

## client alert

SANCTIONS & COMPLIANCE | IRAN |

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### IMPLICATIONS OF U.S. PRESIDENT'S IRAN POLICY ANNOUNCEMENT

#### OVERVIEW

On January 12th, the incumbent U.S. President granted a stay of execution, waiving for another 120 days the otherwise automatic reimposition of sanctions against Iran which were initially lifted as part of the Joint Comprehensive Plan of Action ("JCPOA" or "Nuclear Deal" or "Nuclear Accord"). Yet he has coupled his most recent sign-off with a warning that this would be the final time for any such waiver.

Issuing an ultimatum, the U.S. President has demanded that the other members of the P5+1 "fix the terrible flaws" of the deal, particularly the sunset provisions which were an essential component of the accord. He has also taken an unyielding stance on Iran's ballistic missile program, asserting that Iran's defense technologies are in violation of United Nations Security Council ("UNSC" or "UN Security Council") Resolution 2231, and he has expressed continuing opposition to the supposed "regional aggression" by Iran. In absence of a revision to the agreement that would somehow address these issues (and that would be agreed upon by all signers to the JCPOA, including Iran), President Trump has threatened that the United States will unequivocally not renew sanction waivers and thereby abrogate the Nuclear Deal.

This follows a previous announcement, on 13 October 2017, at which time the U.S. President proclaimed his refusal to recertify Iran's fulfillment of the terms of the Nuclear Accord, in spite of successive affirmations by the International Atomic Energy Agency ("IAEA") of Iran's total adherence to all conditions and the avowals of Iran's compliance by the rest of the P5+1. According to the Iran Nuclear Agreement Review Act ("INARA"), passed by U.S. Congress in conjunction with the JCPOA to impose a degree of congressional oversight on the agreement, the President must make quarterly evaluations, and concomitant certifications, that Iran is upholding its end of the bargain.

Accordingly, the refusal was followed by a 60-day window allowing Congress to introduce a bill reinstating statutory sanctions on an expedited basis, a prerogative which it chose not to exercise. Congress's subsequent inaction (and failure to endorse the President's decertification) placed the fate of the JCPOA in the hands of the President.

For more information on this, [click here](#) to read our client alert of 23 October 2017.

## JCPOA: WHAT HAPPENS NEXT?

If the U.S. President makes good on his commitment to abstain from any future waiver, the immediate effect will be an automatic reinstatement of the sanctions that were lifted as part of JCPOA. Such action does not, *de jure*, mean the U.S. has left the deal, but it would put America in non-compliance with its obligations under the accord and make a clear signal the U.S. intends to abrogate, unilaterally or otherwise.

The consequences which would follow such an abstention to waive are not entirely clear, since the JCPOA does not expressly authorize any party to leave the agreement or prescribe remedies or damages in the event that one party does in fact leave. It is clear enough, however, that if the U.S. were to stop signing off on sanctions-relief, this would effectively lead to U.S. abrogation, and due to the workings of the UN Security Council, there would be little hope for an alternate substitutive relief.

This is because the U.S. President retains the power to trigger the "snapback" mechanism, envisaged in paragraphs 11-13 of the Resolution 2231 of the UN Security Council, which entails notifying the Security Council of "an issue that the [United States] believes constitutes significant non-performance of commitments under the JCPOA". American politicians, Secretaries of State and Defense, along with the President himself, have railed against Iran's supposed violation of the "spirit of the deal" since Mr. Trump's election victory, and their shrill cries are reason to believe America may attempt to use this pretext as an excuse to claim non-performance as per para. 11-13.

Notification of such an issue would prompt a procedure before the Joint Commission, which is the dispute resolution mechanism specifically provided for by the Nuclear Deal. The Joint Commission procedure was created to address and help untangle issues of legitimate non-compliance by a party, whereas America's complaint against Iran concerns matters which are outside the strict parameters of the JCPOA. Since the IAEA, which monitors and verifies on-site the respect of Iran's commitments under the deal, has repeatedly confirmed that Iran is in full compliance with all obligations, there is little scope for the Joint Commission to address U.S. grievances about Iran.

In effect, the difficulty is that the U.S. President's demands have created an unanticipated detonation of the deal by one of the signers, in spite of manifest compliance by all parties.

Because renegotiation of any form is not provided for in the agreement, it is difficult to understand which mechanism the U.S. President might use to pursue his accusations that Iran is violating the "spirit" of the agreement (whereby it is claimed that the preamble and Article 28 of the JCPOA establish standards of conduct which Iran has not upheld). This is all the more problematic since the other members of the P5+1 believe that neither the preamble nor Article 28 create legal obligations for any party.

Thus, what is being contemplated is a resurfacing of the philosophical discord which has long existed between Iran and the U.S., now made manifest within the context of a legally binding contract between these two nations. In this scenario, only the UN Security Council is left as a named entity for resolving an otherwise irreconcilable impasse, and to do so, the Security Council would need to vote on a resolution as to whether to continue the lifting of UN sanctions.

Under the JCPOA, if such a resolution is not adopted within 30 days of the snapback trigger, or, by definition, if a permanent member of the UN Security Council were to veto such a resolution, all UN sanctions may be reimposed. Because of America's status as a permanent member of the Security Council, by definition it wields the power to kill the deal. While it is theoretically possible that America could abstain from the vote on any resolution to continue waiving sanctions, the highly public, hawkish stance by the President, his Cabinet, and his mouthpieces, including the American Ambassador to the UN, would seem to virtually assure that the deal's fate now hangs in the balance.

## **POSSIBLE SCENARIOS**

### **a) Challenging the good faith trigger**

Should the U.S. President choose to trigger the "snapback" mechanism, as per the standards set in the JCPOA, the U.S. should substantiate a belief that there is a legitimate non-performance by Iran. While undoubtedly flexible, the threshold of "belief" is not entirely discretionary because it must be triggered in good faith.

If it were demonstrated that the snapback provision was not exercised in good faith, other participating countries could have grounds to resist and dispute the trigger.

This could allow the opposing countries to consider that Resolution 2231, which incorporates the JCPOA, is still in force, and those countries may thereby decline to implement effectively the reimposition of prior UN sanctions.

### **b) Resisting possible U.S. sanctions**

If the reinstated or new sanctions were to affect European companies through extraterritoriality, the Europeans may take action similar to 1996, when the U.S. passed the Helms-Burton and D'Amato-Kennedy Acts.

At the time, the EU adopted a "blocking statute" (Council Regulation EC 2271/96), which nullified the U.S. Acts by prohibiting European companies from complying with the sanctions and banning the recognition of U.S. decisions based on this legislation. In addition, the opposing countries could consider challenging U.S. sanction law in the World Trade Organization, as had been initiated by the European Council to target the Helms-Burton Act. This proved efficient since the U.S. subsequently sought a compromise with European authorities.

### **c) "Uniting for Peace" resolution**

Finally, in an attempt to mitigate the consequences of a snapback of UN sanctions, it would be possible to call on a vote for a Resolution 377, or "Uniting for Peace" resolution.

When unanimity is not met in the UN Security Council, a matter may be submitted to the UN General Assembly "in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression".

This would bypass a potential failure to vote the sanctions-relief resolution, owing to America's veto power within the Security Council. Despite its essentially symbolic nature, such a resolution would have the virtue of countering the U.S. President's approach from the standpoint of blunting global acceptance of American hegemony.

## IRAN'S OPTIONS AND NEXT STEPS

In the midst of these scenarios, Iran would be faced with limited choices. The next sanctions waivers fall due on May 12th. Past this countdown, Iran can, with little lateral room, either keep complying, or choose to pursue a nuclear program outside the bounds of the deal.

If Iran were to choose to scrap the agreement by so doing, reimposition of EU sanctions and withdrawal of trade support by European partners could be imminent.

Furthermore, P5+1 countries opposed to the U.S. stance could no longer justifiably withstand America's request for the "snapback" of sanctions since the standard, legitimate non-compliance, would be evident, and the reimposition of UN sanctions would soon follow.

Moreover, the JCPOA does not differentiate according to whether Iranian non-compliance is provoked, or unprovoked, or is in response to the non-compliance of another party to the deal, and so any adverse reaction by Iran to new U.S. sanctions or to the absence of further U.S. sanction relief as required by JCPOA would still be grounds for America to lodge further complaints of strict non-compliance by Iran.

Set against this quandary, any attempt to coerce Iran back to the negotiating table would also likely fail. Not only is renegotiation, amendment, alteration or redaction of the deal in any form not permissible under its terms, but Dr. Mohammad Javad Zarif, Iran's Foreign Minister, has made clear that Iran will never consider accepting revised terms, and the Supreme Leader of Iran, Ayatollah Ali Khamenei, has sworn that Iran will continue to abide by the deal, for as long as the U.S. does.

With Iran's proclivity to remain compliant established, the European signatory nations have also repeatedly defended the agreement and expressed their intent to uphold the deal as long as Iran does. And although sporadic pronouncements from some European countries that ballistic missile activity and regional "aggression" need to be reined in have not helped to clarify the broad European stance, the aggregate investment by European companies in Iran since Implementation Day, as well as the remarkable resurgence in trade, suggest that Europe, as a whole, is a real stakeholder in seeing the deal through and may not easily let it go. Russia has been vocal about its explicit support for the deal and its concurrence with the IAEA's position, with China in tow. Hence, it is not unreasonable to expect that the non-U.S. countries will continue to foster a *détente* with Iranians, both politically and economically, independent of the United States. How and in what form such a policy of continued engagement develops remains to be seen.

Given that the policy implications of the U.S. President's approach will play out in the coming months, his future moves are difficult to predict, and European (or Russian or Chinese) tertiary responses are equally unclear. Setting aside the potential reimposition of nuclear-related sanctions, new secondary sanctions can reasonably be expected at routine intervals. The practical consequences of these new sanctions should nevertheless remain moderate since, after the JCPOA, U.S. secondary sanctions against Iran will no longer be mirrored by EU and/or UN sanctions. Thus, incremental U.S. moves to penalize Iran, its citizens, companies or government, may have little bearing on the world's rapport with Iran.

## NEW SANCTION TARGETS

In the latest round of largely symbolic sanctions, the U.S. President announced 14 new designations which the U.S. Office of Foreign Assets Control (OFAC) added to its List of Specially Designated Nationals and Blocked Persons (the SDN list), 5 individuals and 9 entities. These sanctions are related to areas which fall outside the scope of the Nuclear Deal.

A number of individuals and entities were branded under EO 13553, EO 13606 and EO 13628, while others were designated pursuant to EO 13382. These designations target well-worn claims of the United States about issues of human rights, censorship, and certain kinds of weapons, none of which have been substantiated in recent times by other members of the P5+1.

The week prior to this announcement, five other designations were made by the Treasury Department.

America's stated hope is that these steady Iran-related designations may continue to impose pressure on non-U.S. companies who are already active in Iran or are planning to do business in Iran. However, the effectiveness of such a praxis remains unclear, and if the U.S.'s claims of the primacy of the preamble are to be believed, it may be against the "spirit" of the Iran deal to continue extending the waiver on one hand, while expanding the SDN list and fomenting uncertainty on the other.

What is clear is that, in spite of the number of uncertainties about the outlook for the deal and the future actions by parties to it, global trade with Iran, ex-U.S., continues to expand apace, with increasing engagement by export credit agencies, multinational corporations, and banking and investment firms in the Iranian jurisdiction.

Publicly announced developments include the conclusion of a five-billion-euro finance deal between Invitalia and two Iranian banks, which demonstrates that, at least from a European perspective, Iran remains open for business. As a sign of continued strengthening of the political rapport between nations, the French Foreign Minister has also confirmed his visit to Iran on 5 March.

While rare, a veritable schism on conduct by Western powers with respect to an Eastern nation appears to be developing. Europe has, by all accounts, begun to align its economic fortunes firmly with Iran, whereas America has reinstated its policy of isolation and non-engagement with the Islamic Republic.

Although intended to function as an ironclad contract that could survive the multiplicity of economic, geopolitical, and political cross-winds blowing from West Asia through the Middle East, Europe, and finally to America and back, the JCPOA has, it seems, become subject to the countervailing forces which have long guided, or at least influenced, Iran's rapport with the West. It remains to be seen whether billions of euros of investment, and contractual commitment which the deal represents, will be enough to lead Europe to embrace Iran, unconditionally, and turn its back on the decades-long tradition of coordinated policy efforts with America.

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