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From Grievances to Guarantees: Getting to Yes in the Iran Nuclear Talks

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(This post is co-authored with Ruti Teitel, Ernst C. Stiefel Professor of Comparative Law at New York Law School and a Life Member of the Council on Foreign Relations)

After a long hiatus that followed a change in Iran's political leadership (and something of a rocky start in the last two weeks), Vienna talks on rebooting the Iran nuclear deal are now in full swing. The original accord, the 2015 Joint Comprehensive Plan of Action (JCPOA), an agreement between the P5 (permanent members of the UN Security Council), the EU and Iran, offered economic sanctions relief in return for Iran implementing specific verifiable curbs on its nuclear program. The other partners and the International Atomic Energy Agency (IAEA) were basically satisfied that Iran was holding up its end of the deal but Trump embraced then Israeli Prime Minister Benjamin Netanyahu's multiple attacks on the deal and its alleged inadequacies for curbing Iran's longer-term nuclear ambitions. Accordingly, Trump pulled the U.S. out from the JCPOA and reimposed sanctions.

Putting the JCPOA together again has proven a daunting task. A positive step this week was the IAEA reaching an agreement with Iran to settle some of the differences on monitoring. As for sanctions relief, at the United Nations the Biden Administration reiterated that it is prepared to lift all JCPOA-inconsistent sanctions. This includes not only the sanctions that had been removed when the JCPOA was put in place then reimposed by Trump but newer nuclear-related sanctions as well. A key demand of Iran is that these latter be addressed—they are inconsistent with Article 26 of the JCPOA. For Iran, this includes some measures not specifically tagged as “nuclear sanctions” but closely related to Trump's “maximum pressure” alternative to the JCPOA. Thus, there is some debate on what counts as nuclear-related or not. But this concerns relatively few measures compared with what the US and Iran are already agreed must be lifted.

But there *is* another dimension of Iran's position that needs to be addressed promptly. Iran insists on guarantees that what happened with Trump will never happen again—a subsequent Administration will not be able to break the deal, reimposing sanctions. The challenge is that, under US law, even if a revived JCPOA were to be approved by the US Senate as a treaty (politically impossible under the current configuration in the Senate) it could not stop subsequent Congressional action inconsistent with the US commitments.

In our view, there are two possible motivations behind Iran's insistence on “guarantees.” One aspect is symbolic, ideological and dignitary. Iran has a sense of grievance that the US did not keep its word, imposing considerable economic hardship on the country when Trump broke the JCPOA and re-imposed sanctions, even (as noted above) adding new ones. The other concern is pragmatic. Many of the benefits of sanctions relief depend on the confidence on the part of those dealing with Iran that sanctions will not be reimposed, say by a Republican Administration after the next US election. This concern is about locking in economic benefits.

On the dignitary front, an apology from President Biden for the conduct of the Trump Administration may well go a long way. The President has already said that his Administration would honor its commitments under a restored JCPOA. As one of us (Ruti Teitel) elaborates in a forthcoming book, “Righting America's Wrongs”) Presidents have not infrequently spoken for the nation as a whole reckoning with the wrongful conduct of previous Administrations. Indeed, President Biden has already shown that he is willing to do this where necessary. Just last month, the President said sorry publicly to world leaders for Donald Trump's exit from the Paris climate agreement: “For Trump's action, he said: “I shouldn't apologize, but I do apologize for the fact the United States, the last administration, pulled out of the Paris Accords and put us sort of behind the eight ball a little bit.”

The case for an apology to Iran is in fact stronger. In the case of the Paris agreement, the Trump Administration eventually followed the proper legal formalities for exit, whereas they cavalierly violated the JCPOA, without any regard for the proprieties of the text. Since President Biden has long denounced Trump's destruction of the JCPOA, indeed an apology seems a logical next step.

On the pragmatic or economic front, there are a number of approaches that might be taken to securing the economic benefits of sanctions relief against a possible reimposition of sanctions by a future US Administration—or Congress. One approach would be for the United States along with the other JCPOA partners to commit to supporting Iran's accession as a Member of the World Trade Organization before November 2024 (the next U.S. presidential election). Iran has taken steps to join the WTO but abandoned these efforts when the Trump Administration came to power.

As a WTO Member, Iran would have an avenue to challenge U.S. (and other) sanctions in WTO dispute settlement—the WTO covers goods, services (including financial services) and intellectual property. While some restrictions based on national security or human rights grounds might be defensible under WTO exceptions provisions, sanctions reimposed by a future Administration contrary to its international commitments would not likely survive scrutiny. Even if Iran might have limited options to enforce such a dispute ruling against the US through economic countermeasures, other JCPOA parties harmed by sanctions against Iran, and related secondary sanctions, could pre-commit to join suit in a WTO action against the U.S., which could lead to substantial retaliation by other JCPOA parties such as the EU or China against the U.S.

Political risk insurance is another avenue for protecting longer-term transactions against the possibility that a future US Administration would break the JCPOA and reimpose sanctions. Ideally such insurance would be issued by some intergovernmental entity. The entity in question would either provide financial compensation to relevant parties for the economic losses from US reimposition of sanctions or seek its own avenues to complete or facilitate the transactions in question despite the new sanctions. One possibility is the creation of a political risk insurance facility by the Asian

Infrastructure Investment Bank (AIIB). Iran is a member of the AIIB. China, a strong supporter of a return to the JCPOA, holds the largest stake there, and Russia also has a significant share.

Finally, and perhaps most ambitiously, there could be an arrangement for international arbitration of disputes about JCPOA sanctions compliance, with arbitral awards of monetary compensation enforceable in domestic courts around the world pursuant to the New York Convention, for example.

Operationalizing commitments by the JCPOA partners to these kinds of approaches will obviously take time; but the steps that Iran will have to take to roll back its nuclear program to the JCPOA level of constraint won't happen all at once, either. Along with a Biden apology, the commitments themselves should build trust and good will, key ingredients for a successful conclusion to the Vienna talks.