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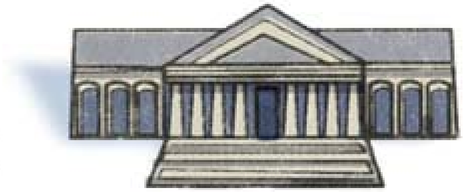
Global Coverage



DECEMBER 2016

SPECIAL POST-ELECTION CAPITOL EDITION FROM PHILLIPS LYTLE

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U.S. Sanctions Policy

A regular feature of the President-elect's campaign speeches was his vow to undo many of the actions taken by the current Administration in lifting sanctions on certain regimes and imposing them on others. In promising to do so, he relied on the fact that many of these actions were taken by Executive Order – and could thus be similarly undone by Executive Order – and has announced his intention to "rescind or renegotiate" them to get "better deals." Whether he will proceed in this fashion remains to be seen. Much may depend upon who is appointed to key advisory positions and whether the nations involved are amenable to coming some part of the way to meet him on specific issues of his concern.

But the new Administration may find that the scope for such measures may be more limited than anticipated – in this case, by a number of external factors, such as a) the multilateral nature of some of the sanctions agreements, complicating and limiting the effectiveness of unilateral action by the U.S.; b) the extent to which U.S. businesses have become involved and invested in new markets opened up by improved relations; and c) the extent to which the leverage to negotiate a "better deal" may be less than previously thought.

One constraint on quick and disruptive action may be Congress which, while led by his party, may differ at times with his negotiating priorities; and which has a number of tools at its disposal to make its preferences known and felt.

CUBA

The area in which such a difference of priorities may first be found is Cuba. The Obama Administration sought, largely by Executive Order, to normalize relations with Cuba to the extent possible without running afoul of the basic embargo statute (mandated under legislation renewed and expanded in 2000). Such steps included fostering non-state trade delegations and associated travel, support for private entrepreneurs, medical and scientific exchanges, private aid and increasing relaxation of the ban on individual travel.

The President-elect has threatened to "terminate" the effort to normalize relations, and roll back the Executive Orders, unless the Cuban regime takes measures to free political prisoners and take other, as yet-unspecified, steps toward a more open society. The recent passing of former Cuban premier Fidel Castro has highlighted the potential dilemma confronting the new Administration. While the regime has a dismal human rights history, the demise of Castro is seen by some as auguring a new opportunity by which freer travel and exchanges can support progress.

In fact, it appears that many of the steps taken by the Obama Administration have become popular at home with the very constituency that most opposed the regime: anti-Castro Cuban Americans. And U.S. commercial airlines, which recently began direct flights to Cuba, have put in place plans quickly to reach 110 flights to Cuba each day. Major U.S. hotel interests, including Starwood and Marriott, are in discussions regarding potential sites on the island. Such ties – and investment – would need to be unraveled very carefully, if at all.

It is also reported that significant U.S. agricultural interests intend to ask Congress to expand the current agricultural exemption to allow purchases of U.S. food on U.S.-extended credit, currently prohibited by statute.

One possibility: the new Administration could make symbolic rescissions (downgrading the status of the new U.S. Havana mission, re-tightening restrictions on individual travel, reducing official contacts) while quietly allowing bilateral investment and trade deals to continue – thus indicating displeasure with the regime while still remaining "pro-business," as promised.

Our assessment at this stage would be to look for movement on restoration of barriers rescinded by President Obama's Executive Orders to proceed slowly and cautiously, despite occasional mixed rhetoric from the transition team and the new Administration.

IRAN

The Joint Comprehensive Plan of Action (JCPOA), effective January 15, 2016, rescinded so-called "secondary sanctions" – those affecting non-U.S. third parties in their dealings with the Islamic Republic of Iran – in exchange for Iran's agreement to limitations on its development of nuclear weapons (so-called "primary sanctions," those prohibiting U.S. persons or companies from having business dealings with Iran or Iranian persons or enterprises, are statutory and still in force). It was adopted by Executive Order and international "political agreements" that President Obama, having calculated that it would not garner the necessary votes to gain ratification as a treaty, opted to proceed by Executive Order (surviving an attempted vote of disapproval in the Senate).

Criticism of the JCPOA or, as he called it, "the terrible, terrible Iran Deal" became a staple of the President-elect's campaign speeches. In his skepticism about Iranian motives and intentions, he is likely to find ample support on Capitol Hill – in the just-finished Congressional lame duck session, both Houses passed (unanimously in the Senate, nearly so in the House) a bill extending and expanding Iran Sanctions for 10 years (President Obama is expected to sign). Moreover, unlike with the Cuba relaxations, American business (with the exception of the aviation and aviation support industry, recipients of special consideration under the JCPOA – see Boeing's proposed $16.8 billion sale of 80 aircraft, just announced) is generally much less invested, due to existing prohibitions.

There is no question of the President's legal authority to rescind the Executive Orders and “agreements” and, if necessary, invoke the "SnapBack" reservation under the JCPOA upon making the appropriate finding. As secondary sanctions relief was achieved by terminating Executive Order sanctions or by statutory waivers, it is clearly reversible by the President. Some may argue that the United Nations' adoption of the JCPOA under President Obama limits the President's rescission authority; it's a fine point that a determined President is unlikely to find dispositive.

Such rescission could effect the relisting of certain Iranian banks and persons to the “Specially Designated Nationals”(SDN) list; revoke the current licenses for the sale of U.S. aircraft, equipment or components to Iran; preclude foreign companies with any U.S. ownership from doing business with Iran; restrict foreign financial institutions and insurers using dollars from dealing in Iranian currency or facilitating investment in Iranian energy, shipping or shipbuilding; and other activities.

Practical considerations, however, may well limit the President's scope and timing in taking such a step. A major complication is that the JCPOA is a multilateral, multinational agreement – five other nations are involved. The other nations, several of whom have worked and invested much to open up and pursue trade and investment relations with Iran, are unlikely blindly to follow any unilateral U.S. invocation of the "SnapBack" provision. Much of the sanctions relief also came from the lifting of UN and EU sanctions, which would require a formal and, at this point, somewhat politically improbable process to reinstate. And unilateral American withdrawal might be used to provide the Iranian regime with an excuse to proclaim U.S. bad faith, and scrap any constraints imposed upon it by the deal. President-elect Trump, when President, will certainly be reminded of these concerns.

Further, it should be noted that the President-elect's stated intention to "renegotiate" might well be undercut by diminished leverage; Iran has already recovered billions of dollars in embargoed funds and cash.

Nevertheless, it bears noting that even just the threat of unilateral reimposition of secondary sanctions by the U.S. could have substantial economic impact. Such a threat could well have the effect of raising the risks, and therefore the costs, of doing business with Iran – especially for money center banks, shipping insurers, and others who hedge or clear in dollar denominated transactions.

RUSSIA

Few of the new Administration's foreign relations dealings are likely to be scrutinized more closely than those involving Russia and its leader, Vladimir Putin. Whether factual or not, much was made of alleged Russian attempts to interfere in the election, and of the President-elect's ostensible desire for more cooperative relations with Russia and with Putin. As current U.S. sectoral sanctions (imposed upon certain named individuals and enterprises, primarily in energy and banking, rather than on a nation or regime) are not statutory but were imposed by President Obama via Executive Orders, what President-elect Trump may do will be watched carefully. The authority rests in his hands.

Other nations are watching as well, and perhaps looking for some sign of the direction the new Administration will take. The European Union (EU) sanctions imposed on Russia after its annexation of the Crimea (and renewed every 6 months since) are set to expire on January 31, 2017, if not renewed again. The EU next meets formally to consider renewal on December 15-16, 2016.

Since the relevant Executive Orders apply individually to a number of different persons and businesses, the future President will have the option (should he desire) of relaxing some, all or none of the sanctions, in any combination, as he sees fit. He may see in that some potential room for maneuver, or not. Signals have been scarce in this regard. It's probably fair to presume that clarity regarding the new approach will likely await the naming and arrival of the new President's foreign policy team.

Until then, the world, and prospective investors, will be watching and waiting.

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