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Maximilian Dieter

The European Union and the Nuclear Deal
with Iran



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Preface

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List of abbreviations

EU (European Union)

E3 (United Kingdom, France, Germany)

E3/EU+3 (United Kingdom, France, Germany, EU, China, Russia and the United States)

US (United States)

EEAS (European External Action Service)

ECJ (European Court of Justice)

IAEA (International Atomic Energy Agency)

JCPOA (Joint Comprehensive Plan of Action)

TFEU (Treaty on the Functioning of the European Union)

TEU (Treaty on European Union)

VCLT (Vienna Convention on the Law of Treaties)

WMD (Weapons of Mass Destruction)

NPT (Treaty on the Non-Proliferation of Nuclear Weapons)

UNSCR (United Nations Security Council Resolution)

CFSP (Common Foreign and Security Policy)

STFI (Special Trade and Finance Instrument)

COVID-19 (Coronavirus disease 2019)

A. Introduction

In this master's thesis, I will set out to analyse the nuclear deal that an international coalition of actors struck with Iran in 2015 and assess, in particular, the role of the European Union (EU) therein. Consequently, a first object of my analysis will be the nuclear deal itself. In greater detail, I will thus look at the basis of it, the Joint Comprehensive Plan of Action (JCPOA). Attention will be paid to both material and procedural elements of the JCPOA. Additional focus will lie on the JCPOA's relationship with international law in order to fully appreciate the nature of the nuclear deal with Iran. In a second step, the role of the European Union in the framework of the JCPOA will be examined. This includes a reference to the legal basis for EU action as well as a specific survey of those JCPOA provisions that concern the European Union. In light of the current US administration's disengagement with the nuclear deal at the time of the writing of this thesis, a dedicated section seeks to depict the legal aspects of the EU's effort to save the nuclear deal. Referencing an assessment of the JCPOA of both academic observers and political actors, this thesis will be concluded with a comprehensive summary of the findings.

I. Background: The Foreign Policy Interests of the European Union

Reference to the foreign policy interests of the European Union can be found in the Treaties. While Article 3.1 of the Treaty on European Union (TEU) sets out the Union's aims, including the promotion of peace and its values, Article 3.5 TEU specifies that the Union in its relations with the wider world shall, inter alia, *„uphold and promote its values and interests...contribute to peace, security...as well as to the strict observance of international law”*.¹ This is further elaborated in Article 21 TEU. According to the precepts of Article 21 TEU, *„the Union shall...pursue common policies and actions...in order to...preserve peace, prevent conflict and strengthen international security...and promote an international system based on stronger multilateral cooperation and good global governance”*.² These themes are, accordingly, echoed in the latest European Union foreign policy strategy. The interests of the EU are spelled out in there in plain: *„peace and security”, „prosperity”, „rules-based global order”, „multilateralism as key principle and United Nations as its core”, „manage interdependence”* and *„address root causes of conflict and poverty and promote human rights”*.³

Therefore and before the backdrop of the evolution of EU foreign policy interests, it is not surprising that the EU has a long-standing interest in contributing to international efforts in the area of non-proliferation of weapons of mass destruction (WMD), including, most

¹ TEU, Article 3.1, 3.5

² TEU, Article 21.2; note that Article 205 TFEU also refers to the provisions of Chapter 1, Title V TEU

³ The quoted priorities already represent a selection, see, EEAS, 2016, p. 7,8

importantly, nuclear weapons.⁴ Non-proliferation of WMD has been on the international agenda for a long time. As early as 1970, the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) came into effect, building on three pillars: nuclear disarmament, non-proliferation, and peaceful use of nuclear energy.⁵ Beyond the NPT, several other international legal instruments add to the global nuclear non-proliferation and disarmament system.⁶ Although opinions amongst EU Member States on nuclear disarmament diverge considerably, the issue of non-proliferation as such is largely uncontroversial within the EU.⁷ The European Union has, reflecting large consensus amongst its Member States and in line with its most fundamental foreign policy interests as set out in the Treaties, identified the proliferation of weapons of mass destruction (WMD), including nuclear weapons, as a key threat to European security. This has consequently led to the adoption of a dedicated EU strategy against the proliferation of weapons of mass destruction.⁸ This strategy was endorsed by the Council in 2003. The strategy states unambiguously: *„WMD and missile proliferation puts at risk the security of our states, our peoples and our interests around the world. Meeting this challenges must be a central element in the EU’s external action”*.⁹ With a view to responding to this challenge, the strategy sets out: *„Our approach will be guided by our conviction that a multilateralist approach to security...provides the best way to maintain international order...our commitment to strengthen multilateral non-proliferation agreements and treaties...our determination to support the multilateral institutions charged respectively with the verification and upholding of compliance with these treaties”*.¹⁰ With a view to tools and instruments, the strategy refers, inter alia, to the use of multilateral treaties, political dialogue and diplomatic pressure, including with the support of partners, national and internationally coordinated export controls, political and economic levers (including trade and development policy), but does not fail to mention that the Security Council may also have recourse to coercive measures under Chapter VII of the UN Charter.¹¹ The strategy identifies a number of action points that may be carried out in furtherance of the envisioned objectives.¹² The theme of supporting international initiatives aimed at the promotion of EU

⁴ Compare with provisions on interests of EU in, e.g., the Treaties of Maastricht and Amsterdam, see, Vertrag über die Europäische Union, 1992 and Vertrag von Amsterdam, 1997

⁵ European Parliamentary Research Service, 2016; for a concise summary of the main provisions of the NPT, see, European Parliamentary Research Service, 2016, p. 5,6

⁶ For a more detailed account, see, European Parliamentary Research Service, 2016, p. 6,7,8

⁷ Two EU Member States (UK and France) are nuclear weapons states, others host US nuclear weapons on their territory while others are very strong disarmament advocates (e.g. Sweden and Finland), see, European Parliamentary Research Service, 2016, p. 29; Meier, 2014, p. 6

⁸ European Parliamentary Research Service, 2016, p. 29

⁹ *ibid.*

¹⁰ Council of the European Union, 2003, p. 5

¹¹ *ibid.*; Council of the European Union, 2003 p. 8

¹² Council of the European Union, 2003, p. 9-13

goals (e.g. „*verification regimes*”; „*export control regimes*”) is fully reflected as is the intent to support other states in their efforts to ensure non-proliferation.¹³

It is before the backdrop of the EU’s foreign policy interests, in particular its long-standing commitment to non-proliferation of WMD, including, most importantly, nuclear weapons, and its consequent espousal of a dedicated WMD strategy that European efforts to engage with Iran on its nuclear programme have to be understood.¹⁴

II. Negotiating the Joint Comprehensive Plan of Action (JCPOA)

The Iranian nuclear programme had for a long time been the subject of heated international debate.¹⁵ Iran began developing nuclear technology in the 1970s when the US Atoms for Peace programme provided support to the Iranian government under the Shah.¹⁶ After initial suspension following the revolution 1979, the new Islamic regime continued to pursue the programme in 1980s, but always declared that it would serve civilian purposes only.¹⁷ It was, however, widely believed that this might well be a cover for a clandestine attempt at developing nuclear weapons.¹⁸ These suspicions were corroborated in 2002 when intelligence brought to light that Iran was covertly constructing the *Natanz* enrichment facility and the *Arak* heavy-water reactor, which could be used to produce weapons-grade plutonium.¹⁹ This was in breach of Iran’s obligations under the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) to which Iran acceded as a non-nuclear weapon state. Additionally, there were reports from the International Atomic Energy Agency (IAEA) that made public in 2003 that Iran violated the terms of the NPT.²⁰ This led to first diplomatic negotiations between France, Germany, the United Kingdom and Iran that culminated in the Teheran Declaration and later the Paris Declarations in 2003 and 2004. In these declarations, Iran professed to abandon temporarily activities that aim at both enrichment and conversion.

This was meant to extend also to both manufacture and operation of centrifuges. The two declarations have, however, proven unsuccessful in curtailing the Iranian nuclear programme.²¹ After the election of *Mahmoud Ahmadinejad* in August 2005, the new Iranian leader called the deal off and informed the IAEA that Iran would restart conversion and

¹³ *ibid.*; for an interesting comment and leads to further literature on international efforts in the area of non-proliferation, see, Martellini and Zucchetti, 2016

¹⁴ Compare how the language of the Council conclusions adopting the JCPOA makes reference to the EU’s interests, see, Council of the European Union, 2015

¹⁵ Sterio, 2016, p. 70-74

¹⁶ Sterio, 2016, p. 70; Joyner, 2016, Chapter 1

¹⁷ Meier-Walser, 2017, p. 183

¹⁸ Sterio, 2016, p. 71

¹⁹ Meier-Walser, 2017, p. 182

²⁰ Sterio, 2016, p. 71; *Perthes* has convincingly argued that if Iran had the „bomb”, this would also mean a huge blow to the NPT, see, *Perthes*, 2008, p. 11

²¹ For a summary of past negotiations with Iran about its nuclear programme and their respective outcome, see, Haupt, 2016, p. 408

enrichment at several locations.²² In response, the IAEA had to refer the matter to the UN Security Council which then adopted six different resolutions in view of Iran's nuclear programme, demanding from Iran to cease its enrichment activities. The UN Security Council also imposed sanctions on Iran, including asset freezing of Iranian individuals and companies.²³ The situation grew even more tense when US intelligence services revealed in 2009 that Iran had significantly expanded its nuclear programme.²⁴ It was only with the election of *Hassan Rouhani* in August 2013 to the post of Iranian President that the situation was gripped by a novel dynamic. *Rouhani* indicated a readiness on part of the Iranians to resume serious talks about the Iranian nuclear programme.²⁵ It did not take long before Iran was able to sign an interim agreement with the US, Russia, the United Kingdom, France, China and Germany. Under the so called „Joint Plan of Action” Iran accepted the temporary suspension of its nuclear programme while the other powers agreed to decreased economic sanctions. This interim agreement was set to last six months, giving negotiators the time to reach a long-term agreement.²⁶ Formal implementation of the interim agreement was undertaken on January 20, 2014. This date kicked off the process that led to the negotiation and the subsequent conclusion of the JCPOA.

III. Negotiating Parties: The E3/EU+3 and Iran

European concern for the Iranian nuclear programme had been long-standing. In 2003, after an alarming report of the IAEA Board of Governors on Iran's nuclear programme that criticized in particular Iran's lack of cooperation with the IAEA, some EU Member States decided for themselves to join international efforts to keep Iran from acquiring nuclear weapons.²⁷ It was namely France, Germany and United Kingdom who initiated, as already pointed out, first joint political action. Consequently, they founded a diplomatic group, which was referred to as the EU-3 or E3 to reach out to Iran in the framework of joint discussions.²⁸ The purpose of this initiative was to prevent Iran from developing nuclear weapons and limit its nuclear programme.²⁹ *Alcaro* has pointed out that the E3 (United Kingdom, France, Germany) acted as a lead group – and won support for their initiative from other EU Member States by including the EU High Representative.³⁰ *Javier Solana*, who then served as EU High Representative, became hence actively involved and supported missions and

²² Sterio, 2016, p. 72

²³ Sterio, 2016, p. 72

²⁴ Sterio, 2016, p. 72

²⁵ Meier-Walser, 2017, p. 184

²⁶ For details of the Joint Plan of Action, see, Meier-Walser, 2017, p. 186

²⁷ Osiewicz, 2018, p. 155

²⁸ Osiewicz, 2018, p. 155

²⁹ Osiewicz, 2018, p. 155

³⁰ *Alcaro*, 2018; *Rafati* suggested that the EU was included in the negotiations process to assuage concern in other capitals regarding the E3 remit as it made the carrots on offer for Iran much more significant as with the involvement of the EU the scope became continental instead of only national, see, *Rafati*, 2017, p. 2

negotiations with Iran early on while at the same time preparing the ground for the EU's role in these negotiations.³¹ In the years 2003-2005, the EU was the lead actor in the negotiations with Iran.³² Then powers in the Security Council assumed a stronger role.³³ It was in 2006 when China, Russia and the United States came to join the E3. The format became E3/EU+3.³⁴ The inclusion of Russia and China as well as the United States ensured that any mutually agreeable solution would very likely find the blessing of the UN Security Council as all UN Security Council members that carry veto powers were directly implicated.³⁵ The United States, for their part, have long regarded the prevention of Iran's obtaining of an atomic bomb a critical security objective.³⁶ The *Obama* Administration did, in that, not set itself significantly apart from previous US-administrations as it clearly reaffirmed its commitment to prevent Iran from acquiring nuclear weapons prior to the commencement of real negotiations.³⁷

After the irksome and unsettling years of *Ahmadinejad's* reign in Iran when a climate of confrontation predominated the relations and effectively thwarted all attempts at real progress with regards to Western concerns over Iran's nuclear programm, Iran, under its new President *Hassan Rouhani*, decided to become a serious negotiation party.³⁸ Iran's newly appointed Minister of Foreign Affairs, *Javad Zarif*, wrote an article in which he clearly stated Iran's interest in improving relations with the West: *„Iran will also engage with European countries and other Western states with the goal of reinvigorating and further expanding relations. This normalization process must be based on the principles of mutual respect and mutual interest, and it must address issues of legitimate concern to both sides”*.³⁹

On this basis, negotiations on the contents of the JCPOA were commenced. These negotiations, that stretched from early 2014 until July 14, 2015, culminated in the agreement on the initial deal framework in Lausanne and eventually in a 17 days-long negotiation in Vienna in late June and July 2015. On July 14, 2015, the E3/EU+3 and Iran were able to announce that they had reached a groundbreaking agreement, the Joint Comprehensive Plan of Action.

³¹ Thränert, 2005

³² *ibid*

³³ *ibid*

³⁴ Osiewicz, 2018, p. 155

³⁵ Rafati, 2017, p. 2

³⁶ Gärtner and Akbulut, 2017, p. 171

³⁷ Gärtner and Akbulut, 2017, p. 173

³⁸ Yet even under Ahmadinejad, negotiations of Iran with the EU3/EU+3 took place, see: Meier-Walser, 2017

³⁹ Zarif, 2014, p. 10

B. The Nuclear Deal with Iran (JCPOA)

I. Main Elements of the Nuclear Deal

The basis of the nuclear deal with Iran takes the form of a document that counts 18 pages that are divided up into three consecutive parts (A, B, C) that are each further subdivided. Preceding this structure is both a preface and a preamble that contains general provisions. To this document, an Annex is attached that comprises another five documents that further specify provisions of the agreement. All this forms part of the agreement that is entitled „*Joint Comprehensive Plan of Action*” (JCPOA). The role of the Annex is clarified in the preceding document. Reference is accordingly made to „*technical details of the implementation of this JCPOA*” that are dealt with in the five Annexes to the document.⁴⁰

a. Material Elements

aa. Mutual Commitments

Mutual commitments are laid down in the core document and further specified in the annexes thereto. It is noted that the commitments in the JCPOA are „*reciprocal*”.⁴¹ Both sides promise to commit to the JCPOA in „*good faith*” and in a „*constructive atmosphere*”, „*based on mutual respect*”.⁴² All JCPOA participants agree furthermore „*not to engage in any action inconsistent with letter, spirit and intent of this JCPOA*”.⁴³ Materially, it is of foremost importance to note that Iran, by entering into the JCPOA, commits to an exclusively peaceful nuclear programme and pledges never to seek, develop or acquire any nuclear weapons.⁴⁴ While this is already explicitly stated in the preamble, it is also reaffirmed on other occasions in the document.⁴⁵ The document is designed around this very fundamental centerpiece of the agreement. Iran’s subsequent commitments, as they are detailed in the course of the document, are flowing from this very crucial first key commitment. Further to this, Iran commits to respect limitations on all uranium enrichment and uranium enrichment-related activities. This extends also to the acceptance of limits to specific research and development activities.⁴⁶ All of Iran’s nuclear-related commitments are further specified in Annex I.⁴⁷ The main duties that Iran accepted in the context of the JCPOA include the reduction of operational centrifuges, the establishment of a civilian Research and Development center by reconvertng the enrichment facility at *Fordow*, the redevelopment of the *Arak* heavy water

⁴⁰ JCPOA, xii. p. 4

⁴¹ JCPOA, i, p. 3

⁴² JCPOA, viii. p. 3

⁴³ JCPOA, ii. and iii., p. 3

⁴⁴ JCPOA, ii and iii, p. 3

⁴⁵ E.g. JCPOA, paragraph 16, p. 9

⁴⁶ JCPOA, paragraph 1-7, p. 6,7

⁴⁷ JCPOA, Annex I; for a concise summary of technical nuclear-related commitments of Iran, see, Martellini and Zuchetti, 2016, p. 479,480,481

reactor in order to prevent the production of weapon-grade plutonium, a commitment not to construct a reprocessing facility, the evacuation out of Iran of nearly all its enriched uranium stocks, and the acceptance of enhanced levels of IAEA-monitoring.⁴⁸ Some of the obligations carry a time limit.⁴⁹ It is noteworthy in this regard that Iran also accepted a certain range of associated obligations that are clustered under the heading „*Transparency and Confidence Building Measures*”. Consequently, Iran accepted to provisionally apply the Additional Protocol to its Comprehensive Safeguards Agreement.⁵⁰ Further to this, Iran committed to fully act on the Roadmap for clarification of Past and Present Outstanding Issues that has been agreed with the International Atomic Energy Agency (IAEA).⁵¹ Iran also committed to allow the IAEA access to monitor and verify compliance both with its commitments under the JCPOA and with the voluntary measures Iran committed to under paragraph 15 of the JCPOA.⁵² Additionally, Iran pledged full cooperation and to act in line with the procurement channel as detailed in Annex IV.⁵³ All JCPOA participants undertook a mutual commitment to dispute resolution in line with a dispute resolution mechanism provided for in this JCPOA if necessary.⁵⁴

A further commitment, that all participants undertake vis-à-vis each other, is to proceed with the implementation of their respective commitment in accordance with a so-called „*implementation plan*”.⁵⁵ Mention is made of a „*Joint Commission*” that shall oversee the implementation of the JCPOA.⁵⁶ Meetings at ministerial level are foreseen at least every two years in order to take stock of the progress.⁵⁷ All JCPOA participants acknowledge that the Non-Proliferation Treaty (NPT) remains the heart of the nuclear non-proliferation regime as they do reaffirm their commitment to the UN Charter.⁵⁸ Participants in the JCPOA pledge to cooperate in the field of peaceful uses of nuclear energy where this is deemed appropriate. More specifically, the participants agree to explore the possibility for civil nuclear cooperation projects.⁵⁹

Furthermore, the EU and the US enter into clearly specified commitments to terminate specific sanctions that were in place in respect of Iran’s nuclear programme. It is explicitly

⁴⁸ JCPOA, Annex I; Martellini and Zuchetti, 2016, p. 479,480

⁴⁹ E.g. provisions with regards to spent fuel reprocessing activities, see, JCPOA, Annex I, paragraph 18,19, p. 7; paragraph 24,25,26, p. 8; or provisions with regards to enrichment capacity, see, JCPOA, Annex I, paragraph 31, p. 9; or provisions with regards to centrifuges research and development, see, JCPOA, Annex I, paragraph 36,39, p. 10; paragraph 40, p. 11; or provisions with regards to the Fordow fuel enrichment plant, see, JCPOA, Annex I, paragraph 45,46, p. 12; paragraph 50, p. 13

⁵⁰ JCPOA, paragraph 13, p. 8

⁵¹ JCPOA, paragraph 14, p. 8

⁵² PCPOA, x, p. 4; JCPOA, paragraph 15, p. 9

⁵³ JCPOA, paragraph 17, p. 9

⁵⁴ JCPOA, paragraph 36, p. 17

⁵⁵ JCPOA, paragraph 34, p. 16

⁵⁶ JCPOA, ix, p. 4

⁵⁷ JCPOA, xvi, p. 5

⁵⁸ JCPOA, vii, vi, p. 3

⁵⁹ JCPOA, xiii, p. 4

stated that the E3+3 commit to refraining from the introduction of discriminatory regulatory and procedural requirements that would contravene the express commitment to end all nuclear-programme related sanctions on Iran.⁶⁰ Additionally, the participants in the JCPOA pledge also to lift all UN Security Council sanctions related to Iran's nuclear programme.⁶¹ To facilitate this, the E3+3 promise to table a draft resolution in the Security Council, which endorses the JCPOA and decides to end on implementation day all UN sanctions directed at Iran in relation to its nuclear programme.⁶² This was to lead in effect to a situation in which Iran can fully exercise its right to nuclear energy for peaceful purposes in line with the nuclear Non-Proliferation Treaty (NPT). The E3+3 states accordingly commit to treat Iran like any other state party to the NPT.⁶³ Other commitments of the EU and the E3+3 countries include, notably, a pledge to cooperate with Iran in field of peaceful uses of nuclear energy as is detailed further in Annex III.⁶⁴

bb. Sanctions

The JCPOA participants commit themselves upon adoption of the JCPOA to terminate a range of specific sanctions that were previously instituted notably by the UN Security Council, the US and the EU with a reference to the Iranian nuclear programme. Accordingly, the JCPOA dedicates a section to „*sanctions*“. In this section, there are provisions in respect of which sanctions are to be lifted⁶⁵, the timeframe⁶⁶, safeguards for the reintroduction of sanctions⁶⁷, a political commitment on part of the E3+3 to consistent and good faith execution of the agreement⁶⁸, a commitment not to undermine the effects of this sanctions-lifting⁶⁹, specific provisions on sanctions targeted at individuals or companies⁷⁰, and a pledge of the E3+3 to facilitate Iran's peaceful use of nuclear technology by means of technical cooperation projects.⁷¹ A complete list of all sanctions that are to be terminated are attached to the JCPOA in Annex II.⁷² The three-phased lifting of sanctions is set out in Annex V.⁷³ In the JCPOA, reference is made to a series of UN Security Council resolutions that are related to Iranian nuclear programme and whose provisions are to be terminated by a new UN Security Council resolution endorsing the JCPOA.

⁶⁰ JCPOA, viii, p. 3

⁶¹ JCPOA, v, p. 3

⁶² JCPOA, xiv, p. 4

⁶³ JCPOA, iv, p. 3

⁶⁴ JCPOA, xiii, p. 4

⁶⁵ JCPOA, paragraph 20,21,22,23,24,31, p. 10,11,14,15

⁶⁶ JCPOA, paragraph 18,19,20,21,22,23,24,31, p. 10,11,13,14,15; see also, Haupt, 2016, p. 443,444; JCPOA, Annex V

⁶⁷ JCPOA, paragraph 24,25,26,27,28,29, p. 13,14

⁶⁸ JCPOA, paragraph 28, p. 14

⁶⁹ JCPOA, paragraph 29, p. 14

⁷⁰ JCPOA, paragraph 31, p. 14,15

⁷¹ JCPOA, paragraph 32, 33, p. 15

⁷² See, JCPOA, Annex II, p. 1 - 15

⁷³ JCPOA, Annex V

Another heading concerns those sanctions that were previously put in place in pursuit of the pertinent EU regulation. Heading 19 enumerates a list of areas that were subject to EU sanctions prior to the JCPOA, and that are to be terminated as a consequence of the JCPOA. The character of these sanctions is „*economic and financial*” as the JCPOA affirms. Another set of EU sanctions that relate to proliferation are to be ended eight years after Adoption Day or when the IAEA has attested that all nuclear material in Iran serves peaceful purposes, whichever is earlier.⁷⁴ With reference to the US, it is noteworthy that the US pledges to cease the application of sanctions that are specified in Annex II.

The JCPOA furthermore provides in Article 24 that Annex II constitutes a complete list of all nuclear-related sanctions and restrictive measures that are to be lifted in accordance with the implementation plan in Annex V. This Annex is divided up into two parts, one (Part A) that lists all sanctions that were imposed by the European Union, and another one (Part B) that lists all the sanctions that were put in place by the United States. Part A is further subdivided into three parts, one part that lists all sectors of the Iranian economy that were targeted with EU sanctions, naming all the sanctions and respective legal bases in EU law⁷⁵, another that counts only one paragraph that stipulates that all those listed sanctions amount to a full list of all EU nuclear-related sanctions or restrictive measures aimed at Iran⁷⁶, and a third on EU economic and financial sanctions and their effect.⁷⁷ Part B of Annex II follows a similar subdivision. There are four parts to Part B, one detailing all sanctions whose application the US commits to cease⁷⁸, another on „*other trade measures*” the US commits to⁷⁹, a third part stipulating that the preceding list equals all US nuclear-related sanctions in place against Iran⁸⁰, and a fourth part on the lifting of US economic and financial sanctions and its effect.⁸¹

cc. International Procurement Channel

Reference to the procurement channel is made in the JCPOA whereby the respective paragraph points to Annex IV for further elaboration.⁸² The paragraph also contains a commitment on the part of Iran to act in accordance with aforementioned procurement channel. It is, thus, an obligation Iran enters into. Annex V in accordance with the reference made in the JCPOA sets out to specify the notion of a procurement channel, its purpose and functioning.⁸³ The procurement channel will be administered by the Procurement Working Group, a sub-group of the Joint Commission, that has the powers „*to review and to decide on*

⁷⁴ JCPOA, paragraph 20, p. 11

⁷⁵ JCPOA, Annex II, Part A, p. 1 - 4

⁷⁶ JCPOA, Annex II, Part A, p. 5

⁷⁷ JCPOA, Annex II, Part A, p. 5 - 7

⁷⁸ JCPOA, Annex II, Part B, p. 8 - 12

⁷⁹ JCPOA, Annex II, Part B, p. 12 - 13

⁸⁰ JCPOA, Annex II, Part B, p. 13

⁸¹ JCPOA, Annex II, Part B, p. 14 - 15

⁸² JCPOA, paragraph 17, p. 10

⁸³ JCPOA, Annex IV, paragraph 6, p. 3

*proposals by states seeking to engage in, for instance, the supply, sale or transfer...of all items, materials, equipment, goods and technology...if the end use will be for Iran's nuclear programme".*⁸⁴ The same applies to technical assistance or training or even Iran's ability to take part in another state's activity involving Uranium mining.⁸⁵

The Annex lays down the composition and the functioning of this working group as well as the process for consideration of proposals and related decision-making.⁸⁶ These rules include a provision on the maximum duration for the consideration and subsequent decision on a proposal, a provision on the requirement of „*necessary supporting information*“, and a provision on the adoption of a proposal.⁸⁷ It attracts attention that, procedurally, consensus is required for a proposal to be approved. Consensus is reached when there is no explicit disapproval. If the Working Group fails to achieve consensus the proposal can be referred to the Joint Commission for a consensus decision.⁸⁸ The Working Group itself shall meet every three weeks and shall have the EU's High Representative as coordinator.⁸⁹ The Procurement Working Group will submit a record of its decisions via the Joint Commission to the UN Security Council at least every 6 months.⁹⁰

dd. Snap-Back Mechanism

The so-called snap-back mechanism is introduced as an element of the dispute resolution paragraph of the JCPOA.⁹¹ As it is introduced in the JCPOA, „*snap-back*“ means that UN sanctions against Iran, which were meant to be lifted as a commitment on part of the JCPOA participants, could be easily reinstated in their entirety in case dispute resolution fails. For this to happen, the UN Security Council has a special role. After notification from the complaining participant that dispute resolution in line with the pertinent provisions of the JCPOA has failed, the Security Council has to vote on a resolution to continue the sanctions-lifting.⁹² If that resolution is not adopted within 30 days after notification, all the previous sanctions contained in the respective UN Security Council resolutions would be reinstated unless the Security Council makes a different decision.⁹³ As standard procedural rules of the UN Security Council apply to such a decision, any participant in the JCPOA, who holds a permanent seat in the Security Council and who does have veto power, would be technically able to thwart a Security Council resolution which is required to maintain the abrogation of

⁸⁴ JCPOA, Annex IV, paragraph 6.1.1, p. 4

⁸⁵ JCPOA, Annex IV, paragraph 6.1.2 and 6.1.3, p. 4

⁸⁶ JCPOA, Annex IV, paragraph 6.2, 6.3, 6.4, p. 4

⁸⁷ JCPOA, Annex IV, paragraph 6.4.4, 6.4.5, 6.4.6, 6.5, p. 5

⁸⁸ JCPOA, Annex IV; paragraph 6.4.4, p. 5

⁸⁹ JCPOA, Annex IV, paragraph 6.4.6, 6.3, p. 4,5

⁹⁰ JCPOA, Annex IV, paragraph 6.10, p. 6

⁹¹ JCPOA, paragraph 37, p. 17

⁹² JCPOA, paragraph 37, p. 17

⁹³ JCPOA, paragraph 37, p. 17,18

the sanctions.⁹⁴ This amounts to a reverse veto. Commentators have tended to view this clause as a safeguard and a deterrent, reflecting „*mistrust*“.⁹⁵

It has to be noted that „*snap-back*“ refers to UN Security Council-mandated sanctions only, the specific US sanctions regime as well as independent EU sanctions would be exempt from this mechanism. Neither in the JCPOA nor in UNSCR 2231 mention is made of reimposing US or EU nuclear-related sanctions upon activation of „*snap-back*“.⁹⁶ A second limitation of the snap-back mechanism is that the mechanism does not have retroactive effect. Accordingly, contracts concluded by third parties in Iran after January 16, 2016 until the day of possible reimposition of UN sanctions would be exempted from the effect of reintroduced sanctions.⁹⁷ Note that Iran has stated that it would treat the reimposition of sanctions as a reason to renege on its commitments under the JCPOA.⁹⁸

b. Procedural Elements

aa. Timetable

The JCPOA was agreed and concluded on July 14, 2015 in Vienna („*Finalization Day*“).⁹⁹ On July 25, 2015 the UN Security Council adopted Resolution 2231 regarding the Joint Comprehensive Plan of Action.¹⁰⁰ This resolution endorses the JCPOA and specifies a schedule to end restrictive measures against Iran.¹⁰¹ Following the review of the JCPOA in the EU and the US, „*Adoption Day*“ was proclaimed on October 18, 2015 which initiated in accordance with the so called „*implementation plan*“ the implementation of the provisions of the JCPOA. „*Implementation Day*“ was reached on January 16, 2016 after the International Atomic Energy Agency certified that Iran fully honoured its commitments under the JCPOA. Next steps include „*Transition Day*“ and 10 years after Adoption Day the „*Termination Day*“ would be reached.¹⁰² The timetable for sanctions-lifting is three-phased in accordance with the implementation plan.¹⁰³

bb. Implementation Plan

The implementation plan is dealt with both in the JCPOA, paragraphs 34 and 35, and by extension in greater detail in Annex V. Paragraph 34 makes reference to a specific series of

⁹⁴ Dubowitz, 2015; Perkovich, 2015

⁹⁵ New York Times, 2015; Haupt, 2016, p. 442

⁹⁶ Haupt, 2016, p. 442

⁹⁷ UN Security Council Resolution 2231, 2015, paragraph 14; JCPOA, paragraph 37

⁹⁸ JCPOA, paragraph 37, p. 18

⁹⁹ JCPOA, preface; Auswärtiges Amt, 2018

¹⁰⁰ UN Security Council Resolution 2231, 2015

¹⁰¹ See also, JCPOA, Annex V; Haupt, 2016, 436-431

¹⁰² EEAS, 2017

¹⁰³ Haupt, 2016, p. 443; JCPOA, paragraph 34,35; JCPOA, Annex V

milestones that are to be achieved as implementation of the JCPOA progresses.¹⁰⁴ Those milestones include, as has already been touched upon, „*Finalisation Day*”, „*Adoption Day*”, „*Implementation Day*”, „*Transition Day*”, and „*Termination Day*”.¹⁰⁵ Each of these milestones carries along with it specific actions that EU, US, and Iran commit to undertake at a given point in time, which is stipulated in the pertinent paragraph. Reference to these actions is made in the JCPOA, a concrete list of these actions is given in Annex V. In line with the proposed sequence, „*Adoption Day*”, for example, will see the preparation of an EU Regulation, taking effect on Implementation Day, that ends specific provisions of the earlier EU Regulation in which nuclear-related economic and financial sanctions against Iran are contained. The US, in accordance with its commitment made under the paragraphs of the JCPOA relating to sanctions, will cease the application of its nuclear-related sanctions in place against Iran.¹⁰⁶ It is important to note that the same time-delayed effect applies, so that US nuclear-related sanctions will cease to apply as of Implementation Day. A detailed description of actions is attached to the other milestones.¹⁰⁷ Additionally, „*Termination Day*” will bring about a new UN Security Council Resolution in accordance with the terms of the Security Council Resolution endorsing the JCPOA.¹⁰⁸ On Termination Day and with this new UN Security Council Resolution, the UN Security Council would no longer be concerned with the Iran nuclear issue.¹⁰⁹

cc. Joint Commission

A „*Joint Commission*”, consisting of the E3/EU+3 and Iran, is established on the basis of the JCPOA.¹¹⁰ A provision to this effect is included in the Preamble. While the paragraph provides for the establishment of the Joint Commission, it does set out broad notions of its functioning („*will carry out functions provided for in this JCPOA*”) and clarifies its *raison d'être* („*address issues arising from the implementation of this JCPOA*”).¹¹¹ The Annex IV on the Joint Commission then further specifies in seven paragraphs nature, functioning and decision-making of the Joint Commission.¹¹²

The EU High Representative shall act as coordinator of the Joint Commission.¹¹³ It may also establish dedicated Working Groups.¹¹⁴ It is noteworthy in that regard that on the basis of Annex IV the Joint Commission allows for the establishment of the „*Procurement Working*

¹⁰⁴ JCPOA, paragraph 34, p. 16

¹⁰⁵ JCPOA, paragraph 34, p. 16

¹⁰⁶ JCPOA, Annex V, p. 2

¹⁰⁷ JCPOA; Annex V, p. 1-6

¹⁰⁸ JCPOA, Annex V, paragraph 23, p. 5

¹⁰⁹ JCPOA, Annex V, paragraph 24, p. 6; Rosenthal, 2016, p. 102

¹¹⁰ JCPOA, ix, p. 4

¹¹¹ JCPOA, ix, p. 4

¹¹² JCPOA, Annex IV, p. 1-6

¹¹³ JCPOA, Annex IV, paragraph 1.4, p. 1

¹¹⁴ JCPOA, Annex IV, paragraph 1.3, p. 1

Group”, that shall be a Joint Commission configuration responsible for discharging its functions in accordance with its role in the procurement channel as stipulated in relevant paragraphs of the JCPOA.¹¹⁵ A similar Joint Commission configuration, established by means of Annex IV, is the „*Working Group on Implementation of Sanctions Lifting*”, which is another offshot of the Joint Commission assembling participants from the the Joint Commission under the coordinatorship of the EU High Representative.¹¹⁶ The central functions of the Joint Commission relate to the close monitoring and to the review of issues pertaining to Iran’s civilian nuclear programme.¹¹⁷

An example include a Joint Commission responsibility to assess the final design for the modernised heavy water research reactor and the design of the subsidiary laboratories.¹¹⁸ The Joint Commission shall meet at least quarterly and at any time upon the request of an JCPOA participant, decisions shall be made by consensus except as stated otherwise in Annex IV.¹¹⁹ Consensus shall guide decisions under the procurement channel in the Procurement Working Group. As pointed out in the paragraph on the procurement channel of this thesis, consensus in the Procurement Working Group will be reached when there is no explicit disapproval.¹²⁰ The Working Group on Implementation of Sanctions Lifting provides a forum to discuss all matters related to the implementation of sanctions-lifting. If the Working Group is unable to resolve any issue relating to the implementation of sanctions-lifting that may be put on the agenda at any time at the request of an individual Working Group participant, then the issue will be passed onto the Joint Commission for consideration.¹²¹ This is illustrative of the fact that the Joint Commission may be viewed as the highest institutionalised political forum within the framework of the JCPOA to resolve questions and issues arising from the implementation of the JCPOA.¹²² The Joint Commission consequently also has a role in dispute resolution under the JCPOA.

dd. Dispute Resolution Mechanism

Dispute resolution is provided for in the JCPOA and the terms are laid down in two paragraphs at the very end of the JCPOA main text body.¹²³ In essence, all parties to the JCPOA have been given the right to turn to the Joint Commission if any participant holds the

¹¹⁵ JCPOA, Annex IV, p. 3

¹¹⁶ JCPOA, Annex IV, p. 6

¹¹⁷ JCPOA, Annex IV, paragraph 2, p. 1-2

¹¹⁸ JCPOA, Annex IV, paragraph 2.1.1, p. 1

¹¹⁹ JCPOA, Annex IV, paragraph 3, 4, p. 2-3, exception to consensus requirement for example in Article 4.4, Annex IV, JCPOA

¹²⁰ JCPOA, Annex IV, paragraph 6.4.4, p. 5

¹²¹ JCPOA, Annex IV, paragraph 7.3, p. 6

¹²² Note that the neither UNSCR 2231 nor the JCPOA do provide for the duration of existence of the Joint Commission. *Haupt* has suggested that even after Termination Day there are no established provisions that would stipulate a deadline for its institutional winding-up or agreed automatics for its liquidation, see, Haupt, 2016, p. 433

¹²³ JCPOA, paragraph 36,37, p. 17,18

view that another participant is not respecting its commitments under the JCPOA.¹²⁴ The Joint Commission would then have 15 days to resolve the issue unless a consensus decision provides for an extension. After the Joint Commission has considered the issue, it could then be transferred to the consideration of Ministers of Foreign Affairs. Dispute resolution also provides for the ad-hoc appointment of an Advisory Board, which includes three members (one each appointed by participants to the dispute and one independent member). If set up, the Advisory Board would have 15 days to issue a non-binding opinion for the attention of the Joint Commission on the dispute in question, which would have another five days to resolve the issue. After this time has elapsed and the complaining JCPOA participant still believes that the issue has not been resolved satisfactorily, then the participant could treat this as a ground to cease its own obligations under the JCPOA and inform the UN Security Council, making a case that the unresolved issue constitutes significant non-performance on part of another participant.¹²⁵ Once it has become seized of the matter, the Security Council votes, in accordance with its procedures, on a resolution to continue the sanctions-lifting. If the respective resolution is not adopted within 30 days, then the „*snap-back mechanism*” will be enabled and all the provisions of former UN Security Council resolutions that imposed sanctions on Iran would be reinstated, unless the UN Security Council comes to a different decision.¹²⁶

II. The Joint Comprehensive Plan of Action (JCPOA) and International Law

a. The Legal Status of the JCPOA

Treaties are an important source of international law. States enter into binding commitments and regulate by consent matters of common concern. Treaties can thus be considered an instrument that brings „*stability, reliability and order in international relations*”.¹²⁷ The Vienna Convention on the Law of Treaties (VCLT) defines a treaty as an „*international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation*”.¹²⁸

The Vienna Convention on the Law of Treaties notes furthermore that „*every state possesses capacity to conclude treaties*”.¹²⁹ A defining characteristic of a treaty is the fact

¹²⁴ JCPOA, paragraph 36, p. 17

¹²⁵ JCPOA, 36, p. 17; note that the notion of „significant non-performance” has been found to be indefinite as the JCPOA itself is devoid of criteria of what constitutes „significant non-performance”, see, Haupt, 2016, p. 440, 441

¹²⁶ JCPOA, 37, p. 18; see, section B.I.a.dd of this thesis

¹²⁷ Dörr, 2012, p. 1

¹²⁸ UN, 2005, p. 3

¹²⁹ UN, 2005, p. 3

that states have expressly consented to be bound by a treaty. Article 11 VCLT accordingly reads: „*The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed*“.¹³⁰ It is important to note that states often also have domestic rules in place on what constitutes a treaty.¹³¹

Treaties as defined in the VCLT must be considered as distinct from so called political commitments or political accords. The concept of a political accord or commitment has been defined by *Hollis and Newcomer* as „*a non-legally binding agreement between two or more nation-states in which the parties intend to establish commitments of an exclusively political or moral nature*“.¹³² The „*manifest intent*“ to undertake a political commitment as opposed to consent to be legally bound by a treaty is a defining difference that puts a state’s sovereignty at the center.¹³³ While they do most notably base their argument on established state practice, it is worth noting that the drafters of the Vienna Convention on the Law of Treaties also understood their definition of treaties to exclude political commitments.¹³⁴ In short, states agree to a treaty if they have the intention of doing so; likewise, states agree to a political commitment if this is what they intend to do.¹³⁵ This intent can be demonstrated by plainly stating it in the respective document or by deliberately disclaiming any intention to create a legally binding instrument, including in terms of language use.¹³⁶

At the heart of the distinction between treaties and political commitment is thus the question of legal effect. In the words of *Hollis and Newcomer*: „*International law governs the treaty such that its breach can generate both political and legal consequences; in contrast, only politics governs the political commitment so its breach will only produce political consequences*“.

Haupt has argued that JCPOA does not constitute an international treaty.¹³⁷ According to him, the language of the JCPOA reflects its drafters’ intention not to create an international agreement, most notably the fact that all commitments made in JCPOA have been qualified

¹³⁰ UN, 2005, p. 6; see also Lauterpacht, 1953, comment on Article 11, VCLT „The consensual nature of treaties constitutes their principal characteristic which underlies the rules of customary international law in the matter of the conclusion, the binding force, the validity, the interpretation and the termination of treaties“.

¹³¹ Under US law for example „a treaty is an agreement between the United States and another state that does not enter into force until it receives the advice and consent of a two-thirds majority of the Senate and is subsequently ratified by the President“, see, Mulligan, 2018 (2), p. 3

¹³² Hollis and Newcomer, 2009, p. 517

¹³³ Hollis and Newcomer, 2009, p. 522

¹³⁴ In preparing the draft used for VCLT negotiations, the UN International Law Commission viewed treaties as distinct from political commitments. See, International Law Commission, 1959, p. 96

¹³⁵ Hollis and Newcomer, 2009, p. 523

¹³⁶ Hollis and Newcomer, 2009, p. 523

¹³⁷ Haupt, 2016, p. 435; others have made the same argument, see, for instance, Klingler, 2015

as „voluntary commitments” would count as evidence to that effect.¹³⁸ Similarly, JCPOA participants have carefully avoided all treaty terminology.

They do refer to themselves as „JCPOA participants” rather than „parties” to the JCPOA, mindful that a „party” is defined in Article 2 (1) (g) of the Vienna Convention on the Law of Treaties as „a state that has consented to be bound by a treaty and for which the treaty has entered into force”.¹³⁹ Talmon has observed that the signatures on the JCPOA must not be confused with treaty signatures. The difference is shown by the fact that a treaty is signed at the end of the document, while the JCPOA was signed by the negotiators on its cover page. Rather than constituting signatures legally binding State parties, the signatures of the negotiators of the JCPOA symbolized the political endorsement of the text contained in the document.¹⁴⁰ This view is corroborated by the respective own legal assessment of major JCPOA participants.¹⁴¹ Fischer and Scholl concur with Haupt as they also point to mentions of „voluntary commitments” in the JCPOA that support, according to Fischer and Scholl, the view that the text was designed not to create a priori legal obligations, but rather signal a political commitment. Similarly, the fact that the JCPOA may only take effect after 90 days following Security Council endorsement is also cited in support of this view.¹⁴² The JCPOA is, hence, viewed both by legal scholars and practitioners as an intricate form of political accord.¹⁴³ This architecture has arguably cleared the way for the accord as a treaty would have required ratification by each domestic legislature, which could have possibly created political challenges.¹⁴⁴ While the JCPOA itself cannot, if these arguments were accepted, be considered, as such, as legally binding, the Security Council endorsement of Resolution 2231, which on the basis of and by invocation of Article 41 and Article 25 of the UN Charter, sets out to make binding numerous commitments that are contained in the JCPOA.

b. Relationship of the JCPOA with UN Security Council Resolutions

Under Article 41 of the UN Charter, the Security Council „may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include

¹³⁸ Haupt, 2015, p. 435; Haupt also carries out an analysis of the question of binding effect of the JCPOA with reference to the „Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations” that were adopted by the International Law Commission in 2006 and comes to the conclusion that the JCPOA cannot be regarded a legally binding international treaty on the basis of these guidelines, see, Haupt, 2016, p. 436

¹³⁹ The International Law Commission, 2006

¹⁴⁰ Talmon, 2020

¹⁴¹ Letter of US State Department to Mr Mike Pompeo, see, US State Department, 2017; Talmon, 2020; Iran took a slightly different reading of the accord as Fischer and Scholl point out, see, Fischer and Scholl, 2018

¹⁴² Fischer and Scholl, 2018

¹⁴³ Galbraith, 2017, p. 1677; Goldsmith, 2018; Bellinger, 2015; Fischer and Scholl, 2018; Talmon, 2020

¹⁴⁴ For a good explanation of the legal intricacies of the JCPOA process with reference to the United States of America, see, Goldsmith, 2015 and for a more principled discussion of legal requirements for political commitments and treaties in the United States, see, Galbraith, 2017

complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations“.¹⁴⁵ Before it takes measures under Article 41 of the UN Charter, the Security Council must determine the existence of „*a threat to the peace, breach of the peace or act of aggression*“ in accordance with Article 39 of the UN Charter.¹⁴⁶ UN Security Council Chapter VII decisions are binding on all UN Member States according to Article 25 of the UN Charter. Under Article 48 (2) of the UN Charter, UN Member States are also required to carry out Security Council decisions through their membership in international organisations.¹⁴⁷ O’Connell argues that the Security Council has on that basis broad authority to impose sanctions.¹⁴⁸ Boon notes that while Article 41 of the UN Charter does not mention sanctions explicitly, it gives the Security Council what may be termed a „*preventative*“ power to be used whenever it may be necessary to protect international peace and security.¹⁴⁹ Boon suggests with a view to UN Security Council practice that it has shown creativity in exploiting the Article 41 provisions.¹⁵⁰ Tzanakopoulos specifies that the Security Council has used its „*sanctioning powers*“ of Article 41 in the past in many different ways, including „*to affect international treaties, to create war tribunals, to decide in the responsibility of Member States or even to „legislate“ for all Member States*“.¹⁵¹

As has been shown, the UN Security Council has passed numerous subsequent resolutions imposing sanctions on Iran.¹⁵² The JCPOA, in turn, provides for sanctions-lifting, including those sanctions that were previously instituted by the UN Security Council. To that end, the JCPOA made reference in many instances to a new Security Council resolution, that JCPOA participants would put forward.¹⁵³ E3+3 countries have accordingly committed in the JCPOA to table a resolution in the Security Council that shall endorse the JCPOA.¹⁵⁴ This resolution has been adopted on July 20, 2015.¹⁵⁵

The structure of Resolution 2231 is such that it consists of a preamble, an operative part and two Annexes (A and B).¹⁵⁶ The JCPOA text has been annexed to Security Council Resolution 2231 as Annex A.¹⁵⁷ Annex B is a statement that China, France, Germany, the Russian Federation, the United Kingdom, the United States, and the European Union have made on

¹⁴⁵ UN, 2020; note that the Security Council may also authorize the use of force under Article 42, UN Charter

¹⁴⁶ Tsanakopoulos, 2014, p. 416

¹⁴⁷ UN, 2020

¹⁴⁸ O’Connell, 2002, p. 64

¹⁴⁹ Boon, 2014, p. 2

¹⁵⁰ Boon, 2014, p. 3

¹⁵¹ Tsanakopoulos, 2014, p. 410, 411

¹⁵² Laub, 2015

¹⁵³ JCPOA, xiv, p. 4; paragraph 18, p. 10; paragraph 34, p. 16; Annex V, paragraph 2, 3, 4, 6, 14, 16.4, 18, p. 1, 2,3,4

¹⁵⁴ JCPOA, xiv, p. 4

¹⁵⁵ UNSCR 2231, 2015

¹⁵⁶ Haupt, 2016, p. 411; for a legal analysis of the legal structure of UNSCR 2231, see, Haupt, 2016, p. 410-412

¹⁵⁷ For a legal analysis of UNSCR 2231, see, Haupt, 2016, p. 409-422; Rosenthal, 2016, p. 100-102

July 14, 2015 in which they outline certain provisions as regards the implementation of the nuclear accord.¹⁵⁸ In the operative part of Resolution 2231, Security Council members have voted to endorse the JCPOA and urged participants to fully implement it in accordance with the timetable set in the JCPOA.¹⁵⁹

The Security Council with Resolution 2231 has, by virtue of the language it uses in some instances (e.g. „*decides*”), purported to solidify or make binding crucial provisions of the JCPOA. In Resolution 2231, the Security Council takes decisions in 10 out of 30 operative paragraphs, acting under Article 41 of the UN Charter.¹⁶⁰ Crucially, UNSCR 2231 decides to terminate Security Council-mandated UN-sanctions imposed on Iran previously.¹⁶¹ Additionally, UNSCR 2231 under Article 11 and Article 12 decides to institute the „*snap-mechanism*” as provided for in the JCPOA.¹⁶²

According to *Haupt*, it is important to note that the operative part of UNSCR 2231 does not fully reproduce the contents of Annexes A and B. The reason for this, in his view, is that the Security Council had the intention to give those provisions of the JCPOA, that are explicitly mentioned in UNSCR 2231, *strictu sensu*, legally binding effect.¹⁶³

It is, however, debated whether the binding effect did only apply to selected provisions of the JCPOA as produced in the operative part of UNSCR 2231.

In view of all sanctions that might be in place nationally against Iran and that are not based on previous UNSCR resolutions, the Resolution 2231, in paragraph 2, only „*calls upon all Members States [...] to take such actions as may be appropriate to support the implementation of the JCPOA, including by taking actions commensurate with the implementation plan set out in the JCPOA and this resolution and by refraining from actions that undermine implementation of commitments under the JCPOA*”.¹⁶⁴

According to *Fischer and Scholl*, this does nonetheless not necessarily preclude a legally binding effect of that provision.¹⁶⁵ In doing so, they cite the *Namibia Advisory Opinion of the International Court of Justice* where the court has pointed out that Article 25 of the UN Charter, which obliges UN members to carry out decisions of the UN Security Council, does not solely apply if the Security Council takes decisions on the basis of Article 41 and 42.¹⁶⁶ In

¹⁵⁸ For a detailed analysis of Annex B, UNSCR 2231, see, Haupt, 2016, p. 417-422; in the statement, the negotiating parties have, for instance, included a reference to ballistic missile-related activities on part of Iran and their restriction. *Haupt* notes on pages 450-456 the intricacies. According to him, it is clear that paragraphs 7b, UNSCR 2231 in conjunction with paragraph 4 and 5 of the statement in Annex B in legally binding fashion restrict outside support to Iran’s ballistic missile programme

¹⁵⁹ UNSCR 2231, 2015

¹⁶⁰ Haupt, 2016, p. 438

¹⁶¹ UNSCR 2231 has regard to Security Council Resolutions 1996, 1737, 1747, 1803, 1835, 1929, 2224, see, UNSCR, 2015

¹⁶² UNSCR 2231, 2015

¹⁶³ Haupt, 2016, p. 412

¹⁶⁴ UNSCR 2231, 2015

¹⁶⁵ Fischer and Scholl, 2018

¹⁶⁶ International Court of Justice, 1971

Recital 115 of the *Namibia opinion* the Court has considered a paragraph of a Security Council resolution to be „*binding*”. In a legal opinion for the US Congress, *Mulligan* analyses the same legal problem. On paragraph 2 of UNSCR 2231 he comments:

*„While this provision arguably seeks general compliance with the JCPOA, some commentators interpret the phrase „calls upon” as a hortatory, nonbinding expression in Security Council parlance. Others argue that the phrase can create an obligation under international law to comply. And a third group falls in between, describing the phrase as purposefully ambiguous or dependent on its context”.*¹⁶⁷ According to *Mulligan*, who also refers to the lessons from the *Namibia opinion* the binding effect cannot be conclusively established: *„Since the ICJ’s opinion, U.N. Member States have ascribed varying levels of significance to the phrase „calls upon” in subsequent Security Council resolutions. Consequently, there is no clear answer to whether Resolution 2231 creates an obligation to comply with the JCPOA that is binding as a matter of international law”.*¹⁶⁸

Fischer and Scholl, on the contrary, do further argue that the call for the lifting of national sanctions has received binding character already thanks to the interlink between JCPOA and UNSCR 2231. The argument recalls that the JCPOA as a whole does take effect 90 days after endorsement by the Security Council. This has happened October 18, 2015 as the UNSCR 2231 was successfully passed on July 20, 2015. If, as runs their argument, the formulation in paragraph 34 of the JCPOA is construed in such a way that participating countries have agreed to the binding nature of the text on condition of Security Council endorsement, the binding effect of JCPOA has materialised 90 days after the adoption of UNSCR 2231.¹⁶⁹ That, they concede, may only be applicable to those provisions in the JCPOA, which are clearly and unambiguously phrased to create binding commitments.¹⁷⁰

While some authors have accepted that the JCPOA does by virtue of adoption of UNSCR 2231 contain legally binding provisions, anchored in international law, their extent cannot be conclusively determined and may remain a source for legal debate.

c. Link of the JCPOA to other International Legal Instruments

The JCPOA does contain a series of references to other international legal instruments. These mentions are in most instances specific and clear, but are, however, in limited instances of a more general nature. In the preface to the JCPOA, mention is made that Iran shall be allowed a peaceful nuclear programme *„consistent with international non-proliferation norms”*.¹⁷¹ This is further elaborated in the pertinent paragraph of the JCPOA, where Iran’s right to the peaceful use of nuclear energy in line with the provisions of the Non-

¹⁶⁷ Mulligan, 2018

¹⁶⁸ Mulligan, 2018

¹⁶⁹ Fischer and Scholl, 2018

¹⁷⁰ Fischer and Scholl, 2018

¹⁷¹ JCPOA, preface, p. 2

Proliferation Treaty, to which Iran is a state party, is reaffirmed.¹⁷² Reference is also made to the UN Charter.¹⁷³ Under the heading „*Transparency and Confidence Building Measures*“ Iran does commit to apply provisionally the Additional Protocol to its Comprehensive Safeguards Agreement with the International Atomic Energy Agency (IAEA).¹⁷⁴ This Protocol does extend the monitoring and verification powers of the IAEA with respect to Iran.¹⁷⁵ This commitment is further specified in Annex V of the JCPOA.¹⁷⁶ Links between JCPOA and the IAEA are reinforced by means of UNSCR 2231.¹⁷⁷ Other references include a commitment of the US to treat Iran eight years after Adoption Day consistent with the US approach to a non-nuclear weapon state under the Non-Proliferation Treaty.¹⁷⁸ Reference is also made to potential future technical cooperation projects, that may be concluded by way of bilateral or plurilateral treaty. This would have to be in accordance with JCPOA.¹⁷⁹ Mention is also made of possible future cooperation agreement in the area of nuclear safety.¹⁸⁰ Interestingly, a dedicated paragraph of the JCPOA does voluntarily stipulate limits on the scope of the JCPOA: „*All provisions and measures should not be considered as setting precedents for any other state or for fundamental principles of international law and the rights and obligations under the NPT and other relevant instruments, as well as for internationally recognised principles and practises*“.¹⁸¹

d. The JCPOA and International Organisations

The JCPOA gives an important role to the International Atomic Energy Agency (IAEA).¹⁸² Reference to the authority is made on numerous occasions in the text.¹⁸³ The IAEA will be requested to verify and monitor all the nuclear-related commitments Iran has entered into with the adoption of the JCPOA.¹⁸⁴ Note that this mandate is also echoed in UNSCR 2231.¹⁸⁵

¹⁷² JCPOA, iv and vii, p. 3

¹⁷³ JCPOA, vi, p. 3

¹⁷⁴ JCPOA, paragraph 13, p. 8

¹⁷⁵ IAEA, 2018 (1) and IAEA, 2018 (2); Rosenthal, 2016, p. 99; for a good analysis of the precepts of the IAEA Additional Protocol, see, Asada, 2016

¹⁷⁶ JCPOA, Annex V, paragraph 8 and 22, p. 1,5

¹⁷⁷ Haupt, 2016, p. 422-426

¹⁷⁸ JCPOA, paragraph 24, p. 13

¹⁷⁹ JCPOA, Annex III, paragraph 2, p. 1

¹⁸⁰ JCPOA, Annex III, paragraph 8.1, p. 5

¹⁸¹ JCPOA, xi, p. 4

¹⁸² Rosenthal, 2016, p. 99,100

¹⁸³ JCPOA, x, p. 4; xiii, p. 4; paragraph 1, 2, 4, p. 6; paragraph 6, p. 7; paragraph 14, p. 8; paragraph 15, p. 9; paragraph 18, 19, p. 10; paragraph 20, 21, p. 11; paragraph 23, p. 12; paragraph 32, p. 15; paragraph 34, p. 16; Annex 1, paragraph 2, 3, p. 2; paragraph 6, 8, p. 3; paragraph 10, 12, p. 4; paragraph 15, p. 15; paragraph 46.1, p. 12; paragraph 48.2, 51, p. 13; paragraph 57, p. 15; paragraph 60, p. 16; paragraph 63, p. 17; paragraph 64, 65, p. 18; paragraph 66, p. 19; paragraph 67.1, 67.2, 67.3, p. 20; paragraph 68, 69, p. 21; paragraph 70, 71, p. 22; paragraph 74, 75, 76, 77, 78, p. 23; paragraph 79, 80.1, 80.2, p. 25; paragraph 81, p. 26; Annex III, paragraph 1, 3.2, p. 1; paragraph 5.4, 6.1, p.3; paragraph 7.4.3, p. 4; paragraph 8, 9, p. 5; paragraph 9.2, p. 6; Annex IV, paragraph 2.1.8, p. 2; paragraph 6.4.1, p. 4; paragraph 6.4.6; Annex V, paragraph 5, 8, p. 1; paragraph 10, 14, p. 2; paragraph 15.9, p. 3; paragraph 19, p. 4

¹⁸⁴ JCPOA, xi, p. 4; JCPOA, paragraph 15, p. 9

This includes, notably, that the JCPOA confers upon the IAEA the powers to monitor Iran's uranium mines and mills.¹⁸⁶ In addition, Iran must place all of the country's uranium ore concentrate under IAEA's „*containment and surveillance measures*” at Iran's uranium conversions facility.¹⁸⁷ In addition, the JCPOA requires Iran to allow IAEA-monitoring of rotors and bellows and IAEA-inspections of Iran's heavy-water plant.¹⁸⁸ In executing the JCPOA-mandate to verify Iran's compliance with the JCPOA, the IAEA can also activate a process if they have specific concerns regarding undeclared nuclear material or activities on part of Iran. So even going beyond access requests for sites that have been notified to the agency under the Safeguards Agreement and Additional Protocol, the IAEA may ask Iran to grant access to locations where the agency has concerns about undeclared nuclear materials or activities inconsistent with the JCPOA.¹⁸⁹ If Iran fails to accommodate IAEA-requests for access to a specific Iranian facility, the IAEA could call on the Joint Commission that may, by majority decision, grant access to Iranian facilities for inspection purposes.¹⁹⁰ In addition, the JCPOA provides for a long-term IAEA-presence in Iran, which is designed to facilitate and expedite rapid IAEA-inspector access to Iranian facilities.¹⁹¹

All these provisions shall ensure that the assessment of JCPOA implementation can be based on facts. Fact-finding and verification, with a particular focus on the timely implementation of JCPOA commitments on part of Iran, remain the most important function of the IAEA.¹⁹² Accordingly, progress in fulfilling the JCPOA implementation plan is, at decisive junctures, tied to positive IAEA-reports that certify honest implementation of nuclear-related commitments on part of Iran.¹⁹³

C. The European Union and the Joint Comprehensive Plan of Action (JCPOA)

I. The Role of the EU in Respect of the JCPOA

a. The EU's Involvement in the Nuclear Deal

aa. Actors

In line with the pertinent treaty provisions, the High Representative of the Union for Foreign Affairs and Security Policy („*the High Representative*“) shall conduct the Union's Common

¹⁸⁵ UNSCR 2231, 2015, paragraph 3, 6

¹⁸⁶ JCPOA, x, p. 4; JCPOA, Annex I, paragraph 68, 69, p. 21

¹⁸⁷ JCPOA, Annex I, paragraph 70, 71, p. 22; Kerr, 2018

¹⁸⁸ JCPOA, Annex I, paragraph 80.1, p. 24; Kerr, 2018

¹⁸⁹ JCPOA, Annex I, paragraph 75, p. 23

¹⁹⁰ JCPOA, Annex I, paragraph 78, p. 23; Kerr, 2018

¹⁹¹ JCPOA, Annex I, 67; Kerr, Paul, 2018

¹⁹² Rosenthal, 2016, p. 99

¹⁹³ JCPOA, Annex V, paragraph 14, p. 2; paragraph 19, p. 4

Foreign and Security Policy („CFSP“).¹⁹⁴ Accordingly, the High Representative conducts „political dialogue with third parties on the Union’s behalf“.¹⁹⁵

While the High Representative is, thus, the Union’s agent in direct negotiations with Iran and in the framework of the E3/EU+3, other European Union institutions have, for their part, also had a role to play in line with competences conferred upon them in the Treaties. Accordingly, the European Council shall identify the Union’s strategic interest in the context of the CFSP, determine the objectives and define the general guidelines for action while the Council shall frame the CFSP and take the decisions necessary for defining and implementing it on the basis of these general guidelines and strategic lines defined by the European Council.¹⁹⁶

The rules and procedures governing this decision-making as well as various forms of action are laid down in the TEU.¹⁹⁷ Most notably, in most cases unanimity applies.¹⁹⁸

The Council has adopted conclusions and taken decisions in respect of Iran on numerous occasions, including in the context of the JCPOA as will be further elaborated.¹⁹⁹

bb. Mandate

The European Union in accordance with the Treaty on European Union (TEU) operates on the international scene by means of its External Action policy, more specifically its Common Foreign and Security Policy („CFSP“).²⁰⁰ All this action has to be based on a specific competence as stipulated in pertinent Treaty provisions.²⁰¹ Accordingly, the Union shall only act „within the limits of the competences conferred upon it by the Member States in the Treaties“.²⁰² The Treaties give the EU the power to adopt restrictive measures in pursuit of CFSP objectives. Restrictive measures are governed by Article 75 and 215 TFEU.²⁰³ Article 215 para. 1 TFEU states: „Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures“. This means that, under the terms of Article 215 TFEU, legal effect will be given to a CFSP decision by means of a formal EU legal act („EU Council Regulation and/or Council

¹⁹⁴ TEU, Article 18; TEU, Article 27; TEU, Article 30

¹⁹⁵ TEU, Article 27.2

¹⁹⁶ TEU, Article 26

¹⁹⁷ TEU, Articles 28, 29, 31 as well as TEU, Articles 30, 32, 33, 34, 35, 37; note that restrictive measures are provided for in the TFEU; for a good explanation of CFSP decision-making, see, Frenz, 2010

¹⁹⁸ TEU, Article 31

¹⁹⁹ For an account of Council activity with regards to Iran, see, EEAS, 2020 (1)

²⁰⁰ TEU, Article 21; for a discussion on the legal intricacies surrounding the relationship of CFSP and External Action policy of the EU, see, Seah, 2015, p. 2-4

²⁰¹ TEU, Article 5 in conjunction with Article 3.6 TEU

²⁰² TEU, Article 5; for an explanation of the principle of conferral, see, Gersdorf, 1994, p. 417

²⁰³ TFEU, Article 215

Implementing Regulation“). For this prior CFSP decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, having regard in particular to Articles 29 and 31 TEU, unanimity is required. On the purpose of preventing and combatting terrorism and related activities, Article 75 TFEU enables the European Parliament and the Council to adopt regulations in accordance with the ordinary legislative procedure that shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities. The Council, on a proposal from the Commission, will adopt further measures to implement the former framework.²⁰⁴

It is important to note that according to Article 275 TFEU, the European Court of Justice (ECJ) has no jurisdiction in regards to provisions that relate to the CFSP and in regards to acts that are based on those provisions.²⁰⁵ However, the ECJ does have jurisdiction to review the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union. In addition, Declaration No. 25 on Articles 75 and 215 of the TFEU recalls that the respect for fundamental rights and freedoms demands that proper attention is given to the protection and observance of the due process rights of the individuals or entities concerned.²⁰⁶ For this purpose and in order to guarantee a thorough judicial review of decisions subjecting an individual or entity to restrictive measures, such decisions must be based on clear and distinct criteria. Note that the European External Action Service (EEAS) uses the terms „*sanctions*“ and „*restrictive measures*“ interchangeably, describing them as measures designed „*to bring about a change in activities or policies such as violations of international law*“.²⁰⁷

cc. The Nuclear Deal and European Union Law

By means of its Council conclusions on July 20, 2015 the Council adopted the JCPOA.²⁰⁸

Subsequent to this, the European Union formally adopted the legal acts required to lift all EU economic and financial sanctions relating to Iran’s nuclear programme in line with the provisions of the JCPOA. In doing so, the European Union implements UN Security Council resolution 2231 (2015). Note that while the lifting of the sanctions took effect on Implementation Day (January 16, 2016), the EU, in line with its commitments under the JCPOA, adopted the required legal acts already on Adoption Day (October 18, 2015),

²⁰⁴ TFEU, Article 75

²⁰⁵ Cardwell, 2013, p. 449

²⁰⁶ TFEU, Declaration No. 25 on Articles 75 and 215 of the TFEU

²⁰⁷ Cenevska, 2018, p. 5

²⁰⁸ Council of the European Union, 2018

stipulating a delayed application.²⁰⁹ Consequently, the bulk of the EU legislative action on October 18, 2015 produced effect only on Implementation Day (January 16, 2016).

Legally this sequence was implemented as follows: Already following the Council conclusions of July 20, 2015, the Council on July 31, 2015 and on the basis of Article 29 TEU decided (Council Decision (CFSP) 2015/1336) to amend the Council Regulation No. 267/2012 that gives effect to Council Decision 2010/413/CFSP concerning restrictive measures against Iran.²¹⁰ On the same day, the Council passed a regulation that gives effect to the aforementioned decision. In the recital, it says: „*Council Regulation (EU) No 267/2012 gives effect to the measures provided for in Decision 2010/413/CFSP. On 31 July 2015, the Council adopted Decision (CFSP) 2015/1336 amending Decision 2010/413/CFSP providing for certain measures in accordance with United Nations Security Council Resolution (UNSCR) 2231 (2015) endorsing the Joint Comprehensive Plan of Action (JCPOA) on the Iran nuclear issue and providing for actions to take place in accordance with the JCPOA*“.²¹¹

The wording „*providing for certain measures*“ indicates that more measures and thus additional legal acts were to follow. On October 18, 2015 further legal acts were then adopted to amend Council Decision 2010/413/CFSP and Council Regulation (EU) 267/2012. Council Decision (CFSP) 2015/1863 of 18 October 2015 amending Council Decision 2010/413/CFSP concerning restrictive measures against Iran establishes the suspension of the those provisions of Council Decision 2010/413/CFSP that concern all EU economic and financial sanctions as specified in the JCPOA.²¹² The Council Decision also provides for the suspension of the asset freeze as well as for the suspension of visa ban measures for persons and entities. Furthermore, an authorisation regime in view of nuclear-related transfers and transfers of certain metals and software is introduced. Aforementioned Council Decision is implemented by two Regulations. On the one hand, Council Regulation (EU) 2015/1861 of 18 October 2015 amending Regulation (EU) 267/2012 concerning restrictive measures against Iran implements legally the lifting of all EU economic and financial sanctions relating to Iran’s nuclear programme by deleting the respective articles of Council Regulation (EU) 267/2012.²¹³ On the other hand, Council Implementing Regulation (EU) 2015/1862 of 18 October 2015 implementing Regulation (EU) 267/2012 concerning restrictive measures against Iran then implements Council Decision (CFSP) 2015/1863 to the extent that it lifts the restrictive measures in place against individuals and entities as laid down in Annexes V (UN listings) and VI (autonomous listings) to Decision 2010/413/CFSP.²¹⁴

²⁰⁹ JCPOA, Annex V

²¹⁰ EurLex, 2015 (1)

²¹¹ EurLex, 2015 (2)

²¹² EurLex, 2015 (3)

²¹³ EurLex, 2015 (4)

²¹⁴ EurLex, 2015 (5)

On January 16, 2016 („*Implementation Day*“), the Council of the EU then acknowledged the report of the IAEA-Director-General, addressed to the IAEA-Board of Governors and to the UN Security Council, which confirmed that Iran had implemented its commitments under the JCPOA. Consequently, the Council Decision, Regulation and Implementing Regulation came into effect on the same day. With Council Decision (CFSP) 2016/37 of 16 January 2016 concerning the date of application of Decision (CFSP) 2015/1863, EU economic and financial sanctions taken with respect to Iran’s nuclear programme were lifted.²¹⁵ On that same day, the EU published in its Official Journal a notice to confirm that the legislation adopted on Adoption Day took effect. Note that a set of specific sanctions which the EU put in place against Iran, notably in view of the human rights situation in Iran and its alleged support for terrorism, are not part of the JCPOA, and do therefore remain in place.

b. The EU’s Role in the JCPOA Framework

aa. Joint Commission

In accordance with Annex IV of the JCPOA, the EU takes part in the work of the Joint Commission, as described in section B.I.b.cc of this thesis. Within this Joint Commission the EU shall assume a coordination function, with the High Representative to be designated Coordinator of the Joint Commission.²¹⁶ The JCPOA provides that the Coordinator of the Joint Commission shall convene the meetings of the Joint Commission.²¹⁷

bb. Coordination Function

The coordination function of the High Representative in the Joint Commission is regulated in specific provisions of Annex IV.²¹⁸ First reference to it is made in paragraph 1.4 of the JCPOA.²¹⁹ The coordination function includes procedurally to ensure that meetings of the Joint Commission take place on a quarterly basis or at any time upon request of a JCPOA participant.²²⁰ It is the responsibility of the Coordinator to receive and act upon these requests and to make sure that the timetable requirements are duly respected.²²¹ The role extends to the transfer of information within the Joint Commission so as to facilitate dialogue within the group. Correspondingly, the High Representative is responsible to circulate, at any time, notifications from a JCPOA participant to the respective others.²²² While each JCPOA participant has one vote in the Joint Commission, the High Representative will, as

²¹⁵ EurLex, 2016

²¹⁶ JCPOA, Annex IV, paragraph 1.4, p. 1

²¹⁷ JCPOA, Annex VI, 3.1, p. 2

²¹⁸ JCPOA, Annex IV, p. 1, 3, 5, 6

²¹⁹ JCPOA, Annex IV, paragraph 1.4, p. 1

²²⁰ JCPOA, Annex IV, paragraph 3.1, p. 2

²²¹ *ibid.*

²²² JCPOA, Annex IV, paragraph 5.2, p. 3

Coordinator, not take part in decision-making as set out in section 6 of Annex IV.²²³ The High Representative will also serve as the Coordinator of the Procurement Working Group as specified in the Article 6.3 of Annex IV.²²⁴ In this capacity, the High Representative will receive communications by the other JCPOA participants as to whether they approve of proposals under the procurement channel.²²⁵ For its part, the High Representative serves as the link between the Procurement Working Group of the Joint Commission and the UN Security Council as the High Representative sends communications relating to recommendations from the Procurement Working Group to the UN Security Council.²²⁶ Additionally, the High Representative will also coordinate work of the Working Group on the Implementation of Sanctions Lifting.²²⁷

II. The EU's Commitments in the Context of the JCPOA

a. The Rights and Obligations of the EU under the JCPOA

The most notable obligation of the EU includes its commitment to sanctions-lifting as described in a previous chapter and in line with the timetable set in the implementation plan.²²⁸ This commitment, along with a like US-pledge, is an important cornerstone of the JCPOA's architecture.²²⁹ In that regard, the EU pledged to undertake respective associated commitments so as to ensure consistent and good faith execution of the agreement.²³⁰ This includes, most notably, a commitment not to undermine the effects of this sanctions-lifting²³¹ as well as specific provisions on sanctions targeted at individuals or companies.²³² Similarly, the EU undertakes a commitment to dispute resolution in line with a dispute resolution mechanism provided for in this JCPOA if need may be.²³³ The EU obliges itself to become a part of the Joint Commission that shall oversee the implementation of the JCPOA.²³⁴ Moreover, the EU undertakes to cooperate with Iran in the field of peaceful use of nuclear energy coupled with several associated commitments.²³⁵

Furthermore, the EU commits to fulfill its obligations in accordance with the implementation plan.²³⁶ In turn, the agreement confers certain rights upon the EU. Notably, the JCPOA gives the EU the right to coordinate the work of the Joint Commission, including full access to all

²²³ JCPOA, Annex IV, paragraph 4.5, p. 3

²²⁴ JCPOA, Annex IV, paragraph 6.3, p. 4

²²⁵ JCPOA, Annex IV, paragraph 6.4.3, p. 5

²²⁶ JCPOA, Annex IV, paragraph 6.4.5, p. 5

²²⁷ JCPOA, Annex IV, paragraph 7.2, p. 6

²²⁸ JCPOA, Annex V

²²⁹ JCPOA, paragraph 18-20, p.10, 11; paragraph 24, p. 13

²³⁰ JCPOA, paragraph 28, p. 14; JCPOA, paragraph 26, p. 13

²³¹ JCPOA, viii, p. 3; JCPOA, paragraph 29, p. 14

²³² JCPOA, paragraph 31, p. 14, 15

²³³ JCPOA, p. 17

²³⁴ See, section B.I.b.cc and section C.I.b.aa of this thesis and JCPOA, ix, p. 4; JCPOA, Annex IV

²³⁵ See, section C.II.c of this thesis

²³⁶ JCPOA, paragraph 34, p. 16; JCPOA, Annex V

information necessary for the work therein.²³⁷ The EU shall take part in the ministerial meetings every two years that the JCPOA provides for.²³⁸ By means of its inclusion in the so called „*international partnership*“ that will facilitate efforts to modernize the reactor at Arak (Iran), the EU will have the right to be involved in specific matters that concern nuclear cooperation with Iran as provided for in Annex III.²³⁹ Additionally, the EU has rights with respect to matters related to sanctions-lifting and it has been given rights in the context of dispute resolution mechanism that the JCPOA provides for.²⁴⁰ These rights include the ability to initiate a Joint Commission investigation should the EU have grounds to believe that Iran is not respecting its commitments under the JCPOA.²⁴¹ The EU, if acting as complaining JCPOA participant and after having exhausted the dispute resolution process that the JCPOA provides for, may refer the matter in question to the Security Council for consideration, which would have to make a resolution to continue the sanctions-lifting.²⁴²

b. Sanctions

The parties to this agreement commit themselves upon adoption of the agreement to terminate a range of specific sanctions that were previously instituted by, notably, the UN Security Council, the US and the EU with reference to the Iranian nuclear programme. Consequently, the EU does commit to terminate the nuclear-related sanctions the Union has imposed on Iran in accordance with the relevant JCPOA provisions. Paragraph 19 of the JCPOA enumerates a list of areas that prior to the JCPOA were subject to EU sanctions that shall be terminated as a consequence of the JCPOA.²⁴³ Another set of EU sanctions that relate to proliferation are to be ended eight years after Adoption Day or when the IAEA has come to the conclusion „*that all nuclear material in Iran serves peaceful purposes, whichever is earlier*“.²⁴⁴

A complete list of all sanctions that are to be terminated or disapplied are attached to the JCPOA in Annex II.²⁴⁵ The EU and the US commit to refrain from the introduction of new nuclear-related sanctions against Iran and to undertake good faith execution of the agreement.²⁴⁶ Other commitments of the EU and the E3+3 countries include, as has been pointed out, a pledge to cooperate with Iran in field of peaceful uses of nuclear energy as is

²³⁷ JCPOA, Annex IV, paragraph 3.1; JCPAO, Annex IV, paragraph 3.4; note that IAEA verification reports are only for the attention of their Board of Governors and the UN Security Council, see, JCPOA, x, p. 4

²³⁸ JCPOA, xvi, p. 5

²³⁹ JCPOA, paragraph 8, p. 7; Annex III

²⁴⁰ JCPOA, paragraph 24, p. 13; JCPOA, paragraph 36, p. 17

²⁴¹ JCPOA, paragraph 36, p. 17

²⁴² JCPOA, paragraph 37, p. 17

²⁴³ JCPOA, paragraph 19, p. 10, 11

²⁴⁴ JCPOA, paragraph 20, p. 11

²⁴⁵ See, JCPOA Annex II, p. 1 - 15

²⁴⁶ JCPOA, paragraph 26, p. 13; JCPOA, paragraph 28, p. 14

detailed further in Annex III. This might be achieved by means of technical cooperation projects.²⁴⁷

c. Support (Civil Nuclear Cooperation)

The EU and E3+3 countries have committed to cooperate with Iran „*in the field of peaceful uses of nuclear energy*“.²⁴⁸ Mention is made of „*mutually determined civil nuclear cooperation projects*“.²⁴⁹ The details of this cooperation are further specified in Annex III.²⁵⁰ Annex III sets out the framework and the scope for cooperation of E3/EU+3 parties with Iran, lay down ground rules for such cooperation, and identify a set of areas where this cooperation could be envisaged.²⁵¹ The EU, along with the other parties, commits in particular, next to exploring potential areas of cooperation as listed in Annex III, to become part of an „*international partnership*“ that shall „*support and facilitate the redesign and rebuilding of the IR-40 reactor at Arak*“.²⁵² Details of the EU’s commitments with regards to the Arak modernization project can be found in Annex I. Commitments include to join aforementioned international partnership as a member of a dedicated Working Group that shall together with Iran implement the Arak modernisation project.²⁵³ Concretely, the EU and the other members of international partnership, shall support „*the purchase by Iran, the transfer and supply of necessary materials, equipment, instrumentation and control systems and technologies required for the construction of the redesigned reactor*“ and „*through exploration of relevant funding contributions*“.²⁵⁴ Support will also be lent to Iran in aspects related to uranium stocks and fuels and spent fuel reprocessing activities.²⁵⁵

Besides the Arak modernization project, the EU has taken on commitments to support Iran with regards to nuclear fuel, with regards to research and development practices where scientific exchange on a number of nuclear-related issues has been specifically identified, and with regards to the establishment of a Nuclear Safety Center in Iran.²⁵⁶ Additionally, the EU has committed to facilitate exchange between EU nuclear regulatory authorities and Iranian counterparts, and to cooperate more broadly with Iran in the areas of nuclear safety and security.²⁵⁷ Cooperation in the field of nuclear medicine as in waste management and

²⁴⁷ JCPOA, paragraph 32, 33, p. 15

²⁴⁸ JCPOA, xiii, p. 4

²⁴⁹ JCPOA, xiii, p. 4

²⁵⁰ JCPOA, Annex III

²⁵¹ JCPOA, Annex III, p. 1,2

²⁵² JCPOA, Annex III, paragraph 5.1, p. 2

²⁵³ JCPOA, Annex I, paragraph 4, p. 2

²⁵⁴ JCPOA, Annex I, paragraph 7, p. 3

²⁵⁵ JCPOA, Annex I, paragraph 60, p. 16; JCPOA, Annex I, paragraph 22, p. 7

²⁵⁶ JCPOA, Annex III, paragraph 6.1 and 6.2, p.3 Annex III, paragraph 7, p. 3,4; JCPOA, Annex III, paragraph 8, p. 4

²⁵⁷ JCPOA, Annex III, paragraph 8, p. 5; JCPOA, Annex III, paragraph 8.1 – 8.6, p. 5; paragraph 10, p. 6

facility decommissioning are also listed.²⁵⁸ Under the heading „*Other projects*“, Annex III enumerates few other potential areas for cooperation.²⁵⁹

III. Legal Aspects of the EU’s Effort to save the Nuclear Deal

a. The US Departure from the JCPOA

On October 13, 2017, *US-President Trump* gave a speech in which he outlined his Administration’s strategy toward Iran and denounced the Joint Comprehensive Plan of Action (JCPOA).²⁶⁰ A long term critic of the JCPOA, *President Trump* announced in the same speech that he will not renew certification of Iran’s continued compliance with the JCPOA. The US-President, in line with this announcement, consequently withheld this certification on January 12, 2018.²⁶¹ This did not, as such, immediately terminate the US commitments under the JCPOA. The obligation on part of the President to certify Iran’s compliance with the JCPOA stems from the Iran Nuclear Agreement Review Act.²⁶² Since the Obama Administration has considered the JCPOA as a nonbinding political commitment, it followed that express congressional consent was not required.

Congress did however adopt the Iran Nuclear Agreement Review Act that gives it certain powers of oversight and review with regards to the JCPOA.²⁶³ Among other provisions, the Iran Nuclear Agreement Review Act requires the US-President to certify every 90 days that „*Iran (i) is fully implementing the JCPOA; (ii) has not committed an uncured, material breach of the plan of action; (iii) has not taken action that could significantly advance its nuclear weapons program; and (iv) that the continued suspension of sanctions under the JCPOA is vital to the national security interests of the United States and is „appropriate and proportionate“ in view of Iran’s measures to terminate its nuclear weapons programme*“.²⁶⁴ The Act authorizes Congress to swiftly pass legislation reinstating all US sanctions, that the US-President lifted in implementation of the JCPOA, if the US-President decided not to certify.²⁶⁵ Similarly, the US-President has the power under current domestic US law to terminate US participation in the JCPOA and to reinstate US sanctions on Iran. This can be done either by means of an executive order or by declining to renew statutory waivers.²⁶⁶

²⁵⁸ JCPOA, Annex III, paragraph 11, p. 6; paragraph 12, p. 7

²⁵⁹ JCPOA, Annex III, paragraph 16, p. 7

²⁶⁰ „As I have said many times, the Iran Deal was one of the worst and most one-sided transactions the United States has ever entered into“, see, The White House, 2017

²⁶¹ *ibid.*

²⁶² US-Congress, 2018

²⁶³ US-Congress, 2018

²⁶⁴ US-Congress, 2018

²⁶⁵ Congressional Research Service, 2018, p. 26

²⁶⁶ *ibid.*

On May 8, 2018, *US-President Donald Trump* then declared that the United States will withdraw from the JCPOA.²⁶⁷ On August 6, 2018, the US-President gave orders to reimpose sanctions against Iran.²⁶⁸ A first series of sanctions came into effect August 7, 2018 while another set of sanctions („*all remaining nuclear-related sanctions*“) became effective November 5, 2018.

b. International Reactions

The Russian government released a statement in which it expressed its „*deep disappointment*“ with *US-President Trumps* decision to unilaterally give up US commitments to implement the JCPOA. Russia recalled that Iran is „*strictly abiding with the obligations it has undertaken which is regularly confirmed by IAEA*“ and reaffirmed that Russia remains „*open to further cooperation with other JCPOA participants*“.²⁶⁹ China also made it known that it will remain committed to the JCPOA.²⁷⁰ Iran has announced that the deal has a future if they receive enough practical guarantees from the three European countries, but did not fail to issue clear warnings if that cannot be achieved.²⁷¹

In response, the European Union reaffirmed its commitment to the JCPOA. In this regard, the E3 as well as the E3 together with the High Representative on behalf of the EU repeatedly resorted to the adoption of declarations to make known its views. This merits closer inspection.

While declarations play an important role in EU practice and have become the most regular means by which the EU has made its voice heard, they are not official instruments of the CFSP as defined in Articles 23-41 TEU. Declarations therefore have no formal legal effects, but are a statement expressing the EU’s position on foreign affairs. *Wessel* has characterised declarations pointedly as a form of „*informal instruments*“.²⁷²

The responsibility for issuing declarations on behalf of the Union lies with the High Representative as Article 18 (2) TEU states that the High Representative is responsible for the conduct of the CFSP.²⁷³ However, given the special provisions applicable to the CFSP which underline the intergovernmental characteristics of the policy, a declaration is only

²⁶⁷ The New York Times, 2018; for discussion on the legality of Trumps departure from the JCPOA, see, e.g.: Jürgens, 2018 and Bellinger, 2015. *Bellinger* and *Jürgens* anticipated a possible US withdrawal from the JCPOA. For them, this was perfectly legal from a US and international law perspective. While it is true that the US did prior to its departure from the JCPOA not exhaust the dispute resolution process the JCPOA provides for, the US in withdrawing from the JCPOA was not in breach of a legally binding treaty, but rather in breach of a political commitment.

²⁶⁸ The White House, 2018

²⁶⁹ The Ministry of Foreign Affairs of the Russian Federation, 2018; IAEA has confirmed Iranian compliance with JCPOA in 12 consecutive reports, see, EEAS, 2018

²⁷⁰ Islamic Republic News Agency, 2018

²⁷¹ „If necessary, we can begin our industrial (uranium) enrichment without any limitations“, Iranian President *Hassan Rouhani* in BBC, 2018; The Guardian, 2018

²⁷² Wessel, in: Wessel and Larik 2020, p. 307.

²⁷³ Article 18, TEU; Cardwell, 2016, p. 604

issued after consultation with Member States since they are issued in the name of the EU and its Member States. The annual report of the High Representative on CFSP offers some insights into the procedures and practices that govern EU practise with regards to the issuing of declarations. Accordingly, *„declarations issued by the High Representative on behalf of the EU reflect the official positions of the EU and are issued under the authority of High Representative with prior consultation of the Member States. Where no such official positions exist, these declarations are agreed by Member States within the Council“*.²⁷⁴ Declarations of the EU can therefore be said to require the input and the consent of the Member States before they can be issued. Once a declaration is agreed, selected third states are invited to align themselves with the declaration. Once this is finalised, the declaration is placed on the press release section of the website of the Council.²⁷⁵

With respect to the US departure from the JCPOA, it was the heads of government of France, Germany and the United Kingdom, who issued a statement regretting *US-President Trumps* decision while upholding the E3 continued commitment to the JCPOA.²⁷⁶ The European powers recalled: *„Together, we emphasize our continuing commitment to the JCPOA. This agreement remains important for our shared security. We recall that the JCPOA was unanimously endorsed by the UN Security Council in Resolution 2231. This resolution remains the binding international legal framework for the resolution of the dispute about the Iranian nuclear programme. We urge all sides to remain committed to its full implementation and to act in a spirit of responsibility“*.

On the future of the JCPOA, the E3 professed: *„Therefore we, the E3, will remain parties to the JCPOA. Our governments remain committed to ensuring the agreement is upheld, and will work with all the remaining parties to the deal to ensure this remains the case, including through ensuring the continuing economic benefits to the Iranian people that are linked to the agreement“*. The E3 also highlight that the IAEA has repeatedly confirmed that Iran continues to honour its commitments under the JCPOA.²⁷⁷

In the same statement, the E3 call on the US to avoid taking steps which obstructs full implementation by all other parties to the deal.²⁷⁸

Following this initial statement by the E3 heads of government, the High Representative and the foreign ministers of the E3 issued on August 6, 2018 a joint statement in which they deeply regret the reimposition of US sanctions by the US and addressed concerns that the re-imposition of US sanctions created.²⁷⁹ The joint declaration of High Representative and E3 ministers notes: *„The remaining parties to the JCPOA have committed to work on, inter alia,*

²⁷⁴ Cardwell, 2016, p. 604. Note that the High Representative may also issue declarations without formal consultation of the Member States in response to events requiring quick EU action.

²⁷⁵ Cardwell, 2016, p. 604

²⁷⁶ France Diplomatie, 2018

²⁷⁷ France Diplomatie, 2018

²⁷⁸ *ibid.*

²⁷⁹ EEAS, 2018

the preservation and maintenance of effective financial channels with Iran, and the continuation of Iran's export of oil and gas...Preserving the nuclear deal with Iran is a matter of respecting international agreements and a matter of international security".²⁸⁰

In the same statement, the High Representative and the E3 ministers declared that they are „determined to protect economic operators engaged in legitimate business with Iran“.²⁸¹ This determination then translated into legal action with the updating of the EU blocking statute.

c. The Update of the EU Blocking Statute

On June 6, 2018, the European Commission adopted an update of Council Regulation (EC) No 2271/96, the so called „blocking statute“.²⁸²

The blocking statute was originally created in 1996 when the US took measures concerning Cuba, Iran and Libya that in effect attempted an extra-territorial application of US laws, including sanctions against Cuba, Iran and Libya. According to the European Commission, „it protects EU operators engaged in lawful international trade and or movement of capital, as well as related commercial activities, against the effects of the extra-territorial legislation specified in its Annex“.²⁸³ In concrete terms, Article 5 (1) of the blocking statute „prohibits EU operators from complying with the legislation listed in the blocking statute that has extraterritorial effect, or with any decision, ruling, or award based thereon, given that the EU does not recognise its applicability to or effects towards EU operators“.²⁸⁴ This operates in practice by means of nullifying the effect in the EU of any foreign court ruling which bases itself on those foreign laws that are listed in the annex of the blocking statute.²⁸⁵ The blocking statute additionally creates an obligation for European companies to alert the European Commission within 30 days should their economic or financial interests be negatively impacted, directly or indirectly.²⁸⁶ In case that EU nationals and companies do have their interests adversely affected, the statute provides a right to recover lost compensation. Accordingly, „EU operators are allowed to recover in court damages caused by the extra-territorial application of the specified foreign laws“ on the basis of Article 6 blocking statute.²⁸⁷ With the updated blocking statute, the EU took account of the US extraterritorial sanctions.

²⁸⁰ EEAS, 2018 (1)

²⁸¹ *ibid.*

²⁸² Note that the update concerns the annex to the blocking statute, European Commission, 2018; for a detailed reference to the legal basis of the „blocking statute“, see, European Commission, 2019

²⁸³ European Commission, 2019; this Annex was updated to take account of the US sanctions directed at Iran following the US departure from the JCPOA, see, EUR-Lex, 2018 (3)

²⁸⁴ EurLex, 1996, Article 5

²⁸⁵ Hellmann, 2018

²⁸⁶ EurLex 1996, Article 2

²⁸⁷ EurLex, 1996, Article 6; Ter Avest, 2019, p. 192

Yet, in practical terms, reinstated US sanctions, regardless of EU action and the blocking statute, created significant real impediments for economic operators.²⁸⁸ Hence, the E3+EU intensified efforts to save the nuclear deal. On September 24, 2018 a ministerial meeting under chairmanship of the High Representative took place in New York in which all remaining JCPOA participants „reconfirmed their commitment to full and effective implementation [of the JCPOA]“.²⁸⁹ The ministers noted the importance of tangible results, especially with reference to the maintenance and development of payment channels in view of reinstated US sanctions.²⁹⁰ Ministers welcomed the initiative to establish a so called „Special Purpose Vehicle“ and pledged support to its operationalisation.²⁹¹

d. Special Purpose Vehicle (SPV)

Special Purpose Vehicles are legal entities with no employees and no locations, created by a sponsor to act as a managing and operating company for projects.²⁹² The SPV legal entity is usually set up as an „orphan company“ with professional directors provided by an administration company or institution. *Chowdhuran and Chen* note that „all legal and financial agreements with various parties and stakeholders of a project are accorded with the SPV, thus it acts as an entity for legal manifestation of a project consortium“.²⁹³ As a consequence, a contractual network may revolve around the SPV.

On November 2, 2018, the High Representative and E3 foreign and finance ministers issued a statement in which they indicated the establishment of such „Special Purpose Vehicle“ which shall „enable continued sanctions-lifting to reach Iran and allow for European exporters and importers to pursue legitimate trade“.²⁹⁴ According to the High Representative, the Special Purpose Vehicle (SVP) established by the E3 is devised to be a legal entity „to facilitate payments related to Iran’s exports and financial transactions with Iran“ in order „to allow European companies to continue trade with this country...the mechanism will also be made available to global partners“.²⁹⁵ The SVP will be designed in way so as „to handle transactions between companies and their Iranian trade partners without being transparent to US authorities, and thus not be subject to US sanctions“.²⁹⁶ On January 31, 2019, the E3 foreign ministers then announced the creation of INSTEX, the special purpose vehicle aimed at facilitating legitimate trade with Iran as part of the efforts to preserve the JCPOA.²⁹⁷ Council conclusions of February 4, 2019 have welcomed the creation of INSTEX and

²⁸⁸ Ehrhardt, 2018; Handelsblatt, 2018

²⁸⁹ EEAS, 2018 (2)

²⁹⁰ *ibid.*

²⁹¹ *ibid.*

²⁹² Chowdhuran and Chen, 2010, p. 65

²⁹³ Chowdhuran and Chen, 2010, p. 65

²⁹⁴ UK Government, 2018

²⁹⁵ European Parliamentary Research Service, 2018

²⁹⁶ *ibid.*

²⁹⁷ France Diplomatie, 2019; for an explanation on how INSTEX works, see, Zable, 2019

confirmed EU support for it.²⁹⁸

INSTEX is based in France and managed by a German banker. Its supervisory board consists of diplomats from the E3 countries.²⁹⁹ INSTEX is a „*Société par actions simplifiée*“ (simplified joint stock company) under French law.³⁰⁰ It is set up to function as a transaction tool. Whilst it is not meant to be a bank, it will not allow for any direct cross border (EU-Iran) financial transfers. Devised as a platform for recording transactions and claims of EU exporters and importers that result from commercial transactions with Iran, INSTEX will facilitate the settlement of these claims. This is being done by advising EU importers and exporters which use INSTEX to bilaterally settle their respective claims within the EU.³⁰¹ Iran has welcomed INSTEX as a first step in E3 implementation of their May 2018 commitments.³⁰² In April 2019, Iran set up the required counterparty, the „*Special Trade and Finance Instrument*“ (STFI).³⁰³

On November 29, 2019 Norway, Belgium, Finland, Sweden, and the Netherlands became shareholders of INSTEX.³⁰⁴ This step marks a visible sign of commitment to continuous European support for the agreement and the ongoing efforts to facilitate legitimate trade between Europe and Iran. The mechanism subsequently sought to speed up its operation with a view to support Iran with the COVID-19 pandemic.³⁰⁵

On March 31, 2020 the German Federal Foreign Office announced that INSTEX has completed its first transaction.³⁰⁶

e. Iran breaches the JCPOA: Consequences under the JCPOA

On May 8, 2019 Iran announced that it will no longer be bound by limits on heavy water and uranium stockpiles. As has been demonstrated, this is in breach of Article XX, JCPOA.

On July 1, 2019, Iran announced that it has exceeded the limitations on its enriched uranium stockpiles. Until the end of 2019, four other specific instances of breaches of the JCPOA were documented by the IAEA, including the resumption of uranium enrichment at the *Fordow plant*, that was prohibited under the JCPOA.³⁰⁷ At first, violations have been relatively minor, but Iran did aggravate violations, so that they are widely viewed as being „*serious*“.

On December 6, 2019, there was a Joint Commission meeting (E3+2 and Iran) under the chairmanship of the EU in Vienna. The chair notes in statement that all parties „*emphasized*

²⁹⁸ Council of the European Union, 2019

²⁹⁹ CNBC, 2019

³⁰⁰ Le Figaro, 2019

³⁰¹ Gussetti, 2019, p. 186

³⁰² *ibid.*

³⁰³ Gussetti, 2019, p. 186

³⁰⁴ Government of Norway, 2019; Note that the six European governments link their support with an appeal to Iran „to return without delay to full compliance with the terms and provisions of the nuclear agreement“.

³⁰⁵ Katzmann, 2020, p. 50

³⁰⁶ Auswärtiges Amt, 2020

³⁰⁷ IAEA, 2019; Arms Control, 2019 (1)

the key importance of full and effective implementation by all sides as well as their determination to pursue all efforts to preserve the agreement“.³⁰⁸ This effectively echoed the joint statement after a ministerial meeting of E3+2 and Iran foreign ministers in New York of September 2019.³⁰⁹ At the time of writing of this thesis, E3+EU were still committed to upholding the JCPOA. However, in view of Iran’s repeated breaches of the JCPOA, the E3 have triggered the dispute resolution mechanism that the JCPOA provides for. This process is still ongoing, the timeline for resolution has been extended, owing to the complexity of the issues involved as their press release reads.³¹⁰

D. Conclusion

I. Assessment of the Nuclear Deal in the Literature

The European Union and its Member States have viewed the Iranian nuclear deal as a success of their diplomacy. Note also that reference to the nuclear deal is made in the EU’s grand foreign policy strategy where it is mentioned as an example of successful use of combined weight of its Member States to promote agreed rules to certain power politics and contribute to a peaceful, fair, and prosperous world.³¹¹ In analysing the hitherto existing implementation of the JCPOA, *Lohmann, Meier and Zamirirad* argued in 2017 that structures and mechanisms of the accord would work and would serve their purpose.³¹² The IAEA has, for the longest time since the conclusion of the JCPOA, repeatedly certified Iranian compliance with the commitments it has undertaken under the JCPOA. *Brzoska and Neuneck* recalled that the strengthening of verification, which is embedded in the nuclear accord, could serve as a role model of confidence building in the region.³¹³ They argued that the nuclear deal with Iran was a success for patient and well coordinated diplomacy. A dangerous crisis had been defused. *Meier-Walser*, in noting the most salient benefit of the conclusion of the JCPOA, pointed out that with the accord a very dangerous conflict had been defused for the time being and escalation successfully prevented.³¹⁴ *Martellini and Zuchetti* believed the agreement to make a relevant contribution to the combat against the proliferation of weapons of mass destruction as it showed a proportional balance of obligations and concessions. They also highlighted that the JCPOA insisted on the necessity of a well-designed verification mechanism. In the spirit of „*trust, but verify*“, the JCPOA by means of strengthened IAEA-monitoring allowed for quick detection if Iran pursued prohibited

³⁰⁸ EEAS, 2019 (1)

³⁰⁹ EEAS, 2019 (2)

³¹⁰ EEAS, 2020 (2)

³¹¹ EEAS, 2016, p. 15

³¹² Lohmann, Meier and Zamirirad, 2017

³¹³ Brzoska and Neuneck, 2015

³¹⁴ Meier-Walser, 2017

nuclear-weapons related activity and research.³¹⁵ *Gärtner and Akbulut* provided a realist assessment in 2017 as they noted that the JCPOA succeeded in eliciting countless commitments on the part of Iran, which operated as strict de-facto restrictions on its nuclear programme. That, along with the transparency and verification mechanisms the JCPOA provided for, made it an accord that reflected what had been realistic to achieve.³¹⁶ *Fikenscher* concurred with this assessment as he stressed that the deal was a valuable achievement, especially as compared with the alternatives.³¹⁷ Other authors have recommended more caution. *Pabian* suggested that the possibility of a covert Iranian nuclear programme, despite rigorous IAEA-monitoring, could not be ruled out completely, given Iran's long-standing experience both in building the necessary infrastructure and in admitting to it only if the evidence was utterly overwhelming.³¹⁸ *Haupt* saw the nuclear accord also as a balancing of the actors diverse interests, but argued that the final negotiated solution was beneficial for Iran.³¹⁹

On the exit of US from the JCPOA, *Fiedler* noted that it gave the EU the opportunity to have a more independent policy towards Iran. Iran, however, remained a challenging partner with potential domestic instability. *Fiedler* also saw a risk that big European corporations might be cautious to undertake sizeable investments in Iran in face of the reach of reinstated US sanctions. This could render European support for the JCPOA ineffective following the departure of the US.³²⁰ *Osiewicz* pointed out that, the US exit from the accord notwithstanding, Iran still retained an interest in preserving European commitment to the JCPOA. *Zamirirad* suggested that the JCPOA strengthened proponents of a moderate approach to foreign policy in Iran to the detriment of more conservative political forces, who did not budge from their principled opposition to any kind of nuclear deal.³²¹

Yet credible European support to those forces in Iran that do want to stay in the JCPOA was instrumental. The recent registration of INSTEX is, according to her, „*the bare minimum*“, which was, despite being a politically important signal vis-à-vis Tehran, not enough. The danger of an Iranian drop-out of the JCPOA had not yet been averted.³²² In a similar vein, *Meier-Walser* alluded to the fact that the power struggle in Iran that pits moderate pragmatics against conservative hardliners had not necessarily been won by the champions of the accord.³²³ The hardliners in Iran knew about the political tools to upset the nuclear deal's

³¹⁵ Marteilini and Zuchetti, 2016, p. 486

³¹⁶ Gärtner and Akbulut, 2017

³¹⁷ Fikenscher, 2016

³¹⁸ Pabian, 2010, p. 234-238

³¹⁹ Haupt, 2016, p. 463; *Haupt* comes to this appraisal after a legal analysis of the accords features. He sees key benefits for Iran notably with regards to the design of the „snap-back mechanism“ as well as the avoidance of binding provisions on its ballistic missile programme, see, Haupt, 2016, p. 441, 442, 450, 451

³²⁰ Fiedler, 2018, p. 302, 303

³²¹ Zamirirad, 2015

³²² Zamirirad, 2018

³²³ Meier-Walser, 2017

chances. *Osiewicz* notes that European support would, for example, be complicated if Iran crossed red lines with respect to its ballistic missile programme or non-compliance with the JCPOA.³²⁴ At the time of the writing of this thesis, Iran has begun to commit breaches of its commitments under the JCPOA as has been noted. This may also be viewed as a sign of growing Iranian frustration with the effectiveness of the EU's efforts to protect the nuclear deal. How this plays out and how this will impact the overall assessment of the JCPOA remains to be seen.

Meanwhile on August 20, 2020 the US attempted to activate the snap-back mechanism. The remaining JCPOA participants argued that the US is no longer entitled to activate „*snap-back*“ since it is no longer a JCPOA participant.³²⁵ Consequently, *„the US notification to activate „snap-back“ is incapable of having any legal effect under international law and cannot bring into effect the snap-back procedure“*.³²⁶

II. Findings of this Thesis

This master's thesis has attempted to unpick and analyse the nuclear deal that the E3/EU+3 have concluded with Iran. A special focus has been on the role of the European Union therein. In that, I have described notable elements, both material and procedural, of the JCPOA, its interlink with Security Council resolutions and reviewed, in detail, the genesis and legal basis for European Union involvement therein.

It has been demonstrated that the JCPOA is, owing to the fact that there is convincing evidence to regard it as a political commitment, not legally binding as such. Negotiators had no intention to make the JCPOA a treaty. It is only by virtue of its relationship with Security Council Resolution 2231 that, as has been established, makes binding some, but not all of its provisions, in international law. Furthermore, this thesis has set out to retrace the multiple linkages and references that the JCPOA makes to international legal instruments and to expound what role it accords outside bodies, notably the IAEA, in the context of implementation of its own provisions.

It has been found that European Union involvement in the nuclear deal can be related to and is commensurate with a long-standing foreign policy interest of the Union. This has been argued with reference both to the Treaties and subsequent EU strategies, including a dedicated EU WMD strategy. EU action in the framework of E3/EU+3 has been appreciated in the prism of the legal groundrules that govern EU foreign policy activity. In a similar vein, the legal mandate for the EU's commitments under the JCPOA and the legal action that ensued on part of the EU in pursuit of consequent JCPOA implementation, notably in the area of sanction retraction, have been examined. Owing to the topicality of recent political

³²⁴ *Osiewicz*, 2018

³²⁵ *Dupont*, 2020

³²⁶ *Dupont*, 2020

developments surrounding the JCPOA, this thesis was also able to depict the legal aspects of the latest European efforts to save the nuclear deal with Iran. Of particular interest, next to the political intent, were consequently the legal auxiliaries the European Union and its Member States sought to employ to this end. Accordingly, an examination of the EU blocking statute and a description of the „Special Purpose Vehicle“ were undertaken.

Will the JCPOA survive? As has become plain in the light of the literature review undertaken, an assessment of the nuclear deal with Iran can hardly be strictly legal. For so much is political about it, this thesis recalls the basic objective of the deal, which is to prevent Iran from acquiring nuclear weapons. So the groundbreaking virtue of the JCPOA is the underlying idea of the nuclear deal: Iran would abandon its ambitions to develop nuclear weapons and would submit to far-reaching and strict control of compliance with this commitment in exchange for substantial sanction-relief. As Iran has for a long time complied with its commitments, which the IAEA has consistently certified, the deal has until recently been effective. However, with a view to recent events there are good grounds to believe that the future of the nuclear deal with Iran may realistically be considered as seriously imperilled.

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