

The Controversy about the Iranian Nuclear Sanctions Snapback

On May 8, 2018, the U.S. government announced its withdrawal from the Iran nuclear deal.¹ Six months later, on August 6 of that year, President Donald Trump re-imposed U.S. sanctions on Iran. As he explained, the aim was to isolate Iran through a policy of “maximum economic pressure.”² In the words of the U.S. Secretary of State Michael R. Pompeo, this pressure was meant to be amplified by a “global effort,” in collaboration with the U.S. partners, with the aim of reminding “the Iranian regime of the diplomatic and economic isolation that results from its reckless and malign activity.”³

On September 19 of this year, the Secretary of State announced that the U.S. had brought the former United Nations sanctions against Iran, terminated in the wake of the nuclear deal, back into operation. He claimed to have done so through the application of the so-called “snap-back” procedure.⁴ However, rather than resulting in the fresh imposition of broader, universal sanctions against Iran by the UN, the United States appeared isolated and, on October 18, the remaining UN arms embargo against Iran was lifted.

The Iran Nuclear Deal of 2015

Responding to threats of uranium enrichment for nuclear weapons, the United Nations Security Council started in 2006 imposing sanctions on Iran. These covered nuclear technology, ballistic missiles, and conventional arms, in addition to financial services and transport and communication connected with proscribed activities.⁵ As the risk of an Iranian break-out from the universal nuclear non-proliferation regime increased, the sanctions were progressively tightened. However, offering a carrot along with the stick, Security Council Resolution 1928 (2010) declared that sanctions would be terminated should Iran end its nuclear weapons program.⁶

In 2015, after prolonged negotiations, a sextet of mediating states (China, France, Germany, the Russian Federation, the United Kingdom, and the United States), with the European Union (EU) supporting implementation, formally concluded the Joint Comprehensive Plan of Action (JCPOA) with Iran.

At close to 100 pages, the JCPOA is highly technical and detailed. It contains very specific commitments of conduct for Iran, including a draw-down of its uranium enrichment program and verification by the International Atomic Energy Agency. However, in spite of its technical legal language and clear, apparent obligations, the arrangement is not a treaty but a “Plan of Action.” This was necessitated by U.S. difficulties in achieving Senate ratification and Iranian sensitivity relating to its sovereignty.

In return for Iran agreeing to the JCPOA, the existing sanctions were supposed to be lifted in their entirety by the UN Security Council and by UN members. However, as was foreseen in the JCPOA, when endorsing the deal in Resolution 2231 (2015), the Council imposed a fresh set of more limited sanctions. But in contrast to the set of previous sanctions, the 2015 sanctions were to expire automatically according to an agreed schedule. The first tranche of Security Council sanctions concerning conventional arms transfers was set to expire in October 2020, five years after the JCPOA became operational. Restrictions on ballistic missiles will run until 2023, with the remaining limits on nuclear transfers being eliminated ten years after the conclusion of the deal, in 2025, subject to International Atomic Energy Agency safeguards. The staggered, but automatic, sanctions removal was meant to reassure Iran that the lifting of the remaining sanctions could not be obstructed by any state (in particular, the U.S.).

Expiry of First Set of UN Sanctions and the Snapback Procedure

The imminent expiry of the first tranche of sanctions on October 18, 2020, precipitated the present controversy. Initially, in August, the U.S. proposed a draft resolution to the Council that would have kept the sanctions in place. The draft failed, gaining only the affirmative votes of the U.S. and the Dominican Republic.⁷

When the U.S. withdrew in 2018 from the JCPOA, Iran was in compliance with its commitments.⁸ Iran initially continued compliance but, after a year, started a policy of “reduced compliance” in response to the U.S.’s withdrawal.⁹

Tensions escalated early this year with allegations that Tehran has enhanced its uranium production in excess of the permitted limits, along with test-launches of nuclear-capable

ballistic missiles and violations of the restrictions on conventional arms transfers, in particular in relation to the conflict in Yemen.¹⁰ In response, the European states invoked the dispute settlement mechanism that is part of the JCPOA. Meanwhile, China and the Russian Federation sided with Iran, arguing that the U.S. unilateral withdrawal constitutes a material breach of the arrangement.¹¹

The U.S., on the other hand, started to consider the so-called snapback procedure. It gives the individual participating states the unilateral right to reimpose pre-JCPOA UN sanctions on Iran. Ordinarily, this power to reimpose sanctions on a UN member state would only reside with the Security Council.

After attempting the dispute settlement procedure offered in the JCPOA, the snapback mechanism is triggered simply by the assertion of significant non-compliance on the part of a participating state. The unilateral use of the snapback procedure can be overturned if the Security Council votes within thirty days of this claim to resist the snapback and to retain the termination of previous sanctions. The Council President is obliged to put forward a draft resolution proposing to overturn a snapback within ten days of any complaint if no member state does so. Of course, any one of the Permanent Members can then prevent the adoption of such a resolution through a veto and broad UN sanctions would resume.

United States' Use of the Snapback Provision

On August 20, the U.S. submitted a letter to the President of the UN Security Council, indicating that the efforts of the EU participating states to bring Iran back into compliance had failed. Hence, the U.S. claimed “significant non-compliance” leading to the re-imposition of sanctions.¹²

Thirteen of the 15 members of the Council then immediately wrote to the Council President rejecting the attempted use of the snapback provision on account of the U.S. withdrawal from the JCPOA.¹³ The Council President for August, the Permanent Representative of Indonesia, stated that the views expressed to him indicated that there was no consensus in the matter within the Council and hence no action would be taken—a view also adopted by his successor from Niger presiding in September. The UN Secretary-General distanced himself from the brewing controversy, pointing out that this was a matter for the Council.

Thirty days after the U.S. invoked the snapback, Secretary of State Michael Pompeo claimed that UN sanctions had now been automatically reinstated—a view has been

broadly ignored.¹⁴ Germany, France, and the United Kingdom issued a joint statement, noting formally that “the U.S. ceased to be a participant to the JCPOA following their withdrawal from the deal on 8 May 2018. Consequently, the purported notification under paragraph 11 of UNSCR 2231 (2015) . . . is incapable of having legal effect.”¹⁵

The U.S. submitted a five-page legal memorandum in support of its claim to trigger the snapback.¹⁶ First, the government argued that it cannot have breached the JCPOA, as it is not a binding legal agreement. Accordingly, its unilateral imposition of sanctions against Iran cannot be a material breach of a legal obligation of the JCPOA resulting in the corresponding loss of Washington’s right to invoke the snapback. On the other hand, it can be argued that the political undertakings of the sides have gained a legal quality in this instance, via the doctrine of good faith and estoppel. Iran engaged in certain conduct in reliance on U.S. undertakings which are now being breached to its detriment.

Moreover, the JCPOA was re-cast in a Security Council resolution. The JCPOA is annexed to Resolution 2231 (2015) and forms part of it, or it is at least part of its context which must be used in interpreting the resolution.¹⁷ The provisions on sanctions in the resolution were adopted expressly under Article 41, attracting the binding enforcement powers of the Council. Hence, they would persist for the U.S. even after departing from the JCPOA. In addition to UN sanctions, the JCPOA includes an express obligation for participants not to re-impose unilateral sanctions against Iran. The resolution expressly and unusually points to Article 25 of the Charter, which obliges UN member states to comply with the decisions of the Council.

Second, Washington relies on the fact that paragraph 10 of Security Council Resolution 2231 (2015) names the U.S. as one of the “participants” in the deal. According to Article 11, only a “participant state” can invoke the snapback.

In the U.S. view, the definition of a participant in Article 10 is permanent and independent of continuing participation in the JCPOA. However, this view is not consistent with the structure of the arrangement. The snapback is a mechanism to enforce the arrangement, not a tool to destroy it from the outside. According to the JCPOA, which either underlies the resolution as “context” or is actually incorporated into it, the snapback can only be invoked once the JCPOA dispute settlement mechanism has been attempted. This is only available for present participants in the deal.

Moreover, all the other states involved in the deal, and indeed all Security Council members other than the U.S. and the Dominican Republic, assert that the U.S. cannot rely on the snapback, quite simply because it has withdrawn from the deal and is

accordingly no longer a “participant.” This is certainly what a literal interpretation of the terms used would suggest.

The choice of wording by President Trump reinforces the view that the U.S. is not currently a participant. He expressly announced in 2018 that the U.S. is bringing to an “end the participation of the United States in the JCPOA.”¹⁸ In view of this fact, even John Bolton, U.S. National Security Advisor at the time of the U.S. withdrawal from the deal, asserts that the U.S. view is “legally incorrect.”¹⁹

Conclusion

Ironically, the White House could have easily succeeded in ending the Iranian deal altogether, if it had remained a participant and invoked the snapback from within. The U.S. insistence that universal UN sanctions now apply again against Iran will have little effect, undermining the credibility of both the U.S. and of the UN Security Council. The U.S. cannot opt out of multilateral cooperation and act alone, while still expecting the benefits of concerted multilateral action, such as universal sanctions. The polarization of views on the Security Council triggered by the U.S. action has, thus far, isolated the U.S., rather than Tehran. Even Washington’s closest allies have been willing to oppose U.S. action in an unusually open way, orchestrating the failure of the snapback in coalition with Russia, China, and other members. Yet, the urgent need to bring Iran back into compliance remains.

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¹ Presidential Memorandum, Ceasing U.S. Participation in the JCPOA (May 8, 2018), www.whitehouse.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additional-action-counter-irans-malign-influence-deny-iran-paths-nuclear-weapon/.

² Statement from the President (Aug. 6, 2018), www.whitehouse.gov/briefings-statements/statement-president-reimposition-united-states-sanctions-respect-iran/.

³ Michael R. Pompeo, Press Statement (May 8, 2018), www.state.gov/on-president-trumps-decision-to-withdraw-from-the-jcpoa/.

⁴ Michael R. Pompeo, Press Statement (Sept. 19, 2020), www.state.gov/the-return-of-un-sanctions-on-the-islamic-republic-of-iran/.

⁵ Most comprehensively in Resolution 1929 (2010), following upon Resolutions 1696 (2006), 1747 (2007), 1803 (2007), and 1835 (2008).

⁶ UN Security Council Resolution 1929 (2010), Annex IV, ¶¶ 37.

⁷ Draft resolution S/2020/797 (Aug. 17, 2020), ¶¶ 1; result of the vote in S/2020/803 (Aug. 17, 2020).

⁸ Fifth Report of the Secretary-General on the Implementation of SCR 2231, S/2018/602 (June 12, 2018), p.1.

⁹ Ninth Report, S/2020/531 (June 12, 2020).

¹⁰ *Id.*

¹¹ Letters, S/2020/451 (May 28, 2020, Russian Federation), and S/2020/517 (June 8, 2020, China).

¹² Letter from the Permanent Representative of the U.S. to the President of the Security Council (Aug 20, 2020), on file with the author.

¹³ Michelle Nichols, “Thirteen of 15-member UN Security Council oppose U.S. Push for Iran Sanction,” Reuters (Aug. 21, 2020), www.reuters.com/article/us-usa-iran-un-idUSKBN25H1Q5.

¹⁴ An exception is provided by Israel which has called for the re-imposition of sanctions, see Sarah Chemla, “Erdan demands re-imposition of Iran sanctions backing U.S. ‘snapback,’” Jerusalem Post (Sept 21, 2020), <https://www.jpost.com/middle-east/erdan-demands-the-reimposition-of-iran-sanctions-backing-us-snapback-642990>.

¹⁵ Permanent Mission of France to the UN, Joint Statement (Sept. 20, 2020), <https://onu.delegfrance.org/Iran-JCPOA-Joint-statement-by-France-Germany-and-the-United-Kingdom>.

¹⁶ On file with the author.

¹⁷ See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep.403 (July 22), ¶¶ 94.

¹⁸ Indeed, the U.S. Presidential Memorandum is entitled ‘Ceasing U.S. Participation in the JCPOA ...’ above, note 1.

¹⁹ John Bolton, Trump is Bringing the Iran Nuclear Deal Back to Life, 26 August 2020, Bloomberg.com/opinion/articles/2020-08-26/trump-helps-biden-by-bringing-the-iran-nuclear-deal-back-to-life, accessed 21 September 2020.