UNC SCHOOL OF LAW

NORTH CAROLINA BANKING INSTITUTE

Volume 23 | Issue 1 Article 12

3-1-2019

An Attempt to Negate Iranian Sanctions: How Special Purpose Vehicles May Be the EU's Last Hope to Keep the JCPOA Alive

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I. INTRODUCTION

U.S. sanctions have had a palpable effect on Iran.[1] Iran's crude oil exports have plummeted,[2] international companies forfeited their business agreements with Tehran months before the sanctions even took effect, and international financial entities are cutting ties with the Islamic Republic.[3] However, European leaders are actively fighting to keep the Joint Comprehensive Plan of Action ("JCPOA") intact, with the hope that their efforts will keep Persia clear of nuclear weapons.[4]

EU tactics have primarily been centered around protecting Iranian-affiliated entities from November 2018's wave of secondary sanctions.[5] The sanctions forced countries and companies to make a choice between working with Iran or doing business with the financial institutions and markets of the United States.[6] Most companies are currently choosing to fall in line with the United States, in spite of the initial protections and U.S. financial institution aversion strategies that the EU has

1. Clifford Krauss, *Trump Hit Iran With Oil Sanctions. So Far, They're Working*, N.Y. TIMES (Sept. 19, 2018), https://www.nytimes.com/2018/09/19/business/energy-environment/iran-oil-sanctions.html.

2. Julian Lee, *What's Not to Like About Trump's Iran Oil Sanctions*?, BLOOMBERG (Sept. 30, 2018, 1:00 AM), https://www.bloomberg.com/view/articles/2018-09-30/what-s-not-to-like-about-trump-iran-oil-sanctions-100-oil.

3. Ellen R. Wald, *10 Companies Leaving Iran as Trump's Sanctions Close in*, FORBES (June 6, 2018, 3:14 PM), https://www.forbes.com/sites/ellenrwald/2018/06/06/10-companies-leaving-iran-as-trumps-sanctions-close-in/#6fd5fe14c90f.

4. Steven Erlanger, *As U.S. Sanctions on Iran Kick in, Europe Looks for a Work Around*, N.Y. TIMES (Nov. 5, 2018), https://www.nytimes.com/2018/11/05/world/europe/us-iran-sanctions-europe.html.

5. Marheen Khan, *EU Launches Counter Measures Against US Sanctions on Iran*, FIN. TIMES (Aug. 6, 2018), https://www.ft.com/content/be32d010-9973-11e8-9702-5946bae86e6d.

6. Krauss, *supra* note 1.

proposed.[7] However, the EU is not yet out of options.[8] It is possible that the recent EU-backed creation of a Special Purpose Vehicle ("SPV") may effectively delay, or entirely prevent, the current impending demise of the JCPOA.[9]

This Note proceeds in six parts. Part II details the background of the JCPOA and reports the U.S. sanctions currently in place against Iran.[10] Part III describes the objectives of the EU in pursuing its initial approach to lessen the impact of U.S. sanctions.[11] Part IV discusses why the three main pillars of the EU's initial strategy to salvage the JCPOA failed.[12] Part V describes the recently announced SPV and how SPVs may be the EU's best option moving forward.[13] Part VI concludes this Note by describing the consequences of a financial system that avoids U.S. markets.[14]

II. THE JCPOA AND RE-IMPLEMENTATION OF U.S. SANCTIONS AGAINST IRAN

In May of 2018, the Trump Administration announced that the United States would withdraw from an international agreement with Iran, the JCPOA.[15] The JCPOA, otherwise known as the Iranian Nuclear Deal, was formed on July 14, 2015 and signed by Britain, China, Germany, France, Russia, the United States, and Iran.[16] The success of the JCPOA itself was conditioned on a bargain: Iran agreed to "verifiably scale

7. Krauss, *supra* note 1.

8. *See* Esfandyar Batmanghelidj & Axel Hellman, *How Europe Could Blunt U.S. Iran Sanctions Without Washington Lifting a Finger*, FOREIGN POL'Y (Dec. 3, 2018, 8:54 AM), https://foreignpolicy.com/2018/12/03/how-europe-can-blunt-u-s-iran-sanctions-without-washington-raising-a-finger-humanitarian-spv (describing various ways SPVs could be used to combat U.S. sanctions against Iran).

9. *Id.*

10. *See infra* Part II.

11. *See infra* Part III.

12. *See infra* Part IV.

13. *See infra* Part V.

14. *See infra* Part VI.

15. *See* Donald J. Trump, Pres. of the U.S., Remarks on the Joint Comprehensive Plan of Action (May 8, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-joint-comprehensive-plan-action [hereinafter Trump's Remarks].

16. Joint Comprehensive Plan of Action, July 14, 2015, http://www.state.gov/documents/organization/245317.pdf [hereinafter JCPOA].

back"[17] its nuclear development capabilities if the international community removed some of the economic penalties placed on the country.[18]

After the JCPOA was implemented, Iran began to benefit from increased access to the global economy.[19] The International Monetary Fund ("IMF") reported that in 2016, Iran's GDP grew by 12.5%.[20] Oil exports in the country also began to rise.[21] Iran had exported around 1.1 million barrels of oil per day before the JCPOA, but by early 2018 the Islamic Republic was estimated to have more than doubled their daily oil exportation.[22] Additionally, the JCPOA increased employment in Iran, providing hope to Iranians for a better future.[23]

Though economic conditions were improving, Iran's growth under the JCPOA was overall less than what the Iranian government initially expected.[24] The JCPOA lifted certain sanctions against Iran, but some of "the most disruptive banking restrictions remained in place."[25] The U.S. financial system was still unable to engage with Iran, and many major European banks refused to work within the Islamic Republic given the consequences that could result from violating the sanctions that were still enforceable.[26] The 2016 U.S. presidential election also limited potential economic growth in Iran.[27] Republicans made clear their opposition to the JCPOA.[28] International businesses capable of working within

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17. JCPOA, *supra* note 16.

18. ESFANDYAR BATMANGHELIDJ & AXEL HELLMAN, EUROPEAN LEADERSHIP NETWORK, EUROPE, IRAN AND ECONOMIC SOVEREIGNTY: A NEW BANKING ARCHITECTURE IN RESPONSE TO US SANCTIONS NETWORK 4-5 (2018) [hereinafter *A New Banking Architecture*].

19. Amir Paivar, *Nuclear Deal: Is Iran's Economy Better off Now*, BBC NEWS (May 4, 2018), https://www.bbc.com/news/world-middle-east-43975498.

20. *Id.*

21. *See id.* (suggesting that initial growth reported by the IMF was all due to increase in oil exportation in the country).

22. *Id.*

23. *See* Negar Habibi, *How the US Withdrawal From the Iran Nuclear Deal Will Affect Iran's Economy*, THE CONVERSATION (May 11, 2018. 8:44 AM), http://theconversation.com/how-the-us-withdrawal-from-the-iran-nuclear-deal-will-affect-irans-economy-96476 ("[T]he deal did have some major effects on Iran's economy. It resulted in a doubling of Iran's oil exports, helped stabilise the foreign exchange market, created jobs and – most importantly – optimism to the overall trend of the economy.").

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. Nora Kelly, *Where the 2016 Candidates Stand on the Iranian Nuclear Deal*, ATLANTIC (Sep. 1, 2015), https://www.theatlantic.com/politics/archive/2015/09/where-the-2016-candidates-stand-on-the-iran-nuclear-deal/448380/ (describing how the 2016 presidential candidates would respond to or alter the JCPOA if elected to serve as President of the United States).

the Islamic Republic were concerned about investing too many resources in Iran due to the potential impact of a Republican administration, and these concerns were amplified a couple of years later by the rhetoric of the Trump campaign.[29]

Despite these concerns, the International Atomic Energy Agency ("IAEA") has consistently confirmed that Iran has remained compliant with the standards set by the nuclear agreement.[30] In spite of this verified compliance, the Trump Administration followed through with its campaign promise[31] and withdrew the United States from the JCPOA in hope of making a new, more restrictive agreement with Iran.[32] The Trump Administration believes the JCPOA does not entirely deter Iran from engaging in nuclear activity.[33] Its hope is to find a more permanent solution to prevent Iran from obtaining nuclear weapons in the future.[34] The Trump Administration seeks a new deal that would require Iran to abandon its ballistic missile development program and cease the funding of militant groups that the United States classifies as terrorist organizations.[35]

U.S. sanctions lifted under the JCPOA were re-introduced, and additional economic penalties were devised.[36] Sanctions against Iran came in two waves, or wind-down periods, set by the U.S. Department of Treasury.[37] The wind-down periods allowed both American and foreign

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29. *See* Habibi, *supra* note 23 (discussing how U.S. politics impacted business decision of whether or not to invest in Iran).

30. *See* Press Release, IAEA Director General, Verification and Monitoring in the Islamic Republic of Iran in Light of United Nations Security Council Resolution 2231 (2015) (Nov. 12, 2018) (describing Iran's compliance with standards set by the JCPOA).

31. Trump's Remarks, *supra* note 15.

32. Nicolas Miller, *Trump Wants to Wring a 'Better Deal' from Iran. Here's Why That's So Unlikely*, WASH. POST (May 8, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/08/trump-wants-to-wring-a-better-deal-from-iran-heres-why-thats-so-unlikely/?utm_term=.2bb56db1cb45.

33. Trump's Remarks, *supra* note 15.

34. *See* Trump's Remarks, *supra* note 15 ("The agreement was so poorly negotiated that even if Iran fully complies, the regime can still be on the verge of a nuclear breakout in just a short period of time.").

35. *See* Trump's Remarks, *supra* note 15 ("Not only does the deal fail to halt Iran's nuclear ambitions, but it also fails to address the regime's development of ballistic missiles that could deliver nuclear warheads . . . [T]he deal does nothing to constrain Iran's destabilizing activities . . . .").

36. Rick Gladstone, *Iran Sanctions Explained: US Goals, and the View from Tehran*, N.Y. TIMES (Nov. 5, 2018), https://www.nytimes.com/2018/11/05/world/middleeast/iran-sanctions-explained.html.

37. *Id.*

entities time to withdraw their businesses and pull their money out of Iran before the sanctions took effect.[38]

The first wave of sanctions, implemented in August 2018, targeted the purchase or acquisition of U.S. dollar banknotes by the government of Iran, Iran's trade in gold or precious metals, transactions related to the purchase or sale of Iranian rials, the maintenance of significant funds or accounts outside the territory of Iran, and Iran's automotive sector.[39] The second wave of sanctions, implemented in November 2018, focused on Iran's oil exports by blocking international dealings with Iranian banks.[40] Sanctions on oil-related transactions, transactions by foreign financial institutions with the Central Bank of Iran, specialized financial messaging services to banks and Iranian financial institutions and the provision of underwriting services of insurance all have impacted Iran's economy.[41]

The United States has granted some exemptions to the sanctions.[42] Iran's biggest oil customers, China and India, will not be penalized for purchasing petroleum from Iran until at least May 2019,[43] as long reductions in the amount of oil obtained can be demonstrated.[44] Even despite the exemptions, Iran is feeling the impacts of U.S. forces.[45]

The Iranian rial, the currency of the country, has suffered significantly.[46] Throughout 2018, the rial lost more than 60% of its value.[47]

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38. Ted Regencia, *What Sanctions Will the US Reimpose Against Iran on Tuesday*, ALJAZEERA (Aug, 6, 2018), https://www.aljazeera.com/news/2018/08/sanctions-iran-snap-tuesday-180804193910915.html.

39. U.S. DEPT. OF TREASURY, FREQUENTLY ASKED QUESTIONS REGARDING THE RE-IMPOSITION OF SANCTIONS PURSUANT TO THE MAY 8, 2018 NATIONAL SECURITY PRESIDENTIAL MEMORANDUM RELATING TO THE JOINT COMPREHENSIVE PLAN OF ACTION (JCPOA) 1-2 (2018).

40. *Id.* at 2-3.

41. *Id.*

42. Gardiner Harris, *U.S. Reimposes Sanctions on Iran but Undercuts the Pain With Waivers*, N.Y. TIMES (Nov. 2, 2018), https://www.nytimes.com/2018/11/02/world/middleeast/us-iran-sanctions-oil-waivers.html.

43. *See* Tom DiChristopher, *Trump Administration Still Might Let Iran Export Oil, and That Could Lower Prices*, CNBC (Jan. 15, 2019, 12:00 PM), https://www.cnbc.com/2019/01/15/trump-administration-leaves-the-door-open-to-letting-iran-export-oil.html ("The State Department's envoy to Iran is declining to say whether Washington will force oil buyers to cut off purchases of Iranian crude later this year.").

44. *See id.* ("The waivers are designed to allow countries to continue buying Iranian crude so long as they demonstrate they are reducing their purchases.").

45. Krauss, *supra* note 1.

46. *Iran's Central Bank Proposes Slashing Four Zeros from Falling Currency*, REUTERS (Jan. 6, 2018, 6:09 AM), https://www.reuters.com/article/uk-iran-currency/irans-central-bank-proposes-slashing-four-zeros-from-falling-currency-irna-idUSKCN1P008C.

47. *Id.*

The state of Iranian currency is so poor that in January 2019 the Central Bank of Iran presented a bill to the government to remove four zeros from the rial in an attempt to counteract hyperinflation.[48] Additionally, the International Monetary Fund ("IMF") estimated that Iran's economy had shrunk by 1.5% in 2018, likely to be worsened by the 3.6% drop estimated to occur in 2019.[49]

The country's oil and banking industries also continue to face hardship as international entities are largely unwilling to work with Iran and risk U.S. sanctions.[50] The return of sanctions results in a lost opportunity for economic engagement for the Islamic Republic on an international level,[51] and Iran has warned that it will pull out of the JCPOA and restart its nuclear program if the remaining members of the deal fail to take action which serves Iran's national economic interests.[52]

III. THE EU'S OBJECTIVES IN PURSUING A MULTIFACETED APPROACH TO KEEP THE JCPOA INTACT

European policymakers were motivated to act quickly in order to maintain the JCPOA after the United States announced that it would be withdrawing from the agreement.[53] From the European perspective, sustaining economic exchange and credit investment with Iran is driven more by pragmatic security concerns than advancing EU economic gains,[54] though some European companies have benefited from working within Iran.[55]

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48. *Id.*

49. *See IMF Data Mapper*, INT'L MONETARY FUND (2018), https://www.imf.org/external/datamapper/NGDP_RPCH@WEO/OEMDC/ADVEC/WEOWORLD/RN (last visited Feb. 8, 2019) (demonstrating IMF predictions regarding Iran's economy via an interactive tool).

50. Gladstone, *supra* note 36.

51. *A New Banking Architecture*, *supra* note 18, at 1.

52. Michael Peel, Alex Barker, & Najmeh Bozorgmehr, *Iran Threatens to Withdraw from Nuclear Proliferation Treaty*, FIN. TIMES (May 25, 2018), https://www.ft.com/content/6dda41ac-6020-11e8-9334-2218e7146b04.

53. *See* Bryan R. Early, *E.U. Countries Want to Save the Nuclear Deal. Don't Expect Cooperation on U.S. Sanctions*, WASH. POST (May 25, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/25/e-u-countries-want-to-save-the-iran-nuclear-deal-dont-expect-cooperation-on-u-s-sanctions/?utm_term=.b5c95ddaa362 ("The E.U. energy chief reassured Iranian officials that Europe would continue to honor the 2015 Iran nuclear agreement — despite the U.S. announcement this month that it would exit the agreement.").

54. *A New Banking Architecture*, *supra* note 18, at 1.

55. *See* Wald, *supra* note 3 (describing companies that had success investing in Iran under the JCPOA that are now being forced to leave the Islamic Republic).

At first, the EU was confident in its ability to limit the impact of U.S. sanctions.[56] Prior to the sanctions imposed under the Obama Administration, Iran was able to trade with third-party entities subsequently evading U.S. efforts to isolate the country from economic exchange.[57] It was only after the EU agreed to work with the United States by imposing penalties against Iran for sanction violations that the sanctions began to have any "bite."[58]

The Trump Administration was hoping to recreate the joint economic pressure that led to the negotiation of the JCPOA.[59] However, immediately after Trump announced that sanctions would be returning, the EU pledged their full commitment to Iran and the JCPOA.[60] The EU specifically promised to "mitigate the impact of [U.S.] sanctions on European businesses"[61] and planned to take steps to continue the international business relations between the EU and Iran.[62]

The EU's initially planned response consisted of measures intended to act on three main fronts with the common objective of securing and sustaining Iranian economic growth.[63] Targeted measures pursued by the EU were: (1) paving the way for an alternative means of financing business transactions through the European Investment Bank ("EIB"); (2) encouraging member states to make direct bank transfers with the Central Bank of Iran ("CBI") in order to continue to facilitate oil-related transactions; and (3) launching a formal process to extend the EU blocking statute to cover the new U.S. measures.[64]

56. *See* Silvia Amaro, *Europe Fights to Keep the Iran Nuclear Deal Intact After Trump Pulls Out*, CNBC (May 9, 2018), https://www.cnbc.com/2018/05/09/europe-fights-to-keep-the-iran-nuclear-deal-intact-after-trump-pulls-out.html (explaining the EU's initial response to Trump's May 8th announcement that the U.S. would be leaving the JCPOA).

57. Early, *supra* note 53.

58. Early, *supra* note 53.

59. Early, *supra* note 53.

60. *See* European Comm'n Press Release, European Commission Acts to Protect the Interests of EU Companies Investing in Iran as part of the EU's Continued Commitment to the Joint Comprehensive Plan of Action (May 18, 2018), http://europa.eu/rapid/press-release_IP-18-3861_en.htm ("European Commission acts to protect the interests of EU companies investing in Iran as part of the EU's continued commitment to the Joint Comprehensive Plan of Action.").

61. *Id.*

62. *See id.* ("The [EU] is committed to mitigating the impact . . . and taking steps to maintain the growth of trade and economic relations between the EU and Iran that began when sanctions were lifted. This can only be achieved by a combination of measures taken at national and European level.").

63. *Id.*

64. *Id.*

However, even before the second wave of Trump Administration sanctions were put into effect, the failure of the EU's economic plan seemed inevitable.[65] First, the EIB announced in July 2018 that the agency would refuse to lend to Iran.[66] Second, the hesitation of European national banks to work directly with Iran was reinforced by the Islamic Republic's unwillingness to comply with global anti-terror standards.[67] Third, it became apparent that the gaps within the EU's blocking statute made its interpretation vague and its force essentially non-existent.[68]

IV. THE INEVITABLE FAILURE OF THE EU'S INITIAL STRATEGY

A. *European Investment Bank's Refusal to Lend to Iran*

Since liquidity is a significant issue in Iran,[69] European officials assumed that the EIB would be able to support small- to medium- sized Iranian companies to offset the impact of the U.S. sanctions.[70] However, the EIB has refused to lend to Iran.[71] This refusal is for two main reasons.

First, the EIB worries that any relationship with Iran would jeopardize the organization's U.S. relations.[72] After the United States

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65. John Irish & Robin Emmott, *As U.S. Sanctions Near, Europe Fails to Protect Iran Deal*, REUTERS (Sept. 24, 2018, 11:12 AM), https://www.reuters.com/article/us-iran-nuclear-eu/as-u-s-sanctions-near-europe-fails-to-protect-iran-deal-idUSKCN1M41UO.

66. *European Investment Bank Balks at Proposal to Offset U.S. Iran Sanctions*, JERUSALEM POST (June 5, 2018, 4:26 PM), https://www.jpost.com/Middle-East/European-Investment-Bank-balks-at-proposal-to-offset-US-Iran-sanctions-559212.

67. Ruth Berschens, et al., *EU Pressuring Central Banks to Help Iran*, HANDELSBLATT GLOBAL (May 29, 2018 at 11:58 AM), https://global.handelsblatt.com/finance/eu-pressuring-central-banks-iran-928936.

68. GIBSON DUNN, THE "NEW" IRAN E.O. AND THE "NEW" EU BLOCKING STATUTE, (Aug. 9, 2018), https://www.gibsondunn.com/new-iran-e-o-and-new-eu-blocking-statute-navigating-the-divide-for-international-business.

69. Structural banking deficiencies and the explosion of semi-governmental organizations in Iran's economy have resulted in the growth of liquidity held in bank accounts but this growth has not been on conjunction with the economic realities, such as production capacity. Additionally, the large pieces of the extra liquidity held in bank accounts have been moved towards the non-productive sector and "immovable assets." Hoorzan, *Sanctions of Liquidity-Which One Is More Dangerous for Iran's Economy*?, ATLANTIC COUNCIL (Oct. 10, 2018), http://www.atlanticcouncil.org/blogs/iransource/sanctions-or-liquidity-which-one-is-more-dangerous-for-iran-s-economy.

70. Beatriz Rios, *EIB Cannot Do Business with Iran, Bank Chief Warns*, EURATIV (July 19, 2018), https://www.euractiv.com/section/global-europe/news/eib-cannot-do-business-with-iran-bank-chief-warns.

71. *Id.*

72. Alissa de Carbonnel & Robin Emmott, *Under U.S. Pressure, EIB balks at EU Plan to Work in Iran*, REUTERS (June 5, 2018, 8:30 AM), https://www.reuters.com/article/us-iran-

withdrew from the JCPOA, the EU quickly passed legislation to add Iran to the list of countries in which the EIB was legally able to conduct business and subsequently began to pressure the EIB to find ways to support Iran in light of the impending sanctions.[73] Yet, even EU legislation could not force the union's own lending arm to work with Iran.[74]

If the EIB had succumbed to the EU's pressure, the EIB would have likely jeopardized its ability to raise money within U.S. markets.[75] The inability to work within U.S. markets would result in significant long-term consequences for EIB operations, as the EIB currently has €500 billion in outstanding bonds[76] with roughly one-third of its lending operation dollar-denominated.[77] The EIB raised $66 billion in 2017 on international capital markets and reasonably worried that the threat of U.S. sanctions against the EIB could scare off potential bond buyers.[78] Although the EU did budget a guarantee that would attempt to shield the entity against any losses derived from sanctions, they failed to offer a solution for the EIB to address funding risks.[79]

Second, any engagement with Iran would risk the business model on which the EIB was formed.[80] The EIB does not engage in jurisdictions categorized by the Financial Action Task Force ("FATF")[81] as "high risk."[82] FATF expected Iran to quickly pass strict legislation to combat money laundering, especially in the midst of the re-imposition of U.S. sanctions, but hardliners in Iran's Parliament were deeply opposed to ushering in an era of global compliance and stalled any attempts to satisfy

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nuclear-europe-exclusive/exclusive-under-us-pressure-eib-balks-at-eu-plan-to-work-in-iran-idUSKCN1J11J3.

73. Robin Emmott & Alissa de Carbonnel, *European Investment Bank Casts Doubt on EU plan to Salvage Nuclear Deal*, REUTERS (July 18, 2018, 7:04 AM), https://www.cnbc.com/2018/07/18/reuters-america-update-1-european-investment-bank-cannot-invest-in-iran-eib-chief-says.html. [hereinafter *EIB Casts Doubt*].

74. Rios, *supra* note 70.

75. de Carbonnel & Emmott, *supra* note 72.

76. *EIB Casts Doubt*, *supra* note 73.

77. de Carbonnel & Emmott, *supra* note 72.

78. de Carbonnel & Emmott, *supra* note 72.

79. de Carbonnel & Emmott, *supra* note 72.

80. *EIB Casts Doubt*, *supra* note 73.

81. *See* FATF, WHO WE ARE, http://www.fatf-gafi.org/about (last visited Feb. 8, 2019) ("FATF is an inter-governmental body that has developed a series of recommendations currently recognized as the international standard for combating money laundering, the financing of terrorism and proliferation of weapons of mass destruction.").

82. de Carbonnel & Emmott, *supra* note 72.

FATF requirements.[83] The strong opposition was mainly due to the fact that the implementation of FATF regulations would significantly hamper Iranian support for allied groups, including United States designated terrorist entities.[84]

FATF originally had given Iran until October 2018 to either implement new standards to end the Islamic Republic's support for terror financing or face the consequences of being "blacklisted"[85] by the organization.[86] This threat did fuel the passage of an anti-terror funding bill in the Iranian Parliament, but as FATF members only review fully-enacted legislation, Iran failed to meet the October deadline.[87]

FATF did agree to extend extra time to Iran to complete reforms that would bring the country into line with global norms, but it currently remains unclear if Iran will be able to avoid pariah-status.[88] Even if Iran can prevent the most extreme of FATF's force, the country's inability to move swiftly away from terror financing has undoubtedly worked to solidify the fears of companies who are hesitant about working with Iran, including the EIB.[89]

B. *European Central Bank's Unwillingness to Aid Iran in the Purchasing of Oil*

After the United States withdrew from the JCPOA, European officials were quick to maintain a commitment to Iran for the purchase oil, and this allegiance was extended by officials guaranteeing direct

83. Najmeh Bozorgmher, *Iran's Parliament Votes to Ratify UN Anti-Terror Funding Treaty*, FIN. TIMES (Oct. 7, 2018), https://www.ft.com/content/1aa2a208-ca20-11e8-9fe5-24ad351828ab.

84. *See id.* ("Mohammad Ali Movahedi Kermani said . . . the FATF 'is surely a dangerous thing', which might prevent Iran from supporting its proxy forces in the region, notably Lebanon's Hizbollah and Yemen's Houthis.").

85. A place on FATF's blacklist would cement the reluctance of foreign investors and banks in dealing with Iran and could essentially ensure that European efforts to keep some financial channels open to Iran all but impossible. *Anti-Money-Laundering Body Gives Iran Until Feb to Complete Reforms*, REUTERS (Oct. 25, 2018, 8:03 AM), https://www.reuters.com/article/us-iran-moneylaundering/anti-money-laundering-body-gives-iran-until-feb-to-complete-reforms-idUSKCN1MT1OT.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

payments from Europe to Iran.[90] EU member states were subsequently pressured to bypass the U.S. financial system by dealing with oil purchases from Iran exclusively in euros.[91] For the purchase of oil to be feasible in euros, the central banks of Europe would have to transfer large sums directly to Iran's central bank.[92]

This facet of the EU's plan was based on a notion that the United States would not be willing to sanction the central bank of an EU member state given the consequences that would likely follow.[93] However, European central banks were much more hesitant to test the force behind Trump's sanction enforcement threats.[94]

The European Central Bank refused to directly transfer money to Tehran, alleging that such money transfers are incompatible with their mandate,[95] and individual European national central banks are likely to follow suit.[96] European national central banks are simply not likely to oblige to the EU's request, and the EU does not have the authority to force their compliance.[97] Additionally, European national central banks share the EIB's and FATF's concerns of indirectly aiding money laundering or the funding of terrorism by transferring money to Iran's Central Bank.[98] European officials have not yet found a way to ease these fears.[99]

C. *The Impractical Assertion of the Blocking Statute*

Shortly after the United States announced it would be re-implementing sanctions, the European Commission began the formal process of activating the European Union's blocking statute.[100] The blocking

90. Ruth Berschens, et al., *EU Pressuring Central Banks to Help Iran*, HANDELSBLATT GLOBAL (May 29, 2018, 11:58 AM), https://www.handelsblatt.com/today/finance/creative-solutions-eu-pressuring-central-banks-to-help-iran/23582276.html.

91. Berschens, et al., *supra* note 90.

92. Berschens, et al., *supra* note 90.

93. Josh Lederman & Dan De Luce, *How Europe Plans to Skirt Trump's Sanctions and Keep Doing Business with Iran*, NBC NEWS (Sep, 4, 2018, 11:04 AM), https://www.nbcnews.com/politics/national-security/how-europe-plans-skirt-trump-s-sanctions-keep-doing-business-n906161.

94. Berschens, et al., *supra* note 90.

95. Rios, *supra* note 70.

96. Lederman & De Luce, *supra* note 93.

97. Berschens, et al., *supra* note 90.

98. Berschens, et al., *supra* note 90.

99. Berschens, et al., *supra* note 90.

100. *Guidance Note: Questions and Answers: Adoption of Update of the Blocking Statute*, Official Journal of the European Union

statute was first adopted by the EU in 1996 in response to U.S. sanctions against Cuba and has historically only been activated to serve as a political warning to the United States.[101] The recent amending process revisited the current list of blocking statute provisions to add protections on behalf of the European companies that have, or plan to, invest in Iran.[102]

The current version of the blocking statute is meant to protect European entities by theoretically creating an obligation for companies to alert the European Commission within 30 days should their economic or financial interests be negatively impacted, directly or indirectly, by U.S. sanctions.[103] In the case that EU nationals and companies do have their interests adversely affected, the statute provides a right to recover lost compensation.[104] The statute also bans the recognition of any court judgment or decision that gives effect to U.S. Iranian sanction law[105] and prohibits EU organizations and persons from complying with U.S. sanctions.[106]

However, the EU presently does not have enough strength to make the blocking statute a useful tool in combating the impact of U.S. sanctions,[107] given the great deal of legal uncertainty surrounding the statute.[108] Certain provisions of the blocking statute are ambiguous, and there is consensus regarding the lack of practical application of the statute.[109]

For example, the "right to compensation"[110] clause could lead to a great deal of litigation between contracting business entities.[111] Proving

(2018),https://eurlex.europa.eu/legalcontent/EN/TXT/?toc=OJ%3AC%3A2018%3A277I%3ATOC&uri=uriserv%3AOJ.CI.2018.277.01.0004.01.ENG [hereinafter EU Guidance Note].

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. EU Guidance Note, *supra* note 100.

106. EU Guidance Note, *supra* note 100.

107. *See* Steven Erlanger, *Europe, Again Humiliated by Trump, Struggles to Defend Its Interests*, N.Y. TIMES (May 9, 2018), https://www.nytimes.com/2018/05/09/world/europe/europe-iran-trump.html (stating that the blocking statute "would not entirely reassure companies that also trade with the United States").

108. GIBSON DUNN, THE "NEW" IRAN E.O. AND THE "NEW" EU BLOCKING STATUTE (Aug. 9, 2018), https://www.gibsondunn.com/new-iran-e-o-and-new-eu-blocking-statute-navigating-the-divide-for-international-business.

109. *Id.*

110. EU Guidance Note, *supra* note 100.

111. ROBERT MEADE & JOSH ZIVE, BRACEWELL LLP, INTERNATIONAL SANCTIONS AND THE ENERGY SECTION- PART 1: IRAN (Oct. 26, 2018), https://www.jdsupra.com/legalnews/international-sanctions-and-the-energy-91302.

that one party terminated a contract as a result of U.S. sanctions to trigger the actual right to compensation would be difficult.[112] Unless of course, the exiting party specifically stated they were withdrawing from the relationship due to the U.S. sanctions.[113]

Further, the blocking statute, as currently constructed, puts EU companies that invested in a post-JCPOA Iran in a tricky position.[114] If an entity continued business with Iran in breach of the sanctions, the business would be cut off from the entirety of the U.S. financial system.[115] Yet if the company decided to leave Iran as a result of the sanctions, they would breach the blocking statute and be subsequently subject to EU penalties.[116]

Failure of the blocking statute to protect EU based companies extends past organizations with specific ties to U.S. markets.[117] The EU has repeatedly discussed finding ways to support small- or medium -sized Iranian or EU enterprises that have limited or no exposure to U.S. financial markets.[118] It has been suggested that supporting these sized entities could continue Iran's economic growth, possibly keeping the Islamic Republic complaint to the standards set by the nuclear agreement.[119] However, the success of small- or medium- sized organizations in maintaining the JCPOA, despite their independence from the U.S. financial market, seems unlikely given the blocking statute's lack of protections.[120] Even organizations with no interest in penetrating the U.S. market place may face significant difficulty in finding business partners, or financial backing, to support their efforts.[121]

V. A NEW SPECIAL PURPOSE VEHICLE: INSTEX

On January 31, 2019, INSTEX (Instrument for Supporting Trade Exchanges) became a registered SPV with France, Germany and the

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112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. ROBERT MEADE & JOSH ZIVE, *supra* note 111.
117. GUY SOUSSAN, ET AL., STEPTOE & JOHNSON LLP, WHAT THE EU'S IRAN SANCTIONS' MEANS FOR COS. (May 31, 2018, 2:20 PM), https://www.steptoe.com/en/news-publications/what-the-eus-iran-sanctions-blocking-means-for-cos.html.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*

United Kingdom (the "E3") as initial shareholders.[122] Given that the first tier of sanction blocking efforts failed,[123] the EU decided it was in its best interest to create a new entity that would make it possible for companies to trade with Iran.[124] The SPV is devised to facilitate financial transactions and trade between European companies and Iran.[125] Eventually, the SPV could be opened to other partners in the world."[126] INSTEX was registered in France and will be supervised by a Franco-German delegation chaired by former Commerzbank Governor Per Fischer.[127]

INSTEX will focus "initially on the sectors most essential to the Iranian population, such as pharmaceuticals, medical devices, and [food] goods."[128] The United States does not sanction these goods,[129] but European banks have not facilitated exports of these products due to fears of American retribution.[130] Applications of INSTEX may increase as the SPV shows its value, potentially being used to facilitate the trade of U.S. sanctioned commodities.[131]

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122. European Union Press Release, Statement by High Representative/Vice-President Federica Mogherini on the creation of INSTEX, Instrument for Supporting Trade Exchanges (Jan. 31, 2019).

123. The EU kept delaying the promise to create a SPV mainly because it was difficult to find a country to host the vehicle. Jones Hayden & Golnar Motevalli, *EU Says Preparations for Iran SPV are at 'Advanced Stage*,' BLOOMBERG (Jan. 24, 2019, 7:54AM), https://www.bloomberg.com/news/articles/2019-01-24/eu-says-preparations-for-iran-spv-are-at-advanced-stage.

124. *INSTEX: Europe Sets up Transactions Channel With Iran,* DW (Jan., 31, 2019), https://www.dw.com/en/instex-europe-sets-up-transactions-channel-with-iran/a-47303580 ("'We're making clear that we didn't just talk about keeping the nuclear deal with Iran alive, but now we're creating a possibility to conduct business transactions,' German Foreign Minister Heiko Maas told reporters [January 31, 2019] . . . .").

125. Press Release, Foreign & Commonwealth Office, New Mechanism to Facilitate Trade with Iran: Joint Statement (Jan. 31, 2019) https://www.gov.uk/government/news/joint-statement-on-the-new-mechanism-to-facilitate-trade-with-iran.

126. Virginia Pietromarchi, *EU Launches Mechanism to Bypass US Sanctions on Iran*, ALJAZEERA (Jan. 31, 2019), https://www.aljazeera.com/news/2019/01/eu-launches-mechanism-bypass-sanctions-iran-190128084529234.html.

127. *INSTEX: Europe Sets up Transactions Channel with Iran*, *supra* note 124.

128. Press Release, Foreign & Commonwealth Office, New Mechanism to Facilitate Trade with Iran: Joint Statement (Jan. 31, 2019), https://www.gov.uk/government/news/joint-statement-on-the-new-mechanism-to-facilitate-trade-with-iran.

129. These goods are commonly referred to as "essential goods." Batmanghelidj & Hellman, *supra* note 8.

130. Esfandyar Batmanghelidj, *Europe Protects Itself from Trump's Caprice*, BLOOMBERG (Jan. 31, 2019), https://www.bloomberg.com/opinion/articles/2019-01-31/with-its-iran-spv-europe-protects-itself-from-american-caprice.

131. Batmanghelidj, *supra* note 130.

At this time, technical details on INSTEX are still being determined.[132] However, though SPV's are most commonly known for their role in securitizing property-based assets,[133] INSTEX would likely work by offering a "compensation" service that coordinates payments between entities operating within the Islamic Republic.[134] INSTEX could be specifically devised to facilitate transactions between European importers and exporters with ties to Iran, eliminating the necessity for any cross-border payments.[135] For example, a European exporter of goods to Iran would be able to have their payments coordinated by INSTEX so the exporter would be able to be paid by a European organization working as an importer of goods from Iran.[136] Ultimately this means that exporters would be paid from funds outside of Iran while importers would be paid by the funds within Iran.[137]

No matter what technical form INSTEX takes, the SPV's primary goals should remain centered around humanitarian purposes.[138] Though trade within the essential goods market will not result in a significant financial boost for the Islamic Republic, INSTEX may be enough to keep Iran content for a little longer while the European bloc continues to devise alternative methods to protect the Iranian economy.[139]

Having essential goods promised by INSTEX could keep the Iranian government from withdrawing from the JCPOA, at least in the immediate future, for two main reasons. First, an increase in essential goods could foster a greater sense of Iranian civility.[140] In the past year, Iranians have taken to the streets almost daily to protest the government regarding the poor working and living conditions in the country[141] and the re-establishment of sanctions has only progressively worsened Iranian civil

132. Batmanghelidj, *supra* note 130 (discussing how it will take months for the SPV to become fully operational).

133. Sean Ross, *The Most Typical Holding in an SPV*, INVESTOPEDIA, (last updated Nov. 15, 2018), https://www.investopedia.com/ask/answers/030515/what-most-typical-holding-spv.asp.

134. Batmanghelidj & Hellman, *supra* note 8.

135. Batmanghelidj & Hellman, *supra* note 8.

136. Batmanghelidj & Hellman, *supra* note 8.

137. Batmanghelidj & Hellman, *supra* note 8.

138. Batmanghelidj & Hellman, *supra* note 8.

139. Batmanghelidj & Hellman, *supra* note 8.

140. Arash Azizi, *Here's How Protests and Strikes are Leading Change in Iran*, ATL. COUNCIL (Dec. 20, 2018), https://www.atlanticcouncil.org/blogs/iransource/here-s-how-protests-and-strikes-are-leading-change-in-iran.

141. *Id.*

unrest.[142] Essential supplies in Iran[143] are so scarce that doctors at the MAHAK Pediatric Cancer and Treatment Research Center warned in November 2018 that by the end of January 2019, medicine shortages at the hospital would prevent the proper treatment of many children suffering from various types of cancers.[144] Finding a way to restock the shelves with medicine, foods, and other essential products could give Iran the boost it so desperately needs to tamper down civilian unrest and continue JCPOA compliance.[145]

Further, INSTEX, as announced, is theoretically immune to U.S. sanctions.[146] If the U.S. tried to sanction INSTEX, the Trump Administration would have to explain why a channel providing medicines to Iran went against U.S. sanction policy and was not subject to an exemption.[147] Denying medicine and food to sick children could be a public relations disaster for the Trump Administration.

Second, INSTEX is meant to signal to Iran that the EU is truly committed to the preservation of the JCPOA.[148] Given that Iran has grown frustrated with the EU's inability to follow through on any of its sanction avoiding proposals, INSTEX could ensure that Iran continues to adhere to the regulations set by the nuclear agreement.[149] It is possible that INSTEX could also signal that alternate SPVs could be created to facilitate other activities, such as exporting oil, in the future.[150]

Future SPVs may be used to create "gateway banks."[151] A joint report by Esfandyar Batmanghelidj and Axel Hellman for the European Leadership Network argued that gateway banks could be part of the

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142. *See* Tim Murphy, *Power, Politics and Pride in Iran*, NEWSROOM (Jan. 23, 2018), https://www.newsroom.co.nz/@summer-newsroom/2019/01/06/75997/long-read-power-politics-and-pride-in-iran ("The unspoken deal in such situations is that the public may tolerate restrictions on personal freedoms so long as the authorities deliver better living conditions, jobs, homes and security.").

143. *See* Batmanghelidj & Hellman, *supra* note 8 ("Humanitarian trade, which includes food items, agricultural commodities, medicine and medical supplies, is broadly accepted to be exempt from sanctions, as is trade in most consumer goods.").

144. Batmanghelidj & Hellman, *supra* note 8.

145. Batmanghelidj & Hellman, *supra* note 8.

146. Batmanghelidj & Hellman, *supra* note 8.

147. Batmanghelidj & Hellman, *supra* note 8.

148. Press Release, Foreign & Commonwealth Office, New Mechanism to Facilitate Trade with Iran: Joint Statement (Jan. 31, 2019) https://www.gov.uk/government/news/joint-statement-on-the-new-mechanism-to-facilitate-trade-with-iran.

149. Batmanghelidj, *supra* note 130.

150. Batmanghelidj, *supra* note 130.

151. *A New Banking Architecture*, *supra* note 18, at 1.

viable solution the EU can pursue to avoid U.S. sanctions effectively.[152] Gateway banks are "financial institutions which can serve as intermediaries between major Iranian and European commercial banks."[153] These gateway banks act as "intermediaries to international financial institutions" from other countries wanting to work with Iran, such as China and Russia.[154] EU officials have seemingly given credit to the idea and have stated that it is a possibility that SPVs could be granted a banking license.[155] This method could make it more likely that the EU would be able to reach the oil sector once again, but gateway banks would have to be supported by other changes in EU infrastructure.[156]

There are many basic uncertainties about INSTEX the E3 will need to address in the coming months before it becomes finalized.[157] The E3 will need to clarify which type of activities are permissible.[158] The E3 will have to provide assurance that companies using INSTEX are legally protected against U.S. action.[159] Additionally, the E3 will need to decide how much autonomy INSTEX will have and what level of transparency the SPV must communicate.[160] It will also be important for the E3 to figure out what exact role European governments are expected to play in financially supporting European commerce with Iran.[161]

VI. CONCLUSION

Many potential consequences accompany the implementation of INSTEX.[162] Secretary of State, Mike Pompeo, warned that the creation of such an SPV would be "one of the most counterproductive measures

152. *A New Banking Architecture*, *supra* note 18, at 1.
153. *A New Banking Architecture*, *supra* note 18, at 1.
154. Batmanghelidj & Hellman, *supra* note 8.
155. *A New Banking Architecture*, *supra* note 18, at 11.
156. *See A New Banking Architecture*, *supra* note 18 (suggesting the creation of a new banking architecture able to bypass U.S. financial institutions requires foundational changes within the global financial system).
157. Kaveh L. Afrasiabi, *Europe's SPV: With or Without Oil*, LOBE LOG (Dec. 21, 2018), https://lobelog.com/europes-spv-with-or-without-oil.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *See* Gardiner Harris, *Bolton Warns of 'Terrible Consequences' for Those Doing Business with Iran*, N.Y. TIMES (Sept. 25, 2018), https://www.nytimes.com/2018/09/25/world/middleeast/bolton-threatens-business-iran.html (discussing many ways the SPV's could threaten U.S. physical and financial safety).

imaginable for regional and global peace and security."[163] While the announced format of INSTEX does not outwardly pose a high level of risk, it is possible that an SPV used for the transaction of other goods, such as oil, could not guarantee the same protections provided by commodities exchanged through U.S. supported entities.[164] Given that SPV's would require the support of new oversight protocol, it is possible terror-related, or money laundering activity could slip through the cracks.[165]

There are other significant issues for the United States if the EU does establish a far-reaching SPV system beyond that of INSTEX.[166] If SPVs are used to create a financial network that can bypass U.S. markets, U.S. financial dominance may be undermined.[167] If U.S. financial dominance is weakened, it will be less likely that the United States will be able to successfully impose and enforce unilateral sanctions moving forward.[168]

However, it is possible that the EU's efforts to sustain the JCPOA could soon become moot.[169] Reports are starting to surface from Iran that government officials have "lost trust" in the ability for Europeans to implement a strategy significant enough to keep Iran interested in staying as part of the peace treaty.[170] Fears that Iran will become impatient with European strategies to salvage Iran's economy and withdraw from the JCPOA to restart their nuclear program have been exacerbated by the recent attempted Iranian group hacking of many nuclear scientist's data.[171]

163. See *id.* ("'This is one of the most counterproductive measures imaginable for regional and global peace and security,' Mr. Pompeo said. 'By sustaining revenues to the regime, you are solidifying Iran's ranking as the No. 1 state sponsor of terror.'").

164. *Id.*

165. *Id.*

166. *See* Rick Noack, *A Subtle Sign of Diminishing U.S. Influence - Besides Leaders Laughing at Trump*, WASH. POST, Sept. 27, 2018, at A15, col. 1. ("In the long run, however, the E.U. effort could dismantle U.S. dominance of international payment systems . . . a status that has handed U.S. leaders a powerful tool of both economic and political influence in the past . . . .").

167. *Id.*

168. *Id.*

169. *See EU Has lost Iranians' Trust for SPV Delay*, TEHRANTIMES (Dec. 15, 2018), https://www.tehrantimes.com/news/430694/Top-MP-EU-has-lost-Iranians-trust-for-SPV-delay (describing Iran's lost trust in the EU's plans to implement strategies to support Iran's economy).

170. *Id.*

171. Raphael Satter, *Hacking Group Charming Kitten Targeting Nuclear Workers, U.S. Officials on Behalf of Iran, AP Reports*, CHI. TRIB. (Dec. 13, 2018, 12:58 PM), https://www.chicagotribune.com/news/nationworld/ct-iran-hackers-nuclear-workers-20181213-story.html.

If the EU hopes to continue to keep Iran from returning to the of nuclear their commitment to salvage the JCPOA, INSTEX may not be enough.[172]

ALEXANDRIA TER AVEST

172. Steven Erlanger, *3 European Nations Create Firm to Trade With Iran, but Will Anyone Use It?,* N.Y. TIMES (Jan. 31, 2019), https://www.nytimes.com/2019/01/31/world/europe/europe-trade-iran-nuclear-deal.html.