

Proliferation Financing: The Potential Impact of the Nuclear Agreement with Iran on International Controls

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Abstract

The UN framework of controls on financing of proliferation included, until 16 January 2016, Implementation Day of the JCPOA, financial provisions of resolution 1540 (2004) and financial sanctions on DPRK and on Iran. To implement financial sanctions effectively, States were required to put in place appropriate legislation, structures and procedures that could also serve, at least in part, to implement financial requirements under resolution 1540. Following Implementation Day, sanctions on Iran have been removed or replaced by “specific restrictions” under UN resolution 2231 (2015), and in consequence the UN framework of controls on financing of proliferation has been loosened. Even before Implementation Day, assessments published by the Financial Action Task Force (FATF) suggested that few States properly implemented one of the key controls on proliferation - targeted financial sanctions. Following Implementation Day, and despite the looser UN framework of controls, it will be important that States maintain in place effective legislation, structures and procedures to ensure they can identify and disrupt financing of proliferation.

Keywords

Proliferation financing, resolution 1540, Iran, DPRK, resolution 2231, financial sanctions, Joint Comprehensive Plan of Action (JCPOA)

Introduction

The financing of proliferation of weapons of mass destruction (WMD) is prohibited by international sanctions and controls, including a framework of United Nations (UN) Security Council resolutions. Detecting and disrupting circumvention of these sanctions and controls is an important element of the international community’s efforts to combat proliferation.² Financial transactions connected with proliferation usually take place at least in part through the global financial system, so detection and disruption is usually focused on that system.³

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²Council of the European Union, “Council Conclusions and New Lines for Action by the European Union in Combating the Proliferation of Weapons of Mass Destruction and their Delivery Systems,” 17172/08, Brussels, December 17, 2008.

³FATF, “FATF Typologies Report on Proliferation Financing,” June 18, 2008, <<http://www.fatf-gafi.org/media/fatf/documents/reports/Typologies%20Report%20on%20Proliferation%20Financing.pdf>>; United Nations, “Final Report of the Panel of Experts

The UN framework has been modified following the successful start of the Joint Comprehensive Plan of Action (JCPOA). On 16 January 2016, Implementation Day of the JCPOA, UN sanctions resolutions (four in total) on Iran were terminated.⁴ Their financial provisions were either removed altogether or replaced by financial restrictions under UN resolution 2231 (2015). This is not a sanctions resolution.

The purpose of this paper is to highlight the possibility that states may be tempted to divert the resources previously devoted to financial sanctions on Iran and use them to bolster work taking place against other priorities. The paper outlines the UN framework of controls before Implementation Day and examines available evidence, albeit limited, of how well UN Member States implemented them. The paper makes the case that resources devoted to implementation of UN financial sanctions may also assist in implementation of financial measures under resolution 1540 (2004).

The paper concludes that diversion of resources following Implementation Day, if any, must be done with great care. There is a continuing need to implement financial controls on Iran under resolution 2231 (2015), even though these are time-limited.⁵ There is a need to monitor the JCPOA and ensure no cheating. States are obliged to implement UN sanctions on proliferation and proliferation financing by the DPRK. A recent successful prosecution of financing of proliferation is a timely reminder to states and the private sector that identifying and disrupting such activity should remain a high priority.⁶

Background

There is no universally-recognised definition of financing of proliferation. The definition used in this paper follows that adopted by the Financial Action Task Force (FATF), i.e. “the act of providing funds or financial services which are used, in whole or in part, for the manufacture, acquisition, possession, development, export, trans-shipment, brokering, transport, transfer, stockpiling or use of nuclear, chemical or biological weapons and their means of delivery and related materials (including both technologies and dual use goods used for non-legitimate purposes), in contravention of national laws or, where applicable, international obligations.”⁷

The current UN framework of controls against proliferation financing includes measures in resolution 1540 (2004) and subsequent resolutions, the five sanctions resolutions on the Democratic Peoples Republic of Korea (DPRK) and restrictions on the Islamic Republic of Iran.^{8,9,10}

The UN Framework to Combat the Financing of Proliferation: Before Implementation Day

The UN framework to combat the financing of proliferation rests on two pillars. One pillar was (and still

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⁴ UN Security Council Resolution 1737, S/Res/1737, 2006; UN Security Council Resolution 1747, S/Res/1747, 2007; UN Security Council Resolution 1803, S/Res/1803, 2008; UN Security Council Resolution 1929, S/Res/1929, 2010.

⁵ UN Security Council Resolution 1737, S/Res/1737, 2006; UN Security Council Resolution 2231, S/Res/2231, 2015 contains provisions for the re-imposition of UN sanctions in the event of “significant non-performance” of the JCPOA.

⁶ Andrea Berger, “Thanks to the Banks: Counter-Proliferation Finance and the Chinpo Shipping Case,” 38 North, 16 December 2015, < <http://38north.org/2015/12/aberger121615/>>.

⁷ FATF, “Combatting Proliferation Financing: A Status Report on Policy Development and Consultation,” February 2010, < <http://www.fatf-gafi.org/media/fatf/documents/reports/Status-report-proliferation-financing.pdf>>. FATF’s methodology for assessing technical compliance with FATF Standards, and effectiveness of their implementation, is described in the FATF publication: Methodology for Assessing Technical Compliance with FATF Recommendations and the Effectiveness of AML/CFT Systems, February 2013.

⁸ UN Security Council Resolution 1673, S/Res/1673, 2006; UN Security Council Resolution 1810, S/Res/1810, 2008, UN Security Council Resolution 1977, S/Res/1977, 2011.

⁹ UN Security Council Resolution 1718, S/Res/1718, 2006; UN Security Council Resolution 1874, S/Res/1874, 2009; UN Security Council Resolution 2087, S/Res/2087, 2013, UN Security Council Resolution 2094, S/Res/2094, 2013 and the most recent, UN Security Council Resolution 2270, S/Res/2270, March 2016.

¹⁰ UN Security Council Resolution 2231, S/Res/2231, 2015.

is) resolution 1540 (2004). This resolution requires States to adopt and enforce legislation which prohibits financing of activities prohibited under the resolution. Prohibitions include WMD-related activities by non-State actors and their financing. The term “non-State actors” is not defined, but could include any entity or individual that is not acting under control of the State.¹¹ In addition, States are required to maintain effective export controls, including controls on provision of related funds and financial services.¹²

The second pillar for combatting proliferation financing is comprised of UN Security Council Chapter VII resolutions on Iran and DPRK.¹³ Implementation of such resolutions is mandatory for all UN Member States although it is for States to determine how they do so. The resolutions included (and in the case of DPRK still include) a variety of provisions intended to halt or slow Iran’s or DPRK’s proliferation-related activities, including four categories of financial sanctions:^{14,15}

Targeted Financial Sanctions (TFS)

TFS require the freezing of funds, other financial assets and economic resources of designated entities and individuals, as well as those of persons or entities acting on their behalf or at their direction, or of entities owned or controlled by them.¹⁶ Designated individuals and entities were listed on the websites of the Security Council Committees established pursuant to resolution 1737 (2006) for Iran, and resolution 1718 (2006) for DPRK. Forty-three individuals and 78 entities were designated for Iran, and 12 individuals and 20 entities for DPRK. They included five financial institutions: Bank Sepah and Bank Sepah International, and First East Export Bank (in the case of Iran) and Amrogang Development Banking Corporation, Bank of East Land and Tanchon Commercial Bank (for DPRK).¹⁷ The numbers of designated banks were not large by comparison with the numbers designated under unilateral sanctions (such as those of the European Union or United States), but UN sanctions were obligatory on all Member States and their implementation effectively blocked these banks from accessing the international financial system.

¹¹ Definitions of non-State actors include a variety of organisations. For example, the Report of the International Law Association Hague Conference (2010) on Non State Actors included the private sector as well as armed groups in the term.

¹² Two paragraphs of resolution 1540 (2004) make explicit reference of financing. Under paragraph 2 of resolution 1540 (2015) States “... in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or *finance* them”; and under paragraph 3(d), States are required to “Establish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as *financing*, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations” (italics are mine). Paragraph 9, without making a specific reference, clearly extends, financing: “... States [are called upon] to promote dialogue and cooperation on non- proliferation so as to address the threat posed by proliferation of nuclear, chemical, or biological weapons, and their means of delivery.”

¹³ UN Security Council Resolution 1718, S/Res/1718, 2006; UN Security Council Resolution 1874, S/Res/1874, 2009; UN Security Council Resolution 2087, S/Res/2087, 2013, UN Security Council Resolution 2094.

¹⁴ Financial measures included in a further Security Council resolution imposed on DPRK on 3 March 2016, UN Security Council Resolution 2270, S/Res/2270, 2016, are described in footnotes 35, 36 and 37 below.

¹⁵ These categories are further defined in FATF’s Guidance: FATF, “The Implementation of Financial Provisions of United Nations Security Council Resolutions to Counter the Proliferation of Weapons of Mass Destruction,” June 2013, < <http://www.fatf-gafi.org/documents/documents/unscr-proliferation-wmd.html>>.

¹⁶ For Iran: Paragraphs 12 to 15 of resolution 1737 (2006), paragraph 6 of resolution 1747 (2007), paragraph 7 of resolution 1803 (2008) and paragraphs 11, 12 and 19 of resolution 1929 (2010); for DPRK, paragraph 8(d) of resolution 1718 (2006), paragraph 7 of resolution 1874 (2009), paragraph 5(a) of resolution 2087 (2013) and paragraph 8 of resolution 2094 (2013).

¹⁷ Although under UN sanctions on Iran only two banks were designated, under unilateral sanctions regimes, in particular those of the US and EU, most of Iran’s other major banks were also designated. The UN Panel on Iran created pursuant to resolution 1929 (2010) noted instances of trading companies established by Iranians overseas apparently being used to facilitate financial transactions, perhaps in attempts to circumvent these sanctions (paragraph 194 (c) of the 2012 Report, and Annex V of the 2014 Report, of the Panel of Experts created pursuant to resolution 1929 (2010).

Activity-based Sanctions

These prevented the transfer of financial resources or services related to the supply, sale, transfer, manufacture and use of proliferation-sensitive items that were prohibited for transfer to Iran or DPRK. They also prevented the provision of financial services and transfer of financial assets or resources which could contribute to prohibited activities by Iran or DPRK.^{18,19}

Vigilance Requirements:²⁰

In the case of Iran, States were obliged to ensure individuals and entities were vigilant when doing business with Iran. States were also called upon to exercise vigilance in the provision of any financial assistance or services to Iran, and vigilance over the banking sector's interaction with Iran's banks (in particular with Bank Melli and Bank Saderat, and also the Central Bank of Iran). In the case of DPRK, States are called upon to exercise vigilance and monitoring over business conducted with DPRK financial institutions, and also over DPRK diplomatic personnel (in connection with cash smuggling). In practice, many States exercised vigilance by requiring transactions with individuals or entities in Iran for example, if over a certain limit, to be licensed.²¹

Other Financial Provisions:²²

In the case of Iran these included a prohibition on initiating new business between Member States banks and Iranian banks if related to prohibited activities. In the case of DPRK, States are called upon not to provide grants and loans, or support for trade and new business with banks if connected with prohibited activities.

Prior to Implementation Day, how well in fact were the two pillars of the UN framework being implemented? On the basis of available information it is difficult to answer this question with more than general, qualitative statements. Resolution 1540 (2004) for example makes no provision for formal assessment of its implementation by Member States. A few clues can be found in reports published by the Committee established pursuant to resolution 1540 (2004), in particular the Committee Report of 2011, summarized in the table below.²³ The Committee noted in this report that, rather than implementing legislation directed specifically at financing of proliferation, in many of the cases in this table States had used existing anti-terrorism and anti-money-laundering enforcement legislation to criminalize the financing of illicit activities relating to nuclear, chemical and biological weapons and their means of delivery. Legislation directed specifically at financing of proliferation is rare.

¹⁸ For Iran, paragraph 6 of UN Security Council Resolution 1737, S/Res/1737, 2006, paragraphs 8, 13 and 21 of UN Security Council Resolution 1929, S/Res/1929, 2010; for DPRK, paragraph 8(c) of UN Security Council Resolution 1718, S/Res/1718, 2006, paragraphs 9, 10 and 18 of UN Security Council Resolution 1874, S/Res/1874, 2009, paragraph 5(b) of UN Security Council Resolution 2087, S/Res/2087, 2013, and paragraphs 7, 11, 14 and 20 of UN Security Council Resolution 2094, S/Res/2094, 2013.

¹⁹ In the case of Iran, prohibited activities included proliferation-sensitive nuclear activities or the development of nuclear weapon delivery systems. In the case of DPRK they included nuclear-related, ballistic missile-related and other WMD-related programmes.

²⁰ For Iran: Paragraph 6 of UN Security Council Resolution 1747, S/Res/1747, 2007, paragraphs 9 and 10 of UN Security Council Resolution 1803, S/Res/1803, 2008, paragraph 22 of UN Security Council Resolution 1929, S/Res/1929, 2010; For DPRK, paragraph 18 of UN Security Council Resolution 1874, S/Res/1874, 2009, paragraph 6 of UN Security Council Resolution 2087, S/Res/2087, 2013, and paragraph 24 of UN Security Council Resolution 2094, S/Res/2094, 2013.

²¹ E.g. Council Regulation (EU), No 961/2010 of 25 October 2010 on Restrictive Measures against Iran, 2010.

²² For Iran: Paragraph 7 of UN Security Council Resolution 1747, S/Res/1747, 2007, paragraph 7, 23 and 24 of UN Security Council Resolution 1929, S/Res/1929, 2010; for DPRK, paragraphs 19 and 20 of UN Security Council Resolution 1874, S/Res/1874, 2009 and paragraphs 12 and 13 of UN Security Council Resolution 2094, S/Res/2094, 2013.

²³ UN, "Report of the Committee Established Pursuant to Resolution 1540 (2004)," September 12, 2011, paragraphs 54 and 74.

	2008	Dec 2010	
Legislative measures to prevent financing of:	Nuclear weapons	66	125
	Chemical weapons	71	128
	Biological weapons	64	121
Enforcement measures to prevent financing of:	Nuclear weapons	78	120
	Chemical weapons	87	122
	Biological weapons	75	114
States with measures in place against the financing of illicit trade transactions related to nuclear, chemical and biological weapons, their means of delivery and related materials	29	49	

Compared to the total number of UN Member States (193) these numbers are low. However, they increased significantly between 2008 and December 2011 and if the trend continued it can be assumed that many UN Member States have some sort of framework for implementing financial aspects of resolution 1540 (2004), even if this framework is not set out specifically in terms of financing of proliferation.

UN sanctions resolutions, and resolution 2231 (2015), similarly make no formal provision for assessment of their implementation by Member States. The best available information can be found in reports of relevant UN Panels.²⁴ Qualitative assessments by these Panels suggest most States were implementing financial sanctions reasonably well. For example, the Panel on Iran found in 2012 "...a high level of awareness among Member States and the private sector of United Nations financial sanctions. Many Member States are implementing sanctions through their financial regulatory bodies with rigour."²⁵ The Panel on DPRK assessed in 2014 that "Financial measures in the resolutions, along with the strengthening of standards governing international finance, have combined to change fundamentally the financial environment in which the Democratic People's Republic of Korea operates."²⁶

However, when implementation is looked at in more detail, this conclusion looks overly-positive, as demonstrated by reviews published by FATF and FATF-style regional bodies (FSRBs). As part of FATF's review of Member States under the mutual evaluation process, a formal assessment is made of implementation of one specific element of UN controls on proliferation, TFS, under Recommendation VII.²⁷ Assessments published to date of performance against Recommendation VII provide insights into the challenges of UN TFS implementation, and the legislation, structures and procedures set up by individual countries to meet them.²⁸ The results of these assessments are summarized in Table I below. The data all pre-date Implementation Day.

²⁴ In the case of DPRK these are: UN document S/2010/517 of 5 November 2010, S/2012/422 of 14 June 2012, S/2013/337 of 11 June 2013, S/2014/147 of 6 March 2014 and S/2015/131 of 23 February 2015. In the case of Iran they are S/2012/395 of 12 June 2012, S/2013/331 of 5 June 2013, S/2014/393 of 5 June 2014 and S/2015/401 of 2 June 2015.

²⁵ UN, "Report of 12 June 2012 of the UN Panel Created Pursuant to 1929 (2010)," June 2012, Paragraph 208.

²⁶ UN, "Report of 6 March 2014 of the UN Panel established pursuant to resolution 1874 (2009)," March 2014, Paragraph 164.

²⁷ Recommendation 7 of the FATF Standards of 2012 states that «Countries should implement targeted financial sanctions to comply with United Nations Security Council resolutions relating to the prevention, suppression and disruption of proliferation of weapons of mass destruction and its financing. These resolutions require countries to freeze without delay the funds or other assets of, and to ensure that no funds and other assets are made available, directly or indirectly, to or for the benefit of, any person or entity designated by, or under the authority of, the United Nations Security Council under Chapter VII of the Charter of the United Nations.» <<http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html>>.

²⁸ See for example Chapter IV of the Mutual Evaluation Report of Spain of December 2014, the first such report to evaluate a country's implementation of Recommendation 7.

Table 1: Assessments Published to Date of Performance against Recommendation VII²⁹

Country and Date of Publication of FATF/FSRB Review	Technical Compliance¹ with Recommendation VII	Effectiveness of Implementation² of Recommendation VII (Measured by Immediate Outcome 11)
Spain (Dec 2014)	Partially Compliant	Moderate
Norway (Dec 2014)	Partially Compliant	Moderate
Belgium (Apr 2015)	Partially Compliant	Moderate
Australia (Apr 2015)	Compliant	Substantial
Ethiopia (Jun 2015)	Non-Compliant	Low
Malaysia (Sep 2015)	Partially Compliant	Substantial
Sri Lanka (Oct 2015)	Non-Compliant	Low
Vanuatu (Oct 2015)	Non-Compliant	Low
Samoa (Oct 2015)	Non-Compliant	Low
Cuba (Dec 2015)	Largely Compliant	Moderate
Costa Rica (Dec 2015)	Non-Compliant	Low
Armenia (Jan 2016)	Partially Compliant	Substantial
Italy (Feb 2016)	Partially Compliant	Substantial
FATF Technical Compliance Ratings		
Compliant	There are no shortcomings	
Largely Compliant	There are only minor shortcomings.	
Partially Compliant	There are moderate shortcomings.	
Non-Compliant	There are major shortcomings.	
FATF Effectiveness Ratings		
High level of effectiveness	The Immediate Outcome is achieved to a very large extent. Minor improvements needed.	
Substantial level of effectiveness	The Immediate Outcome is achieved to a large extent. Moderate improvements needed.	
Moderate level of effectiveness	The Immediate Outcome is achieved to some extent. Major improvements needed.	
Low level of effectiveness	The Immediate Outcome is not achieved or achieved to a negligible extent. Fundamental improvements are needed.	

The data set is as yet very limited (there will probably be in total more than 180 reviews of FATF or FSRB jurisdictions assessed in due course against Recommendation VII) and may not be representative of FATF/FSRB States in total.³⁰ However, it can be seen immediately from Table 1 that with the exception

²⁹ The information in this table is taken from the FATF website <fatf-gafi.org>.

³⁰ According to a statement on FATF's website "Over 180 jurisdictions around the world have committed to the FATF

of Australia, no country has been assessed by FATF or by a FSRB as meeting the requirements to be rated at the top of the scale (“Compliant”) with the technical requirements of Recommendation VII. The scores against technical requirements of the majority of States cluster in lower parts of the scale, in the “Partially Compliant” or “Non-Compliant” categories. Against FATF measures for effectiveness of compliance with Recommendation VII, no country has been assessed at the top of the scale (“Highly Effective”) although the majority of States cluster towards the middle of this scale (“Substantial” or “Moderate”).

In summary, the data, albeit limited, show that the majority of States were not implementing FATF Recommendation VII to a satisfactory standard before Implementation Day. It seems reasonable to conclude, therefore, that the majority of UN Member States were probably not implementing UN TFS to a satisfactory standard, and, likely, were not implementing the full range UN financial sanctions to a satisfactory standard.

There are a number of reasons why this may have been the case. Transactions associated with financing of proliferation may be difficult to distinguish from legitimate transactions. The goods or materials involved may not be distinctive and the sums involved may not stand out.³¹ Iran and DPRK practice deception to try to hide their involvement in the transactions. The channels used for financing may be separate, possibly in foreign jurisdictions, and so difficult to match with related goods and materials. Financial authorities or institutions may not have access to relevant information. Finally, there is relatively little work publicly available about typical typologies (the most recent compilation was published by FATF in 2008).³²

The UN Framework to Combat the Financing of Proliferation: After Implementation Day

The provisions of resolution 1540 (2004) remain of course unchanged. The four UN sanctions resolutions on DPRK also remain unchanged but in addition the Security Council has subsequently imposed a fifth resolution, 2270 (2016). This contains additional TFS (two more financial institutions are designated: Daedong Credit Bank (also known as Taedong Credit Bank) and the Korea Kwangson Banking Corporation), activity-based sanctions, and other financial provisions.^{33,34,35} However, in the case of Iran, the Security Council has terminated all sanctions, and in their place resolution 2231 (2015) imposes a variety of new controls (referred to as “specific restrictions”).³⁶ These are mandatory and time-limited, as follows:

Procurement by Iran that was previously prohibited under UN sanctions, together with provision of related financial assistance and transfer of financial resources and services, is now permitted so long as the Security Council approves each transaction on a case-by-case basis:

1. For nuclear goods and materials, procurement must take place through a “procurement channel,” with ultimate approval by the Security Council.³⁷ This requirement ceases ten years after 18 October 2015;³⁸

Recommendations through the global network of FSRBs and FATF memberships,” <fatf-gafi.org>.

³¹ UN, “UN Panel on Iran Report of June 2013”, Paragraph 143, < http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_331.pdf>.

³² FATF, “FATF Report on Typologies of Proliferation Financing,” 2008, < <http://www.fatf-gafi.org/publications/methodsandtrends/documents/typologiesreportonproliferationfinancing.html>>.

³³ UN Security Council Resolution 2270, S/Res/2270, 2016, paragraph 32.

³⁴ UN Security Council Resolution 2270, S/Res/2270, 2016, paragraph 37.

³⁵ UN Security Council Resolution 2270, S/Res/2270, 2016, paragraphs 33, 34, 35 and 36.

³⁶ UN Security Council Resolution 2231, S/Res/2231, 2015, paragraph 18.1 of Annex V of Annex A.

³⁷ See Annex IV to Annex A (the JCPOA) of UN Security Council Resolution 2231, S/Res/2231, 2015.

³⁸ Or sooner if the IAEA reaches a “Broader Conclusion” regarding Iran’s nuclear programme. A “Broader Conclusion” that “all nuclear material remains in peaceful activities” requires IAEA to conclude both that no indication exists of diversion of declared nuclear materials and that no indication exists of undeclared nuclear material or activities. See IAEA Safeguards, “Staying Ahead of the Game,” 2007, p.18, <<https://www.iaea.org/sites/default/files/safeguards0707.pdf>>.

2. For procurement related to missile technologies, the requirement for approval by the Security Council ceases eight years after 18 October 2015;³⁹
3. For procurement of certain categories of conventional arms, the need for approval ceases five years after 18 October 2015.⁴⁰

States must continue to freeze funds, other financial assets and economic resources that are owned or controlled by individuals or entities listed by the UN. Although in many respects this requirement is identical to requirements under UN sanctions TFS, some differences exist:

1. The provision expires eight years after 18 October 2015;⁴¹
2. Only 23 individuals and 62 entities, connected with Iran's ballistic missile activities, conventional arms transfers or the IRGC, are listed.⁴² They comprise those remaining on the list maintained by the 1737 Sanctions Committee after entities and individuals directly connected with Iran's nuclear programme, and Bank Sepah, were removed on or following Implementation Day;⁴³
3. The 23 individuals and 62 entities are not included in the UN's consolidated sanctions list of designations under all UN sanctions regimes, but listed separately.^{44,45} This is consistent with resolution 2231 (2015) not being a sanctions resolution;
4. Under UN sanctions prior to Implementation Day, requirements to freeze funds, other financial assets and economic resources of listed individuals and entities extended also to entities owned or controlled by listed individuals or entities, and to individuals or entities acting on their behalf or at their direction. Resolution 2231 (2015) contains no language requiring such extension;
5. Exemptions in place under UN sanctions remain in their same general form under resolution 2231 (2015) but are also extended.⁴⁶

Additional asset freezes must be imposed by States on individuals and entities that may be designated by the Security Council for involvement in activities contrary to Iran's commitments under the JCPoA, for assisting designated individuals or entities evading or acting inconsistently with the JCPoA or resolution 2231 (2015), for acting on behalf or at the direction of designated individuals or entities, or for being owned or controlled by designated individuals or entities.

Following Implementation Day all activity-based financial sanctions, requirements for vigilance and other financial measures are terminated.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Or sooner if the IAEA reaches a "Broader Conclusion" regarding Iran's nuclear programme.

⁴² United Nations Security Council, "Resolution 2231 List," <<http://www.un.org/en/sc/2231/list.shtml>>.

⁴³ UN, "Security Council Removes Bank Sepah and Bank Sepah International from 2231 List," January 17, 2016, <<http://www.un.org/press/en/2016/sc12209.doc.htm>>. Bank Sepah was listed because of its connections to Iran's ballistic missile programmes.

⁴⁴ United Nations Security Council, "Consolidated United Nations Security Council Sanctions List," <<https://www.un.org/sc/suborg/en/sanctions/un-sc-consolidated-list>>.

⁴⁵ United Nations Security Council, "Resolution 2231 List," <<http://www.un.org/en/sc/2231/list.shtml>>.

⁴⁶ These exceptions include basic expenses (subject to notification to the Security Council); extraordinary expenses (subject to approval by the Security Council); if subject to judicial lien etc (subject to notification to the Security Council), in connection with civil nuclear cooperation and activities required for implementation of the JCPoA (both also subject to approval by the Security Council).

The Changes to the Framework of UN Controls on Financing of Proliferation

UN sanctions were imposed on Iran in response to prohibited proliferation activities, so it is logical that these sanctions, including financial sanctions, should be modified under resolution 2231 (2015). The JCPOA and resolution 2231 (2015) comprise a series of steps which, if successfully implemented, will enable a determination by the IAEA and the international community that Iran's nuclear programme is exclusively peaceful in nature and of no proliferation concern.

Furthermore, although financial sanctions on Iran have formally been removed, resolution 2231 (2015) has in effect created a new type of control on proliferation and the financing of proliferation: the need for Security Council approval of procurement and related financial assistance or transfer of financial resources or services, on a case-by-case basis. Financing of any relevant procurement that takes place outside this framework could be considered not only a violation of resolution 2231 (2015) but also financing of proliferation.

However, in other respects resolution 2231 (2015) loosens the UN framework of controls on financing of proliferation following Implementation Day. First, consistent with resolution 2231 (2015) not being a sanctions resolution, the specific restrictions are scheduled to terminate after set periods of time. Iran is not reliant on their termination by a Security Council decision. Termination could take place even if Iran fails to comply with the resolution, so long as any such failure does not constitute "significant non-performance" with the JCPOA and a trigger of "snap-back" provisions.⁴⁷ Furthermore, even though "snap-back" provisions apply to the JCPOA, no such provisions exist in respect of non-compliance by Iran with other controls on proliferation or its financing under resolution 2231 (2015), such as ballistic missile activities. A Security Council resolution would be necessary to penalize Iran for any such non-compliance.

Second, Resolution 2231 (2015), not being a sanctions resolution, includes no provision for the creation of a Security Council Committee or an independent Panel of Experts to provide guidance or advice to Security Council or Member States regarding implementation of the resolution, or to investigate reports of possible violations. Although the UN Secretariat will take on some of these tasks, it may not have the expertise nor independence of a Panel of Experts. Furthermore its terms of reference include no requirement to investigate allegations of non-compliance.⁴⁸ In summary therefore not only are financial restrictions under Resolution 2231 (2015) weaker than under UN sanctions, but it is possible that the resolution itself may not be as well policed as were UN sanctions.

Potential Impact of these Changes on Implementation of Controls on Financing of Proliferation

In addition to loosening the global framework of controls on financing of proliferation, resolution 2231 (2015) may weaken the commitment of individual States to maintain in place appropriate structures and procedures to control it. It is too soon after Implementation Day to test whether this has happened, but the relevant UN structures, and FATF, will need to be vigilant for any indications.⁴⁹ There are two potential dangers: first, to financial sanctions on DPRK that States must continue to implement; and second, because structures and procedures to implement sanctions can also contribute to the capacity of Member States to implement effectively financial measures under resolution 1540 (2004).

Examples of structures and procedures are described in annual reports of the UN Panels on Iran and on DPRK

⁴⁷ See Annex A (the JCPOA) of UN Security Council Resolution 2231, S/Res/2231, 2015.

⁴⁸ UN, "Note by President of the Security Council: Security Council Tasks under Security Council resolution 2231 (2015)," S/2016/44, January 16, 2016, < http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2016/44&referer=http://www.un.org/en/sc/2231/note.shtml&Lang=E>.

⁴⁹ In the case of UN sanctions on DPRK, the Panel, and in the case of resolution 2231 (2015) the UN Secretariat structures set up under the note referenced in footnote 41.

published by the Security Council.⁵⁰ They include, for example, effective inter-departmental coordination of policy, and of operational responses (such as disruption), in response to information about attempts to circumvent financial sanctions and financing of proliferation. Fundamental is effective inter-departmental communication: in the case of TFS, for example, the need to identify assets of designated individuals or entities requires mechanisms for exchange of relevant information which might be sensitive or classified. Mechanisms for exchanging sensitive or classified information with overseas partners are also vital.

Crucial, in addition, are effective procedures and channels for communication between authorities and the private sector. These should be capable of handling information that may be commercially sensitive or classified intelligence, including regarding policy issues as well as specific information about suspicious individuals or entities.⁵¹ Financial institutions in turn must be required to submit relevant Suspicious Activity Reports. These should be investigated and, if appropriate, action taken to disrupt proliferation activity.⁵²

Successful implementation of UN sanctions on financing of proliferation requires significant investment of resources and effort in these structures and procedures. States may be tempted, in the light of the successful start to the JCPOA, to assume that the need to implement such sanctions is less pressing, and so be tempted to divert resources elsewhere. This they must do, if at all, with extreme care. There is a continuing need to implement financial controls on Iran under resolution 2231 (2015) and a need to monitor the JCPOA and ensure no cheating. In addition, States remain obliged to implement UN sanctions to counter the financing of proliferation by the DPRK.

The importance of ensuring that existing structures and procedures are not permitted to wither is demonstrated by the very small number of reports, even to date, of identification and disruption of financing of proliferation. A recent case (December 2015) in which a defendant was found guilty by a Singaporean court of providing financial services or transferring financial assets or resources “that may reasonably be used to contribute to the nuclear-related, ballistic missile-related, or other weapons of mass destruction-related programs or activities of the Democratic People’s Republic of Korea,” simply demonstrates that cases are rarely brought to trial.⁵³ Even in the cases of suspicious transactions reports submitted by banks on the basis of proliferation, subsequent prosecutions are almost always based on other grounds (for example, export control violations). Prosecutions of related financial activity, on the rare occasions these take place, are usually based on money-laundering or other offences.⁵⁴

The second area of potential danger is the undermining of the capacity of Member States to implement financial measures effectively under resolution 1540 (2004). These measures (see footnote 9 above) are set out in only in general terms. The resolution mandates no standards or procedures. There are no specific requirements, for example, to freeze assets, conduct vigilance or implement activity-based financial sanctions. Member States must decide for themselves what measures to take, and the resources to devote to the task.

In the absence of mandated standards or procedures, some guidance can be found in certain of the financial provisions of UN sanctions on Iran and on DPRK. These in some respects resemble the financial provisions

⁵⁰ See footnote 20.

⁵¹ Paragraph 188 of UN, “Report of 2012 of UN Panel of Experts pursuant to resolution 1929 (2010),” 2012.

⁵² See example described in paragraph 23 of UN, “Final report of the UN Panel on Iran,” S/2013/331, 2013.

⁵³ Under Regulation 12b of Singapore’s United Nations Regulations, 2010.

⁵⁴ For example, Karl Lee (aka Li Fang Wei), indicted on a series of charges related to procurement of WMD-related goods and materials that included money-laundering and wire fraud. Funds have been seized in the US in connection with alleged violations of US sanctions law by overseas companies owned by Lee, see US Department of Justice, ““Karl Lee” Charged in Manhattan Federal Court with Using a Web of Front Companies to Evade U.S. Sanctions,” April 29, 2014, <<http://www.justice.gov/opa/pr/karl-lee-charged-manhattan-federal-court-using-web-front-companies-evade-us-sanctions>>.

of resolution 1540 (2004). For example, language in UN resolutions regarding activity-based financial sanctions is similar to that in paragraph 2 of resolution 1540 (2004) under which States are required to “...adopt ...laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery ...as well as attempts to engage in any of the foregoing activities ... or finance them.”⁵⁵

Similar language, relating to “manufacture, transfer and use” of items, and references to “activities”, can also be found in the former UN sanctions resolutions on Iran: States were a) required to “...take the necessary measures to prevent the provision ... of ... financial assistance, investment ... and the transfer of financial resources or services, related to the supply, sale, transfer, manufacture or use of... items, materials, equipment, goods and technology...” which could contribute to prohibited nuclear activities or to the development of nuclear weapon delivery systems; and b) called upon to prevent the provision of financial services...or the transfer ... of any financial or other assets or resources ... that ... could contribute to Iran’s proliferation-sensitive nuclear activities.”⁵⁶

Similarly under UN resolutions relating to DPRK states are required to a) “...prevent any transfers ... of services...related to the provision, manufacture, maintenance or use...” of items prohibited for “direct or indirect transfer” to DPRK”; and b) “...prevent the provision of financial services or the transfer of any financial or other assets or resources... that could contribute to [DPRK’s prohibited WMD programmes] ... or other activities prohibited by [UN sanctions resolutions] ...”.⁵⁷

Separately, under paragraph 3(d) of resolution 1540 (2004), States are required to implement “...export and trans-shipment controls over nuclear, chemical or biological weapons and their means of delivery including appropriate laws and regulations to control ... funds and services ... such as financing... that would contribute to proliferation.” Effective implementation of this requirement requires states, in order to control “funds and services such as financing”, to determine precisely what items fall into the category of “nuclear, chemical or biological weapons and their means of delivery.”

Provisions of UN sanctions resolutions on Iran and DPRK relating to funding and financing of items subject to export controls contain similar language, but in addition they reference specific lists of items that fall into the category of “nuclear, chemical or biological weapons and their means of delivery”. For example, with regards to Iran, states were required to “take the necessary measures to prevent the provision to Iran of ... financial assistance ... and the transfer of financial resources or services, related to the supply, ... transfer ... of the prohibited items ...”.⁵⁸ Resolutions on DPRK require states to prevent “...services ... related to provision ...” of prohibited items.⁵⁹ In the case of both Iran and of DPRK, the resolutions state that the prohibited items referred to are those on relevant versions of lists published by the Nuclear Suppliers Group and by the Missile Technology Control Regime.^{60,61}

It is very likely therefore that despite the absence of mandated standards or procedures under resolution 1540 (2004), and the difficulties of many Member States in determining what constitutes implementation to

⁵⁵ United Nations Security Council Resolution 1540, S/Res/1540, 2004, paragraph 2.

⁵⁶ Paragraph 6 of United Nations Security Council Resolution Resolution 1737, S/Res/1737, 2006 and paragraph 13 and 21 of United Nations Security Council Resolution 1929, S/Res/1929, 2010.

⁵⁷ Paragraphs 8(a) and 8(c) of United Nations Security Council Resolution 1718, S/Res/1718, 2006, paragraph 11 of United Nations Security Council Resolution 2094, S/Res/2094, 2013.

⁵⁸ Paragraph 6 of United Nations Security Council Resolution Resolution 1737, S/Res/1737, 2006.

⁵⁹ Paragraph 8 of United Nations Security Council Resolution 1718, S/Res/1718, 2006.

⁶⁰ See current version at: “NSG Guidelines Dual Use List,” Nuclear Suppliers Group, <<http://www.nuclearsuppliersgroup.org/en/news/148-update-of-nsg-control-lists>>.

⁶¹ See current version at: “MTCR Equipment, Software, Technology Annex,” Missile Technology Control Regime, <<http://www.mtcr.info/english/annex.html>>.

a satisfactory standard, those states that already possess legislation, structures and procedures to implement sanctions on Iran and on DPRK are also in a position to implement effectively, at least in part, financial measures of resolution 1540 (2004). Hence, any diversion of resources and or dilution of procedures related to financial monitoring and control, following Implementation Day, could impact on the ability of states to combat effectively financing of proliferation under resolution 1540 (2004). This might matter less if states were already implementing UN controls on financing of proliferation satisfactorily, but as described above, most are probably not.

FATF's Role in Assessing Implementation of UN Resolutions on Financing of Proliferation

Asset freezes under the specific restrictions of resolution 2231 (2015) are similar to TFS on Iran that existed prior to Implementation Day, so FATF could presumably assess their implementation in future, in some form. Recommendation 7 and FATF's mutual evaluation procedures would need to be modified. It will be important that FATF does so in order to provide an independent assessment of States' implementation of resolution 2231 (2015), and to continue to contribute fully to international efforts to ensure that UN controls on proliferation are effectively implemented.

Other elements of UN sanctions on financing of proliferation, such as activity-based sanctions and vigilance, are not covered by FATF Recommendations. FATF has published a number of other papers on proliferation financing and guidance regarding their implementation.^{62,63} The latter in particular will also need to be updated following Implementation Day.

Conclusion

The framework of UN controls on financing of proliferation has been loosened following Implementation Day. UN sanctions on Iran, including financial sanctions, are substituted by specific restrictions of varying timescales culminating, after ten years, with lifting of sanctions⁶⁴. The financial requirements of UN sanctions on DPRK, recently extended, and resolution 1540 (2004) must continue to be implemented. It remains as important as ever that states have in place effective measures to identify and disrupt financing of proliferation.

The mechanisms and procedures put in place by states to implement Iran and DPRK sanctions can be used to implement resolution 1540 (2004), at least in part. States need to ensure that such mechanisms and procedures are not allowed to wither following Implementation Day. It is too early to say whether this is happening, but the relevant UN structures, and FATF, need to be vigilant for any signs that it is. FATF will in particular need to consider how to incorporate asset freezing elements of resolution 2231 (2015) into Recommendation 7. FATF assessments of how well FATF countries are implementing financial measures under this resolution will contribute to ensuring that the UN framework of controls on financing of proliferation is maintained effectively.

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⁶² FATF, "FATF Report on Typologies of Proliferation Financing," 2008, <<http://www.fatf-gafi.org/publications/methodsandtrends/documents/typologiesreportonproliferationfinancing.html>>; FATF, "Combatting Proliferation Financing: A Status Report on Policy Development and Consultation," February 2010, <<http://www.fatf-gafi.org/media/fatf/documents/reports/Status-report-proliferation-financing.pdf>>.

⁶³ FATF, "The Implementation of Financial Provisions of United Nations Security Council Resolutions to Counter the Proliferation of Weapons of Mass Destruction," 2013, <<http://www.fatf-gafi.org/documents/documents/unscr-proliferation-wmd.html>>.

⁶⁴ "...provided that the provisions of previous resolutions have not been reinstated.", paragraph 23 of the JCPOA, Annex A (the JCPOA) of UN Security Council Resolution 2231, S/Res/2231, 2015.