

Sanctions Relief for Iran Without Congressional Approval

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If he is willing to pay the political price, President Obama can give Iran as much economic relief as he wishes by simply not enforcing existing sanctions.

Among the participants in the October 15-16 Iran nuclear talks in Geneva was the U.S. official who administers most of Washington's sanctions against the regime -- Adam Szubin, director of the Treasury Department's Office of Foreign Assets Control (OFAC). His presence, and the agreement that sanctions experts would have a follow-up meeting before the next round of negotiations on November 7, was a sign that the United States is willing to discuss easing sanctions if Tehran takes steps to scale back the troubling parts of its nuclear program. The U.S. government has imposed many different sanctions on Iran under many different legal authorities -- some by executive order, some by legislation -- raising questions about what relief the president could provide without congressional approval. In addition to obvious measures such as lifting executive orders and using his waiver authority to bypass restrictions imposed by law, the president has other options should he find it necessary to offer timely sanctions relief in exchange for substantive Iranian compromises.

THE ILSA PRECEDENT

To better understand these options, it is useful to examine how the executive branch has provided sanctions relief to Iran in the past. The most important example concerns the 1996 Iran and Libya Sanctions Act (ILSA), which mandated that one or more of a menu of sanctions be imposed in the event of large foreign investments in Iran's oil and gas industry. The law also provided for presidential waivers, either for individual investment projects or for all investments from a given country.

The Clinton administration was unwilling to impose ILSA sanctions in the face of strong European objections that they were extraterritorial applications of U.S. law. Accordingly, it used its project waiver authority for the only project ever targeted under ILSA (the South Pars gas development initiative, designated in 1998). And although the administration was unwilling to make use of its country waiver for political reasons, it found another way to avoid sanctioning certain allies -- in April 1997, Undersecretary of State for Economic, Business, and Agricultural Affairs Stuart Eizenstat negotiated an agreement with European representatives under which Washington signaled that it would not impose any ILSA sanctions on European firms.

Many in Congress were displeased by this sidestep, viewing it as a pledge not to enforce the law. In renewing ILSA in 2001 and passing subsequent laws that replaced it, Congress tried to ensure enforcement, but these efforts were in vain for years (until September 2010). Although Congress forced the Clinton and George W. Bush administrations to spend much time justifying their Iran policy -- arguing that their successes, such as they were, would be jeopardized if ILSA's provisions were enforced -- at the end of the day, sanctions were not applied. In a 2007 report, Congressional Research Service analyst Kenneth Katzman identified at least \$11 billion in investments that were subject to ILSA, but penalties were never imposed. The State Department's Bureau of Economic Affairs continued to report to Congress every six months that it was investigating but had not determined that any of these projects met the ILSA criteria. In many cases, administration officials correctly noted that press reports about investments are often inaccurate, though that hardly explained the failure to designate upon further investigation. Such practices, so common during the Clinton and Bush administrations, only changed under Obama.

THE OBAMA ADMINISTRATION'S APPROACH

The U.S. government's practice has long been to respect the discretion of investigators and prosecutors in prioritizing law enforcement. It is therefore a well-established norm that certain federal crimes are not prosecuted in the event of small-scale violations. For instance, U.S. Attorneys typically set minimum thresholds for prosecution of narcotics cases. President Obama has followed past practice in discussing this process of discretion and prioritization. As he told *Rolling Stone* in 2012 regarding marijuana laws, "I can't ask the Justice Department to say, 'Ignore completely a federal law that's on the books.' What I can say is, 'Use your prosecutorial discretion and properly prioritize your resources to go after things that are really doing folks damage.'"

Indeed, his administration has made extensive use of the prosecutorial-discretion argument in situations where Congress has not acted on proposed legislative changes. In June 2012, for example, after Congress repeatedly

failed to pass the DREAM Act and other measures regarding the immigration status of individuals who came to the United States illegally as children, the administration stopped initiating deportation proceedings against some 800,000 immigrants who arrived in America before age sixteen and met other criteria. It took this action despite strong objections from many in Congress.

While the president may have to pay a heavy political price for not enforcing a given law, some in Congress might prefer that the White House bear that responsibility. In the case of Iran, such an approach could allow Washington to reach a nuclear accord without Congress having to vote on rescinding, even temporarily or conditionally, certain sanctions. No matter how stiff and far-reaching sanctions may be as embodied in U.S. law, they would have less bite if the administration stopped enforcing them.

For instance, the Obama administration could turn a blind eye by following the ILSA precedent, claiming that it is unable to verify press reports that a particular country is purchasing Iranian oil. Or it could take a more subtle approach by simply easing up on its enforcement efforts. Implementing the many Iran sanctions has required much work to ferret out front companies, and the resources currently being committed represent a drastic increase from past years (e.g., a 2007 Government Accountability Office report criticized OFAC for opening more investigations and imposing more penalties on individuals found carrying Cuban cigars at U.S. airports than for violations of Iran sanctions). If the administration were to scale back the resources devoted to enforcing these sanctions, they would be less effective.

To be sure, major businesses have changed their internal procedures and norms to comply with sanctions rules over the past decade. Given the large fines imposed for past violations, they may be hesitant to test U.S. laws against doing business with Iran even if the administration relaxes its enforcement efforts.

HOW WOULD IRAN REACT TO DE FACTO SANCTIONS RELIEF?

Ideally, Iran would no doubt prefer formal legislative sanctions relief over de facto relief via nonenforcement. In practice, however, that distinction may not matter much to Iranian decisionmakers, even if they claim otherwise in negotiations.

Iran has years of experience in evading U.S. sanctions. Long after the ban on nearly all U.S. exports other than food and medicine, Iranian importers were able to procure American goods without great difficulty through front companies and intermediaries in third countries. Based on this track record, Tehran was confident that it could evade the new sanctions Congress enacted in 2011-2012. Ali Akbar Salehi, the foreign minister at the time, noted recently that senior officials waved off his warnings that the new restrictions would bite hard. What these officials may not have realized was that the tougher laws would be accompanied by much more vigorous enforcement.

Iran would obviously prefer full access to U.S. markets and the U.S. financial system, which could only be attained through formal lifting of all sanctions. But that will not happen even if a nuclear deal is reached, since many of the sanctions in question are at least partly based on the regime's support for terrorists and massive violations of human rights.

OBAMA CAN DO AS HE SEES FIT

The extent to which President Obama can provide sanctions relief to Iran is largely a political question. He may find it advantageous -- either for domestic political reasons or as a bargaining technique with Tehran -- to complain that his hands are tied by Congress. Although that argument would be true in terms of the law, it is definitely not true with regard to de facto sanctions relief. If the administration deems it necessary to erode sanctions in order to reach a nuclear deal, reducing enforcement and eschewing action against the many new front companies Iran is constantly creating would do the trick.

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