be "the biggest signal yet that the

The line of credit opened by a few European banks does not mean the end of credit restrictions to Iran. As noted earlier, certain international credit evaluation organizations, such as the FATF, as well as the U.S. laws and the President's executive orders concerning the threat of terrorism from Iran are still valid laws of the land. The immediate past history shows that the violation of the international rules or non-adherence to banking conventions, or terrorism laws, might result in heavy penalties for the recalcitrant banks. In 2014, BNP Paribas, a French bank, had to pay a fine of \$8.97 billion for transmitting \$30 billion dollars in transactions mainly to Iran (and a few other countries) in violation of the laws governing sanctions.<sup>377</sup> Further, the prohibitive statutory provisions in France or Italy, as to the injunction of doing business with Iran, do not exist or operate the way they do in the U.S. French or Italian banks could be more flexible in their banking transactions with Iran. There is still the nonexistence of export guarantees that threaten the expansion of trade with Iran. The German government has expressed its concern that "[b]ecause of high penalties German banks had to pay in the past due to sanction violations, all participants are very reluctant. . . . Without any state export guarantees for deals with Iran, nothing will happen on our side."<sup>378</sup>

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U.S. and Iran are moving toward normalized trade relations."). One of the major reasons for the air travel corporations to enter into an agreement of commercially significant size is in fact the deteriorating financial position of the major air companies. For example, in its negotiations with Iran to sell reportedly \$25 billion worth of aircraft and various related facilities, it was agreed that Iran would be paying substantially below the catalog price given the scale of the order. According to one report, "[f]or Airbus, the sale of [the aircraft] is a significant milestone in securing the future of a program whose survival was called into question just 12 months ago by the group's own finance director. The world's largest passenger jet has not won in new customer in almost 3 years. . . . [In fact] investors have questioned whether Airbus can recover more than €10 billion spent on development although it has pledged to break even on current running costs." Peggy Hollinger & Najmeh Bozorgmehr, *Iran Air to Buy 118 Airbus Jets*, FIN. TIMES (Jan. 28, 2016), <https://www.ft.com/content/ac4189d8-c5da-11e5-b3b1-7b2481276e45>.

<sup>377</sup> Tiffany Kary, Del Quentin Wilber, & Patricia Hurtado, *BNP to Pay Almost \$9 Billion to End U.S. Sanctions Probe*, BLOOMBERG (July 1, 2014, 3:21 PM), <http://www.bloomberg.com/news/articles/2014-07-01/bnp-to-pay-almost-9-billion-to-end-u-s-sanctions-probe>.

<sup>378</sup> Gernot Heller, Balazs Koranyi & Andrew Heavens, *German Business Lobby Says Obstacles Remain to Iran Deals*, REUTERS (Apr. 28, 2016),

The extent of credibility of doing business with Iran using the banking facilities is relative. Under the JCPOA, the European banks, which have been holding \$55 billion in repatriated wealth, could allow Iran to have access to such restricted funds.<sup>379</sup> The only exception to that are banks and companies that are blacklisted by the U.S. However, the European banks were cautious in letting Iran have access to such funds.<sup>380</sup> Current U.S. policy bars foreign banks from clearing dollar-based commercial transactions with Iran through U.S. banks.<sup>381</sup> Despite President Obama's side deals with Iran concerning lifting sanctions from two Iranian banks, Bank Sepah and Bank Sepah International, such restrictions are likely to continue during the administration of President Trump.<sup>382</sup>

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<http://uk.reuters.com/article/uk-iran-trade-germany-idUKKCN0XP22D> (quoting a statement by Anton Boemer, head of the Federation of German Wholesale, Foreign Trade and Services).

<sup>379</sup> See Dave Clark, *US says European banks should feel free to deal with Iran*, TIMES OF ISRAEL (Apr. 23, 2016, 3:28 AM) (reporting that as of the end of April 2016, Iran had received only \$3 billion of the estimated \$50 to 55 billion); see also AFP, *US insists European banks can deal with Iran*, DAILY MAIL (Apr. 22, 2016, 5:57 PM), <http://www.dailymail.co.uk/wires/afp/article-3554045/US-buy-32-tonnes-heavy-water-Iran.html>.

<sup>380</sup> See Josh Lederman, *U.S. says Iran open for business, but Europe's banks disagree*, AP (May 12, 2016), <http://bigstory.ap.org/article/73fd6c11e9b6474896cf59a4fc3ba108/us-says-banks-wont-be-punished-lawful-business-iran>; see also Remarks Before Meeting with Iranian Foreign Minister Javad Zarif, U.S. DEP'T STATE (April 22, 2016), <https://www.state.gov/secretary/remarks/2016/04/256536.htm> [<https://web.archive.org/web/20170118160649/https://www.state.gov/secretary/remarks/2016/04/256536.htm>] (last visited Jan. 5, 2017) (statement of Secretary of State John Kerry: "the United States is not standing in the way and will not stand in the way of business that is permitted with Iran since the JCPOA took effect . . . and there are now opportunities for foreign banks to do business with Iran. Unfortunately, there seems to be some confusion among some foreign banks."). As of January 24, 2017, the page containing Secretary Kerry's statement has been removed from the Department of State website. It can be accessed via the Internet Archive web address listed above, and is also on file with the author.

<sup>381</sup> See Lesley Wroughton, *UPDATE 2-U.S. not against foreign banks dealing with Iran -Kerry*, REUTERS (Apr. 22, 2016), <http://www.reuters.com/article/iran-nuclear-kerry-idUSL2N17P1U6>.

<sup>382</sup> See Jay Solomon & Carol E. Lee, *U.S. Signed Secret Document to Lift U.N. Sanctions on Iranian Banks*, WALL ST. J. (Sep. 29, 2016), <http://www.wsj.com/articles/u-s-signed-secret-document-to-lift-u-n-sanctions-on-iranian-banks-1475193723> (reporting on secret bank documents signed by the U.S. during the Obama Administration). During his term, President Obama

## VI. Dispute Resolution Mechanisms between Iran and Foreign Commercial Companies

An important question concerning the post-JCPOA international trade agreements, is what kind of forum would be acceptable for international corporations and Iran in case of any disagreements between the parties? Under the Constitution of the Islamic Republic, granting concessions to foreign persons on commercial, industrial, agricultural, and mineral developments is absolutely forbidden.<sup>383</sup> However, the Iranian Constitution refers to the duty of the President or his legal representative “to sign . . . contracts and agreements between the government of Iran and any other governments . . . after such contracts have been approved by the Islamic Assembly.”<sup>384</sup>

Iran has a long history of participating in bilateral treaties and commercial or non-commercial agreements. In over 170 years, the U.S. Courts have generally applied a strong presumption with respect to the validity of the treaties. On the other hand, U.S. precedent indicates an unquestionably high regard and consideration of U.S. treaty obligations. Even when there is an apparent inconsistency between the treaty obligations of the United States and the act of Congress, the courts have tried to construe the statute to minimize inconsistencies with the treaty provisions. The U.S. Supreme Court has followed this tradition since 1801 under the Restatement (Third) of Foreign Relations Law, where a U.S. statute is to be construed so as not to conflict with international law or with an international agreement of the United States.<sup>385</sup>

On August 15, 1955, the United States and Iran entered into the “Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran.” The purpose of this treaty was:

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also extended Executive Order 12170 to curb transactions with the Iranian banks. See Press TV, *President Obama extends national emergency against Iran* (Nov. 4, 2016), [http://www.presstv.ir/Detail/2016/11/04/492062/ US-Obama-Iran-national-emergency-](http://www.presstv.ir/Detail/2016/11/04/492062/US-Obama-Iran-national-emergency-).

<sup>383</sup> QANUNI ASSASSI JUMHIRI ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], art. 81.

<sup>384</sup> QANUNI ASSASSI JUMHIRI ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], art. 125.

<sup>385</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 (1987).

[T]o enter and remain in the territories of the other High Contracting Party for the purpose of carrying on trade between their own country and the territories of such other High Contracting Party and engaging in related commercial activities . . . [Article 2.] Property of nationals . . . of either High Contracting Party shall receive the most constant protection and security within the territories of the other High Contracting Party. [Article 4.] Each High Contracting Party, shall accord to the nationals, companies, and commerce of the other High Contracting Party fair and equitable treatment, as compared with that accorded to the nationals, companies, and commerce of any third country. . . [Article 11.]<sup>386</sup>

The U.S.–Iran Treaty of Amity is an agreement of commercial nature and was signed for the purpose of developing commerce and protecting the commercial safety and interest of the two governments. The Treaty deals with each country's interest in protecting that country's products and preventing deceptive or unfair trade practices.<sup>387</sup> The Treaty of Amity specifically indicates that, “[b]etween the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.”<sup>388</sup> Despite the Islamic Revolution of 1979, The Treaty of Amity has never been abrogated by either signatory government. Under international law, both Iran and the U.S. are subject to their treaty obligations.

Iran has strongly endorsed and has effectively employed the Treaty of Amity. Iran's policy reaction to *Bank Markazi* is a case in point. In *Bank Markazi*, the U.S. Supreme Court rejected the Central Bank of Iran's claims that it had equitable title to—or beneficial interest in—assets deposited with Citibank in New York that totaled over \$1.75 billion.<sup>389</sup> Shortly thereafter, Iran instituted a claim against the United States before the ICJ.<sup>390</sup> It

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<sup>386</sup> *Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran*, U.S.–Iran, (Aug. 15, 1955), [http://www.parstimes.com/law/iran\\_us\\_treaty.html](http://www.parstimes.com/law/iran_us_treaty.html) [hereinafter *Treaty of Amity*].

<sup>387</sup> *Treaty of Amity*, *supra* note 386, at art. 8.

<sup>388</sup> *Id.* at art. 10.

<sup>389</sup> *See Bank Markazi*, 136 S. Ct. at 1320–22.

<sup>390</sup> *See* Press Release, Int'l Court of Justice, Iran institutes proceedings against the United States with regard to a dispute concerning alleged violations of the 1955 Treaty of Amity (June 15, 2016), <http://www.icj-cij.org/docket/files/164/19032.pdf>.

is likely that in a commercial dispute between Iran and U.S. corporations, (where the U.S. party is a publicly owned entity), and in the absence of any other arrangement, that court could apply the Treaty of Amity as a governing text for any agreement between the parties.

Traditionally, Iran has resolved its contractual disputes with foreign corporations through arbitration mechanisms. Should a dispute arise between Iran and a foreign company, the following dispute resolution forums may be applied. First, a dispute resolution mechanism and governing law may be provided in the contractual agreement between the parties. Second, a choice of forum could be found in the Iranian Law of International Commercial Arbitration (“LICA”), which was passed in 1997 and has been effective and enforced.<sup>391</sup> LICA is based on the UNCITRAL model law.<sup>392</sup> LICA adopts the use of international arbitration if the contractual party to the arbitration agreement is of non-Iranian nationality.<sup>393</sup>

With respect to post-sanctions commercial agreements between Iran and foreign companies, the fundamental question is what the appropriate dispute resolution mechanism employed by Iran and its commercial partners would be: adjudication, mitigation, or arbitration? Post-sanction agreements between Iran and foreign companies will most likely follow arbitration mechanisms traditionally employed by Iran in foreign contractual agreements. Thus, in referring to possible blockages to the delivery of aircraft purchased by Iran from Airbus or Boeing, Iranian officials stated emphatically that “[b]oth sides are committed, and there are scenarios in the contracts for violation of commitments or in case of *force majeure* to deal with those cases.”<sup>394</sup> Here, Iran could defer to the international Hague Arbitration Tribunal, which could serve as a forum for alternative dispute resolution; Iran has a generally reliable record of adhering to and enforcing the judgments of

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<sup>391</sup> See Hamid G. Gharavi, *The 1997 Iranian Law on International Commercial Arbitration: The UNCITRAL, Model Law à l'Iranienne*, 15 ARB. INT'L 85 (1999).

<sup>392</sup> *Id.* at 85.

<sup>393</sup> See generally Gharavi, *supra* note 391.

<sup>394</sup> Feliz Solomon, *Iran Says It Will Recover 'Prepayments With Interest' If Trump Scuppers the \$16.6 Billion Boeing Deal*, FORTUNE (Dec. 19, 2016), <http://fortune.com/2016/12/19/iran-boeing-airbus-trump-sanctions/>.

international tribunals. The Hague Arbitration Tribunal's verdict, issued almost a year prior to the implementation of the JCPOA, is a case in point.<sup>395</sup> The Iran-Turkey contract was signed in 1996 between BOTAS Petroleum Pipeline Corporation ("BOTAS"), the Turkish national gas company, and the National Iranian Gas Company ("NIGC").<sup>396</sup> Turkey brought an action before the Hague Arbitration Tribunal against Iran for non-performance. Under the agreement between BOTAS and the NIGC, the NIGC would supply Turkey with ten billion cubic meters of gas annually over a 25 year period.<sup>397</sup> Turkey's petition related to the NIGC's alleged non-performance with respect to the delivery of Iranian natural gas to BOTAS.<sup>398</sup> In mid-April of 2016, The Hague Arbitration Tribunal entered a judgment of \$1 billion dollars against Iran due to the NIGC's non-performance.<sup>399</sup> According to NIGC officials, Iran will pay \$1 billion to Turkey in compliance with the tribunal's award.

For the aforementioned reasons, any post-sanctions contractual agreements between Iran and foreign parties will most likely specify that disputes will be resolved by arbitration. Considering that Iran has displayed a willingness to comply with such arbitration awards, international arbitration provides a reliable means for resolving any dispute that may arise.

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<sup>395</sup> *Verdict on Iran-Turkey Gas Dispute Announced*, FIN. TRIB. (Feb. 3, 2016), <https://financialtribune.com/articles/energy/35610/verdict-on-iran-turkey-gas-dispute-announced>.

<sup>396</sup> *Id.*

<sup>397</sup> *Id.*

<sup>398</sup> *Id.*

<sup>399</sup> *See Verdict on Iran-Turkey Gas Dispute Announced*, *supra* note 395; *see also* Anthony McAuley, *Dispute between Sharjah's Crescent Petroleum and Iran moves to damages phase*, THE NATIONAL (Jan. 22, 2017), <http://www.thenational.ae/business/energy/dispute-between-sharjahs-crescent-petroleum-and-iran-moves-to-damages-phase> (reporting that Iran has also referred its dispute with Crescent Petroleum of Sharjah to The Hague Arbitration Tribunal, and that the dispute was widely watched as Iran sought to re-establish its relationship with international oil companies; also reporting that Iran's dispute with Crescent involved a contractual agreement, dated 2001, in which the National Iranian Oil Company was obligated to supply 600 million cubic feet a day of natural gas from the southern field of Salman to Sharjah).

## VII. Sanctions and the Extra-Constitutional System Governing Conduct of Transnational Business in Iran

In an international transaction, the foreign investor will normally bear the economic risks inherent in commercial trade, including possible changes in market conditions such as entry of a competitor in the market, volatilities in prices, exchange rates or changing financial circumstances. In certain transactions, provisions are made for adaptation or renegotiation in case of a significant change in the economic and financial context of the project. The investor may require the host government to provide protection on a number of investment related issues including the tax regime, the applicable law, the customs regulations for products needed for manufacturing, and the dispute resolution mechanism. While any investment, domestic or international, entails certain political and commercial risks, the risk of international investment by the European and American companies in Iran is of a different nature.

In some cases the exporters of goods and services to a familiar country may be willing to ship goods under “open account” thereby supplying credit to such buyer until the transaction is completed. In this case, the foreign supplier of the goods relies on the familiar buyer’s creditworthiness. As an authority has indicated, “this simplifies the transaction considerably and may reduce the cost of the third-party commissions or interest.”<sup>400</sup> However, the U.S. or European investors or sellers may not be willing to rely on the creditworthiness of the buyer or the host government. There is a credit insurance mechanism available for such sellers or investors that provides an insurance policy against non-payment by the buyer for the goods and services, or lost investment abroad due to political upheavals. In the U.S., the mechanism of Foreign Credit Insurance Association (“FCIA”) is set up to, with the assistance of the Exim Bank, furnish a political insurance credit to U.S. companies.<sup>401</sup>

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<sup>400</sup> JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT* (AMERICAN CASEBOOK SERIES) 59 (3d ed. 1977).

<sup>401</sup> The FCIA, established in 1961, protects exporters against political and commercial risks which may result in default by the foreign partner of the



The political risks of international investment, particularly in the Middle East, are generally without parallel in a domestic environment. In the U.S. and Western Europe, the nature of the risk is primarily related to the prolific and at times anti-business regulatory atmosphere. However, there are familiar laws and regulatory systems, which the trader and investor would have to conduct business within. Above all, there is a jurisprudential system that makes the outcome of the business-related conflicts fairly predictable. This is not the case with respect to doing business with Iran. The following briefly indicates a sample of organizations that function as banks and provide benefits including investment services.

#### *A. Unlicensed Financial Institutions*

The unlicensed financial institutions ("UFI") are business establishments that function as de facto banks. These financial outfits routinely lend money to individuals or, at times, juridical persons such as partnerships or small corporations. The rate of interest by these individuals or financial outfits is substantially higher than interest rates charged by official banks. Thus, a major impact of the extra-constitutional banking transactions by these business entities is contributing to the rate of inflation in Iran. The usurious interest rates controlled by the UFI, have decreased the value of Iranian money and greatly contributed to the inflationary economy. According to the IMF's Country Report on the Islamic Republic of Iran's Monetary Policy:

[T]he complex difficulties experienced in the financial system [of Iran], reflected by high nonperforming loans and competition from unlicensed financial institutions (UFIs), have brought real interest rates to very high levels that threaten macroeconomic stability.<sup>402</sup>

Another problem with the UFI is their impact upon the function of the traditional banks. Based on the report by the IMF, in order to control the hyper-inflation in the country, the Central Bank of Iran allowed the private banks to engage in

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United States Company.

<sup>402</sup> IMF 2015 Iran Report, *supra* note 152, at 14. This report was prepared by a staff team of the IMF for the executive board's consideration on December 7, 2015 following discussions with the officials of the Islamic Republic of Iran on economic developments and policies.

inter-bank borrowing. The banks would follow the rules aimed at better aligning market rates with inflation developments, capping deposit interest rates at 7-22% for maturities up to one year. According to the IMF Country Report on Iran, “[e]nforcing this agreement has been difficult due to weak bank balance sheets and competition from unlicensed financial institutions.”<sup>403</sup>

### *B. Corporate Entities Acting to Achieve Political Goals*

One of the major issues facing Iran is allotting financial resources on projects with little, if any, justification for their economic values. At times, the commercial banks—or even the Central Bank in Iran—support, or even finance, projects with very little economic grounds for such a decision. One project specifically indicated by the IMF as an example of the government arrears was a huge housing project. According to the IMF, this project involved issuance of about 108 trillion Riyal (\$620 million) that is, about 0.5% of the GDP of Iran. The project, “Mehr Housing Scheme,” involved construction of 120,000 housing units.<sup>404</sup> The IMF report strongly recommended that the government of Iran issue securities at marketable terms to repay or restructure these arrears.<sup>405</sup> The site of this housing project was in the southeastern province of Sistan – Baluchistan, near the Pakistani state of Baluchistan – one of the poorest provinces in Iran. Clearly, this project was initiated because of the political considerations and not its economic value.

### *C. Institutional Inefficiencies and Patrimonial Corruption*

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<sup>403</sup> IMF 2015 Iran Report, *supra* note 152, at 6 (also stating that “Six UFIs reportedly represent 15% of deposits.”).

<sup>404</sup> See Mohammad Affianian, *Mehr Housing Project Adds 120,000 New Units*, FIN. TRIBUNE: FIRST IRANIAN ENGLISH ECON. DAILY (Aug. 12, 2015), <https://financialtribune.com/articles/economy-business-and-markets/23213/mehr-housing-project-adds-120000-new-units> [hereinafter Mehr Housing Project] (reporting that with the addition of these units, the Mehr conglomerate announced that “with the addition of 120,000 housing units, Mehr Housing Scheme is poised to become a 1.5 million strong housing- project.” Reporting also that an additional 240,000 units were built but not yet connected to water and electricity).

<sup>405</sup> IMF 2015 Iran Report, *supra* note 152, at 18.

There are two fundamentally different sets of institutional entities in Iran; the constitutional powers and the extra-constitutional entities. The extra-constitutional institutions have a multitude of functions; religious, political and the informal sector of the economy. These institutions have no official relationship with the executive, judicial or legislative branch of the government. That is, they do not function as a regular bureaucracy in the governmental apparatus. They do however, have a big impact on foreign trade.

For a foreign investor, political risk includes interference by the host government with the operation of business. Such interference has significant implications with respect to the proper role of government in managing and regulating business affairs.<sup>406</sup> Political risks have been measured by the indicators familiar in the Western investment business environment. In doing business abroad, the indicators at times considered by the Western companies may be:

Are there chances of nationalization? What is the imposition of exchange controls? Of the host state government's negligence to provide the foreign investor with adequate political security and financial protection against insurgent attacks? What would be the chances of failure of the host government to treat the investor fairly and equitably? How reliable is the state in terms of its political stability?<sup>407</sup>

These investment parameters pose valid questions for foreign investors concerning the reliability of host governments. Such standards do not, however, apply to investment milieu of Iran. In its totality, the government of Iran has ministries, governmental organizations, and state agencies with a rather sophisticated bureaucratic system of administration with a vertical form of managerial organizations. Further, politically, Iran is the most stable country in the Middle East. It has also

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<sup>406</sup> Stephen J. Kobrin, *Political Risk: A Review and Recommendation*, 10 J. INT'L BUS. STUD. 67, 77 (1979). The author has provided numerous political risk citations and articles from the 1960s and 1970s. See also *Symposium: Investment in Emerging Markets: The Challenges of Infrastructure Development: Article: Political Risk and International Investment Law*, 24 DUKE J. COMP. & INT'L L. 477, 481 ("existing data, as well as the inherently multi-causal complexities of modern society, will often impede the calculation [of political risk] with any real accuracy of a probability that political event x will happen and if it happens that it will impose cost y on a certain project with probability z.").

<sup>407</sup> Yackee, *supra* note 406, at 487.

the highest educated and professional class of individuals, particularly in the urban environment. These are all positive factors for international investment and commercial transactions in Iran.

Iran's predicament, for a Western company, lies elsewhere. While Iran has embraced modernity in its governmental bureaucracy, there are also powerful extra-constitutional institutions that live and operate side by side with the traditional governmental bureaucracies. Such duopolistic system of governance has created serious issues for the decision-making and economic development of the country. In major structural economic decisions such as rules of privatization, distribution of capital, and major contractual state-tenders, the extra-constitutional institutions exert their influence.

The most powerful and formidable extra-constitutional institution in Iran is the IRGC.<sup>408</sup> The IRGC's constitutional *raison d'être* is Article 150 of the Islamic Constitution, which states that the "Sepahe Engelab" was intended "to pursue and continue its role in safeguarding the Revolution." This is, of course, an ideological and not an administrative or commercial mission. Nevertheless, the IRGC's activities in the economic sphere have been expansive. The IRGC is probably the most powerful economic entity in the Islamic Republic of Iran. As the former U.S. Treasury Secretary, Henry Paulson, famously told, "it is increasingly likely that if you are doing business with Iran, you are doing business with the IRGC."<sup>409</sup> It has reportedly ties to over 100 companies with its annual revenue exceeding \$12 billion in business and construction. The IRGC also has associations with a number of banks in Iran. These banks are either directly owned by, or affiliated with, the IRGC.<sup>410</sup>

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<sup>408</sup> See Mathew Douglas Robin, *Explaining the Economic Control of Iran by the IRGC*, UNIV. OF CENT. FL STARS (2011), [http://etd.fcla.edu/CF/CFH0004119/Robin\\_Matthew\\_D\\_20135\\_BA.pdf](http://etd.fcla.edu/CF/CFH0004119/Robin_Matthew_D_20135_BA.pdf). For the history of the IRGC, see Alireza Nader, *The Iran Primer, The Revolutionary Guards*, UNITED STATES INSTITUTE OF PEACE, Aug. 2015.

<sup>409</sup> Amir Teheri, *Who Are Iran's Revolutionary Guards?*, WALL ST. J. (Nov. 15, 2007), <http://www.wsj.com/articles/SB119509278241693687>.

<sup>410</sup> See *Designated IRGC and Designated Iran Linked Financial Institutions*, U.S. DEP'T TREASURY [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/irgc\\_ifsr.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/irgc_ifsr.pdf) (current as of Sept. 24, 2012). These banks include: Persia International Bank PLC, Post Bank of Iran, Arian Bank, Bank of Industry and Mine of Iran (commonly known as Bank Sanat va

Additionally, the IRGC has a bank under its own name, "Bank Sepah."<sup>411</sup>

In its study of the Iranian economy, the IMF concluded that bolstering the Iranian economy "will help better detection of illegal proceeds including those related to tax evasion and corruption."<sup>412</sup> The IMF has considered such shortcomings in Iran's economy to be rooted in the unofficial sector of Iran's economy and as "the structural weakness on the policy framework, taxation, and bank balance sheets."<sup>413</sup> For a Western company, commercial association with extra-constitutional entities or quasi-governmental organizations in Iran, would mean ignoring the standards for conduct of business as set by Western countries' rules of doing business abroad such as the rules set by the Foreign Corrupt Practices Act, and by the IMF, Exim Bank, the OECD, and Transparency International.<sup>414</sup>

Considering the highly complicated political structure of Iran, compounded with the juxtaposition of extra-constitutional forces in that country, it is safe to say that the political risks of investment in and trade with Iran are not comparable with the domestic environment in the U.S. or Western Europe. For domestic investments in the U.S., there is usually a "regulatory risk." In such a risk environment, the government, through fiscal and commercial policies unfavorable to conducting business, may change the rules of the game in a way that will

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Maadan), Bank eh-Ansar, associated with "Ansar Institute," an ideological organization whose main banking activity is to provide interest free loans, the Export Development Bank of Iran (Bank Tose-eh Saderat Iran), Europaesch-Iranische Handel Bank (German Iranian Bank), and Future Bank B.S.C.

<sup>411</sup> *Id.* Bank Sepah started its operations on May 4, 1925, 54 years prior to the Islamic Revolution in Iran. Currently, it is one of the most influential financial institutions in Iran and the Middle East. Bank Sepah has nearly 1800 domestic branches and a few branches in Europe. *See* The Profile of the First Iranian Bank, BANK SEPAH, <http://www.banksepah.ir/English/default-1077.aspx> (last visited Jan. 24, 2017).

<sup>412</sup> IMF 2015 Iran Report, *supra* note 151, at 18.

<sup>413</sup> *Id.*

<sup>414</sup> For judicial framework of Iran *see*, MAJID MOHAMMADI, JUDICIAL REFORM AND REORGANIZATION IN 20TH CENTURY IRAN chs. 5-6 (Nancy A. Naples ed., 2008). For quasi-governmental organizations in Iran, *see* STEVEN O'HERN, IRAN'S REVOLUTIONARY GUARD 115-133 (2012); GOLKAR, *supra* note 27, at 1-107. For the role and the function of the Revolutionary Guards and the strength and weaknesses of the U.S. policy in Iran, *see* ABRAHAM D. SOFAER, TAKING ON IRAN: STRENGTH, DIPLOMACY, AND THE IRANIAN THREAT chs. 1-4 (2013).

adversely affect the economics and the profitability of the investment. Nevertheless, in domestic investments, there are tested jurisprudence, verifiable statutory regime, and familiar regulatory tools that would permit the investing company to make a calculated and reasoned judgment as to the regulatory risks prior to making an investment commitment.

*D. The Impact of Commercial Transactions on Extra-Constitutional Institutions in Iran*

As important as the commercial agreements concluded between Iran and a number of Western companies may be, their real significance should be seen from a different perspective—integration of Iran’s financial activities, in its traditional sense, into the global community. The commercial transactions will make possible integration of Iran’s vision, in law and policy, with those of the world community perspective. This point needs a brief explanation.

Throughout the post-Islamic Revolution, two types of institutional establishments have functioned in Iran side by side. The first type is the traditional official bureaucratic establishment. These are government ministries, state-owned banks and publicly owned commercial entities. Such official establishments have initiated fairly developed laws, regulatory rules, policies, operational frameworks and bureaucratic procedures and programs. The second type, as was mentioned earlier, is forces of extra-constitutional power, ideological establishments, and, at times, seemingly invisible policies and operations that hold significant political and financial command and domination in the country. Extra-constitutional is best defined as those authorities and forces that are not specified in the Iranian constitution or, if there is a reference to such powers, their present authority and domain inordinately exceed the original constitutional mandate. Of the multiple extra-constitutional or non-governmental entities, only one such organization has been mentioned in the Constitution of the Islamic Republic. That is, under Article 150 of the Constitution of the Islamic Republic of Iran, “[t]he Islamic Revolutionary Corps that was formed in the first days of the victory of this

Revolution shall remain active in order to continue its role as the guardian of the Revolution and of the fruits of its victory. . .”<sup>415</sup>

There were no subsequent laws that would specify in detail or give further operational authority to the IRGC. Historically, the *raison d'être* of establishing the IRGC was political and originally created to assist the police in apprehending counter-revolutionary elements. The IRGC was also assigned to train its members in moral, and ideological and politico-military issues.<sup>416</sup> Pragmatically, the IRGC has three distinct institutional features: military, commercial and ideological. According to the Constitution of the Islamic Republic, one of the functions of the Supreme Leader is to have “supreme command of the armed forces.”<sup>417</sup> Institutionally speaking, the Iranian military has a dual feature: classic military and ideological. The IRGC's military outfit is far more expansive than the regular military.<sup>418</sup>

The IRGC's commercial activities started shortly after the Iran–Iraq War of September 1980 (about a year and half after the Islamic Revolution) when the late Rafsanjani, then the President of Iran and a member of the clerical group, encouraged the IRGC to bolster its budget by taking control of confiscated factories. By doing so, the IRGC would be economically independent. Thus, the IRGC became intensely active in the industrial mining, transportation, agriculture, road construction, and import and export sectors. The IRGC's financial institutions, and affiliated organizations, are regulated, presided and operated independently. The IRGC's funds are administered and managed separate from the public funds. The IRGC often undertakes its investment and

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<sup>415</sup> FLANZ, ET AL, CONSTITUTIONS, *supra* note 213, at 65.

<sup>416</sup> The IRGC's domestic ascendancy over other security institutions was not preordained. In the chaotic aftermath of the Islamic Revolution, the IRGC was one of the several security instruments used by the leaders of the new state against existential threats and, at times, wildly exaggerated challenges, posed by an array of armed groups. *See* WEHREY ET AL., *supra* note 144.

<sup>417</sup> QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980] art. 110.

<sup>418</sup> Organizationally, the Iran military is divided into two separate entities: the regular army “Artesh” and the Islamic Revolutionary Guards Corps, IRGC. The classic military also has the Air Force known as the Islamic Republic of Iran Air Force and the Navy called Islamic Republic of Iran Navy (IRN). The IRGC also has a Navy known as Iran Revolutionary Guards Corps Navy (IRGCN).

commercial activities under the rubric of assisting the economically oppressed groups and is exempt from any form of tax payment. In 1990, the IRGC established a juridical entity called the Khatam-el-Anbia Establishment.<sup>419</sup> This conglomerate has over 800 registered corporations, each in charge of certain specialized commercial, production, and investment projects, and is customarily awarded in various fields including construction of highways, heavy-duty structures, and offshore construction.

There were a myriad of reasons for bestowing such an enormous economic power upon the Revolutionary Guards. First, these organizations are not part of the traditional governmental apparatus, and, as such, need not report to the appropriate office of the president of Iran or a government ministry. Under ordinary circumstances, for the government of Iran to grant a contract to a private company, such a company would follow standard bidding procedures. Therefore, the company in question should factor in the cost of tax or payment of customs to the government. Those participants of the bids that have to make such payments are in a disadvantageous position as compared with companies that do not have to make such payments. This is a clear example of the patrimonial corruption where the governmental structure or the regulatory provisions provide for a selective group, an inherent market power or procurement system. Professor Susan Rose Ackerman, an authority in governmental corruption indicates, “a common abuse [in a bidding procedure] involves procurement orders written so that only one firm can qualify.”<sup>420</sup> Second, of about 25,000 engineers and employees of the Khatam el-Anbia organization, 10% are reportedly employees of the IRGC.<sup>421</sup> Khatam el-Anbia functions as the engineering arm of the IRGC and engages in several engineering activities, including manufacturing of pipelines, road and dam construction, mining operations, telecommunications, and agriculture. About one third of the imported goods to Iran have reportedly been

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<sup>419</sup> Literally meaning the Last Prophet, a reference to the Prophet Mohammed.

<sup>420</sup> SUSAN ROSE ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 64 (1999).

<sup>421</sup> WEHREY ET AL., *supra* note 144, at 60.



“delivered through the black market, underground economy, and illegal jetties.”<sup>422</sup>

The extra-constitutional organizations of Iran have been active in many parts of the world with the goal of acquiring wealth in order to finance their vast bureaucratic organizations. In Iran, the IRGC has been active in using foreign banks. For example, the Quds Force, an elite group that supports pro-Iranian militant groups in the Middle East, has used Chinese banks in transferring funds in that region. According to a Reuters report, the Shenzhen Lanhao Electronic Technology Company LTD, “is one of several companies in China that receives money from Iran through a Chinese bank.”<sup>423</sup> The financial transactions are reportedly conducted through supervision of Bank Markazi (the Central Bank of Iran), which has accounts with the Chinese National Petroleum Bank of Kunlun. Upon transferring these amounts by Kunlun to other Chinese entities, the Iranian Quds organization can use them for various acquisitions in other countries including the import of products to Iran (especially during the period of sanctions) or use them abroad for financing ideologically oriented groups.<sup>424</sup>

Sanctions imposed on Iran fortify the economic position of the extra-constitutional organizations. That is, in the absence of any competitive commercial organizations, the IRGC will use (and benefit from) its monopolistic advantage in communication, banking, or bartered transactions, and will thereby acquire goods and services not available to official government agencies or corporations. The regime of sanctions makes foreign products for the traditional Iranian government organizations inaccessible and costly. Such products and services become inordinately expensive for the consuming population. However, those extra-constitutional organizations that may have access to

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<sup>422</sup> WEHREY ET AL., *supra* note 144, at 64. (statement by Ali Ghanhari, a member of the Islamic Assembly).

<sup>423</sup> Louis Charbonneau, Jonathan Saul, & James Romfret, *Iran Uses China Bank to Transfer Funds to Quds-linked Companies*, REUTERS (Nov. 18, 2015), <http://www.reuters.com/article/us-iran-sanctions-china-exclusive-idUSKCN0J20CE20141119>.

<sup>424</sup> DAVID ALBRIGHT & JACK DISHNER, INST. FOR SCI. & INT'L SEC., CASE STUDY: IRANIAN ILLICIT FINANCING FOR QUDS FORCE'S OVERSEAS PURCHASES (2014), [http://isis-online.org/uploads/isis-reports/documents/Bamdad\\_case\\_study\\_Iran\\_financial\\_violations\\_17Dec2014.pdf](http://isis-online.org/uploads/isis-reports/documents/Bamdad_case_study_Iran_financial_violations_17Dec2014.pdf).

foreign products will be in a tremendously advantageous position *vis-à-vis* their competitors.

*E. Use of the Barter System in International Transactions in Iran*

As a result of imposing sanctions, Iran, in dire need of available markets to sell its crude oil and petroleum products and to buy needed products, sought politically accessible markets. These markets were located mostly in Asia such as China, South Korea, and Pakistan, as well as in Russia, Southern Europe such as Turkey and Greece – all with less-developed banking systems than Western European countries, but willing to enter into oil agreements with Iran. Despite the U.N. Security Council Resolution,<sup>425</sup> China invested in various Iranian oil and gas projects.<sup>426</sup> In the absence of international banking facilities, one of the major channels of Iran's foreign trade was engaging in barter deals. For example, Iran entered in trade deals with Russia and Pakistan by trading crude oil for Pakistani wheat, thus evading restrictions imposed by the electronic banking transfers.<sup>427</sup> The barter deals included Russian companies that helped the Islamic Republic of Iran by fuel oil available for export and receiving Russian products instead. The same pattern of non-banking transactions was followed with a substantial amount of oil delivery to China.<sup>428</sup>

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<sup>425</sup> See S.C. Res. 1696, ¶ 2 (July 31, 2006) (U.N. Resolution 1696 that was imposed after Iran refused to suspend its uranium enrichment program).

<sup>426</sup> Erica S. Downs, *China, Iran and the Nexen Deal*, BROOKINGS INSTITUTION (Oct. 12, 2012), <https://www.brookings.edu/articles/china-iran-and-the-nexen-deal/>.

<sup>427</sup> *Cabinet Okays 100,000 Tons Wheat Export to Iran*, THE NEWS INT'L (May 17, 2013), <https://www.thenews.com.pk/archive/print/630526-cabinet-okays-100,000-tons-wheat-export-to-iran>.

<sup>428</sup> Chen Aizhu and Roslan Khasawneh, *Commodity traders in barter deals with Iran post-sanctions: sources*, REUTERS (Mar. 9, 2016), <http://www.reuters.com/article/us-iran-fueloil-exports-idUSKCN0WA13V>. The *Kharg*, a vessel owned by the government of Iran, was used for delivery of crude oil to China. On March 21, 2013, the *Yuan Yang Hu*, a Chinese super-tanker, visited the Kharg Island in Iran and unloaded 2 million barrels of the Iranian crude oil. See Eric Yep, *Chinese Oil Tanker Stops in Iran; More Imports Ahead?*, WALL ST. J. (Apr. 4, 2013), <http://www.wsj.com/articles/SB10001424127887323646604578401612953165422>. Iran has also sold crude oil to China in exchange for Chinese currency. See Collins, *supra* note 239.

In addition to paying in local currencies, bartered transactions, or gold, a number of Iranian vessels sailed to the Mediterranean, where they pulled pier side or anchored off the three Libyan ports of Benghazi, Sirte, and Mistrata.<sup>429</sup> Reportedly “at least one of the Iran Revolutionary Guard Navy (IRISL) ships, the *Parmis*, departed from Iran’s Bandar Abbas port, the headquarters of the IRIN and IRGCN (Iranian Revolutionary Guards Corps Navy), and made intermediate stops in Dubai and Egypt before proceeding to Libya.” Further, the Treasury Department’s announcement indicated that IRISL ships fly a civilian “flag of convenience,” from a number of different nations, but in reality, they are the functional subsidiary of Iran’s Revolutionary Guards.<sup>430</sup>

By enjoying a monopolistic position under the regime of sanctions, the establishment in Iran achieved two goals. First, extra-constitutional entities gained access to funds not otherwise available to ordinary Iranian corporations. They used these funds to buy products abroad that would otherwise be prohibitively costly. Thus, the extra-constitutional institutions act as a monopolistic entity. Second, the extra-constitutional entities accessed resources used to fund ideologically-oriented terrorists and special-interest groups in the Middle East and elsewhere.

#### *F. Sanctions Fostering Economic Inefficiency in Iran*

The imposition of sanctions on Iran created economic deprivation, which brought with it an opportunity for the IRGC to use its military and economic power to engage in business with countries that were not bound by sanctions. Using its naval facilities, the IRGC was able to engage in bartered commodity transactions with those countries.<sup>431</sup> Furthermore, certain

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<sup>429</sup> Claudia Rosette, *About Those Blacklisted Iranian Ships Calling at Libyan Ports*, FORBES (Sep. 13, 2012), <http://www.forbes.com/sites/claudiarosett/2012/09/13/about-those-blacklisted-iranian-ships-calling-at-libyanports/#5ffa2bba12b5>.

<sup>430</sup> *Fact Sheet: Treasury Designates Iranian Entities Tied to the IRGC and IRISL*, U.S. DEP’T TREASURY (Dec. 21, 2010), <https://www.treasury.gov/press-center/press-releases/Pages/tg1010.aspx>.

<sup>431</sup> See, e.g., Valerie Parent & Parisa Hafezi, *Iran Turns to Barter for Food as Sanctions Cripple Imports*, REUTERS (Feb. 29, 2012), <http://www.reuters.com/article/us-iran-wheat-idUSTRE8180SF20120209>.

groups, through means such as money laundering, “havaleh,” and commodity agreements, avoided the crucial banking services, transactional requirements, and facilities such as SWIFT.<sup>432</sup>

During the period of Iran’s sanction, the IRGC was in an advantageous position to engage in international commerce. That is, sanctions created economic rent for the IRGC, which enjoyed the monopoly in production, import or sale of goods and bartered exchanges. Economic rents are the privileges, opportunities and income gained by beneficiaries of other contrived exclusivity such as labor unions and corrupt and paternalistic economic powers. Not being part of an official governmental bureaucracy, the extra-constitutional organizations<sup>433</sup> are not answerable to the government for their profits or taxes.<sup>434</sup> Thus, in the absence of opportunities for the private business sector to enter the market, the IRGC was able to step into the void building a network of companies that came to dominate Iranian industries from energy to telecommunications. Such structure, created a systematic institutional and patrimonial corruption in the country. For example, in 2010, when the European oil companies had to leave the South Pars natural gas field in the Persian Gulf, Mr. Ahmadinejad, the president of Iran at the time, handed the largest portion of the project, \$21 billion in contracts for drilling pipelines and platforms, to the IRGC. Therefore, the sanctions placed the IRGC in a monopolistic position of a rent seeker that could engage in substantial contracts with no alarm for

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<sup>432</sup> See, e.g., Erich Ferrari, *Just Say No: Prohibitions Against Havaleh Between the US and Iran*, Public Affairs Alliance of Iranian Americans (June 24, 2010), <http://www.paaia.org/CMS/just-say-no-prohibitions-against-havaleh-between-the-us-and-iran1.aspx>. “Havaleh” is an informal system of transfer of money sporadically used in the Middle East and North Africa by individuals and business organizations who, throughout the years, have established the trust and confidence of their customers. These entities receive funds in one jurisdiction and pay such funds (minus commission) to the designated representative of the original payer in another jurisdiction.

<sup>433</sup> These are organizations such as the IRGC, the Bonyad-e Mostazafan va Janbazan (Foundation of the Oppressed and Disabled), the Emdad Committee for Islamic Charity, and the Deyeh Headquarters.

<sup>434</sup> In this respect, these organizations followed Russia’s post-communism pattern of generating income by practices such as monopoly of imports, loan for shares, and tax exemption. See, e.g., DAVID HOFFMAN, *THE OLIGARCHS: WEALTH AND POWER IN THE NEW RUSSIA* 296–324 (Public Affairs 2011 ed.).

competition to reckon. Another example is during the reign of sanctions when the IRGC obtained a mega contract from the government for construction of a bullet train from the capital city of Tehran to Isfahan. The project was estimated to be \$2.7 billion. A confidential review of the contract showed that, after lifting the sanctions, there would be possibilities for purchasing the raw materials directly by the Government, rather than by a monopolist party, at a significantly lower cost.<sup>435</sup>

*G. International Trade Policy as a Disincentive for Iran to Undertake Weaponry Nuclear Research*

A distinct, but rather skeptical, view in the United States indicates that the nuclear deal, between Iran and the 5+1 countries, gives an opportunity (a waiting period) to Iran to convert its nuclear research activities into the weaponry system.

In support of this view, it has been stated for example, that based on a source inside the International Atomic Energy Agency ("IAEA"), within a period of between 11 to 13 years, the Islamic Republic of Iran could replace its 5,060 inefficient centrifuges with 3,500 advanced centrifuges.<sup>436</sup> Therefore, the centrifuge replacement clause will allow Iran, after replacing the old centrifuges with the more advanced ones, to start making nuclear weapons if it so decided.<sup>437</sup> Thus, it is claimed that Iran, being able to deploy these more powerful centrifuges, after 13 years indeed may act from the position of power concerning the nuclear weapons.<sup>438</sup>

The above assumption is not logical because it does not take into consideration the potential impact of Iran's international commercial investment and trade during the post-sanction

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<sup>435</sup> See Benoit Faucon, Stacy Meichtry, & Asa Fitch, *Iran's Government and Revolutionary Guards Battle for Control of Economy*, WALL ST. J. (May 19, 2016) <http://www.wsj.com/articles/irans-government-and-revolutionary-guards-battle-for-control-of-economy-1463584510>.

<sup>436</sup> See George Jahn, *AP Exclusive: Document Shows Less Limits on Iran Nuke Work*, AP (July 18, 2016), <http://bigstory.ap.org/article/40ca41aba7a42c1da13792f07df4b8d3/ap-exclusive-secret-document-lifts-iran-nuke-constraints>.

<sup>437</sup> See U.S. Sen. Foreign Rel. Comm. *Next Steps to Achieve a Comprehensive Deal*, (June 25, 2015), (Testimony of President David Albright of the Institute for Science and International Security) [http://www.foreign.senate.gov/imo/media/doc/062515\\_Albright\\_Testimony.pdf](http://www.foreign.senate.gov/imo/media/doc/062515_Albright_Testimony.pdf).

<sup>438</sup> U.S. Sen. Foreign Rel. Comm., *supra* note 437.

period. The fact is that, assuming that Iran will be integrated into the world community and adheres to the basic requirements of, and standards set by, the major world commercial and banking institutions such as the FATF, then Iran's population at large will be benefited from such integration. The possibility of entry into, and integration with, the global market will reduce the monopolistic position of the extra-constitutional establishment, which has traditionally dominated the economy of the Islamic Republic because of the West's closed-door policy during the sanctions period. Diminishing the marketing power of the monopolistic groups will, however, be painstakingly gradual.

As indicated earlier, imposition of the sanctions on Iran resulted in inefficiency concerning the production cost. By Iran's own estimate, "sanctions were costly for our people. They increased the cost of transaction in our economy, 10 to 15 percent."<sup>439</sup>

Another impact of sanctions has been the hyper inflationary economy. One reason for hyperinflation was that as a result of sanctions, very few corporate establishments were able to charge consumers and receive the economic rent from large projects. According to the Governor of Bank Markazi, a significant economic achievement of President Rohani, has been to reduce the annual inflation of Iran to 12% from the prevailing inflationary sanction era rate of 40%.<sup>440</sup> After sanctions lifted, economic competition between formal Government agencies and extra-constitutional institutions will undoubtedly be part of the post-sanction "trade war" inside Iran.<sup>441</sup>

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<sup>439</sup> See *Iran on Nuclear Deal: "Nothing Has Happened,"* THE IRAN PRIMER (Apr. 15, 2016), <http://iranprimer.usip.org/blog/2016/may/23/iran-nuclear-deal-%E2%80%9Cnothing-has-happened%E2%80%9D>.

<sup>440</sup> *Id.*

<sup>441</sup> The competing interest between these two institutions in Iran has been, thus far, maintained imperceptible. Nevertheless, it seems that the official ministries and agencies have not been eager to defend the economic interests of the extra-constitutional organizations in Iran. In this respect, the avowed position of the Central Bank of Iran, during the administration of President Rohani, has been that the Western corporations could always undertake a thorough "know your customer" study before committing themselves to any particular commercial counterpart in Iran. "We are talking about know your customer here and you should know the customer of your customers so that you can have complete coverage for the bank that is providing the service." In other words, the official government agencies in Iran are not going to exert any

There is no doubt that imposition of sanctions in the past greatly increased the market inefficiency concerning the cost of products and services for the ultimate consumer in Iran. A by-product of such market inefficiency has been a major cause of structural and institutional corruption in that country. Even the Governor of the Central Bank of Iran, after officially dismissing the estimates by Transparency International concerning the existence of a rampant corruption in Iran as “politically motivated,” has admitted that:

[Sanctions] increased the cost of transaction in our country – 10 to 15% increased cost of transaction. This is based on general research we conducted . . . [T]his itself can lead to corruption. And when you don’t have a transparent banking system, and it cannot provide the services needed for legitimate business practices, then transactions will be diverted to a nontransparent channel, through exchange bureaus or [through] some people who have expertise in this kind of nontransparent types of transactions.<sup>442</sup>

Therefore, economic sanctions imposed on Iran have led in two different, and opposite, directions: on one hand, sanctions benefited the groups that were part of the extra-constitutional structure of the Islamic Republic; on the other, sanctions created inefficiencies in Iran’s economy, such as an inflationary market, lack of access to resources with competitive prices, and an expansion of institutional corruption.

### VIII. Iran’s Integration in the International Trade Community

#### A. *The Impact of the Regional Organizations Concerning Commercial Transactions with Iran*

Throughout the sanctions period, the extra-constitutional non-governmental establishment in Iran has benefited from prolific unofficial trade activities through barter deals, direct

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influence or condition or defend the IRGC’s interest. See *A Conversation with Valiollah Seif on the Future of the Iranian Economy*, COUNCIL ON FOREIGN RELATIONS (April 15, 2016) [hereinafter *A Conversation with Valiollah Seif*], <http://www.cfr.org/global/conversation-valiollah-seif-future-iranian-economy/p37733>.

<sup>442</sup> *A Conversation with Valiollah Seif*, *supra* note 441.

dollar transactions, undeclared trade operations, exemption from payment of customs fees, and preferential treatment with respect to certain groups. These activities have resulted in the origination of invisible transactions not subject to generally accepted standards, such as the sharing of financial intelligence and information that identifies beneficial owners of front companies.<sup>443</sup> In the long run, Iran's business transactions with European and American companies will weaken the economic power presently exercised by Iran's extra-constitutional establishment. Such change, in turn, will help professionals and highly educated young people in Iran to conduct business based on their skills and financial abilities, and not through the structural nepotism traditionally exercised within Iran's extra-constitutional organizations.

An outstanding example of the well-established institutional principles and rules, developed as a result of conducting business based on adhering to customary rules of international commercial transactions, is the Organization for Economic Co-operation and Development ("OECD"). As an international economic and commercial forum, the OECD provides principles and establishes procedures on its members for export credits and policies with respect to good governance. These issues include anti-corruption measures, sustainable lending policies, and environmental and social due diligence.<sup>444</sup> Even countries outside of the OECD, which are engaged in commercial transactions with the OECD's member-countries, are directly affected by the principles governing the member countries' commercial transactions and banking activities.

Iran is not a member of the OECD community. However, throughout the negotiations between Iran and the 5+1 countries concerning the containment of nuclear weapons, the OECD was a keen observer. In fact, the OECD Secretary-General Angel Gurría, supported the initial understanding reached between Iran and the 5+1 countries concerning the development of atomic energy by the Islamic Republic of Iran. The Secretary-General considered the JCPOA Agreement as "a boost for the

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<sup>443</sup> See SARAH CHAYES, *THIEVES OF STATE: WHY CORRUPTION THREATENS GLOBAL SECURITY* 198-201 (Norton 2015).

<sup>444</sup> These rules are decided under the auspices of the working party on Export Credits and Credit Guarantees.



chances of lasting peace and security in a highly unstable region.” Specifically referring to the relationship between Iran and the OECD members, the Secretary-General of the OECD was emphatic that “[t]he understanding [between Iran and the 5+1 countries] is also an important opportunity, and if followed by other positive actions, could lead to the gradual normalization of relations between Iran and the international community, which would allow for its re-integration into the world economy.”<sup>445</sup>

The above-mentioned statement by the Director of the OECD is not merely a diplomatic nicety expressed by the head of an important global organization. By its own Convention, the OECD is legally obliged to “promote policies designed to achieve the highest sustainable economic growth . . . in member countries, while maintaining financial stability, and thus contribute to the development of the world economy.”<sup>446</sup> Some of the major issues that the OECD member countries must adhere to (and which will have significant impact on doing business with countries such as Iran) follow.

#### 1. Monitoring Credibility and the Degree of Corruption in Various Countries in the World

The OECD sends fact-finding missions to a vast variety of selected countries in order to examine their state of policing and containing corruption and business related corrupt practices. It is important to note that countries under the OECD’s observation are not limited to OECD members. The resulting report by the Secretariat of the OECD contains issues such as “Steps Taken by the State Parties to Implement and Enforce the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.” For example, in 2014 the OECD, studied the position of, or sent missions to, a vast number of countries in Latin America, Africa and Asia, in order to observe those countries’ degree of adherence to anti-corruption rules.

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<sup>445</sup> *OECD’s Gurria welcomes Iran nuclear deal*, OECD, [www.oecd.org/countries/Iran/Gurri-welcomes-Iran-nuclear-deal.htm](http://www.oecd.org/countries/Iran/Gurri-welcomes-Iran-nuclear-deal.htm).

<sup>446</sup> *See id.*

## 2. Observing Regulatory Disciplines Including Anti-Corruption Measures

In terms of regulatory discipline of its members, the OECD has a forum for exchanging information on members' credit systems, export credits and business activities, relating to good governance principles such as anti-corruption (specifically anti-bribery measures), environmental and social due diligence as well as the sustainable lending policies by the member countries.

## 3. Following the Financial Disciplines Concerning Export Credits

The OECD provides a legal forum for maintaining, developing, and monitoring financial disciplines with respect to the export credits by the member countries.<sup>447</sup> These rules and principles apply directly to the member countries. It is important to note that such principles have also been applied to non-members such as Brazil, China, India and South Africa.<sup>448</sup>

Adhering to the export credits disciplines provided by the OECD is, of course, mandatory to the member countries. However, adherence to any of the OECD principles of doing business abroad, *de facto* or *de jure*, by any non-member country would be advantageous to that country's international trade. For example, such adherence by a non-OECD country eventually will enhance the OECD export credits to that country. Under the rules of the OECD conventions, member countries should make consultations "in the framework of the [OECD's] Committee on

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<sup>447</sup> See *The Export Credits Arrangement Text*, OECD, <http://www.oecd.org/tad/xcred/theexportcreditsarrangementtext.htm> (last updated Feb. 4, 2016). These rules are within the "Arrangement on Officially Supported Export Credits."

<sup>448</sup> See *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Turkey*, Org. for Econ. Co-operation & Dev. (2014), <http://www.oecd.org/daf/anti-bribery/TurkeyPhase3ReportEN.pdf> [hereinafter *Anti-Bribery Convention in Turkey*]; see *Better Policies for Development: Better Policies for Better Lives*, Org. for Econ. Co-operation & Dev. (2011), <https://www.oecd.org/pcd/48110465.pdf>; see *Export Credits Work at the OECD*, Org. for Econ. Co-operation & Dev., <http://www.oecd.org/tad/xcred/about.htm> (last visited Jan. 24, 2017).

International Investment and Multinational Enterprises at the request of a member country.”<sup>449</sup>

*B. Application of the OECD Rules Concerning Doing Business with Iran*

The principles and conventions briefly mentioned above are incontrovertible rules which the OECD member countries adhere to. In their business transactions with non-OECD members, such as Iran, the members should, under the OECD rules, follow such long-established commercial precedents. The OECD was established in 1961 – almost 18 years prior to the Islamic Revolution of Iran. At present, 34 OECD member countries worldwide exchange information and analyze them in an effort to maintain a joint policy. Many of these countries are neither European nor North American. For example, Japan, economically an important country, joined the OECD in 1964. As was briefly mentioned above, the OECD has developed elaborate principles concerning conduct of investment and trade by its member-countries. In doing business with a non-OECD country, a member-country will have to adhere to the time-honored policies and rules as established by the OECD members collectively.

Considering the above explanatory note, the conclusion is inescapable that the code of conduct, principles, rules, commercial traditions, and financial regulations governing the OECD are applicable with respect to trade agreements between OECD member countries and Iran. In implementing its investment and commercial transactions with France, Italy, the U.K., and the United States (among many other countries), Iran will have to modify, if not totally eliminate, some of its precedential commercial practices that prevailed in the Islamic Republic during the era of sanctions.

As a result of the post-sanction commercial transactions between Iran and a number of European countries, an issue may be raised by Iranian authorities engaged in business transactions with OECD member-countries: Iran, being outside

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<sup>449</sup> See Org. for Econ. Co-operation & Dev., Declaration by the Governments of OECD Member Countries and Decisions of the OECD Council on Guidelines for Multinational Enterprises National Treatment International Investment Incentives and Disincentives, Consultation Procedures (1979).

of the OECD's orbit, may not have to abide by the OECD's prevailing rules. The fact is that Iran's non-membership in the OECD community will not affect the applicability of the OECD's long-established principles with respect to corruption, favoritism, and preferential treatment in conduct of international trade. The U.S. and European companies engaged in doing business with Iran will have to follow the OECD principles concerning banking, nepotism and corrupt practices. In this respect, Iran's non-membership in the OECD could not be used as a subterfuge to avoid this organization's rules concerning conduct of international business.<sup>450</sup>

Even in a number of cases, non-OECD members, not being able to obtain full credit and economic support from the trading partners, had to seek the OECD's support on anti-corruption business practices. For example, in 2015, the government of Ukraine, a non-member of the OECD, unable to attract sufficient foreign investment, entered into an Action Plan with the OECD "for strengthening co-operation to help tackle corruption, improve public governance and the rule of law, boost investment and foster a dynamic business environment."<sup>451</sup>

Iran's financial credibility, and its ability to restrain its institutional and patrimonial corruption, will have an important impact internationally in terms of Iran's ability to obtain sufficient bank credits for its international commercial transactions and to conduct trade agreements with Western countries. According to Transparency International's Corruption Perception Index, Iran's index of corruption in 2015 was 136, one of the highest on the globe, equal to the corruption index of Nigeria, Kyrgyzstan, Cameroon, Lebanon and Russia.<sup>452</sup>

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<sup>450</sup> In fact, an important issue for not admitting Turkey into the EEC community has been the problem of nepotism, preferential treatment and particularly corrupt business practices in that country. See OECD, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Turkey, October 2014.

<sup>451</sup> See *OECD and Ukraine to Step Up Co-operation on Anti-Corruption, Rule of Law and Business Environment*, Org. for Econ. Co-operation and Dev. <http://www.oecd.org/newsroom/oecd-and-ukraine-to-step-up-co-operation-on-anti-corruption-rule-of-law-and-business-environment.htm> (last visited Jan. 24, 2017).

<sup>452</sup> See *Corruption Perceptions Index 2014: Results*, TRANSPARENCY INT'L: THE GLOBAL COALITION AGAINST CORRUPTION, <https://www.transparency.org/cpi2014/results>.

Despite lifting the nuclear-related sanctions, the extra-constitutional institutions, if they continue to dominate Iran's economic scene, will pose two major impediments concerning expansion of foreign investment obtaining necessary credits and entering into joint venture agreements with major European or American companies.

The first impediment will be Iran's ability to obtain adequate financial credits for its basic investment and commercial transactions. Until the time that structural reforms in Iran (in terms of eliminating patrimonial and institutional corruption) effectively take place, the ability of Iran to obtain financial and banking credits to effectively conduct its commercial transactions will be extremely limited. Even at times, Iran will have to pay for such investment activities mainly in the form of cash rather than credit. For a large state like Iran, with dire infrastructural, building and repairing requirements that have been accumulated since the imposition of sanctions, such financial deprivation will result in draining the country's financial resources.

The second impediment to Iran's international trade, or attracting foreign investment, will be Iran's diminishing ability to acquire necessary insurance for international investment projects. That will result in a high cost of commercial or investment insurance for Western companies that would like to do business with Iran. There will be very little, if any, insurance guarantees for capital investment by Western companies that are planning to invest in Iran or the cost of such investment insurance will be excessively high. In the absence of adequate credit, the only and exceedingly costly available investment would be to charge the government of Iran for the requisite investment insurance costs. Another alternative may be to invite foreign investors to Iran on the basis of investment costs, including insurance, to be borne by the government of Iran – both are unattractive alternatives. Business with foreign companies on the basis of cash and with little access to international credit or investment insurance would be, of course, a highly inadequate alternative.

### *C. The JCPOA's Contribution to Regional Security*

The JCPOA accord is highly controversial in the United States. From the Western governments' point of view, the

essential purpose of entering into the JCPOA accord with Iran was to enhance political security in the Middle East; providing trade opportunities for Western commercial companies was a secondary goal. According to U.S. Secretary of Defense James Mattis, however, the actual outcome amounts to a regional arms race, evidenced by the fact that Saudi Arabia has reportedly surpassed Russia as the third largest military weapons spender in the world.<sup>453</sup>

During the implementation of the JCPOA accord, it was clear that Iran's political objectives were not necessarily comparable with Western parties. Even President Obama, who viewed the Iran nuclear accord as his landmark foreign policy achievement, characterized Iran's response to the JCPOA as "respecting the letter but violating the spirit of the [A]greement."<sup>454</sup> General Firouzabadi, Chief of Staff for the Iranian armed forces, contemptuously remarked that "[w]e studied the details of the nuclear agreement, and we don't have any information about its spirit."<sup>455</sup>

Nevertheless, the JCPOA accord has ardent defenders in the United States. The agreement's proponents acknowledge that the Iran nuclear agreement is not ideal, and concede that "the U.S. arguably paid too much for too little."<sup>456</sup> However, they contend that undermining the nuclear accord with Iran, or being perceived as having done so, "would isolate Washington, not Tehran. Reconstituting the worldwide regime of sanctions that existed before the agreement would prove impossible. The U.S. would quickly face the unpalatable choice between watching Iran cross the nuclear threshold or starting a war in an effort to stop it."<sup>457</sup>

## Conclusion

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<sup>453</sup> 2016 *Defense Markets Report Defense Products: A Market Assessment Tool for U.S. Exporters*, U.S. DEP'T COMMERCE, at 19 (June 2016), [http://trade.gov/topmarkets/pdf/Defense\\_Top\\_Markets\\_Report.pdf](http://trade.gov/topmarkets/pdf/Defense_Top_Markets_Report.pdf).

<sup>454</sup> Middle East Security Challenges, C-SPAN (Apr. 22, 2016), <https://www.c-span.org/video/?408571-1/general-james-mattis-middle-east-security-challenges> (statement of General James Mattis).

<sup>455</sup> *Id.*

<sup>456</sup> Richard Haass, *Don't Make Any Sudden Moves, Mr. Trump*, WALL ST. J., January 19, 2017, at A19.

<sup>457</sup> *Id.*

On March 2016, during the time-honored celebration of Nowruz, Iran's New Year, the people of that country started with new hope for Iranians, of breaking the sanctions, and of embarking on long awaited commercial transactions and investment with Western countries. As pernicious as the regime of the economic sanctions was to the ordinary middle-class Iranians, it served well for a well-placed minority that belonged to the extra-constitutional institutions. Through a powerful and sophisticated network of patrimonial, structural and institutionally-based corrupt practices, these institutions have used a highly structured medium. Such medium included, but was not limited to, money-laundering, bartered commodity exchanges, custom exemptions, and trade deals with countries not bound by the constraints of sanctions. For this group, sanctions provided an unparalleled economic bonanza.

It was only three months after lifting the nuclear-based sanctions, the United States Supreme Court approved President Obama's executive order, to block "all property and interests in property of any Iranian financial institution, including the Central Bank of Iran, that are in the United States."<sup>458</sup> This decision ignored the time-honored principle of the separation of powers under the U.S. Constitution and blindly approved the former president's executive order with ample adverse political implications in Iran. While the United States, through a joint accord, committed itself to lift the nuclear-based sanctions, the U.S. Supreme Court's decision condoned those sanctions that were not nuclear-based. In his strong and eloquent dissenting opinion, Chief Justice Roberts indicated that the Court's majority decision "was an unconstitutional interference with the judicial function, whereby Congress assumes the role of judge."<sup>459</sup>

In terms of U.S. regional security concerns, reconstituting the worldwide regime of economic sanctions against Iran would run counter to the interests of the Iranian people, and would not serve the political and economic interests of the U.S. in the Middle East.

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<sup>458</sup> Exec. Order No. 13,599, 77 Fed. Reg. 6659 (Feb. 5, 2012); *Bank Markazi*, 136 S. Ct. at 1310.

<sup>459</sup> *Bank Markazi*, 136 S. Ct. at 1310.

For U.S. companies, issues concerning trade with or investment in Iran are not limited to the political horizon. Once a company has decided to establish a commercial or contractual relationship with Iran, it will quickly become clear that the labyrinthine Iranian legal system differs vastly from other systems to which U.S. companies are accustomed. These differences relate to Iran's contract laws, which derive from a combination of the Napoleonic Code and religious and ideological principles. Further, to be officially enforceable, a considerable number of contractual agreements between publicly owned Iranian companies and foreign corporations will likely require approval of the Council of Guardians, which exercises judicial review over laws passed by the Islamic Assembly. Moreover, any accord between Iran and a foreign company should be in the form of a contractual agreement rather than a concessionary one.<sup>460</sup>

The political and economic impact of continued sanctions is clear and inevitable. By maintaining nuclear-based sanctions against Iran, the U.S. Treasury Department will serve the interests of two seemingly unrelated groups. First, it will serve the ideologues and extra-constitutional class in Iran, who have persistently claimed that U.S. policy has always been against the interest of the Iranian people, especially economically disposed groups. Second, it will serve the interests of non-U.S. companies, particularly those in Europe, which will rejoice in the fact that they will not compete with U.S. corporations for a share of the Iranian market. In fact, these European companies will provide products and services to Iran in place of U.S. companies, which will find themselves handicapped by the Treasury Department's massive regulatory prohibitions.

Nevertheless, in order to draw the maximum benefit for the Iranian economy from the post-sanctions environment of zeal, eagerness, and exuberance prevalent in the country (and to a lesser degree, in the international commercial community), Iran requires structural reforms to its international trade and investment policies. The first step for such reforms requires that Iran limit extra-constitutional organizations' ideologically

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<sup>460</sup> See QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980] art. 81 (prohibiting concessionary agreements with foreign persons).



inspired powers, as well as their manifestation and exercise. Moreover, Iran must tame the ideologically motivated voices in many of its governmental structures. Iran needs to engage in trade with, and attract investment capital from, Western countries. Its domestic product is insufficient to meet the growing needs of its economy and its highly educated, enlightened, and vibrant urban population.