The Last Word: Iran and the JCPOA: The state of play and what the future may hold

Ian Bolton examines the state of negotiations between Iran, the US, and the other signatories of the JCPOA. The article also casts an eye on the possible futures and what they mean for the private sector, especially financial institutions.

Ever since President Biden took office there have been high expectations that the US would re-join the Joint Comprehensive Plan of Action ('JCPOA')[1] and Iran would come back to full compliance with it. A deal had been expected swiftly so all sides could focus on other priorities. Negotiations are still ongoing. Additionally, even if the US re-joins the JCPOA and Iran becomes fully compliant, there are numerous other concerns, such as money laundering and support of terrorist activity, that may mean the desired outcome of sanctions relief and international trade and investment does not come to fruition. Importantly for the private sector to re-engage with Iran these risks, and companies' own internal risk appetites, must be appropriately mitigated, and they must feel confident that, should they re-invest, they won't have to rapidly withdraw from Iran as they did in 2018.

Background

The JCPOA was negotiated by the P5+1[2] and Iran between 2012 and 2015, and sought to provide assurances and controls to Iran's nuclear programme in return for sanctions relief. The JCPOA was agreed in 2015 and implemented into international law in January 2016. The resulting lifting of sanctions meant that for the first time since 2006, Iran stood open for business and inward investment. Even though sanctions had been lifted, many private sector firms were reluctant to re-engage with Iran and re-invest. For some companies this was due to previous experience of falling foul of sanctions, such as Standard Chartered, who were fined in 2012 by the US Government for sanctions violations relating to processing Iranian money through the US financial system in violation of US law.[3] For companies the uncertainty of the longevity of the deal provoked reluctance. After all, the deals passage through the US Congress had been far from plain sailing,[4] and there was significant opposition, especially within the Republican party ahead of Presidential elections in November 2016. Other companies were concerned by the wider operating environment, with Iran having a poor human rights record[5] and amid ongoing support for designated terrorist organisations. Concern amongst international FIs was so great that the UK Government arranged for then-US Secretary of State John Kerry to address a meeting of the banks to show the US support for the deal and urge them to re-engage.[6] Many FIs, however, took the decision not to as part of their own internally-set sanctions policy for Iran. Nevertheless, several international companies like BNP Paribas, Total and Volkswagen did re-invest in Iran.[7] Indeed, SWIFT, the network that provides and enables FIs to send and receive information about financial transactions, re-admitted a few Iranian banks.[8]

US withdraws from JCPOA

However, in May 2018 following President Trump's election, the US withdrew from the JCPOA[9] and re-imposed substantial sanctions on Iran. Whilst this was happening Iran's implementation of the JCPOA, and the degree to which it stuck to its obligations, varied dramatically. Even from the start, compliance had been inconsistent, and currently the E3[10] have voiced significant concerns over Iran's activity,[11] especially a lack of transparency with the International Atomic Energy Agency ('IAEA'). Recent Iranian announcements of developments, including beginning enrichment of uranium to 60%,[12] far more than what is needed for civil nuclear purposes, have caused concern.

The withdrawal of the US from the JCPOA had an almost instant sobering effect on foreign private sector investment into Iran, and the number of international companies prepared to transact with Iranian companies.[13] This didn't stop with the withdrawal, as President Trump sought to pursue a policy of maximum pressure[14] on Iran and levied sanctions well beyond those that the US had previously enforced. The US designated the Central Bank of Iran as a terrorist entity,[15] and exerted pressure on SWIFT for the Iranian banks to once again be disconnected from the system. By November 2018, this had happened.[16] With the withdrawal of the US from the JCPOA, the private sector once again had mitigate US sanctions risks relating to Iranian activity, including the possibility of companies becoming designated under secondary sanctions. Many companies immediately withdrew from operating and/or supporting business activity in Iran, such as Airbus[17] and Total[18]. In most cases it was because of concerns that, in the absence of licences or exemptions from the US, covering any activity in Iran they may be found in breach of sanctions, or in the worst-case scenario become the target of US sanctions. As companies pulled out of Iran they lost significant investment and faced substantial financial repercussions.

The economic impact on Iran was significant and instant. Iran rightly complained to the remaining signatories of the JCPOA that with US sanctions in place once again, the benefits promised to them under the JCPOA were not forthcoming. In response, the E3 announced the creation of a special purpose vehicle, INSTEX, for funding humanitarian assistance to Iran.[19] Additionally, the EU updated its Blocking Statute, which sought to protect European companies from the extraterritorial reach of US companies.[20] Despite this, most private sector firms continued to de-risk business with/in Iran, due to internal risk appetite and, increasingly, wider concerns. For FIs these were wider financial crime concerns, as set out by the Financial Action Task-Force ('FATF') when, in 2018, FATF blacklisted Iran for failing to address money-laundering and terrorist financing issues.[21] The remaining signatories continued to fight for the survival of the JCPOA, whilst the E3 also recognised many of the issues that it had not tackled and which threatened peace and security in the Middle East, such as Iran's ballistic missile development, and support of terrorist organisations.

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Ongoing negotiations

For all of the issues with the JCPOA, it is still recognised as serving a purpose in curtailing Iran's potential nuclear weapons programme in return for sanctions relief. It was therefore acknowledged as a key early foreign policy objective of the new Biden Administration to negotiate a US return to the JCPOA.[22] At the beginning of the year, it was anticipated that this would be something that both the US and Iran would want to see happen quickly, for several reasons, including the continuing bite of US Iran sanctions, and the recent Iranian Presidential elections in June. Talks between the P5+1 and Iran began in April to seek a solution. However, these have made slow progress, with both Iran and the US believing the other side should make the first concessions. Key asks for the US are that Iran return to full compliance before any sanctions relief is given,[23] and that agreement for the US to return to the JCPOA be followed by the start of negotiations on a new deal that builds on the JCPOA. For Iran, sanctions relief must come before the US is re-admitted to the JCPOA, and any agreement of a deal building on from the JCPOA should be independent of this.[24] Additionally, as Kelsey Davenport of the Arms Control Association made clear when talking to *FISC* for this article, 'Iran also want guarantees that a different US Administration wouldn't be able to do the same thing Trump did in withdrawing US support for the JCPOA'. This is both undesirable and unachievable for the Biden Administration, as there is no way to limit the power of a future US Administration.[25] Despite the election of the more hard-line President Raisi in Iran on 18 June, Iran remains committed to the negotiations and a resolution.[26] This in part shows the importance of Ayatollah Khamenei in the process, as he ultimately holds the power in Iran. In spite of a current hiatus in the ongoing negotiations and the separate sides being some way from agreement, it is likely that the US will re-join the JCPOA and Iran will return to full compliance.

The future

What comes next is a bigger question. The JCPOA was agreed with a number of sunset clauses written into it. The first of these was constraints on Iran's ability to purchase and sell conventional weapons. This limit passed in January 2021. Iran has already been noted to be selling arms to Venezuela[27], and even before the lifting of constraints it was selling conventional weapons, including to Houthi rebels in Yemen.[28] The second was constraints Iran's ballistic missile programme. This sunset clause is reached in January 2024,[29] and will allow Iran to purchase materials and systems for its ballistic missile programme, which it has continued to develop since the implementation of the JCPOA. Finally, all constraints are lifted and the JCPOA ends in January 2026,[30] which will be just over a year on from new US Presidential elections. If no party to the JCPOA triggers the snap back of sanctions prior to this, all UN-level sanctions will be lifted, and any new sanctions would have to be agreed by the UN Security Council from scratch. It is currently difficult, when examining a world in which the P5 are increasingly using sanctions on each other, to imagine them coming together to agree new sanctions. Additionally, the JCPOA as it currently stands does not tackle Iran's regional activity or ballistic missile programme, both of which have been highlighted as areas of concern by the E3 and the US. Therefore, whatever the results of negotiations, the future of Iran and sanctions seems far from clear.

What this means for businesses

In the near term whether the US re-joins the JCPOA or not, whether Iran becomes fully compliant or not, and whether there is a future deal agreed, little will change for businesses and FIs. As a leading sanctions compliance lawyer in the oil and energy sector made clear, despite excitement that sanctions around Iran may be lifted, the reality of the situation is few energy firms are likely to engage in a significant way, as they are mindful of other compliance risks. Another expert from the oil and energy sector also explained that the cost of compliance around activity in Iran needs to be weighed up with the potential for profit. For example, even if US sanctions are lifted there will continue to be reporting obligations under the Securities and Exchange Commission in the US for Iran-related activity in the oil and energy sector, which may create a heavy burden on any company engaging in Iran. For many companies, furthermore, as a banker at a leading international FI explained, it is not realistic to ignore the timeframes of US elections, and concerns remain that in 2025 there may be a different Administration in the White House that will follow a different agenda on Iran. If international companies have re-engaged with Iran in the intervening time, they may once again find themselves having to pull out quickly. Ultimately, as a sanctions compliance officer at a British FI explained, unless Iran tackles the issues that have seen it blacklisted by FATF, there is very limited appetite to do anything, and there exists a legitimate reason for this risk appetite.

For now, therefore, companies and FIs should continue to maintain robust internal sanctions policies and procedures to identify potential risks and be able to mitigate them. Critical to this in jurisdictions where Iran blocking statutes may exist, is ensuring that any policy takes into account the wider operating environment and risks.

Conclusion

The stark reality is that, regardless of whether or not the US re-joins the JCPOA, and Iran becomes fully compliant, the sanctions picture on Iran will remain complicated. Whilst the US being back within the JCPOA should, in theory, make it easier to do business in Iran, and with Iranian businesses, without considerable reassurances from governments, it is unlikely the private sector will re-invest and transact with Iran in a significant way. Many companies are wary of having their fingers burnt again. As a banker at a leading French FI explained when discussing this issue, it is also true, that without a concerted effort to address the wider financial crime concerns, such as AML/CFT, and other risks, such as human rights abuses, businesses will have legitimate concerns. Therefore, it is vital that governments such as those of the UK, US and EU Member States work closely with the private sector, as highlighted by a recent commentary from RUSI.[31] The importance of creatively seeking problem solving solutions, such as the Bank of England providing a clearing account for transactions, as evidenced by the commentary, cannot be overlooked. These issues have also been highlighted by a recent piece of analysis by Control Risks, who made it clear that, even with creative thinking, 'FIs will likely remain wary of processing Iran-related transactions'.[32] For businesses and FIs, unless the US returns to the JCPOA there is unlikely to be any real desire for change or impetus in terms of transacting or investing in Iran, despite the EU Blocking Statute finally being enforced more strictly.[33] As such, it will remain important that companies continue to have well developed internal sanctions policies that align with their risk appetite, and that they continue to monitor developments closely.

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Links and notes

1 Joe Biden wants to re-enter the nuclear deal with Iran | *The Economist*
2 The P5+1 is made up of the five Permanent Members of the UN Security Council (China, France, Russia, UK and US) and Germany
3 Federal Reserve Board – Federal Reserve Board issues consent cease and desist order, and assesses civil money penalty against Standard Chartered PLC and Standard Chartered Bank
4 US Senate resolution disapproving of JCPOA fails – Lexology
5 Iran: Council concludes annual review of the EU's Iran human rights sanctions regime – Consilium (europa.eu)
6 John Kerry tells European bankers to get busy with Iran – POLITICO
7 Volkswagen starts automotive business in Iran (volkswagenag.com)
8 Iranian banks reconnected to SWIFT network after four-year hiatus | Reuters
9 Ceasing US Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon – The White House (archives.gov)
10 The E3 consists of France, Germany and UK
11 E3 statement on verification and monitoring in Iran (JCPoA) at the IAEA Board of Governors – GOV.UK (www.gov.uk)
12 Iran to start uranium enrichment up to 60%: E3 statement – GOV.UK (www.gov.uk)
13 Beyond JCPOA: Examining the consequences of US withdrawal | ORF (orfonline.org)
14 Five of Foreign Policy's Best Reads on Trump, Iran, and the Nuclear Deal
15 Treasury Sanctions Iran's Central Bank and National Development Fund | US Department of the Treasury
16 SWIFT system to disconnect some Iranian banks this weekend | Reuters
17 Boeing and Airbus to lose nearly $40bn due to Trump's decision to pull US out of Iran nuclear deal | *The Independent*
18 Total withdraws from Iran amid political tensions – *The New York Times* (nytimes.com)
19 France, Germany, United Kingdom: joint statement on the creation of INSTEX | Gouvernement.fr
20 Updated Blocking Statute in support of Iran nuclear deal enters into force (europa.eu) Updated Blocking Statute in support of Iran nuclear deal enters into force (europa.eu)
21 Documents – Financial Action Task Force (FATF) (fatf-gafi.org)
22 What Biden's new foreign policy team tells us – BBC News
23 Briefing with Senior State Department Official On Ongoing US Engagement in Vienna Regarding the JCPOA – United States Department of State
24 Iran says it will comply with nuclear deal if Biden lifts all sanctions | Iran nuclear deal | *The Guardian*
25 Iran wants 'guarantee' US will not leave nuclear deal again – Al-Monitor: The Pulse of the Middle East
26 What Ebrahim Raisi's election means for Iran and the nuclear deal | *The Economist*
27 Iran and Venezuela are testing Biden with suspected weapons transfer – POLITICO
28 Iran steps up arms supplies to Yemen rebels | World | *The Times*
29 The Joint Comprehensive Plan of Action (JCPOA) at a Glance | Arms Control Association
30 Microsoft Word – Document2 (europa.eu)
31 Once Bitten, Twice Shy: The UK Must Provide a Credible Plan for Economic Engagement with Iran | RUSI EUROPE
32 Raisi and the nuclear deal – implications for sanctions and financial transactions (controlrisks.com)
33 Advocate General Hogan: Iranian undertakings may invoke EU law blocking US secondary sanctions before the courts of the Member States (europa.eu)