From the Iran Nuclear Deal to a Middle East Zone?

Lessons from the JCPOA for an ME WMDFZ

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MIDDLE EAST WEAPONS OF MASS DESTRUCTION FREE ZONE SERIES

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Compliance and Enforcement

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This essay addresses several aspects related to the compliance and enforcement framework of the Joint Comprehensive Plan of Action (JCPOA) and its lessons for a Middle East WMD-Free Zone (ME WMDFZ): Who makes compliance and enforcement decisions under the JCPOA? Specifically, who decides when a participant in the Iran nuclear deal is in non-compliance with the terms of the agreement, and how is this decision made? What are the mechanisms in the deal to enforce compliance, and how well have these worked to date? Finally, what lessons does the JCPOA experience provide for negotiation and implementation of an ME WMDFZ?

The essay answers these questions in four sections. The first section gives a brief overview of the governance structure of the JCPOA, with a focus on its compliance and enforcement framework. The next section looks at the Dispute Resolution Mechanism (DRM), the principal structure established to resolve disputes between JCPOA participants when claims of non-compliance occur. The essay then examines in the third section the sanctions snapback provision, which is the main means of enforcing an Iranian return to compliance. A fourth section reflects on the lessons we can draw from the roughly five years of operation of the JCPOA's compliance and enforcement framework for a future ME WMDFZ.

JCPOA governance and its compliance and enforcement framework

WHAT IS COMPLIANCE AND ENFORCEMENT?

The JCPOA is based on a simple bargain: in exchange for the lifting of sanctions imposed by the United Nations Security Council, the United States of America and the European Union (EU) on the nuclear programme of the Islamic Republic of Iran, the latter committed to dismantle important parts of its nuclear programme and to significantly reduce its stockpiles of enriched uranium. These stockpiles had caused concern about the nature of Iran's nuclear programme among some in the international community. Iran also agreed to take a series of restrictive measures affecting its ability to conduct dual-use nuclear fuel cycle activities and research (namely on enrichment and reprocessing) and accepted strong inspection obligations for lengths of time varying from 5 to 15 years and, in some cases, indefinitely.[2] The compliance and enforcement framework of the JCPOA was one of the most meticulously negotiated elements in the nuclear talks between China, France, Germany, the Russian Federation, the United Kingdom and the United States with the EU High Representative for Foreign Affairs and Security Policy (the E3/EU+3)

1 Acknowledgments: Key research used in this essay received funding from the European Research Council under the European Union's Horizon 2020 research and innovation programme(Grant Agreement No. 716216, "Bombs, Banks and Sanctions", Project 716216, headed by Grégoire Mallard).

2 The JCPOA's nuclear fuel cycle elements and their lessons for a Middle East WMD-Free Zone are examined in R. Einhorn, "Nuclear Fuel Cycle Activities and Research", From the Iran nuclear deal to a Middle East Zone? Lessons from the JCPOA for an ME WMDFZ, UNIDIR May 2021, https://unidir.org/jcpoa.

and Iran. While the JCPOA was adopted as a political agreement and not a treaty (although it was incorporated into international law through Security Council resolution 2231[3]), it nonetheless emulates some aspects of weapons of mass destruction (WMD) treaties, albeit in the unique circumstances of the Iranian nuclear issue.

A state meeting its obligations under a WMD treaty is said to be "in compliance". This refers to both primary obligations or first-order treaty rules—such as the prohibition in the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) against the acquisition of nuclear weapons by non-nuclear weapon states—and secondary ones—such as the requirement to provide specific information to the International Atomic Energy Agency (IAEA) within a set time frame. WMD treaties not only elaborate the rights and obligations of the states parties, but also provide mechanisms to obtain information, resolve disputes and enforce compliance. In case of "non-compliance", the actions that the state parties of a treaty, or in some cases the international community, take to ensure or re-establish compliance is known as "enforcement". This can vary from positive ("soft") inducements (e.g. providing technical assistance to states working towards compliance), to "intermediate" measures (e.g. naming and shaming those whose compliance is in question), to "hard" ones, including suspension of rights and sanctions.[4]

As some scholars of international law and WMD treaties have noted, the concepts of compliance and enforcement are closely related and can overlap. For example, allowing IAEA officials onto a state's territory to inspect nuclear facilities, as required by a comprehensive safeguards agreement (CSA), is part of that state's compliance with its NPT obligations. However, in case of suspected non-compliance, the IAEA can also be asked to implement verification measures to assist in enforcing the terms of the NPT.[5]

JCPOA GOVERNANCE

The JCPOA negotiators created an intricate governance structure involving the Joint Commission (JC), the DRM, the United Nations Security Council, the IAEA and even non-participant states. The main governing body of the JCPOA is the Joint Commission, comprised of the representatives of the E3/EU+3 and Iran — which together comprise the JCPOA participants. The EU High Representative for Foreign Affairs and Security Policy serves as the JC coordinator. The body is responsible for facilitating implementation of the deal. It meets quarterly or at any time upon a request submitted to the coordinator by any JCPOA participant. Decisions are generally made by consensus. Some issues are decided by a majority vote. Each participant has one vote and the number of votes required varies depending on the issue.[6]

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3 Stefan Talmon, "Germany Finally Comes Clean about the Legal Status of the JCPoA: No More Than Soft Law", German Practice in International Law (GPIL), 24 March 2020, https://gpil.jura.uni-bonn.de/2020/03/germany-finally-comes-clean-about-the-legal-status-of-the-jcpoa-no-more-than-soft-law/. If the JCPOA was initially "no more than soft law", its insertion in United Nations Security Council resolution 2231 under Chapter VII of the United Nations Charter gave it force of "hard law".

4 Treasa Dunworth, Compliance and Enforcement in WMD-Related Treaties, WMD Compliance and Enforcement Series no. 1, UNIDIR, 2019, https://doi.org/10.37559/WMD/19/WMDCE1.

5 Ibid.

6 For example, subparagraph 4.4 of Annex IV states that "Matters before the Joint Commission pursuant to Section Q of Annex I [establishing the process for accessing suspected Iranian nuclear facilities] are to be decided by consensus or by affirmative vote of five JCPOA participants", with no requirement for a quorum.

The JC's specific governance functions found in Annex IV of the JCPOA touch on virtually every aspect of the implementation of the Iran nuclear deal. These functions include, but are not limited to, the review and approval of the final design for the modernized heavy water research reactor under Section B of Annex I; review and consultation to address issues arising from the implementation of sanctions lifting in the JCPOA and its Annex II; review of any issue that a JCPOA participant believes constitutes non-performance by another participant of its commitments under the deal, according to the process outlined in the deal, with a view to resolving the issue; adopting or modifying procedures to govern its activities; and consulting and providing guidance on other implementation matters that may arise under the JCPOA.

The JC was given the authority to establish working groups to oversee day-to-day implementation in specific areas, as deemed appropriate by the JCPOA participants. To date, working groups have been established on procurement, transparency, Arak modernisation and implementation of sanctions lifting, among others.[7] Some working groups have co-chairs (e.g. the one on Arak modernisation), while others are chaired by the EU coordinator.

While the Joint Commission is the central implementation organ of the JCPOA, its work is closely linked to the functions of the United Nations Security Council, the IAEA and, to some degree, non-participant third party states. For example, the Security Council can trigger the "hard" enforcement instrument for dealing with Iranian non-compliance: the sanctions snapback provision (see section 3).

The IAEA is responsible for verifying and monitoring Iran's implementation of the nuclear deal. It does this in a myriad of ways, including by providing technical cooperation to Iran to ensure that it has the capacity to comply with its obligations under the JCPOA; undertaking monitoring, safeguards, and verification activities to confirm the country is in compliance with these obligations; and advising the JC to review proposals related to items, material, equipment, goods and technology intended to be used in nuclear activities under the JCPOA.[8] The IAEA can also formally and informally generate pressure through verification and monitoring of Iran's deal implementation, including by 'naming and shaming' in its Director General's media activities, the Agency's formal reports, and the Board of Governor's ability to refer Iran to the Security Council.

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In addition to dispute resolution (see below), the DRM can also have a "naming and shaming" function by identifying any participant perceived as being out of compliance with the deal. This opens the path to the snapback of sanctions on Iran.

While compliance decisions and referral of a state (namely Iran) for non-compliance are in the hands of JCPOA participants, non-participant states also play a role. They help ensure that Iran is in compliance with

7 The procurement channel, in part overseen by the Procurement Working Group, is examined in A. Khlopkov, "Civil Nuclear Cooperation", From the Iran nuclear deal to a Middle East Zone? Lessons from the JCPOA for an ME WMDFZ, UNIDIR May 2021, https://unidir.org/jcpoa.

8 The safeguards verification and monitoring elements of the JCPOA, and their lessons for an ME WMDFZ, are examined by by A. Persbo, "Monitoring, Safeguards, and Verification", From the Iran nuclear deal to a Middle East Zone? Lessons from the JCPOA for an ME WMDFZ, UNIDIR, May 2021, https://unidir.org/jcpoa.

the deal by providing information about exported items, materials, equipment, goods, and technology in order to verify their end use inside Iran.[9]

The Dispute Resolution Mechanism

The principal instrument in the Iran nuclear deal for managing disputes, particularly those perceived as arising from non-compliance by a JCPOA participant with its commitments under the deal, is the Dispute Resolution Mechanism.[10] The DRM can be triggered by any participant. It acts first and foremost as a tool for deliberation and consultation that allows for the airing of misunderstandings, suspicions, and disagreements. The aim is to prevent immediate referrals to the United Nations Security Council, which could cause escalation and counteractions that might eventually lead to a breakdown of the agreement. Disputes originate in the JC. The DRM starts once a non-compliance concern has been raised. The JC then has 15 days to address the dispute to the satisfaction of all the JCPOA participants. It can extend this consultation period indefinitely by consensus. At the end of this period, if any participant state is unsatisfied that the issue has been adequately resolved, then it can escalate the dispute to the level of foreign ministers or to an Advisory Board. The ministerial-level review lasts another 15 days, but this period can also be extended indefinitely by consensus. The Advisory Board, composed of three members, is required to produce a non-binding opinion by the end of this same 15-day period.[11] If the issue remains unresolved following this 30-day process, the JC can take another 5 days to consider the opinion of the Advisory Board. If the dispute still remains unresolved, and the complaining participant "deems the issue to constitute significant non-performance", it could treat the issue as grounds to wholly or partly cease carrying out its commitments under the JCPOA or "notify the UN Security Council that it believes the issue constitutes significant non-performance".[12]

The DRM was arguably conceived mainly to deal with possible Iranian non-compliance. It is noteworthy that the United States never attempted to trigger the DRM while it was still a participant. At the time of writing, the United States does not sit on the JC following its decision to cease participation in the nuclear deal on 8 May 2018.

On 14 January 2020, France, Germany, and the United Kingdom (the E3) collectively triggered the DRM. After having threatened action for months, they sought to send a strong message to Iran that the diplomatic path was the only way forward. This followed Iran's decision to adopt a "maximum

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9 The JCPOA requires states exporting items to Iran that are included on the Nuclear Suppliers Group (NSG) dual-use list (INFCIRC/254/Rev.9/Part 2, or the most recent version of this document) to follow the procedure laid out under Section 6 of Annex IV.

10 Security Council, S/RES/2231, 2015, https://undocs.org/S/RES/2231(2015).

11 Analyses of the DRM differ on the composition and main function of the Advisory Board. This was not discussed in depth by JCPOA negotiators or the Joint Commission, but it was assumed that each side to a dispute would select one candidate, and that the third would be mutually agreed upon. One publication assumes that the third member of the Advisory Board would be independent and "presumably a national of non-JCPOA signatory". See A. Berger, "Explaining UN 'Snapback' in the Iran Deal", Commentary, Royal United Services Institute (RUSI), 16 July 2015, https://rusi.org/commentary/explaining-un-snapback-iran-deal-0. On the main function of the Advisory Body, another analysis claims that "it was anticipated that the Advisory Board would investigate technical matters". See S. Hickey, "A Quick Guide to the JCPOA Dispute Resolution Mechanism", Center for Arms Control and Non-Proliferation, 22 January 2020, https://armscontrolcenter.org/a-quick-guide-to-the-jcpoa-dispute-resolution-mechanism/.

12 Security Council, S/RES/2231, 2015, https://undocs.org/S/RES/2231(2015).

resistance" strategy in May 2019 in response to the "maximum pressure" policy of the United States. Iran had initially opted for a "strategic patience" approach in the hopes of retaining some sanctions relief from the remaining participants in the deal in response to the withdrawal from the agreement by United States President Donald J. Trump.[13] Iranian "maximum resistance" entailed reduction of compliance with the nuclear restrictions of the JCPOA, among other actions. Iran presumably chose this strategy to build leverage for future negotiations with the United States by generating pressure on the United States, the other JCPOA participants and some Middle Eastern states. It also signalled Iran's frustration at those other participants for not providing the means to realize the economic benefits of the JCPOA.

Under the agreement there is a distinct process for Iran to address any activity it believes is preventing the full implementation of sanctions lifting. It first has the option to consult the relevant JCPOA participant with no set deadline. If they fail to resolve the issue Iran can take it to the Working Group on Implementation of Sanctions Lifting where the participants will consult and review with the aim of resolving it within 30 working days. The lack of a resolution following this period would then permit any participant to escalate the issue to the JC. In the absence of a resolution to an Iranian complaint, and following a JC decision, the agreement authorizes Iran to reduce its compliance with the JCPOA. The agreement does not specify whether this can be done unilaterally or whether it requires Joint Commission authorisation or some other form of authorisation.

Iran triggered the DRM in July 2020.[14] This was due to Iranian disappointment about the E3's ability to deliver sanctions relief following the withdrawal of the United States. Mohammad Javad Zarif, the Iranian foreign minister, has claimed that Iran triggered the DRM six times, the first time immediately follow the departure of the United States from the deal. Whether this in fact happened and whether it was acknowledged by the Joint Commission are disputed.[15]

While it is difficult to assess the efficacy of the DRM since much of the activity of the Joint Commission remains confidential, it is clear that each side seems to have used the DRM to signal dissatisfaction to the other. It has been applied in a more political manner than was intended. However, in order to avoid further damaging the JCPOA, neither side appears to have proceeded very far in the DRM process.[16] Furthermore, once the United States withdrew, there was disagreement among the remaining participants over whether operating procedures could function as they were or had to be revised since a key player was no longer in the deal. Finally, attempts by the remaining participants to collectively address

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13 F. Sabet, "A Fraught Road Ahead for the JCPOA?", UNIDIR, 20 August 2020, https://unidir.org/commentary/fraught-road-ahead-jcpoa.

14 European External Action Service, "JCPOA: Statement by the High Representative Josep Borrell as Coordinator of the Joint Commission of the Joint Comprehensive Plan of Action on the Dispute Resolution Mechanism", 17 July 2020, https://eeas.europa.eu/headquarters/headquarters-homepage/83095/jcpoa-statement-high-representative-josep-borrell-coordinator-joint-commission-joint_en; and L. Cook, "EU says Iran has Triggered Nuclear Deal Dispute Mechanism", Associated Press, 4 July 2020, https://apnews.com/article/9e1ac61d0918b930c-42da69d349df6ec.

15 "Iran Triggered Nuclear Deal's Dispute Resolution Mechanism Six Times – Top Diplomat", TASS, 4 July 2020, https://tass.com/world/1174845.

16 According to one report, "In each instance [of DRM use by Iran and the E3, respectively], the EU high representative, who coordinates the JCPOA parties through a Joint Commission, extended the timeline and in so doing essentially limited the claims to mutual expressions of dissatisfaction." See "The Iran Nuclear Deal at Five: A Revival?", Middle East Report no. 220, International Crisis Group, 2021, https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/iran/220-iran-nuclear-deal-five-revival, p. 3.

the sanctions issue outside the DRM have not fared better.[17] This is illustrated by Iran's gradual reduction of its compliance with the JCPOA since May 2019 without seeking approval through the DRM. Optimistically speaking, the mechanism nonetheless may have provided a methodology and a cooling-off period to prevent the dispute between Iran and the E3/EU from becoming a bigger crisis.

The sanctions snapback provision

As noted above, if a dispute remains unresolved at the end of the DRM process, and the complaining participant "deems the issue to constitute significant non-performance", it has the option to treat the issue as grounds to wholly or partly cease carrying out its commitments under the JCPOA. This is a first line measure a participant can take to enforce the JCPOA.

The logic behind the snapback was based on the E3/EU+3's assumption that the threat of sanctions – and the prospect of their lifting – would be a potent deterrent as well as enforcement mechanism for any nuclear deal with Iran.

The Iran nuclear deal's sanctions snapback provision is supposed to be the enforcement measure of last resort. In case of perceived significant Iranian non-performance of its commitments, and once the DRM process has been exhausted, the snapback can be activated by a JCPOA participant to reimpose previously suspended United Nations Security Council sanctions on Iran (and accompanying unilateral sanctions by United Nations Member States).

The snapback provision has its basis in an effort by the United States to move the Iran nuclear issue to the Security Council in 2006. While Iran has been under unilateral sanctions on-and-off since 1979, the web of multilateral sanctions put in place against it between 2006 and 2011 was in many ways unprecedented in the breadth and scope of the economic pain and diplomatic isolation they imposed. The logic behind the snapback was based on the E3/EU+3's assumption that the threat of sanctions – and the prospect of their lifting – would be a potent deterrent as well as enforcement mechanism for any nuclear deal with Iran. The mechanics work as follows:

> *If the issue still has not been resolved* [within the DRM] *to the satisfaction of the complaining participant, and if the complaining participant deems the issue to constitute significant non-performance, then that participant could treat the unresolved issue as grounds to cease performing its commitments under this JCPOA in whole or in part and/or notify the UN Security Council that it believes the issue constitutes significant non-performance.*
>
> *Upon receipt of the notification from the complaining participant . . . including a description of the good-faith efforts the participant made to exhaust the dispute resolution process specified in this JCPOA, the UN Security Council, in accordance with its procedures, shall vote on a resolution to continue the sanctions lifting.*[18]

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17 G. Mallard, F. Sabet and J. Sun, "The Humanitarian Gap in the Global Sanctions Regime: Assessing Causes, Effects, and Solutions", Global Governance, vol. 26, no. 1 (April 2020), pp. 121–153, https://doi.org/10.1163/19426720-02601003.

18 Security Council, S/RES/2231, 2015, https://undocs.org/S/RES/2231(2015), paragraphs 36–37.

VIENNA, AUSTRIA
Delegates attend a meeting of the Joint Commission of the Joint Comprehensive Plan of Action (JCPOA) on July 28, 2019.

If the resolution has not been adopted within 30 days of notification, then the provisions of the old Security Council resolutions would be reimposed, unless the Security Council decides otherwise. According to the same paragraph 37 of United Nations Security Council resolution 2231, "In such event, these provisions would not apply with retroactive effect to contracts signed between any party and Iran or Iranian individuals and entities prior to the date of application, provided that the activities contemplated under and execution of such contracts are consistent with this JCPOA and the previous and current UN Security Council resolutions." Thus, while resolution 2231 rendered obsolete the nuclear-related sanctions imposed on Iran in 2006–2011, it simultaneously reconsolidated them under the snapback provision. Should Iran engage in significant non-performance of its commitments under the nuclear deal, any JCPOA participant could trigger the snapback provision, restoring these resolutions. In some cases, it would also trigger the snapback of unilateral sanctions by individual United Nations Member States.[19] Should Iran, however, abide by its commitments under the JCPOA between 2015 and 2025, then the United Nations' restrictive measures on Iran would expire over time: the arms embargo in October 2020; ballistic missiles restrictions in 2023; and the snapback itself in 2025.

It is important to note that the snapback is an enforcement mechanism of the JCPOA over which the JCPOA itself has no enforcement powers. As with most other WMD treaties, these powers reside with the United Nations Security Council. But in the case of the JCPOA, there is a unique overlap between the membership of the E3/EU+3 and the P5—the five permanent members of the Security Council, which each hold a veto.

With this background in mind, the entire snapback mechanism was premised on an inherently unequal relationship between the JCPOA participants: the E3/EU+3, on one hand and Iran on the other. It also assumed that serious non-compliance would not come from the E3/EU+3 and, as a result, the JCPOA

19 J. Killick et al., "E3 Triggers Iran Nuclear Deal Dispute Settlement Mechanism (While EU Sanctions Lifting Continues for Now)", Alert, White & Case, 16 January 2020, https://www.whitecase.com/publications/alert/e3-triggers-iran-nuclear-deal-dispute-settlement-mechanism-while-eu-sanctions.

enforcement measure was focused on response to Iranian non-compliance. This complex machinery was designed to prevent P5 veto-holders in the Security Council sympathetic to Iran – namely Russia and China – from blocking the reimposition of sanctions should Iran have been found in non-compliance with its JCPOA commitments by deal participants.

Many of the JCPOA framers assumed that neither the United States nor the E3 would be likely to unilaterally reinstate sanctions on Iran if the Security Council did not provide them with a mandate to do so. This would hypothetically only happen if Iran failed to fulfil its commitments under the nuclear deal in a serious way. Furthermore, after the Security Council passed resolution 2231 in 2015, the JCPOA was enshrined into international law. This assuaged fears held by some in the United States that, even if a future administration was tempted to ignore the sanctions-lifting measures under the JCPOA, it would be less likely to challenge a legally binding Security Council resolution without an explicit Security Council vote to overrule resolution 2231. Despite the negotiators' best intention, the history since the adoption of the JCPOA brings several lessons to mind, speaking to both its efficacy and limits.

The first lesson, demonstrating efficacy, relates to the period after President Trump's withdrawal from the JCPOA in May 2018. This is when Iran entered the "maximum resistance" phase of its response to the United States' withdrawal and "maximum pressure" campaign. In this period, it is plausible that the possibility of the E3/EU, Russia or China still using the snapback mechanism restrained Iran from taking stronger steps to reduce compliance with its nuclear commitments under the JCPOA than it did. If activated through the proper channels, snapback would return Iran to its pre-JCPOA level of international isolation, without granting it any possibility to convince a friendly P5 state like Russia or China to use their veto power to block sanctions. The Iranian government seems to prefer that the sanctions snapback provision expire in 2025 without being triggered. During the period of tension surrounding the highly contested attempt by the United States to trigger snapback in 2020, some Iranian officials threatened withdrawal from the nuclear deal and even the NPT if this happened, underscoring the seriousness with which they viewed the mechanism.[20] The restraining effect of snapback may have been strengthened by the E3 decision to trigger the DRM in January 2020, and consultations between the E3 and the United States during the summer of 2020 around the question of snapback. This is a counterfactual scenario, which we cannot confirm without access to the deliberations of Iranian decision makers, but nonetheless is a compelling one.

This argument in favour of the efficacy of snapback is counterbalanced by at least two major design flaws in the compliance and enforcement framework of the JCPOA. As stated above, the Iran nuclear deal appears not to have planned for the possibility of serious non-performance by a JCPOA participant other than Iran. It is possible that such a possibility was simply not contemplated by the framers. A complementary explanation may be that the world powers were simply unwilling to even consider collectively submitting themselves to any real enforcement mechanism when they did not have to. The reality of international politics is that, while a Global South state like Iran can, under the right set of circumstances, be pressured to accept a temporary enforcement mechanism like snapback, such states are not really in a position to demand reciprocity from the world powers. Whatever the reason for this discrepancy,

20 F. Sabet, "A Fraught Road Ahead for the JCPOA?", UNIDIR, 20 August 2020, https://unidir.org/commentary/fraught-road-ahead-jcpoa.

the lack of enforcement mechanisms applicable to all states participating in the agreement became an Achilles heel in the Iran nuclear deal's compliance and enforcement framework.

When the Trump administration ceased participation in the Iran nuclear deal in May 2018, it chose not to trigger the DRM or snapback. Instead, the United States unilaterally launched its "maximum pressure" campaign. Later, however, as the October 2020 expiration date for the United Nations arms embargo on Iran approached, the United States asserted a continuing right to trigger snapback, while forgoing the DRM. It argued that, despite withdrawing from the Iran nuclear deal, it retained an inalienable right to trigger snapback as a named "JCPOA participant" in Security Council resolution 2231. The remaining participants and most members of the of the Security Council strongly rejected the United States' claim to have a right to trigger snapback. This was in part because of an international legal principle that prevents states from enjoying the benefits of a treaty from which they have withdrawn.[21] Thus, the result of the United States' attempt to trigger snapback in August 2020 was two parallel universes: one in which, according to the United States and a small handful of allies, the conditions for snapback had been met; and one in which, according to much of the rest of the world, they had not. After several months, the new United States administration of president Joseph R. Biden reversed its predecessor's claims.[22]

This has had at least one major knock-on effect to date and may have a second one in the future. The lack of an enforcement mechanism within Security Council resolution 2231 or the JCPOA for significant non-performance by a E3/EU+3 participant has meant that Iran's only way to respond to this precise scenario lies outside the framework of the deal. Had the E3/EU, China and Russia been able to deliver the benefits of sanctions relief in the deal to Iran – for example, through the E3's Instrument in Support of Trade Exchanges (INSTEX) or blocking statute[23] – Iranian nuclear escalation, may have been avoided altogether. However, the Trump administration's unilateral reimposition of sanctions, and the significant economic damage it has inflicted on Iran – going as far as to dissuade private companies of other states and even governments from doing business with Iran – incentivizes Iranian non-compliance to build leverage. This undermines the very purpose of the deal and possibly creates the conditions for more dangerous escalation on both sides. As a result, Iran has taken significant but largely reversible steps outside of the deal in terms of its nuclear commitments. A possible future knock-on effect of this design asymmetry and flaw is that other states, reflecting on the Iranian experience, may be more reluctant to agree to such enforcement mechanisms, even on a temporary basis, in similarly structured WMD treaties and agreements.

There is at least one more critique to be made of the snapback provision of the JCPOA. The text of Security Council resolution 2231 contains some indication that snapback was intended as a last resort for Iranian non-compliance. It notes in the same paragraph that "Iran has stated that if sanctions are

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21 M. Nichols, "Russia, China Build Case at U.N. to Protect Iran from U.S. Sanctions Threat", Reuters, 9 June 2020, https://www.reuters.com/article/us-usa-iran-russia-china-idUSKBN23G2YR.

22 M. Nichols, "U.S. Rescinds Trump White House Claim that All U.N. Sanctions Had Been Reimposed on Iran", Reuters, 18 February 2021, https://www.reuters.com/article/us-iran-nuclear-un-idUSKBN2AI2Y9.

23 INSTEX is an E3-backed special-purpose vehicle (SPV) officially established on 31 January 2019 to facilitate non-US dollar and non-SWIFT transactions between the EU and Iran, thereby avoiding entanglement with US sanctions. The EU blocking statute was formulated to protect EU operators from the extraterritorial application of third country laws, specifically US sanctions in the case of JCPOA implementation. See G. Mallard, F. Sabet and J. Sun, "The Humanitarian Gap in the Global Sanctions Regime: Assessing Causes, Effects, and Solutions", Global Governance, vol. 26, no. 1 (April 2020), pp. 121–153, https://doi.org/10.1163/19426720-02601003.

reinstated in whole or in part, Iran will treat that as grounds to cease performing its commitments under this JCPOA in whole or in part."[24] The E3/EU, Russia and China therefore have to carefully assess whether the perceived Iranian non-compliance in a dispute is worse than the prospect that Iran will cease performing all of its commitments under the JCPOA. Thus, a very high threshold must be met before it is worthwhile for a participant to trigger snapback. This opens a wide space below this threshold for non-compliance that may have little to no consequences. The architects of a future ME WMDFZ may want to consider the inclusion of enforcement tools falling at increments below this high threshold.

Lessons from the JCPOA's compliance and enforcement framework for an ME WMDFZ

Based on the above discussion, at least four main lessons for a WMD-Free Zone in the Middle East can be drawn from the JCPOA's compliance and enforcement framework. The lessons are limited by the basic distinction between the JCPOA and the Zone, which must be kept in mind throughout: the nature of the relationship between actors noted above. The JCPOA is an – inherently unequal – agreement between the world powers and Iran, whereas the ME WMDFZ treaty would be an agreement between state parties that are from the same region and would presumably enter the agreement on an equal footing. This distinction between the JCPOA and the Zone has slightly different implications for each of the lessons explored below.

A JOINT COMMISSION-LIKE BODY

The establishment of a Joint Commission-like governing body could be an important feature of an ME WMDFZ. There are analogous bodies in existing nuclear weapon-free zones. Such a body could facilitate implementation of and dispute resolution in any future Zone. It could become a regular forum for Middle Eastern states to meet, share information and cooperate on implementation of the Zone. An ME WMDFZ joint commission, by its very nature, could also serve as a confidence-building measure (CBM).

A DISPUTE-RESOLUTION MECHANISM

States of the Middle East may want to borrow some of the design elements of the JCPOA's DRM to resolve disputes over compliance with treaty obligations, albeit tailored to the specific dynamics and issues between the region's states. States party to a dispute can first be required to make a good-faith effort to resolve a dispute bilaterally within a set time period. Failing a resolution at this level, a DRM for the WMDFZ could then transfer the dispute to specialized working groups to see if a technical or another kind of resolution is possible. Again, in the absence of a resolution of the dispute, a complaining state party could escalate the dispute to the main decision-making body of the joint commission, setting aside a certain period to find a resolution. If the dispute persists, then the complainant could then escalate to the foreign minister-level or an advisory board (which, like the JCPOA board, could feature an independent member), again setting aside a certain period to find a resolution. From here, and as the final stage of the Zone's DRM, states of the region could vote to refer the dispute to the relevant technical international organisation (e.g. the IAEA) for a compliance determination.

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24 Security Council, S/RES/2231, 2015, https://undocs.org/S/RES/2231(2015).

The decision-making process of a WMDFZ joint commission in general and for a DRM in particular is likely to be contentious. Some Middle Eastern states may want decisions to be by consensus (in the case of a complaint, only among members states other than the state that is the target of the complaint), but this would be likely to make some aspects of general decision-making and the DRM unworkable. Other states may opt for a majority vote, whether it is just over half or a larger qualified majority. Among the existing regional authorities with jurisdiction on nuclear activities, EURATOM provides the most ambitious model of dispute resolution: litigation of disputes by a regional court (e.g. the Court of Justice of the EU, whose decisions are directly enforceable within member states of the EU).[25] The geo-strategic situation in the Middle East may not allow for the adoption of such a model at the outset but (as in the case of Europe) it could be adopted over time as regional circumstances improve.

DELEGATION OF VERIFICATION AND MONITORING

This naturally leads to the third issue: who should verify and monitor ongoing compliance with the provisions of an ME WMDFZ and make compliance determinations. This is where the compliance and enforcement framework of a Zone should diverge from the JCPOA in some key respects. Given the dearth of trust between many Middle Eastern states, as well as limited legal and technical capacities, technical international organisations like the IAEA, the Comprehensive Nuclear-Test-Ban Treaty Organisation (CTBTO) and the Organisation for the Prohibition of Chemical Weapons (OPCW) could potentially be delegated the role of verifying and monitoring a Zone treaty. This could have at least three elements: legal-technical capacity building to make sure all states in the region are able to comply; implementing a WMD safeguards verification and monitoring system for the ME WMDFZ (bespoke or otherwise); and reporting to the joint commission. Unlike the JCPOA the compliance determination for the purpose of a DRM should arguably not be done by states in the region, but as is in other NWFZs, by the technical international organisations, whose decisions are more likely to be considered objective and legitimate and less likely to be politicized. Some may object to this arrangement and prefer a wholly regional technical organisation to verify and monitor compliance, with member states or the Zone's JC making compliance determinations. Assigning this role to existing technical international organisations appears more technically and politically realistic at the time of writing, but some kind of hybrid model may be possible.

In contrast to the JCPOA, which largely incorporated only one kind of enforcement measure, namely the sanctions snapback provision that was very politically sensitive and could be used only in extreme cases, Zone enforcement sanctions could run along a gamut based on the severity of the non-compliance in question.

ENFORCEMENT AT THE REGIONAL AND INTERNATIONAL LEVELS

Once a technical international organisation makes a compliance determination, enforcement action could be taken either at the regional level by the ME WMDFZ joint commission, at the international level by the United Nations Security Council, or both. The principal enforcement instrument that comes to mind based on the experience of the JCPOA are sanctions. The JCPOA experience with sanctions has arguably been negative for Iran and problematic for the E3/EU+3, China, and Russia. Furthermore, several current and former officials as well as experts from the region and beyond have denied the utility

25 G. Mallard, "A Treaty Establishing a Community of Atomic Energy in the Middle East: A Proposal with Comments", Background paper, Robert Schuman Centre for Advanced Studies, 2010, https://gregoiremallard.com/my-projects/international-law-and-the-nuclear-trade/5.

of sanctions or a "carrot and stick" approach for a Zone, instead arguing that the region's states should focus on positive inducements.[26] But, in the words of Richard Holbrook, the late United States foreign policy veteran: "What else fills in the gap between pounding your breast and indulging in empty rhetoric and going to war besides economic sanctions?"[27] Sanctions are thus likely to remain one of the principal tools of international statecraft that balance cost and effect to generate pressure and enforcement action. Given the Middle East's history of WMD proliferation, the states of the region may want to have a strong, sanctions-based enforcement mechanism in an ME WMDFZ.

The decision to take regional level enforcement action could be made by a Zone joint commission after a technical international organisation has made a non-compliance determination towards a state in the region. However, unlike the JCPOA, where any participant state could make a compliance determination on the path to enforcement action, this decision should be reached collectively by a joint commission, either by consensus or a qualified majority. If and when regional circumstances allow for a regional court, such a court could be given a limited jurisdiction on WMD matters, where claims could be aired and/or appealed, should some aspects of the ME WMDFZ be modelled after EURATOM. Additionally, and in contrast to the JCPOA, which largely incorporated only one kind of enforcement measure, namely the sanctions snapback provision that was very politically sensitive and could be used only in extreme cases, Zone enforcement sanctions could run along a gamut based on the severity of the non-compliance in question. This could range from the largely symbolic that 'name and shame', to targeted sanctions on proliferation-related activities, to more potent ones that impose a total trade embargo on the non-compliant state. The types of sanctions at the disposal of Middle Eastern states would depend on the state of political, economic and security relations between them at the time an ME WMDFZ is negotiated. For example, economic sanctions may not be a very effective enforcement tool if the level of economic ties between the states is negligible. Still, we would expect that the creation of the Zone would be decided as part of a larger regional process that is at least partly intended to increase economic exchanges, among other forms of normalisation and regionalisation.

Alternatively, or in addition to a regional ME WMDFZ enforcement mechanism, Middle Eastern states could elect to have an international enforcement mechanism. For example, the United Nations Security Council could act as an external guarantor of a Zone in some fashion. A Zone joint commission or technical international organisation, having made a non-compliance determination, could send it to the Security Council for enforcement action. The latter would then be empowered to act along a spectrum based on the severity of the non-compliance. United Nations Member States, among them the United States and European states, could link the relief of any existing WMD sanctions programmes on states in the region they have at the time to compliance with an ME WMDFZ treaty as an inducement. Existing United Nations, United States and EU WMD-related sanctions in the Middle East are currently mainly against Iran and the Syrian Arab Republic. Of course, the P5 could have a range of reasons – namely strong diplomatic, economic and security ties to a member state of the ME WMDFZ that is the subject of a complaint – to veto Security Council action on a referral from the Zone joint commission or technical

26 This position was expressed by several regional experts in a UNIDIR event entitled From The Iran Nuclear Deal To A Middle East Zone? Lessons From The JCPOA For The ME WMDFZ, held under the Chatham House Rule.

27 D. Rieff, "Were Sanctions Right?", New York Times Magazine, 27 July 2003, https://www.nytimes.com/2003/07/27/magazine/were-sanctions-right.html.

international organisation. It will thus ultimately be up to the region's states to decide how best to enforce compliance with Zone treaty obligations.

Another potential problem with such an enforcement mechanism would be making sanctions-lifting credible, as some regional states could have doubts based on the Iranian experience. While the Security Council, the United States and the European states have become adept at imposing sanctions, lifting them, and making sure that former target states receive the economic benefits of sanctions relief is a different matter altogether. Once sanctions are instituted, they can be very difficult (and states reluctant to) lift them, and even harder to make the lifting have effect by convincing private sector actors to delist previously listed entities or jurisdictions marked as "high risk".[28] This is due to stringent finance legislation to counter money laundering, terrorist financing and proliferation that have placed a heavy burden on the compliance departments of institutions managing global trade and finance. Thus, for the Zone negotiators to consider sanctions relief as a realistic and credible inducement, it is likely that a new sanctions lifting machinery needs to be put in place at the international, national, and local levels (e.g. the New York Department of Financial Services) before trust in the credibility of sanctions lifting commitments by the Security Council, the United States and the EU, to implement their part of an agreement can be restored, especially within the private sector. In the same vein, regional states will be sceptical about sanctions relief as an inducement as state-led sanctions relief does not always result in the expected economic benefits by a target state. As such, private actors, which today are ambivalent about the notion of sanctions relief and participation in economic activity in formerly sanctioned jurisdictions given the experience of the JCPOA, need to be better incorporated into the process that leads up to the creation and implementation of any future relief mechanisms including in the context of a Zone. As with any possible future JCPOA talks, there should ideally be multi-stakeholder negotiations.

Lastly, hope may also come from the civil society sector, and member states of the Treaty on the Prohibition of Nuclear Weapons (TPNW), which privilege the reliance and non-state actors in the monitoring of disarmament obligations. In contrast to the JCPOA, the TPNW resulted from a multi-stakeholder dialogue that involved the private and civil society sectors, and in this regard, it holds the promise of involving the concerns of the private sector. It also contains interesting provisions that emulate the criminalisation of private sector involvement in WMD acquisitions, making it problematic for private actors to engage in "assistance" to nuclear weapons development. Private sector actors (either global banks or private industry) that are likely to commit such crimes are those with financial ties to P5 military-industrial complexes and non-NPT nuclear weapon states. If fully enforced at the member-state level among TPNW state signatories, this provision may be interpreted in a way that the entry into force of the TPNW may mean banks located in its member-states may be prevented from selling shares of (or providing other services to) big military-industrial conglomerates like Lockheed Martin, BAE, or Matra, as well as Middle Eastern entities active in the nuclear weapons field. Exclusion from the markets

28 A state can be the target of multiple kinds of sanctions (WMD proliferation, terrorism, human rights, etc.), such that even if one or more of the sanctions are lifted, others remains in place, thereby perpetuating their economic effect. Domestic politics, namely the need of sanctions relief to be approved by a legislation body, partisan conflict, and the activism of special interest groups, can also impede sanctions lifting. The private sector, for its part, can have a range of reasons to prohibit or limit its relationship with previously sanctioned jurisdictions even after sanctions are lifted. In general private companies are risk-averse and will be slow to forge business relations with a country that was under sanctions. G. Mallard and A. Hanson. 2021. "Embedded Extra-Territoriality: US Judicial Litigation and the Global Banking Surveillance of Digital Money Flows." In *Handbook on Unilateral and Extraterritorial Sanctions*, edited by Charlotte Beaucillon. London: Edward Elgar.

of Austria, Mexico, or New Zealand, three signatories of the Treaty that have ratified it, may not be as dissuasive for the private sector as market exclusion from the United States, but as more states add their signatures, then a real move toward nuclear divesting could begin by a global mobilisation in favour of the abolition of WMDs, not only in the Middle East, but everywhere.

The JCPOA's Joint Commission, Dispute Resolution Mechanism and even its problematic sanctions snapback provision could feasibly inform, in one form or another, an effectively governed Zone with a robust compliance and enforcement system.

As the preceding discussion in this sub-section makes clear, the sanctions experience of the JCPOA, at least in its current form, does not lend itself well to replication in a ME WMDFZ. However, their use over the last few decades has inexorably accelerated and they remain one of the few available instruments between diplomacy and force to enforce vitally important WMD agreements and treaties. Sanctions have shown their propensity to become more potent, but also reform - for example as demonstrated by the shift to targeted sanctions in the late-1990s and early-2000s - and thus may have a place in the enforcement of a future Zone.

Conclusions

The compliance and enforcement framework of the Joint Comprehensive Plan of Action has many valuable lessons for future negotiations on a Middle East WMD-Free Zone and a possible treaty. The JCPOA's Joint Commission, Dispute Resolution Mechanism and even its problematic sanctions snapback provision could feasibly inform, in one form or another, an effectively governed Zone with a robust compliance and enforcement system. The real challenge will be in finding political will, consensus, and ways to implement these lessons in a realistic manner in the context of possible future ME WMDFZ negotiations or even a treaty. While some old barriers between states in the Middle East are coming down, the region remains deeply polarized. A spirit of regionalism will be needed if the states of the Middle East are to agree to be collectively governed in such a manner, not to mention the perception that this will enhance both their individual and collective security.