

## NOTES & COMMENTS

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# Interpreting the United Nations Security Council Resolutions by the Domestic Courts: The Judgment of the High Court of Singapore on the Iranian Nuclear Program

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Amir-Hossein Ranjbarian,<sup>\*</sup> Abdollah Abedini,<sup>\*\*</sup> & Khalil Rouzegari<sup>\*\*\*</sup>

*The scope of the maintenance of international peace and security has been increasingly widened by the United Nations Security Council in response to actions taken not only by the Member States but also in some cases by the individuals. In fact, a range of actions and decisions were taken by the Security Council, approximately in the late 1990s and after the so-called 9/11 attacks in the context of combating terrorism, as well as in other contexts against the member States. In consequence, the affected States and individuals had to seek redress from international or national courts on different grounds such as violations of human rights. This has led the domestic courts to develop novel jurisprudence. Thus, it is necessary to pay due attention to the jurisprudence created by these courts. This paper is devoted to analysis an*

\* Assistant professor in international law at Faculty of Law and Political Science, University of Tehran ("UT"). LL.B/LL.M. (UT), Ph.D. (Paris 13). ORCID: <http://orcid.org/0000-0003-4622-8978>.

\*\* Ph. D. candidate in international law at UT and Lecture at Farabi College, UT. ORCID: <https://orcid.org/0000-0002-3771-4870>. This paper is extracted from my Ph.D. thesis at UT. The author may be contacted at: [s\\_abedini\\_a@ut.ac.ir](mailto:s_abedini_a@ut.ac.ir) / Address: Faculty of Law & Political Science, University of Tehran, Enghelab Ave., Tehran, Iran. Corresponding author.

\*\*\* Ph.D. student in international law at Department of Law and Politics, Tehran Science and Research Branch, Islamic Azad University (I.A.U.) in Tehran and Lecture at Department of Law, Damghan Branch, I.A.U. ORCID: <https://orcid.org/0000-0002-3911-7797>.

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*interpretation by the High Court of Singapore in relation to sanctions resolutions of the Security Council against Iran.*

### Keywords

UNSC Resolution, Iranian Nuclear Program, High Court of Singapore, Judgment, IRISL

## 1. Introduction

What is the precise scope of the United Nations Security Council (“UNSC”)’s powers and functions? Under the UN Charter, the UNSC would take charge of addressing peacekeeping operations, authorizing recourse to force, imposing sanctions in the light of fight against terrorism, etc.<sup>1</sup> For the past two decades, however, there have been round of discussions, especially regarding the scope of the Security Council’s excessive enforcement measures. As the UNSC’s decisions would make a proactive influence on the whole aspects of international relations including reserve effects, these were invariably criticized by the member States.<sup>2</sup>

In particular, legality of the UNSC’s measure against terrorism has been examined internationally and internally; it has become subject matter of case laws.<sup>3</sup>

<sup>1</sup> U.N. Charter ch. VII. As some lawyers have correctly stated, the more the scope of SC activities, the more the challenges it faces, particularly, as a result of violation of sanctioned person and entities’ rights, especially in the case of individuals’ human rights. See A. Reinisch, *Should Judges Second-Guess the UN Security Council?*, 6 INT’L ORGS L. REV. 261 (2009).

<sup>2</sup> See, e.g., in the context of terrorism, Martin Scheinin, the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, held the view that the well-known UNSC Resolution 1373 was *ultra vires* since it is of legislative character and accordingly is not limited to a given time and place. Also, it is in contradiction with fundamental human rights law and general international law specially in including persons’ name in the terrorist sanctions. See Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, UN Doc. A/HRC/16/51, Dec. 22, 2010, ¶ 11, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/134/10/PDF/G1013410.pdf?OpenElement> (last visited on Oct. 25, 2014).

<sup>3</sup> It should be mentioned here that many judgments on terrorism were delivered by the regional and national courts which have formed a valuable jurisprudence in the sphere of protection of human rights. Definitely, among others, the leading judgment of the European Court of Justice in 2008 is an important example, which has created a wave on the various regimes of international law. Other key cases on terrorism which were considered by different regional and national courts are as follows: *World Help Association of France v France*, Judicial Review, CE No 262626, Nov. 3, 2004; *Kadi v Prime Ministry and Ministry of Foreign Affairs of Turkey*, Feb. 22, 2007; *Youssef Nada v State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, Administrative appeal judgment, Case No. 1A 45/2007, ILDC 461 (CH 2007), Nov. 14, 2007; and *Hay v HM Treasury*, Administrative judgment (2009) EWHC 1677 (Admin), ILDC 1367 (UK 2009), July 10, 2009; *Abdelrazik v Minister of Foreign Affairs and Attorney General*

Generally, the precedents governing terrorism and its sanction are developed by the domestic courts, while deciding and ruling on claims and actions brought by the individuals alleging violation of their fundamental human rights.<sup>4</sup> Imposing sanctions by the UNSC resolutions have remarkably drawn the attention of the scholars and practitioners who have been analyzing the legitimacy of such initiatives.<sup>5</sup> Domestic judgments are thus a precious resource.

The primary purpose of this research is to analyze how the UNSC's resolution would be interpreted by the domestic courts. A recent judgment of the High Court of Singapore over a series of sanction resolutions imposed on Iran between 2006 and 2010 is the main focus, given its remarkable interpretation of the UNSC sanction resolutions. This article is composed of four parts including Introduction and Conclusion. Part two will investigate the factual context of the said judgment. Part three will briefly interpret the judgment and highlight its outstanding legal arguments.

## 2. Fact

Having been concerned about Iran's nuclear program, the International Atomic Energy Agency ("IAEA") have been negotiating with Iranian authorities since 2006 to solve existing ambiguities on her nuclear program.<sup>6</sup> These negotiations have finally led to resolution of certain outstanding issues. Some questions were, however,

*of Canada*, 2009 FC 580, June 4, 2009; *HM Treasury v Ahmed and ors*, Appeal judgment, (2010) UKSC 2, Jan. 27, 2010; *Nada v. Switzerland*, ECHR, Grand Chamber, 10593/08, Sept. 12, 2012. For details, see Oxford Reports on International Law, available at <http://opil.ouplaw.com/home/ORIL> (last visited on Apr. 20, 2014).

- <sup>4</sup> The case law related to the sanctions imposed by the UNSC and regional institutions such as the European Union, which has mostly been implementing the SC pertaining resolutions, is remarkable with regard to Iran's nuclear program. See, e.g., *The 'Sahand' and other applications* [2011] SGHC 27 (Jan. 31, 2011); *Bank Mellat (Appellant) v Her Majesty's Treasury* (Respondent) (No. 2), June 19, 2013; *Bank Saderat Iran v Council of the European Union, v European Commission* [2013] EUECJ T-494/10 (Feb. 5, 2013); *Bank Sina v Council of the European Union, v European Commission* [2012] EUECJ T-15/11 (Dec. 11, 2012); *Bank Mellat v Council of the European Union, v European Commission* [2013] EUECJ T-496/10 (Jan. 29, 2013); *Manufacturing Support & Procurement Kala Naft Co v. European Commission*, Case T-509/10, General Court of ECJ (Apr. 25, 2012); *Iranian Offshore Engineering & Construction Co v. Council of the European Union*, Case T-509/10, General Court of ECJ (Sept. 6, 2013).
- <sup>5</sup> From the view point of Cherif Bassiouni, domestic courts are considered as "indirect enforcement system" of international law. See M. O'CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT* 328 (2008).
- <sup>6</sup> In this respect, Resolution GOV/2006/14 of the IAEA Board of Governors is considered as a basic instrument on the basis of which the Board referred Iran's case to the UNSC in 2006 by stating its serious concern that the Agency is not yet in a position to clarify some important issues relating to Iran's nuclear program and then the UNSC, in turn, took the instrument for its further decisions.

remained unsolved. In spite of positive progress between IAEA and Iran in solving the remaining matters, the IAEA Board of Governors decided to refer the matter to the UNSC in 2006 which finally led to adopting six resolutions against Iran.<sup>7</sup> Some of these resolutions imposed sanctions on Iran in order to suspend her ongoing nuclear program activities. The basic contents of these sanctions can be classified into four categories as described in Table 1.<sup>8</sup>

Table 1: Sanctions against Iran

List	Resolution Number & Date	Kind of Sanctions	Evolution
1	S/RES 1737 Dec. 27, 2006	<ol style="list-style-type: none"> <li>1. Suspension of all enrichment-related and reprocessing activities, including research and development;</li> <li>2. Ban on any transfer of the forbidden items;</li> <li>3. Ban on export and import of the forbidden items by Iran and other member States;</li> <li>4. Travel ban on some experts involved in Iran's nuclear program; and</li> <li>5. Asset freeze with its exceptions on some experts involved in Iran's nuclear program.</li> </ol>	Establishing of Sanctions Committee 1737
2	S/RES/1747 Mar. 24, 2007	<ol style="list-style-type: none"> <li>1. Arms embargo</li> </ol>	Adding new persons to the travel ban and asset freeze sections-inserting June 2006 proposals as an annex
3	S/RES/1803 Mar. 3, 2008	<ol style="list-style-type: none"> <li>1. Exercise of vigilance by the member States on not to engage in any commercial contract with Iran;</li> <li>2. Investigation of ships and aircrafts of Iran by the member States on the existence of reasonable grounds; and</li> <li>3. Ensuring by Iran that nobody would protest to sanctions as impeding its contracts.</li> </ol>	Adding new persons to the travel ban and asset freeze sections
4	S/RES/1929 June 10, 2010	<ol style="list-style-type: none"> <li>1. Engagement of the member States not to invest in various sectors such as uranium mine;</li> <li>2. Prevention of fuel services to Iranian Shipping Lines;</li> <li>3. Prevention of credit and financial services such as insurance; and</li> <li>4. Prevention on Iranian Banks from establishing new branches within the territory of the member States.</li> </ol>	Adding new persons to the travel ban and asset freeze sections  Establishing Panel of Expert

Source: Compiled by the authors.

<sup>7</sup> For a detailed review of the factual background on Iran's nuclear program, see P. Dupont, *Countermeasures and Collective Security: The Case of the EU Sanctions against Iran*, 17 J. CONFLICT & SECURITY L. 301-336 (2012).

<sup>8</sup> On the basis of a reliably conducted study, there are five categories in the UN targeted sanctions regime: diplomatic, travel ban, asset freeze, arms embargo and commodity interdiction. See UN Sanctions (Special Research Report) available at <http://securitycouncilreport.org> (last visited on Apr. 20, 2014). However, some other categories such as educational sanctions can be seen in the context of Iran's targeted sanctions regime.

Generally speaking, through these resolutions, the Security Council tried to compel Iran to comply with her obligations under the NPT and the IAEA regulations. Several provisions were included, particularly in UNSC Resolutions 1737 and 1929, which address the ban on some of Iran's shipping lines preventing them from engaging in any commercial or insurance activities. It is at the heart of interpretation made by the High Court of Singapore.

### 3. Judgment

The High Court of Singapore rendered its judgment on the detention of three Iran owned vessels ('Tuchal', 'Sahand' and 'Sabalan') in Singapore's waters on January 31, 2011.<sup>9</sup> By addressing these sanctions and analyzing their issues pertaining to areas such as the scope and effectiveness of the UNSC resolutions against Iranian entities on the one hand, and dealing with numerous topics such as relationship between Singapore's domestic law and international law on the other, the judgment provides for noticeable jurisprudence that would be useful for legal scholars, judges and related decision-makers.<sup>10</sup> The bench took into account on using both the restrictive measures on fund transfers for satisfying debts, and the effect of sanctions against Iran by the UNSC. The conduct of the European Union and the United States was included in this process. The presiding judge should consider all these factors in order to implement the sanctions in Singapore's domestic legal system, although it is one of the admiralty law and practice cases.<sup>11</sup>

<sup>9</sup> *The 'Sahand' and other applications* [2011] SGHC 27, available at <http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/14452-the-ldquo-sahand-rdquo-and-other-applications-2011-sghc-27> (last visited on Nov. 2, 2014).

<sup>10</sup> Unfortunately, there is not sufficient and remarkable analysis on the judgment of the Singapore High Court explaining its different aspects except some introductory notes. See S. Zhixiang, *Interpreting and Applying the UNSC sanctions on Iran in the Admiralty Context: The Sahand* [2011] SGHC 27, available at <http://www.ejiltalk.org/interpreting-and-applying-the-uns-c-sanctions-on-iran-in-the-admiralty-context-the-sahand-2011-sghc-27/#more-3296>; Singapore Academy of Law, *Annual Review of Singapore Cases, 2011*, ¶¶ 26-29, available at [http://www.sal.org.sg/digitalibrary/Lists/SAL%20Annual%20Review/Attachments/271/%282011%29%2012%20SAL%20Ann%20Rev%2026-47%20%28Admiralty\\_Shipping\\_Aviation%29.pdf](http://www.sal.org.sg/digitalibrary/Lists/SAL%20Annual%20Review/Attachments/271/%282011%29%2012%20SAL%20Ann%20Rev%2026-47%20%28Admiralty_Shipping_Aviation%29.pdf) (all last visited on Apr. 20, 2014).

<sup>11</sup> This judgment has taken a more prominent approach in the interpretation of the UNSC resolutions in comparison with that of other domestic courts' judgments. In the case concerning *Bank Mellat (Appellant) v Her Majesty's Treasury* of June 19, 2013, e.g., the UK Supreme Court did not take due approach to the broad contextual aspects of the case and focused just on its domestic applicable law and jurisprudence without considering the related regulations of the EU and UNSC resolutions pertaining to imposing restrictive measures on Iran. Similar approach was taken in the judgment which has been issued on the Bank Mellat as applicant at the General Court of the European Court of Justice approximately six months before that, on January 29, 2013. See *Bank Mellat v Her Majesty's Treasury* (No.

## A. Background

Quentin Loh, judge of the High Court of Singapore, in his decision of January 31, 2011 in the case concerning three Iranian vessels arrested by the government of Singapore (hereinafter defendants), declared that because all the mortgages with other costs had been paid and the vessels were not included on the UNSC sanction list, the three Iranian vessels should be released.<sup>12</sup> Plaintiffs of the case were financial institutions which provided for the mortgage for construction of vessels for Iran.<sup>13</sup> On the words of the judgment, the mortgage involved several contractual agreements which provided a syndicated loan for the construction of several vessels (including the three vessels) and related mortgage and financing arrangements governed by English law dated August 23, 2006.<sup>14</sup> Between April 26 and July 28, 2010, the defendants failed to make payments under the Loan Agreement. In addition, the defendants also failed to renew hull and machinery and war risks insurance with an approved insurer and to maintain acceptable protection and indemnity insurance for the vessels.<sup>15</sup>

On September 9, 2010, as mentioned before, the plaintiffs filed admiralty actions *in rem* against that Iranian vessels ('Tuchal', 'Sahand' and 'Sabalan'). The Tuchal was arrested on the same day; the Sahand and the Sabalan were arrested on September 14, 2010 by an order of the High Court of Singapore.<sup>16</sup>

On September 17, 2010, the defendants entered into the scene and applied for the release of the Sabalan and the Tuchal, on the ground that the value of the Sahand alone was sufficient to cover the plaintiff's claim of USD 37,161,645.35. The Court agreed to release the vessels, but the plaintiff increased the claimed amount up to USD 182,304,981.52 and filed a second set of admiralty actions *in rem* in respect of this sum on September 23, 2010.<sup>17</sup> Thus, the vessels were rearrested against these actions after they had been released according to the first set of

2), available at [http://www.supremecourt.uk/decided-cases/docs/UKSC\\_2011\\_0040\\_Judgment.pdf](http://www.supremecourt.uk/decided-cases/docs/UKSC_2011_0040_Judgment.pdf); *Bank Mellat v Council of the European Union, v European Commission* [2013] EUECJ T-496/10, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010TJ0496:EN:HTML> (all last visited on Oct. 2, 2014).

<sup>12</sup> The 'Sahand' and other applications, *supra* note 9, ¶ 22.

<sup>13</sup> The Plaintiffs were *Société Générale*, and The Export-Import Bank of Korea.

<sup>14</sup> The 'Sahand' and other applications, *supra* note 9, ¶ 3.

<sup>15</sup> *Id.* ¶¶ 3-8.

<sup>16</sup> It should be noted that, according to the Singapore's Court Structure, the High Court has general supervisory and revisional jurisdiction over all subordinate courts such as District Courts and Magistrate's Courts, but it is subordinate to the Court of Appeal. See The Singapore Supreme Court, available at <http://app.supremecourt.gov.sg/default.aspx?pgID=43> (last visited on Jan. 2, 2014).

<sup>17</sup> The 'Sahand' and other applications, *supra* note 9, ¶¶ 9-15.

actions. In the meantime, the defendants attempted to make some payment in three different attempts. Due to the European Union's sanctions against Iran, however, the payments were blocked by France and thus were not available to the plaintiffs. As a French Credit Institution, plaintiffs are required to obtain an authorization from the relevant authorities - the French Direction *générale du Trésor* (Directorate General of the Treasury) - before receiving funds from the defendants.<sup>18</sup> As a result, the plaintiffs applied to sell the vessels *pendente lite* and, on November 12, 2010, the High Court ordered the sale of the vessels. Meanwhile, on December 9, 2010, the defendants' lawyers requested to postpone the sale, on the ground of, *inter alia*, sudden increase in the sum claimed.<sup>19</sup>

The court dismissed the postponement request based on the following grounds: (a) delay in making the postponement application; (b) default by defendants in fulfilling payment obligations under some agreements and difficulty in making payments resulting from sanctions; and (c) there were parties interested in bidding for the vessels and some of them had incurred the cost of underwater hull surveys. On December 14, 2010, the defendants claimed that they had transferred Euro 155 million to the plaintiff which is confirmed. Consequently, the bids were canceled by an order of the Court.<sup>20</sup> Despite the transfer, the judge went on to question as to (1) whether the Direction *générale du Trésor* would give the necessary authorizations to enable the lenders to be paid out of the sums received; and (2) whether the assets and fund frozen on the basis of relevant UNSC resolutions can be implemented in domestic jurisdiction of Singapore.<sup>21</sup>

### ***B. Applicable law: An Opportunity to Interpretation in the Light of Domestic Implementation***

Judge Loh raised the three questions in order to consider the different aspects of relationship between the domestic law of Singapore and international law. First, whether international law, as such, is an independent source of rights and obligations, and powers and duties in Singapore?<sup>22</sup> The court has examined the Singaporean Constitution of 1965 and practices of the United Kingdom which have influences on Singapore legislation. According to Article 38 of the Singaporean Constitution and a principle underlying the English position in this regard, Judge

<sup>18</sup> *Id.* ¶ 12.

<sup>19</sup> *Id.* ¶ 15.

<sup>20</sup> *Id.* ¶¶ 18-21.

<sup>21</sup> *Id.* ¶¶ 16-18.

<sup>22</sup> *Id.* ¶¶ 28-35.

Loh declared that: “In order for a treaty to be adopted into Singapore law, its provisions should be enacted by the Legislature or by the Executive pursuant to the authority delegated by the Legislature.”<sup>23</sup> By examining the precedents of Singapore, he found that: “A rule of customary international law [is] not self-executing, that is to say that it cannot become part of domestic law until and unless it has been applied as or definitively declared to be part of domestic law by a domestic court.”<sup>24</sup>

Second, whether international law can be used as an instrument for interpreting a legislation or regulation issued by the executive?<sup>25</sup> In response to this question, Judge Loh asserted that, if an external rule or principle contributes to discover the meaning of a domestic rule, it would be certainly useful to the interpretation of the case in hand.<sup>26</sup> He believes, in order to interpret domestic regulation based on the implementation of the UNSC resolutions, recourse to international principles would be useful.<sup>27</sup>

Third, Judge Loh raised a question concerning the validity of the regulations issued by the executive body - “when exercising its discretionary powers” - to implement an Act based on the UNSC resolutions.<sup>28</sup> On the assessment of validity of the regulation, he observed that: “It would be assumed principally valid unless it was established that the regulation had been *ultra vires* of the powers endowed with the Constitution.”<sup>29</sup>

Then, Judge Loh referred to some municipal legislations of Singapore such as Immigration Act (2008), Regulation of Imports and Exports Act (1996), Strategic Goods (Control) Act (2003), and Merchant Shipping Act (1996).<sup>30</sup> Among others, two Regulations of Singapore have been focused on by the Court. One is the Monetary Authority of Singapore (Sanctions and Freezing of Assets of Persons-Iran) Regulations 2007 (hereinafter MAS Regulations) which confers upon MAS the power to make regulations concerning financial institutions as it considers necessary

<sup>23</sup> *Id.* ¶¶ 33. In fact, he maintains as the reasoning for his finding that: “It would be contrary to Art 38 [of the Constitution of the Republic of Singapore] to hold that treaties concluded by the Executive on behalf of Singapore are directly incorporated into Singapore law, because this would, in effect, confer upon the Executive the power to legislate through its power to make treaties.”

<sup>24</sup> *Id.* ¶ 31.

<sup>25</sup> *Id.* ¶ 34.

<sup>26</sup> *Id.* As his reasoning behind of this understanding, he states that: “In Singapore, 9A(2) of the Interpretation Act (Cap 1, 2002 Rev Ed) permits consideration to be given to extrinsic materials in interpreting a provision of a written law, if such materials are capable of assisting in the ascertainment of the meaning of the provision.”

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* ¶ 35.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* ¶¶ 39-40.



in order to discharge or facilitate any obligation binding on Singapore by virtue of a decision of the Security Council.<sup>31</sup> The other is the United Nations (Sanctions-Iran) Regulations 2007<sup>32</sup> (S 105/2007) (hereinafter UN Regulations) which empowers the Minister to make regulations to give effect to Article 41 of the UN Charter.<sup>33</sup>

Afterwards, Judge Loh focused on the implementation of the UNSC Resolutions in the legal system of Singapore.<sup>34</sup> Here, he found out paragraphs 12-15 of Resolution 1737 the main basis for asset and fund freezing and quoted relevant paragraphs of the resolution. Paragraph 12 of the resolution, which is a central provision of the resolution for asset and fund freezing, provides that:

*Decide[d]* that all States shall freeze the funds, other financial assets and economic resources which are on their territories at the date of adoption of this resolution or at any time thereafter, that are owned or controlled by the persons or entities designated in the Annex, as well as those of additional persons or entities designated by the Security Council or by the Committee as being engaged in, directly associated with or providing support for Iran's proliferation sensitive nuclear activities or the development of nuclear weapon delivery systems, or by persons or entities acting on their behalf or at their direction, or by entities owned or controlled by them, including through illicit means, and that the measures in this paragraph shall cease to apply in respect of such persons or entities if, and at such time as, the Security Council or the Committee removes them from the Annex, and *decide[d]* *further* that all States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any persons or entities within their territories, to or for the benefit of these persons and entities.

Paragraphs 13-15 of the resolution are exceptions to Paragraph 12. Paragraph 13 includes funds, other financial assets or economic resources;<sup>35</sup> extraordinary expenses subject to approval of sanctions committee;<sup>36</sup> funds which are subject of a judicial, administrative or arbitral lien or judgment<sup>37</sup> and funds determined necessary for activities directly related to the items specified in subparagraphs 3(b)(i) and (ii).<sup>38</sup>

<sup>31</sup> *Id.* ¶ 42.

<sup>32</sup> Charter of the United Nations (Sanction-Iran) Regulations 2007 (S105/2007), available at <http://www.comlaw.gov.au/Details/F2007L00418> (last visited on Oct. 25, 2014).

<sup>33</sup> The 'Sahand' and other applications, *supra* note 9, ¶ 39.

<sup>34</sup> *Id.* ¶ 36.

<sup>35</sup> S.C. Res. 1737, U.N. Doc. S/RES/1737, ¶ 13(a).

<sup>36</sup> *Id.* ¶ 13(b).

<sup>37</sup> *Id.* ¶ 13(c).

<sup>38</sup> *Id.* ¶ 13(d).

Paragraph 14 of the resolution makes an exception to “interests or other earnings due on those accounts or payments due under contracts, agreements or obligations that arose prior to the date on which those accounts became subject to the provisions of this resolution.” Paragraph 15 of the resolution provides:

Measures in paragraph 12 of the resolution shall not prevent a designated person or entity from making payment due under a contract entered into prior to the listing of such a person or entity, provided that the relevant States have determined that the contract is not related to any of the prohibited items referred to in the resolution and the payment is not directly or indirectly received by a person or entity which are subject the sanctions.

It should be noted that these are subject to notifications and obtaining an authorization from the sanctions committee under Resolution 1737.

Judge Loh is of the view that “the ‘extraordinary expenses’ referred to in operative paragraph 13(b) is not defined.”<sup>39</sup> On the term, ‘activities,’ he opined that it “referred to in operative paragraph 13(d) relate to nuclear activities which are not likely to be relevant in Singapore’s context.”<sup>40</sup> Next, he dealt with the UN Regulations and its role in Singapore’s legal system and finally came to the conclusion that the UN Regulations cover paragraph 12 of Resolution 1737 and the person referred to in the paragraph encompasses any person in its broad meaning.<sup>41</sup>

With regard to paragraphs 13 to 15, while there are no equivalent regulations to cover exceptions, the Minister of Law or a person appointed on his behalf by taking into account of the Security Council intention, whenever it would be appropriate, can apply the exceptions that Judge Loh found to have been set out in paragraphs 13 to 15 of Resolution 1737 and it is adequate to implement in Singapore’s domestic law.<sup>42</sup> As regards the MAS Regulations, Judge Loh also maintained that:

The MAS Regulations apply to all financial institutions in Singapore and any financial institution which contravenes the MAS Regulations shall be liable on conviction to a fine not exceeding \$1m...<sup>43</sup> MAS Regulations implemented paragraph 12 of resolution 1737 in its paragraphs 1, 2 by assets blocking and preventing from access to the assets. This

<sup>39</sup> *Id.* ¶ 37.

<sup>40</sup> *Id.*

<sup>41</sup> According to Judge Loh, under S 2(1) of the Interpretation Act, a ‘person’ to whom the UN Regulations apply would include any company or association or body of persons, corporate or unincorporated. *See id.* ¶ 40.

<sup>42</sup> *Id.* ¶ 41.

<sup>43</sup> *Id.* ¶ 42.

implementing has been occurred by paragraph 5 (3) with paragraph 13 of the resolution.<sup>44</sup>

He next observed that the circumstances under which financial sanctions can be applied are incorporated into the regulations; this is enough to enforce in domestic realm.<sup>45</sup> There were no provisions regarding paragraph 15 of Resolution 1737.<sup>46</sup> Judge Loh has thus resorted to common law principles governing the scope and interpretation of the provision. Referring to the related case law of sea and the UK,<sup>47</sup> Judge Loh observed that: “It is presumed Parliament is not intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them.”<sup>48</sup> Therefore, he found that: “The presumption would only apply to the extent that the criteria of paragraph 15 of Resolution 1737 would have been met.”<sup>49</sup> He further observed that: “In this way, indirect effect can be given to operative paragraph 15.”<sup>50</sup>

### *C. Two Fundamental Questions*

Judge Loh believed that no provisions exist in both the MAS Regulations and the UN Regulations regarding the arrest of vessels on grounds that they would not be included in sanction list.<sup>51</sup> However, the Court determines a *de facto* freeze criterion that should be met when it is claimed those assets, which are in the custody of the court, possessed or controlled by the sanctioned entity.<sup>52</sup> The Court viewed:

All this depends on the issue of sanctions and the identity of sanctioned entities being

<sup>44</sup> *Id.* ¶ 43.

<sup>45</sup> *Id.* ¶ 43-44.

<sup>46</sup> In fact, Judge Loh believes that paragraphs 12 and 13 of the resolutions are given effect by way of the UN Regulations 5(1) to 5(3), but that paragraphs 14 and 15 have not been expressly enacted. *See id.* ¶ 45.

<sup>47</sup> *See Secretary of State for Social Security v Tummcliffe* [1991] 2 All ER 712 at 724; *Wilson v First County Trust Ltd* (No 2) [2004] 1 AC 816. *Id.* ¶ 46.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* ¶¶ 48 & 62. The court at the outset of this section of judgment states: “It appears that assets in the custody of the court or its officers are not explicitly covered by the MAS and UN Regulations, which concern assets in the custody of financial institutions and other private entities. Similarly, there is no explicit power for the court to direct the freezing of any assets in its custody.”

<sup>52</sup> The court is of view that a *de facto* freeze criterion is based on two grounds: “(a) if the assets were ordered to be released, the recipient of such assets, or his agent in Singapore, would have to act to freeze the assets in accordance with the MAS or UN Regulations; and (b) if there was a risk that the recipient or his agent would not comply with the MAS or UN Regulations, the court will pre-empt this possible illegality by not releasing the assets in the first place.” *See id.* ¶ 48.

brought to the attention of the court. This is perhaps unlikely in ordinary civil litigation, since it is not in the interest of parties to point out to the court that the assets over which they are litigating may be frozen and put out of their reach. In this case, the issue of sanctions was only brought to the fore because they were clearly hampering the defendants' ability to make payment or provide security due to EU sanction and in particular their implementation by French.<sup>53</sup>

Having considered the facts, Judge Loh placed two pivotal questions. First, whether the vessels in hand are those entities which were sanctioned by the relevant Security Council resolutions? Second, should the answer to the first question was positive?<sup>54</sup> In other words, what is the exact scope of and enforcement quality of the sanction?

### *1. First question: Are the vessels actually sanctioned?*

To answer to this question, Judge Loh believed that it should be determined whether the vessels were belonging to subsidiary of Islamic Republic of Iran Shipping Lines ("IRISL").<sup>55</sup> The applicant also claimed if the vessels were part of IRISL.<sup>56</sup> It was not contested, however; the Court thus found that the vessels had been owned and controlled by IRISL.<sup>57</sup> Another question was whether the vessels were part of economic resources stated in the resolutions. There was no reference to the blocking of vessels in the first three resolutions.<sup>58</sup> It was, however, taken into account as paragraph 19 of Resolution 1929 says that some IRISL entities annexed to the resolution would be included in the sanctions list.<sup>59</sup> According to the literary interpretation:

<sup>53</sup> *Id.* ¶ 48.

<sup>54</sup> *Id.* ¶ 49.

<sup>55</sup> *Id.* ¶ 51.

<sup>56</sup> It should be mentioned that based on Resolution 1929 (Paragraph 19), some of IRISL are among the sanctioned entities by the SC. The paragraph states: "Decides that the measures specified in paragraphs 12, 13, 14 and 15 of resolution 1737 (2006) [related to freeze the funds, other financial assets and economic resources and relevant their exceptions] shall also apply to the entities of the Islamic Republic of Iran Shipping Lines (IRISL) as specified in Annex III..."

<sup>57</sup> *Id.* ¶ 52.

<sup>58</sup> In fact, as correctly said by the court, "[T]he first three of the Iran Resolutions did not designate commercial entities as being subject to the assets freeze." *See id.* ¶ 51.

<sup>59</sup> *See id.* ¶¶ 51-52. In this respect, paragraph 19 reads that the UNSC: "Decide[d] that the measures specified in paragraphs 12, 13, 14 and 15 of resolution 1737 (2006) shall also apply to the entities of the Islamic Republic of Iran Shipping Lines (IRISL) as specified in Annex III and to any person or entity acting on their behalf or at their direction, and to entities owned or controlled by them, including through illicit means, or determined by the Council or the Committee to have assisted them in evading the sanctions of, or in violating the provisions of, resolutions 1737 (2006), 1747 (2007), 1803 (2008) or this resolution..."

Paragraph 19 is very precisely worded. It refers to the entities of the IRISL specified in Annex III of Resolution 1929, i.e., Irano Hind Shipping Company, IRISL Benelux NV and South Shipping Line Iran. It does not refer to Iranian shipping entities in general, or to IRISL, or to IRISL entities generally. On its face, therefore, operative paragraph 19 only imposes the assets freeze on the three Annex III entities, as well as “any person or entity acting on their behalf or at their direction, and to entities owned or controlled by them, including through illicit means.” This view is confirmed by a perusal of the consolidated list, published by the Sanctions Committee on 19 August 2010.<sup>60</sup>

This approach taken by Judge Loh will appear to be accurate especially when one will consider the resolution as pertinent. He went on to justify the IRISL’s activities based on paragraph 18 of Resolution 1929 which provides that:

All States shall prohibit the provision by their nationals or from their territory of bunkering services, such as provision of fuel or supplies, or other servicing of vessels, to Iranian-owned or - contracted vessels, including chartered vessels, if they have information that provides reasonable grounds to believe they are carrying otherwise. He concludes from the contraposition of the provision that there would be no reason to assets of vessels or their assets if there were no reasonable grounds to believe they are carrying otherwise. He adds the end part of the paragraph 18 in which SC underlines that this paragraph is not intended to affect legal economic activities.<sup>61</sup>

Meanwhile, plaintiffs’ lawyer argued that stating the name of IRISL in operative paragraph 19 and in the heading to Annex III is the ground for considering all ships of the line as sanctioned.<sup>62</sup> The lawyer also said that: “The line is included in sanction list of EU Council Regulation (EU No 961/2010) of 25 October 2010 and repealing Regulation (EC No 423/2007 [2010] OJ L 281/1). Article 16 (a) of the Regulation refers to some entities listed in Annex VII and paragraph (b) of the same provision refers to the entities listed in Annex VIII of the regulation.”<sup>63</sup> The lawyer pointed out that IRISL is listed in Annex VIII. However, Judge Loh has dismissed his petition on two grounds, based on expressly indicated intent of the UNSC regarding the determined branches of IRISL and the consolidated list issued by the Sanctions Committee, as well. The Court states as follows:

<sup>60</sup> The ‘Sahand’ and other applications, *supra* note 9, ¶ 52.

<sup>61</sup> *Id.* ¶ 53.

<sup>62</sup> *Id.* ¶ 54.

<sup>63</sup> *Id.*

It is not apparent why operative paragraph 19 only designated three IRISL entities and not IRISL itself. But on the other hand it seems clear that this was precisely the intended effect. If IRISL was itself targeted, it would be redundant to specifically mention the three Annex III entities, which appear to be controlled by IRISL. Also, treating IRISL itself as designated by operative paragraph 19 would be inconsistent with the consolidated list issued by the Sanctions Committee. In his view solicitor position was also contrary to the EU Regulation on the ground that if IRISL needs to be listed in Annex VIII pursuant to article 16(2), it cannot logically be designated under operative paragraph 19 of Resolution 1929, which is already provided for in article 16(1).<sup>64</sup>

When determining whether the vessels falls under “any person or entity acting on behalf sanctioned companies or at their direction, and to entities owned or controlled by them,” the Court maintained that the circumstances of each case should be examined on case by case basis which, in turn, was a difficult task.<sup>65</sup> In addition, Mehrzad Soleymanifar, “who affirmed the affidavit evidence on behalf of the defendants,”<sup>66</sup> according to the documents which have been provided with the Court, was previously in the EU sanction list. Judge Loh, however, did not peruse that the circumstances could be related to include the arrested vessels in Resolution 1929. He said: “These links to IRISL do not *ipso facto* mean that the defendants were linked to the three IRISL entities designated in Annex III of Resolution 1929.”<sup>67</sup>

Based on the evidence and the record before the Court, Judge Loh adjudicated that there was nothing to show that the defendant was an entity included in the UNSC sanction list. Consequently, asset freeze on the vessels could not be applied.<sup>68</sup>

## 2. *Second Question: What is the exact scope of and enforcement quality of the assumed sanction?*

Although Judge Loh found that the answer to the first question was not near affirmative, he continued to examine other important questions for completing the adjudication process. He assumes that even if the answer to the first question is positive, the second one may be put forward to discover the exact scope and enforcement quality of the assumed sanction.<sup>69</sup> To find out the correct strategy for

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* ¶ 55.

<sup>66</sup> According to the case, Mehrzad Soleymanifar “was a director of Asia Marine Network Pte Ltd, which had been listed in the EU Regulation as an entity acting on behalf of IRISL in Singapore.” *See id.* ¶ 58.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* ¶ 62.

<sup>69</sup> *Id.* ¶ 63.

interpreting the question, he examined Resolution 1737 itself and the State practices complying with it.

He began by invoking Article 31, paragraph 3(b) of the Vienna Convention on the Law of Treaties of 1969<sup>70</sup> as well as considering the EU and the US related practices. Having focused on Article 16 of the EU Council Regulation (EU No. 961/2010 of October 25, 2010), he maintained that Section 2(d) of Article 16 of Resolution 1929 does not cover actions such as “impounding or detention of vessels,”<sup>71</sup> although it has included all branches of IRISL. When referring to the UK implementing action in respect of the regulation, he reaches to a similar conclusion.<sup>72</sup>

In the US, there are some legislation in which most of the IRISL branches are included under the sanction list. Without any explicit reference to the US domestic regulations for “impounding or detention of [sanctioned] vessels,” however, Judge Loh believes that: “Practice is not so useful because it was ‘anticipatory’ in implementing related sections of Resolution 1737 approximately two years ago.”<sup>73</sup> Judge Loh noted that even if the High Court had committed an error in assessing the first question, according to the text of the resolution and relevant State practices, it could not be plausible to impound or arrest the vessels.<sup>74</sup> Moreover, there is no instance of detention of IRSIL vessels after six months from the date of adoption of Resolution 1929.<sup>75</sup> In the end, Judge Loh found that there is no dispute between parties, as the debts was paid by defendant and was received by the plaintiff, hence the vessels should be released.<sup>76</sup>

<sup>70</sup> It provides: “Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation...” As to the question of reliability of principles regarding treaty interpretation and utilization of them in the context of the SC resolutions, many of lawyers have indicated the affirmative answer as *mutatis mutandis*. See M. Wood, *The Interpretation of Security Council Resolutions*, 73 MAX PLANCK Y.B.U.N. L. ¶¶ 94–95 (1998); J. Frowein, *Unilateral Interpretation of Security Council Resolution*, in VÖLKERRECHT- MENSCHENRECHTE- VERFASSUNGSFRAGEN DEUTSCHLANDS UND EUROPAS 147-164 (2004); E. Papastavridis, *Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis*, 56 INT’L & COMP. L. Q. 88-118 (2007); A. ORAKHELASHVILI, THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW (2008); A. Orakhelashvili, *Unilateral Interpretation of Security Council Resolutions: UK Practice*, 2 GOETTINGEN J. INT’ L. 823-842 (2010).

<sup>71</sup> The ‘Sahand’ and other applications, *supra* note 9, ¶ 68.

<sup>72</sup> *Id.* ¶ 68.

<sup>73</sup> *Id.* ¶ 70.

<sup>74</sup> *Id.* ¶ 72.

<sup>75</sup> *Id.* ¶ 71.

<sup>76</sup> *Id.* ¶ 73-82.

## 4. Conclusion

In final part of the judgment, Judge Loh pointed out an interesting issue that the effects of the UNSC resolutions on the detention of the vessels owned or controlled by entities and persons included in sanction list cannot be denied.<sup>77</sup> Then, he referred to the MAS regulations and its applicability which allows impound of any fund and financial asset from designated persons. He observed that while the arresting party would be able to obtain a judgment, s/he might not be able to enforce it against the relevant funds.<sup>78</sup> Finally, “as a matter of practicality,” he remarked that: “Parties should take legal advice and, if necessary, apply for the relevant exemptions before committing themselves to a course of action which would end up with their funds, financial assets or economic resources being frozen.”<sup>79</sup>

With this decision, the Court sought to understand the resolutions and their full implementation. On the other hand, the language of the resolutions was said to have an impact on their implementation and accordingly their application.<sup>80</sup>

Case law in this respect has especially developed based on the EU practices. It can be used as a guideline by persons, entities listed as sanctioned person to complain against the sanction and delist themselves from the sanction list. Noticeable is that Judge Loh used the language of paragraph 12 of Resolution 1737 and paragraph 19 of Resolution 1929 as a means for interpreting the provisions and mixing the findings of such interpretation from a viewpoint of the EU. An accurate and simple legal reasoning is that the vessels were not among the sanctioned entities. In addition, Judge Loh shed light on the way to reach such a conclusion through the EU 2010 regulation.<sup>81</sup>

<sup>77</sup> *Id.* ¶ 88. It is worth noting here the court’s complete final statement: “The full application of the Iran Resolutions would seriously impact the arrest, pursuant to the court’s admiralty jurisdiction, of vessels owned by designated persons and persons or entities controlled, etc., by designated persons. The vessels are not themselves subject to impoundment or detention. However, financial institutions covered by the MAS Regulations would effectively be unable to receive any funds or other financial assets from designated persons as consideration for furnishing a guarantee to secure the release of arrested vessels, because such funds or other financial assets would have to be frozen once received. Also, the proceeds from selling the vessels, and any payment into court to secure the vessels’ release, would have to be frozen by the financial institutions administering funds held by the court. This means that, while the arresting party may be able to obtain a judgment, he may not be able to enforce it against the relevant funds.”

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* ¶ 91.

<sup>80</sup> Zhixiang, *supra* note 10.

<sup>81</sup> Regarding the interpretation of the UNSC resolutions, some lawyers have indicated, while it could be taken a wide interpretation with regard to the treaties, when the UNSC takes restrictive measures against a State or States, the extent of the reading and interpretation of the relevant resolution(s) must be narrow down to put on even less damages on the



Judge Loh avoided ruling on the legitimacy and legal validity of the EU and the UNSC decisions as well as their implementation. Having referred to the possibility of binding Singapore, he might be also reluctant to discuss on the legitimacy of unilateral sanction under international law. In a subtle manner, however, he referred to the EU acts as going further than that of UNSC.<sup>82</sup> In the case of the US, Judge Loh refuses to accept its practice as a State practice for interpreting the UNSC resolutions because its measures are further than and “pursuant to her own foreign policy had completely anticipated operative para 19 of Resolution 1929” what is prescribed by the UNSC resolutions.<sup>83</sup>

In fact, domestic courts can implement international law by placing their opinions and views on concrete international rules. A fundamental conclusion, in this respect, is that the courts of sanction targeted States such as Iran should prepare themselves to develop the law of sanction by reviewing the related documents and regulations when facing any action before them. The case law against Iran would not be well developed if tried only before other States’ courts or even in international tribunals. The initiative of Iranian courts would result in two consequences. First, the Iranian court may actively contribute to the law of sanctions regime by introducing some jurisprudence and case law of Iran which will finally lead to development of customary international rules. Second, it can be a stepping stone for interpreting the Security Council resolutions from a more balanced point of view. Iran and other sanctioned States should take due course for shaping such law. If not, other States shape the law as they wish.<sup>84</sup>

sovereignty of the targeted State. See FROWEIN, *supra* note 70, at 160-164.

<sup>82</sup> The ‘Sahand’ and other applications, *supra* note 9, ¶ 67-70.

<sup>83</sup> *Id.* ¶ 70.

<sup>84</sup> Unilateral sanctions can be a good case regarding the approaches upon which some States endeavor to establish its own practice as a prominent and available one to develop the law governing on the sanction regimes. The US invasion to Iraq in 2003 took place alleging to the legal basis underlined in UNSC Resolutions 678 (1990), 687 (1991) and 1441 (2002). See Orakhelashvili, *Unilateral Interpretation of Security Council Resolutions: UK Practice*, *supra* note 70, at 827-830.

