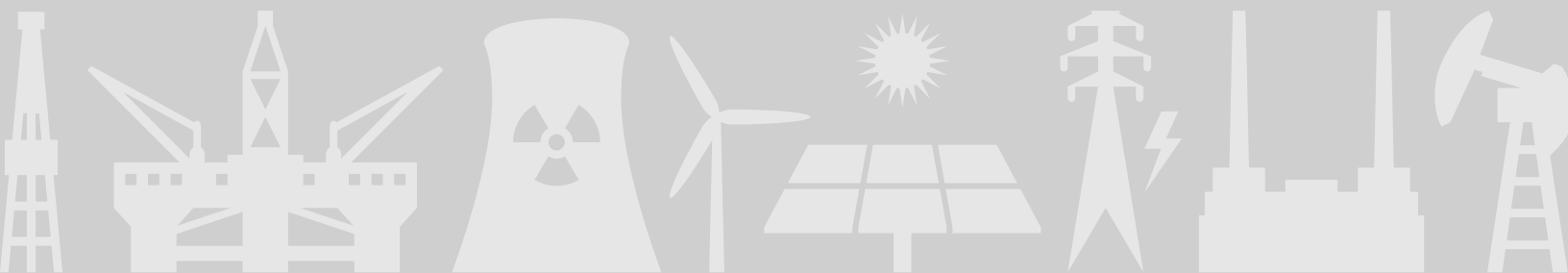


# SIX MONTHS LATER: ASSESSING THE IMPLEMENTATION OF THE IRAN NUCLEAR DEAL

By Richard Nephew

**JULY 2016**



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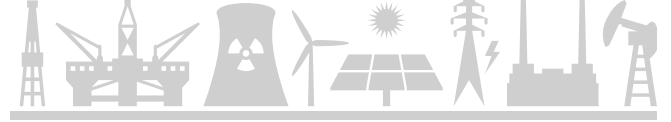


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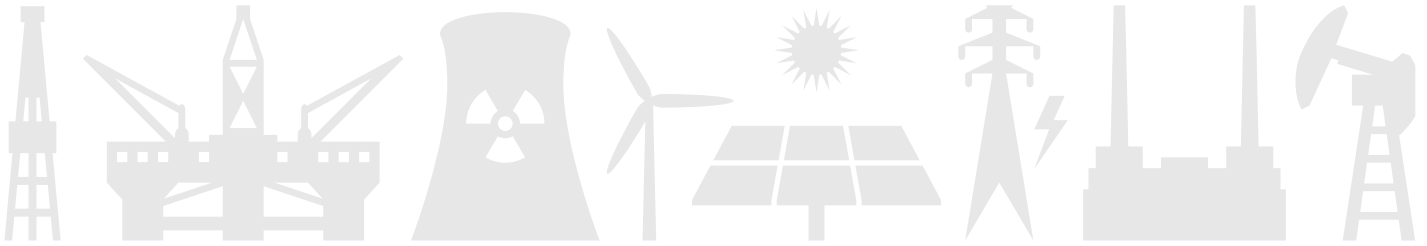


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By Richard Nephew\*

JULY 2016

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## EXECUTIVE SUMMARY

The Iran nuclear deal remains controversial, primarily because of lingering questions around whether it is delivering the benefits promised to all sides and, secondarily, because of residual complaints about how it was negotiated and advertised in Washington and in Tehran. Despite this, it has already achieved much, having lengthened the timetable that would be required for Iran to turn its nuclear program toward the production of material for nuclear weapons; established the mechanisms through which the world would have greater transparency into the nuclear program for the next twenty to twenty-five years; and relieved sanctions on most of Iran's economic activity. Though nuclear implementation has gone largely according to plan, the same cannot be said of sanctions relief. Though legally everything the P5+1 and UNSC are required to do under the deal has taken place, practical fulfillment of the sanctions relief has been halting. There are various reasons for this, but they lie in three general areas: low oil prices; Iran's own internal regulatory and bureaucratic problems; and residual effects from the remaining US financial sanctions against Iran and its banks. Not all of these issues are tied directly to the implementation of the JCPOA, but inadequate attention to these issues will undermine the deal just as surely as if they were a core provision of the agreement.

With respect to low oil prices, there is little that the United States or its partners can do that would address Iran's difficulties. However, with respect to Iran's internal problems and the residual effects of sanctions, more can be done in Iran and in the United States.

For Iran, these steps include

1. domestic reform to sustain banking operations that conform to international standards for anti-money laundering, tax compliance, financial disclosure, capital adequacy, and, critically, stopping the financing of terrorism;
2. reform of the bureaucratic process that makes it difficult for foreign companies and domestic entrepreneurs to operate in the country; and
3. pursuit of more constructive foreign and domestic policies that reduce tensions in the Middle East and give rise to concerns that the sanctions situation will once again get worse.

For the United States, there are limits as to how far the Obama administration (and its successors) should go, given the continued problems that exist both in how the Iranian economy operates and what the Iranian government does

with the proceeds, particularly in the financing of terrorism. Some steps that have been suggested—such as the elimination of most residual sanctions or the establishment of clear US-focused banking channels—would either meet impossible political headwinds or exacerbate the problems they seek to solve.

That said, reasonable additional steps that can be taken, largely by the Treasury Department, such as

1. promulgation of additional guidance and information on the standards the United States intends to use in judging foreign due diligence to prevent Iranian bad actors from receiving direct benefits from business and how best to undertake the recusal of US persons from foreign business decisions involving Iran;
2. further licensing to ease the compliance burden imposed on foreign companies to permit the limited use of standard US business software and other services that do not enhance the ability of companies to do business with Iran, but make it logistically and financially possible; and
3. other similar nonmaterial, and—ultimately—modest steps to aid in the implementation of remaining US sanctions in this different, JCPOA-informed environment, such as permitting technical compliance support by US lawyers and experts to foreign companies engaged in Iran trade.

Ultimately, and as unsatisfying as it may be, time may be the most important element of Iran's return to a more normal relationship with the international economy. Time will permit Iran's compliance with its nuclear obligations to continue to be established and international companies and banks to regain their confidence in doing business in the country. Time will also enable Iran to make the kind of regulatory and bureaucratic reforms necessary for the Iranians to have the kind of economy that they appear to desire, at least at the level of government technocrats, and to develop the political will to make the necessary changes at home. And time will permit the international community to form a complete picture of the future of US policy toward Iran and the JCPOA after the upcoming presidential election. Unfortunately, time may also not be on the side of these Iranian leaders, facing as they do claims that they were suckered in their negotiations with the United States and the rest of the P5+1. The trick, therefore, will be to ensure that Iran is able to make more progress, even if halting, in its reintegration into the global economy and the rigorous monitoring of its progress.

## INTRODUCTION

Though a year has passed since negotiations concluded over the Iran nuclear deal—officially known as the Joint Comprehensive Plan of Action (JCPOA)—and six months have passed since it was implemented fully, the JCPOA remains a subject of intense controversy. Skeptics in the United States and in Iran continue to share remarkably similar perspectives on the deal, each side believing that their governments sacrificed too much in its achievement. Governments, banks, and companies around the world remain confused about the parameters of the deal and worried that one false move will damn their economic and political futures. Analysts around the world continue to debate whether all sides have done enough to ensure the JCPOA is a success.

All of this is as I predicted in July 2015, particularly as relates to the slow start that Iran is experiencing in its enjoyment of JCPOA sanctions relief.<sup>1</sup> Certainly, there have been some surprises along the way. Like many analysts, I did not believe that Iran would be able to complete its required nuclear steps until six months at the earliest after Adoption Day in October 2015. Instead, Iran finished its work in three months, and Implementation Day was observed on January 16, 2016. But with respect to Iran's use of the sanctions relief it purchased with nuclear restrictions and intrusive transparency, there is little in the delay that Iran has experienced that is shocking. Iran remains a difficult place in which to do business, with a complicated bureaucratic, regulatory, and constitutional system that prevents foreign businesses from having easy access to the country. Moreover, the threat of international sanctions—either from the reimposition of those suspended pursuant to the JCPOA or those remaining in place notwithstanding the JCPOA—continues to chill foreign business interest in the country. Volatile politics in the United States and in Iran probably have contributed as well to a sense of unease when foreign companies look to Iran.

This paper will review the major elements of the JCPOA sanctions relief and provide an update on the results Iran has achieved thus far in its use of the relief. The paper will delve deeper into some of the reasons for the delay in Iran's ability to take advantage of sanctions relief along the way. It will then offer views on how the United States and Iran (primarily) can ameliorate these problems. The paper concludes with thoughts on the JCPOA's implementation thus far and what the future may bring.

It is important to note from the outset that the perspective taken in this paper is that the JCPOA is a valuable contribution to international security and therefore merits preservation. However, this position does not imply—and should not be taken as implying—a readiness to preserve the JCPOA at all costs and, particularly, if its fundamental objectives are no longer being satisfied. The JCPOA is a means to an end—ironically, the same end as the sanctions measures that it replaced: the imposition of restraints on Iran's nuclear capabilities that create confidence that Iran is neither pursuing nor intends to pursue nuclear weapons. So long as the JCPOA is able to fulfill this objective, it remains the most economical tool in the US arsenal for doing so; it is on this basis that the deal merits being sustained.

Moreover, this paper does not argue against the continued use of US sanctions tools to address nonnuclear Iranian illicit conduct nor does it argue against maintaining the US extensive embargo, aside from those exceptions cut into the JCPOA already. These tools exist for a reason, and Iran should experience consequences for its support of terrorism, violations of human rights, and destabilizing regional activities. However, it is my view that though sanctions may contribute to solutions of these problems, sanctions are not as useful in addressing these problems as they were in the nuclear context, in large part because of the differing global opinions on the appropriateness of Iran's activities and of sanctions to correct them. The nuclear issue was one that many countries saw as a national priority, which—regrettably—is not the case for human rights or the support of terrorism. Even then, the United States had to engage in significant arm twisting to make the nuclear issue sufficiently relevant to some countries to make it worthwhile to engage in sanctions. Given this difference in views, other efforts—such as regional security cooperation and different forms of pressure on Iran, especially international political pressure—should be the focus of government policy targeting such conduct.

Iran is not a reformed state and US-Iranian relations are not (and will not anytime soon) return to anything approximating normal. There is simply too much bad blood on both sides and disagreement on fundamental issues to suggest that rapprochement is in the offing. However, this simple reality should also not preclude efforts intended to improve the environment such that normalization and stabilization of the relationship can be achieved in the future. Ensuring that the JCPOA is successful is a key element of this effort.

## IMPLEMENTATION OF THE JCPOA TO DATE

The JCPOA has two essential components: the establishment of restrictions and transparency over the Iranian nuclear program; and the provision of sanctions relief by the UN Security Council (UNSC), the European Union, and the United States.

### *Nuclear Matters*

The International Atomic Energy Agency (IAEA) has released three reports on Iranian compliance with the JCPOA since the beginning of 2016. The first report, released on January 16, outlined the various steps that Iran has taken to fulfill its major initial JCPOA commitments.<sup>2</sup> It was on the basis of this report that the United States, European Union, and UNSC acted to bring the JCPOA fully into force by executing the required sanctions relief.

On February 26, the IAEA released its second report.<sup>3</sup> This report was controversial less because of its contents and more because of the absence of some of the data that nongovernmental observers and organizations had become used to seeing in IAEA reports. In particular, the IAEA was criticized for not publishing data on Iran's exact low-enriched uranium stockpile, which had become a normal attribute of IAEA reporting since Iran restarted uranium enrichment in 2007.<sup>4</sup> The nature of this concern focused less on the degree to which Iran was fulfilling its commitments and more on the degree of transparency that the IAEA (and, by extension, the United States, Iran, and the JCPOA parties) was showing into Iran's nuclear program so as to permit "independent determination of Iran's compliance" with the JCPOA.<sup>5</sup> Though reasonable people may disagree on the importance of the public dissemination of such data (as the IAEA has expressed confidence that Iran's enriched uranium stockpile is within the 300 kilogram limit established in the JCPOA), the flap over the content of the IAEA's report extended to a discussion at the IAEA's quarterly Board of Governors meeting in which the United States and its European partners called for greater transparency in IAEA reporting going forward.

This issue notwithstanding, the February IAEA report did provide information on one JCPOA compliance issue. The IAEA reported that Iran produced and then

possessed slightly more than its JCPOA-allotted 130 metric tonnes of heavy water. Iran's overage—which the IAEA measured at 0.9 metric tonnes—was then resolved by the export of 20 metric tonnes of heavy water seven days after the overage was identified.

On May 27, the IAEA released its third report, essentially repeating its conclusions from February, minus the indications that Iran had exceeded the threshold of allowable possession of heavy water. It too, however, generated controversy for its sparse technical detail.

Among these three reports, the IAEA has reported that there was one technical breach of the JCPOA that the Iranians remedied within a week of being discovered. This breach was not only modest in its import—as heavy water is not a nuclear weapons-usable commodity itself but rather a component in the production of plutonium for use in nuclear weapons—but also something that is entirely expected in the implementation of a deal of this sort. Iran will likely violate the terms of this provision again and perhaps similarly the provision dealing with low-enriched uranium (LEU) stocks because they are products of an ongoing process line that must be exported shortly after production. Any problem with shipping these commodities out of the country would lead to the potential for a temporary excess in Iranian stocks of these materials. The real sensitivity in this regard is the degree to which Iran believes that it can engage in these activities and not be caught. If nothing else, the heavy water incident suggests the opposite: the IAEA's identification of the excess heavy water occurred quickly—Iran's production of the 0.9 metric tonnes of excess heavy water occurred between January 16 and its identification on February 17—and Iran had to take swift remedial action to address the problem.

The IAEA reports do not address another element of the deal, which is continued, permitted Iranian nuclear procurement via a dedicated mechanism. When negotiations on the JCPOA commenced in January 2014, an interesting—if little recognized—quandary emerged for negotiators on both sides: how to handle permitted Iranian nuclear procurements while its nuclear program remained, in effect, on probation.



The easiest option from Iran's perspective was for the United States and its partners to remove any controls on its nuclear procurement, essentially eliminating the nuclear program's pariah status in response to the nuclear deal. However, for P5+1 negotiators, this was unacceptable because it would be tantamount to an early declaration that Iran's nuclear program was now entirely aboveboard. This, at the end of the day, is what the JCPOA is intended to demonstrate, and both time and confidence-building measures were required by P5+1 countries in order to prove exactly this point. Moreover, the risk here was not merely rhetorical: unrestricted Iranian nuclear-related procurement could contribute to the creation of a covert nuclear program, something that most nonproliferation experts in the six countries believed was the most likely vector for any future Iranian nuclear weapons program.

At the same time, P5+1 negotiators recognized that Iran would require procurements to support its legitimizing nuclear program, especially those projects that were enshrined in the text, such as the modification of the Arak Reactor and former uranium enrichment facility at Fordow. Additionally, it was recognized that Iran would require some goods for its other industrial processes that are dual use (meaning that they could be utilized in both nuclear and nonnuclear applications). These goods included specialty metals and process equipment (like valves and pressure sensors). Adding a further complication, many of these goods also have applications in Iran's ballistic missile program, which would remain under restrictions under the nuclear deal and unilateral sanctions by the United States.

The result of these negotiations was the creation of a mechanism for Iran's procurement of nuclear goods, based at the UN but effectively run by the members of the P5+1, which approves or disapproves procurement requests made by Iran.\*

The mechanism has been praised by some, including me, as being an artful way to untie an otherwise troublesome knot of policy, technical, and economic issues. Others have underscored that the complexity of the system will present several implementation challenges,<sup>6</sup> which could prompt

complaints from Iran if they led to significant delays in business activity. Still others have suggested that it could be effectively gamed by a determined Iranian proliferation network, skilled at sanctions and export control evasion after decades at the job.<sup>7</sup> However, even an interim grade for the channel is difficult to give because, insofar as public reporting is concerned, there have been no requests made via the procurement channel nor indications given as to how requests are being evaluated.

In all likelihood, the delay in utilization of the procurement channel is explained by continued and deserved hesitation in exporting to Iran goods that could contribute to its nuclear program, even if their use in legitimate purpose is verifiable. A close second, however, is the difficulty that remains in conducting all manner of business with Iran.

### *Sanctions Relief*

The United States, the European Union, and the UNSC have undertaken all of the sanctions relief steps required pursuant to the JCPOA.<sup>†</sup> However, as noted with respect to nuclear procurement, the practical implementation of the economic benefits of the relief has been slower than Iranian government expectations (at least those they stirred in public) due to a combination of economic, political, and physical factors.

### **Oil-Related Measures**

As a result of the JCPOA, Iran is now permitted to export as much oil as its customers wish to buy. However, therein lies the rub: Iran's reemergence into the international oil market has occurred at a time in which the oil market is oversupplied and prices are low. This has impeded Iran's ability to take full advantage of its JCPOA-provided relief thus far, particularly in combination with other economic factors (such as Iran's access to international financial services, which will be discussed in the next section). There are two distinct areas of oil-related sanctions that merit consideration: Iran's ability to sell oil; and Iran's ability to garner investment in its oil and gas sector.

\* More information on the operation of the channel was provided by the UN at its website, <http://www.un.org/en/sc/2231/restrictions-nuclear.shtml>.

With respect to oil sales, Iran could not have picked a worse time to come back onto the scene, especially in comparison to when its ability to sell oil freely was restricted in 2012. In 2012, oil fetched on average \$111 per barrel (Brent). In 2016, oil could cost as little as \$42.30 per barrel on average (Brent), according to some traders.<sup>8</sup> With oil priced at less than 40 percent of what it was four years prior, Iran would require oil production levels not seen since the end of the 1970s in order to even match the revenue stream that it had in 2012 when sanctions were applied. Put another way, the impact of oil reduction sanctions against Iran has now effectively been outstripped by the impact of low oil prices, as the below table demonstrates, and this problem has nothing to do with US or European sanctions.

Yet Iran has proclaimed its intention to average 2 mbpd in oil exports throughout 2016 and has sought to project an image of this as a serious objective, both at home and abroad. It has ramped up production, reporting to OPEC a 7 percent increase in oil production in the first quarter of 2016 as compared against 2015.<sup>9</sup> OPEC's secondary

sources suggest that this production increase may be understated, though largely because these sources peg Iranian production in 2015 at 300,000 barrels per day less than Iran had claimed<sup>10</sup> Either way, both OPEC and the International Energy Agency have reported that Iranian production reached 3.6 mbpd as of the end of May 2016.<sup>10,11</sup> If we limited our vantage point to solely current Iranian production and consumption patterns, however, it is difficult to see how Iran will be able to sustain 2 mbpd in exports. Iranian consumption was estimated to be approximately 1.9 mbpd on average in 2013, meaning that even at 3.6 mbpd in production as Iran currently claims, Iran would only be in a position to export approximately 1.7 mbpd on average.<sup>13</sup> With gas condensates, the amount may be higher, reaching 2.2 mbpd on average. Iranian Oil Minister Zanganeh may have been confirming this interpretation when he said on April 3, 2016, that Iranian production of crude oil and condensates “jumped” by more than 250,000 barrels in March, permitting 2 mbpd to be put on the market.<sup>14</sup>

**Table 1: Comparison of Iranian oil sales in 2012 and projected sales in 2016**

	2012	2016
Average annual exports	1.5 million barrels per day (mbpd)	2.0 mbpd
Average annual oil price	\$111.63 per barrel (Brent)	\$42.3 per barrel
Total per year	\$61.1 billion	\$30.9 billion

Source: Energy Information Administration (EIA), Reuters, author's calculations.

<sup>†</sup> As a reminder, this does not include removal of the comprehensive US embargo against Iran (also known as US “primary” sanctions). This embargo remains in effect. The provisions described above should be construed, unless explicitly stated oth-

erwise, to only capture the effects of US “secondary” sanctions on Iran, secondary sanctions being those that affect foreign business activities with other foreigners

Iran is also likely tapping into its oil inventories. In fact, as negotiations with the P5+1 were concluding, press stories emerged suggesting that Iran might have as much as 40 million barrels stored in cargo ships sitting off the coast of the country, waiting for sanctions to be lifted. With Implementation Day behind Iran, it began to dispatch some of these vessels, eager to profit from what oil it could sell and, further, to attempt to reestablish market share lost starting in 2012. However, according to data gathered and reported by Windward, Iran's floating storage of oil has remained both high and largely static since mid-February at over 50 million barrels.<sup>15</sup> One ship in particular, the *Distya Akula*, has been in transit to Europe for three months with 1 million barrels to off-load and apparently no buyer to receive it (though there may also be concerns with the quality of the product, according to one reviewer of this paper).<sup>16</sup> In the context of Iran's total annual production (which one can extrapolate to 1.2 billion barrels, using Iran's March 2016 reported figures), an inability to sell 50 million barrels may seem fairly marginal. However, even at depressed prices, this oil is worth over \$2 billion and nearly 5 percent of Iran's total annual production. Iran would probably prefer to get this oil off of its hands as soon as

possible and, as Zanganeh noted, "After lifting sanctions, Iran will take back the market share of more than 1 million barrels a day that it lost...We should sell our oil whether the price falls or goes to \$100 (a barrel)"<sup>17</sup>‡

Seen in this context, the political wrangling that is taking place within OPEC and between OPEC and Russia over global oil production takes on significantly new meaning. Though some analysts discount the degree to which the Saudis are motivated to keep prices relatively low as a cudgel against its geopolitical rivals or impediments (like Iran), there is at least an incentive for the Saudis to do so insofar as limiting the overall benefit that Iran can receive from the JCPOA and its new oil position. Press reporting from April 2016 suggests that the Saudis were also taking other steps to complicate the activities of companies and entities that seek to do business in Iran.<sup>18</sup> Moreover, Iran's refusal to accept a production freeze—even if it could contribute to slightly higher prices—makes sense in this context. Even if the price were to increase by just over \$10 per barrel, Iran still earns more by bringing more oil to market than 1.5 mbpd. Table 2 demonstrates this point.

**Table 2: Comparison of Iranian oil sales in 2012 and project sales in 2016**

	2016: More Oil	2016: Higher Price
Average annual exports	2 mbpd	1.5 mbpd
Average annual oil price	\$42.30 per barrel (Brent)	\$55 per barrel
Total per year	\$30.9 billion	\$30.1 billion

Source: Energy Information Administration (EIA), Reuters, author's calculations.

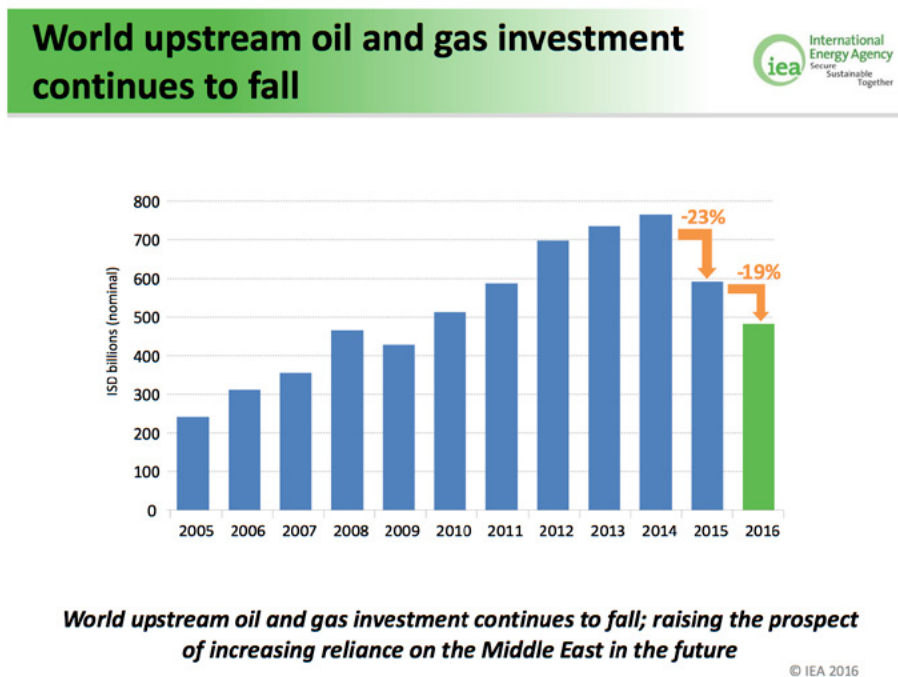
‡ There is an alternative argument, namely that Iran may wish to hold onto this inventoried oil until the price rises. This is sensible from the perspective of Iran's long-term interest. However, if one assumes that Rouhani's short-term focus is on generating momentum behind the JCPOA and his foreign policy approach,

then this economically sensible approach is less attractive. Either way, the drop in oil prices is continuing to delay Iran's ability—and perhaps its willingness—to sell oil now and generate the revenue that would come.

Nevertheless, Iran is still constrained with respect to how much additional oil it can bring to market over time, even assuming Iran can find a market for its floating storage oil. Iran's leaders have made this point, noting that they will require \$50 billion in external investment annually to jump-start the oil industry and improve extraction beyond what was possible by, in essence, turning on the taps from existing fields.<sup>19</sup> Unfortunately for Iran, it is here that two intersecting problems exist: first, with oil prices as low as they are, international investment in new oil production is declining in general, particularly in areas seen as risky; second, Iran's reintegration with the global financial sector remains halting (more on this in the next section).

On the first point, it is no surprise that perceptions of a global oil glut combined with a lack of revenue are prompting a reduction in investment among the world's leading oil companies. The International Energy Agency (IEA) reported to the G7 Energy Ministers on May 1–2, 2016, that upstream investment has fallen by nearly \$300 billion since 2014 (Figure 1).

Figure 1: World upstream oil and gas investment



Source: IEA.<sup>20</sup>

Investment instead will naturally focus on sources that are midstream or those easiest and cheapest to extract, which—in theory—ought to privilege Iran as compared with arctic or unconventional oil drilling (in fact, as one reviewer pointed out, most of the drop in investment has been in these more complicated parts of the industry). However, Iran has its own risks and complications that undermine its otherwise attractive, relatively low-cost production potential. The first is that Iran continues to require different investment arrangements than other countries due to its constitutional prohibition on the ownership of its oil reserves by foreigners. This provision is a historical legacy of a country that has felt preyed upon by international oil companies in the past and betrayed by its political leaders who granted inappropriate concessions to oil companies. But Iran would also like to be able to get the oil it possesses out of the ground, particularly given that—even with changes to the Iranian economy—oil remains the major export commodity. Since the Iranian revolution, Iran has sought to find workarounds to its constitutional predicament, offering complicated buyback and lease options in the 1990s that most oil companies found cumbersome, difficult, and less profitable.

Even now Iran is working on a revised Iran Petroleum Contract (IPC) that would try once more to bridge the gap between its desired approach and that of oil companies. But herein lies the second problem: Iranian internal politics. Iran's leadership remains divided on a variety of issues, especially the degree to which involvement with the outside world is a necessary component of economic development (and, under the surface, perhaps a more fundamental question of just how much development Iran should seek in any event). For this reason, the new IPC has yet to be fully finished, and in fact, former Iranian oil minister Rostam Ghasemi, who himself is a former IRGC officer, was fired from his advisory position in the Iranian government, reportedly in response to Ghasemi's obstructionism over the new IPC.<sup>21</sup> As late as April 26, 2016, Iran's oil minister noted that the revised IPC remains under development and that though the general terms are known, no draft contract has yet been concluded.<sup>22</sup> Deputy Oil Minister Javadi indicated on May 5, 2016, that the IPC would be finalized by "June, July..." implying a desire rather than a concrete rollout plan.<sup>23</sup> The shake-up in mid-June 2016 at NIOC (in which its managing director was replaced along with several board members)

is indicative of further turmoil but may point to a more imminent decision on the part of Iran to put out the new IPC. To this point, it is worth noting that Iran first started considering a revised approach to its investment contract in 2013 with the election of President Rouhani. Taken in combination with the prevailing risk of sanctions reimposition, if Iranian violations of the JCPOA were to be detected and the bureaucratic environment in Iran complicated, many oil companies would remain in the tentative, exploratory stages of investment decisions.

### Financial-Related Measures

Certainly, there were those who believed that Iran would be able to take complete advantage of its reconnection with the international financial system at the outset of implementation of the JCPOA. One noted critic of the JCPOA termed Iran's resumption of financial ties as "precipitous"<sup>24</sup> and argued that the JCPOA "dismantles much of the international sanctions architecture"<sup>25</sup> in service of insufficient nuclear concessions on Iran's part. Other criticisms suggested that, particularly as a result of Iran's resumed access to financial system services—such as the Society of Worldwide International Financial Transactions (SWIFT)—"the relaxed banking standards will grant the Iranian regime the ability to move its money anywhere in the world. With EU sanctions also set to be lifted on Iran's Islamic Revolutionary Guard Corps, major IRGC companies<sup>8</sup> and banks, and the Quds Force, the IRGC's extraterritorial terrorist arm, Europe will become an economic free zone for Iran's terrorist activity."<sup>26</sup> The ultimate conclusion of these arguments was that, "with the Central Bank no longer in the vise-like grip of the US Treasury, and with SWIFT messages flowing, Iran's financial sector will soon be operating at pre-sanctions levels."<sup>27</sup>

Soon, of course, is a relative term, but for its part, Iran has seen nothing near a resumption of its presanctions integration with international banking. In fact, Iran's reintegration with international banking has been sufficiently slow and vexing that the Supreme Leader of Iran used his annual Nowruz\*\* speech to sharply criticize the United States of using informal means of imposing pressure on businesses and banks to avoid doing business with Iran.<sup>28</sup> There are three likely reasons for the slow restart of normal interactions with Iran:

1. Residual effects of nonnuclear-related US financial sanctions, such as the Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA), which the JCPOA did not dismantle, and the possibility of reimposition of sanctions;
2. Continued indications of Iranian financial misconduct; and
3. Continued negative risk/reward calculations in the financial sector.

### *Residual Effects of Nonnuclear Sanctions*

Though underestimated in the days that immediately followed the JCPOA, the impact of the residual nonnuclear sanctions against Iran is real. One of the harshest critics of the JCPOA, who suggested that the residual nonnuclear sanctions would have limited impact in slowing Iran's rapid rise to economic resilience, noted in April, "I think the Iranians completely misjudged how the nonnuclear sanctions were going to deter international financial institutions."<sup>29</sup> But for those who were involved in the application of those penalties against foreign banks, the likelihood of these sanctions slowing reintegration was both recognized and real.<sup>30</sup> Simply put, banks have been scared away from doing business with Iran because US sanctions that could have consequences for their access to the US financial sector still exist and are being enforced. This fear has been heightened by the degree to which sanctioned entities continue to play a major role in the Iranian economy, particularly the Iranian Revolutionary Guard Corps. Banks may have no clear way of knowing for certain who is involved on the other side of the various transactions that must take place but know, based on experience and watching others get caught, that sanctioned entities can intersperse themselves throughout the value chain in Iran. Consequently, banks face a real choice: avoid Iran altogether, or trust that their due diligence and compliance protocols (which Iran has shown a proclivity to attempt to defeat) are effective in weeding out the bad actors in the Iranian system or—at a minimum—demonstrating their good will in a future sanctions case.

Unfortunately for Iran, banks have not seen enough time pass to have a clear sense of how the US Treasury will proceed to enforce sanctions under the JCPOA. They also retain some lingering fears that, even if the federal government were to uphold the JCPOA, state and local government officials (such as the financial regulator for the State of New York) could act differently. Their default view, reinforced by years of tough sanctions enforcement, is to expect the worst. The possibility of swift sanctions reimposition via the snap-back clause of the JCPOA (or, as has been suggested by several US Republican presidential candidates, via US unilateral action) amplifies these concerns.

### *Continued Indications of Iranian Financial Misconduct*

Iran is not helping allay fears through its continued support of terrorism via financial (as well as other) means. Though there is scant public reporting to the effect that Iran is transferring large sums of cash to terrorist proxies and allies, the default assumption in the international community is that these behaviors persist, even if there remains debate as to how much support is being provided and to what degree the JCPOA enabled it to increase.

For this reason, the Financial Action Task Force (FATF) issued a statement on February 19, 2016, that reaffirmed that it "remains particularly and exceptionally concerned about Iran's failure to address the risk of terrorist financing and the serious threat this poses to the integrity of the international financial system."<sup>31</sup> The FATF sets anti-money laundering and counterterrorist financing standards for financial institutions worldwide. Its recommendations and guidance are taken seriously in part because it is a rigorously technical body and no doubt in part because it is also composed of a diverse group of key members of the international financial community (the United States, members of the European Union, Japan, Korea, China, Russia, and India, among others).

On June 24, FATF amended its position on Iran by suspending the financial "countermeasures" that had

<sup>§</sup> Which, as a point of fact, will not take place until Transition Day in 2023.

<sup>\*\*</sup> Nowruz is an annual spring holiday celebrated throughout South-Southwest Asia, especially in Iran. Nowruz marks the

beginning of the Persian New Year.

been called for to prevent Iranian money-laundering and financing of terrorism. (These countermeasures are essentially prohibitive due diligence and screening protocols that would have the effect of stymieing financial transactions with the jurisdiction subject to the countermeasures.) However, this suspension is for one year, renewable only if Iran has made progress in implementing an agreed Action Plan with FATF that is intended to clean up the Iranian financial system. FATF noted, “Until Iran implements the measures required to address the deficiencies identified in the Action Plan, the FATF will remain concerned with the terrorist financing risk emanating from Iran and the threat this poses to the international financial system. The FATF, therefore, calls on its members and urges all jurisdictions to continue to advise their financial institutions to apply enhanced due diligence to business relationships and transactions with natural and legal persons from Iran...”<sup>32</sup>

Iran now has a window of opportunity to improve its financial conduct. But in the face of such a recommendation and absent improvement, it is understandable why international financial institutions are keeping their distance from Iran and will continue to do so.

#### *Continued Negative Risk/Reward Calculations in the Financial Sector*

Banker caution aside, there is probably a financial incentive level at which it would be possible to convince some major banks to go back into Iran. Financial institutions operate on the basis of fees and financial reward, just like any economic actor. Against the expected earnings for doing business with Iran must be arrayed the potential costs, ranging from the simple economic (will our business venture succeed or fail?) to the compliance burden (can we afford all of these lawyers and consultants?) to the regulatory risk of a compliance problem still slipping through the security nets. Given the absence of what one banker described as a need for “certainty” about the longevity of the JCPOA and its embedded sanctions relief, it is likely that finding a mutually acceptable financing structure remains elusive for many financial institutions, especially those with larger reputational risk and greater financial exposure to the US financial system.<sup>33</sup> In such a scenario, a potential solution could be found in Iranian banks providing the necessary financing arrangements. However, Iran’s own banking system remains fragile, undermined due to years of bad loans and sanctions.<sup>34</sup>

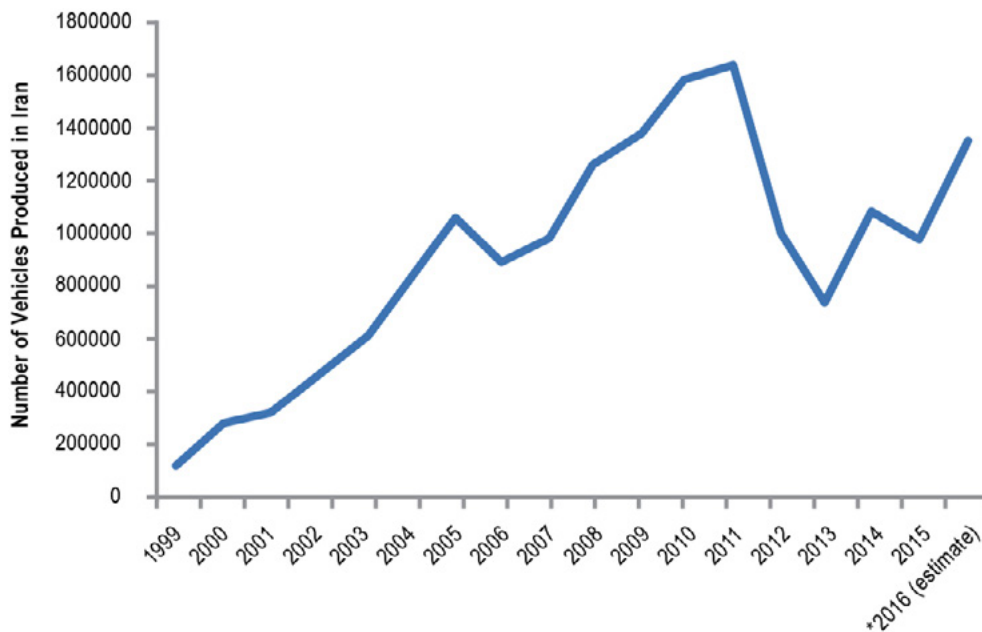
## Other Economic Measures

The JCPOA’s main sanctions relief focuses on Iran’s oil and gas sector, and its access to financial markets, in recognition of the fact that these are key economic interests of Iran. However, these are not the only areas affected by the JCPOA, and many other industries in Iran stand to benefit if the sanctions relief promised is delivered. There are indications that, even if forward momentum on oil, gas, and financing has stalled, there has been progress in these other areas.

Two sectors in particular stand out: the auto industry and the commercial aviation industry.

### *Auto Industry*

Iran’s auto industry was an emerging export driver throughout much of the 2000s. But this industry was far from homegrown. Instead, Iran depended on the import of complete or nearly complete automotive kits from foreign manufacturers, which were then assembled and marketed as Iranian vehicles. Iran has been trying to limit use of such kits and further its own domestic manufacturing, but even then Iran had a major dependency on foreign supply of components. This dependency on foreign partners was also a vulnerability to outside pressure, first exposed in 2011–2012 when oil and financial sanctions deprived Iran of the hard currency required to contract outside support. Production took a further hit after June 2013, when the United States announced that it would impose sanctions on any foreign entity that provided technical support or services in support of Iran’s auto sector. Taken in combination with Iran’s overall economic downturn and loss of hard currency from oil sales, Iran’s automobile production dropped to its lowest level since 2004. (See Figure 2.)

**Figure 2: Iranian total vehicle production (automobile and commercial), 1999–2016**

Source: International Organization of Motor Vehicle Manufacturers,<sup>35</sup> Tehran Times.<sup>36</sup>

The Joint Plan of Action (JPOA) relaxed those sanctions in November 2013, and Iran’s auto manufacturing industry has recovered to some degree. Iran now estimates that it will produce 1.35 million automobiles during the Iranian fiscal year (March 2016 to March 2017).<sup>37</sup> Foreign partners remain integral to these operations. Renault, one of Iran’s most significant automotive manufacturing partners, remained in Iran throughout this period and has stated publicly its commitment to continuing its relationship with the country along with its Japanese partner, Nissan.<sup>38,39</sup> Peugeot, which quit Iran in 2012, has finalized talks with Iran on the compensation necessary to reenter the market.<sup>40</sup> Other manufacturers may soon follow suit.

More interesting for the purposes of this paper is why the auto sector has apparently rebounded much faster than the potentially more lucrative oil and gas sector. Three points seem salient:

**1. The time period between sanctions imposition and sanctions relief was relatively short.** Though it is true that the auto sector took a hit in 2011–2012, it was not explicitly targeted at least by the United

States, and therefore the decision for companies—like Peugeot—to withdraw was political or economic in nature rather than compelled by force of sanctions. This sector was explicitly targeted by sanctions for only five months. As such, when JPOA relief was announced, reversing course for those companies still engaged in Iran was comparatively simple to orchestrate. The limiting factor became Iran’s ability to pay for the necessary imports.

In contrast, most oil and gas companies had been out of Iran for three or more years when the JPOA was announced, and five or more years when the JCPOA was finalized. New markets had been explored, with attendant resources shifted to take advantage of them. The same sort of logic applies with respect to banks, many of which withdrew from business with Iran in 2008–2010.

**2. Long-term exposure risk is smaller than in oil and gas.** Investing in Iran’s auto industry does require some risk exposure and capital expenditure. As Peugeot’s case demonstrates, a decision to withdraw from business in Iran due to sanctions imposition



can cost a company dearly, in Peugeot's case over \$425 million (though indications are that this cost will not be in the form of a cash payout).<sup>41, 42</sup> That said, Peugeot's total review in the first quarter of 2016 was \$14.7 billion<sup>43</sup> and its investment in Iran is reported to be \$435 million *over five years*.<sup>44</sup> So, from Peugeot's perspective, the cost of getting back in and having to face getting back out due to sanctions reimposition or some other political risk is probably manageable.

Contrast this position with, for example, Shell. Shell's annual revenue was reported to be over \$400 billion in 2015. However, Shell's total investment budget for 2016 is only \$33 billion, reflecting cuts made due to collapsing oil prices.<sup>45</sup> To even consider making a sizable investment in Iran's oil and gas sector (much less to contribute substantially to Iran's goal of \$50 billion annually), Shell would need to risk potentially billions on an annual basis. As such, the long-term exposure of risk is both larger in absolute terms as well as in relative terms on an annual basis for oil and gas companies.

**3. The politics around the Iranian auto industry—in Iran and abroad—are nowhere near as toxic.** Starting with the Iranian domestic situation, though the auto industry is important, it is not yet central to the Iranian economy as is the oil and gas sector. Moreover, the auto sector does not carry with it the historical and constitutional complexity that surrounds oil and gas. It is therefore both easier to navigate for international actors and lower in visibility, allowing its investors to fly—to some extent—under the radar.

For much the same reason, the external view of Iran's auto sector is simply different. It was lower profile for those seeking to do damage to Iran's economy during the sanctions regime, known really only to experts as a potentially important source of leverage. And for similar reasons, it could potentially fly under the radar in a future sanctions campaign against Iran. In contrast, oil and gas refineries are big, noticeable, and symbolically significant parts of Iran's economy; consequently, they are major targets for sanctioners and therefore potentially more vulnerable than auto manufacturers in future sanctions scenarios.

### *Aviation Industry*

Iran's aviation industry was the other major target of sanctions relief in the JPOA and JCPOA. In the JPOA, the United States agreed to take a more positive approach with respect to Iranian attempts to procure spare parts required for safety of flight. In the JCPOA, the United States agreed to expand this approach to entire airframes and associated services used for commercial purposes. Given the way that Western aviation companies operate (with supply chains that involve US components that exceed export controls' *de minimis* content levels), this decision effectively reopened Iran to receiving exports from US as well as European, Canadian, and other non-US companies.

Thus far, it appears as if this relief is also starting to bear fruit. Although there are no public reports of completed, authorized transfers of new aircraft to Iran, Airbus has already reached an agreement to sell Iran 118 jetliners, valued at \$27 billion.<sup>46</sup> Airbus has also been reportedly discussing domestic Iranian production of Airbus components.<sup>47</sup> Boeing has also concluded a memorandum of understanding with Iran for the sale of 80 planes, valued at \$17.6 billion.<sup>48</sup> In the meantime, other aviation-related services are likely being planned in Iran, such as the creation of a repair and maintenance hub by Lufthansa.<sup>49</sup>

However, the financing issue noted above apparently remains a problem for Airbus as well as Boeing, and could affect other companies' business with Iran, even in this sector. In February, press reports emerged that Airbus, as well as US and French government officials, were seeking to assuage concerns on the part of banks that the associated transactions with Iran are authorized and consistent with the JCPOA.<sup>50</sup> There are few public indications that this problem has been alleviated.

Part of the issue may lie in the fact that, notwithstanding the approach taken by the Obama administration in advocating use of the aviation component of the JCPOA, this line of business is not—as in the case of the auto sector—completely permissible. Instead, in similar fashion to overall financial-related activities, Iran is now eligible to receive aviation-related services, but the exact terms of how Iran will utilize the planes and technical support it receives are unclear (including whether this trade could end up facilitating Iranian bad acts in Syria, Yemen, and so forth). In the case of bank-related activity, this is because

of the lingering linkages of US-sanctioned persons, like the IRGC, to Iranian banks. For aviation services, the problem is the fact that any transfer of US export-controlled goods must receive a specific license before transfers can take place, even if the goods in question are incorporated into Airbus or any other non-US airplane. Until an export license is provided, any transaction in furtherance of US-controlled goods could be considered a violation of US law. It is in part because of this problem that the US Department of the Treasury released a new general license in March, generally authorizing US persons to enter into negotiations over the provision of aviation services to Iran.<sup>51</sup>

### Other Aspects of Sanctions Relief

The core economic and political elements of the initial phases of JCPOA sanctions relief have already been discussed. However, there are additional elements of JCPOA relief that at least bear mentioning.

First, Iran has also received relief from the various transportation-related provisions of the former sanctions regime, though it remains possible for inspections of Iranian-bound cargo to be conducted to ensure that proscribed items are not being smuggled. As a result, Islamic Republic of Iran Shipping Line (IRISL) vessels are now being welcomed back into foreign ports<sup>52</sup> as are Iranian Air Cargo flights. Some of Iran's airlines are also off of the sanctions list and able to legally travel to Europe and other destinations, though access to the United States remains strictly prohibited.

Second, Iran is also now able to take advantage of other services incidental to and supportive of international trade. This includes export credit insurance for Iran-related trade (subject to the decision-making of the local export credit agency, as—for example—the US Ex-Im Bank has no intention of providing such support for Iran trade nor is it required to do so<sup>53</sup>) as well as more normal insurance protection. Importantly, US financial firms remain generally prohibited from engaging in such business, as it remains sanctionable under the comprehensive US embargo to offer financial services to Iran or in furtherance of Iran-related trade.<sup>54</sup> This may complicate Iran's practical ability to gain access to services such as reinsurance, which is dependent due to its very nature on the sharing of risk among a variety of insurance companies, many of which are in the United States or

have US links. That said, US sanctions governing foreign reinsurance companies without US exposure have been suspended pursuant to the JCPOA, at least opening the possibility for such business.

Third, Iran remains under sanctions for its conventional arms and ballistic missile-related trade. Though some ambiguity surrounds the degree to which Iranian missile tests are themselves a violation of UN Security Council resolution 2231 (which, upon close examination, calls upon Iran not to undertake such tests but does not outright prohibit them), there is no ambiguity surrounding the legality of transferring to or from Iran either arms on the UN Register of Conventional Arms or the Missile Technology Control Regime Annex. For this reason, though the United States has objected to the sale of the S-300 surface-to-air missile system that Russia has apparently begun to transfer to Iran (after years of delays), its transfer is not proscribed by UN sanctions, as air defense systems are not on the UN Register of Conventional Arms.<sup>55</sup> On the other hand, purported plans to transfer tanks or fighter jets to Iran would be without question a violation of the UN arms embargo. These prohibitions will remain in effect until 2020 and 2023, respectively.

## IMPROVING JCPOA IMPLEMENTATION

The JCPOA has yet to lead to an economic renaissance in Iran, as was both entirely predictable and predicted by many observers. It may yet be part of a major economic revitalization in the country, provided that its implementation challenges can be overcome. But how this issue plays out will be critical for how Iran will perceive the nuclear deal and any follow-on attempts on the part of the United States to negotiate with Iran on other issues.

The assessments offered thus far on the individual elements of JCPOA sanctions relief hint at the first fundamental challenge that Iran must overcome: Iran itself. Through a combination of its difficult bureaucratic and regulatory environment, its uncertain political and security situation, and its bellicose role in the Middle East and beyond, Iran has made itself—and remains—a complicated place to do business. Were it not for its unrivaled position in the physical center of global trade routes, its natural resource endowments, and its well-educated, globally oriented population, Iran would probably be relegated to the lowest tier of emerging markets as a major political and economic risk.

Iran can address this problem, but it requires serious and sustained changes to how the country operates internally and externally that will ensure both Iran's future economic development as well as the implementation of the JCPOA. Internally, domestic reform to sustain banking operations that conform to international standards is essential. Reducing the kind of red tape that makes it difficult for foreign companies and domestic entrepreneurs to operate in the country would also be a significant step forward. Iran is ranked 118th on the World Bank's "ease of doing business" 2016 index,<sup>56</sup> sandwiched between Ecuador and Barbados.<sup>57</sup> In some ways, it is ahead of other countries in the Middle East and North Africa, including in offering the legal framework to set up a business and enforce contracts. But many of those countries—Oman and Israel, for starters—do not also have to operate under the burden of Iranian domestic and foreign policy and the reputational—if not actual—risks that come from doing business there.

President Rouhani appears to understand the difficulty that Iran has created for itself. In his campaign, he stressed his desire to improve relations with the West and to pursue a foreign policy that was seen as more constructive.<sup>58</sup> However, his ability to set Iranian foreign policy and the broader agenda is limited both constitutionally and politically. The Iranian system as a whole needs to decide whether it wishes to change how Iran behaves and is perceived to behave, conscious of the fact that—in doing so—Iran could make itself far more competitive economically and thus provide better for its population.

Beyond the level of high politics in Iran, other steps can and should be considered to improve the degree to which sanctions relief is felt in Iran. Some of these are fairly easy for the United States in particular to take. Most of the work will fall on the US Treasury Department, including the promulgation of additional guidance and information on the standards the United States intends to use in judging foreign due diligence and how companies can best undertake the recusal of US persons from foreign business decisions involving Iran (which could prompt the imposition of US penalties). This guidance will be inherently legal but should avoid being legalistic so as to avoid the appearance of creating too much gray space.

In fact, these existing due diligence and recusal standards are often fairly straightforward to implement. In regard to due diligence, for example, companies and banks should thoroughly investigate their potential customer before conducting business, using all manner of available tools, from conversations with the customer to Internet searches to private business intelligence services. And if they find that there are no indications of illegitimate actors, including and especially those named on US and EU sanctions lists, they should proceed with their business, keeping clear documentation on their ongoing attempts to find out more about their business partner and continuing to learn whatever they can about their business partner. If they discover that a customer is engaged in illicit conduct, they should stop doing business with that customer and disclose this information to regulatory or

law enforcement authorities, as appropriate. If they're advised by their government or the United States of illicit conduct, they should stop doing business with that customer. These are commonsense steps, but all too often sanctions violators fail to undertake them or decide against doing so. Certainly, such steps come with costs, but just as banks and companies have had to bear new costs to avoid being complicit in corruption, organized crime, narcotics trafficking, and the like, these costs are simply part of doing business.

Similar steps could be taken to ease the compliance burden imposed on foreign companies in sensible, prudent ways. For example, companies have noted that the use of US business software by foreign-incorporated subsidiaries of US companies in their conduct of Iran business is acceptable in order to avoid companies having to set up entirely different mechanisms for the running of their foreign and US activities. General License H, which established this reasonable standard, only applies to those foreign-incorporated subsidiaries of US parent companies, however. Consequently, the use of US business software by solely foreign entities who have no US connection is potentially sanctionable. This creates the perverse circumstance that foreign-incorporated subsidiaries of US companies are privileged as compared with actual US companies and actual foreign companies. This is the sort of sanctions problem that frequently happens when sanctioners are designing layers of exemptions onto a broad comprehensive embargo, but understanding why it happens is no relief to those companies harmed by it. This issue both can be and should be remedied by further amendment to US general licenses by the Treasury Department. Other similar, nonmaterial, and—ultimately—modest steps to adjust the implementation of US sanctions to accommodate the commitments made with respect to economic relief in the JCPOA could also be undertaken with minimal consequence to the integrity of the sanctions regime. Barbara Slavin and Elizabeth Rosenberg have also suggested similar steps, such as permitting US persons to operate in the compliance departments of foreign entities doing business with Iran, that ought to be considered both because they offer a measure of comfort and reassurance to foreign businesses, and because they would help to prevent sanctions evasion, even if unintentional.<sup>59, 60</sup>

That said, these steps would not be without controversy. In April 2016, a similar proposal to cover the short-term conversion of foreign currencies in conducting Iran trade via the US dollar met furious resistance. Some of this stemmed from a simple misunderstanding that such a step was the equivalent of granting access to the US dollar for trade (a claim that even skeptics of the JCPOA had to correct). But a good portion of this concern stemmed from the fact that Iran would be able to utilize such a modification for its economic benefit. In my view, denying such modifications out of concern that Iran could receive a benefit is the equivalent of refighting a battle already lost: the JCPOA is in place and survived US congressional scrutiny. The more appropriate test ought to be whether the benefit Iran would receive transcends what was intended in the JCPOA, something that is reasonably discernable based on the JCPOA text.

One such example of an overreach in accommodating Iranian banking concerns would be the establishment of a clear banking channel between the United States and Iran. The concept behind such a channel is straightforward: it would involve one or two US banks that are expressly permitted to do legitimate transactions with Iran, subject to either direct scrutiny of those transactions by the US Treasury Department or under an agreed regulatory construct.

It may be that such a channel was needed during the imposition of sanctions in order to permit humanitarian trade to continue to flow unimpeded. However, now, the problem with Iranian banking lies less in the absence of clean channels and more in the resistance of banks to take advantage of the banking relationships they are now permitted to establish. It is not apparent that a clean banking channel would solve this problem so much as it would create a dependency on one or two banks chosen for the task. Such a channel would raise immediate concerns of favoritism for banks not selected to participate (particularly if the channel involved only US banks, to the exclusion of foreign banks that would remain vulnerable to potential US sanctions actions), and it would also create major logjams in the facilitation of Iran trade, as banks would likely assume that only the authorized channel would be appropriate to use.

There is likewise a false hope in the idea of establishing an integrated global licensing regime that would permit individual transactions with Iran to receive scrutiny and approval. But such a scheme—which could involve either the sharing of export control information between states or an agreed set of procedures for managing such trade—would be immensely complex in what is intended to be a more “normal” business operating environment for Iran. Moreover, if the channel were to be corrupted—which, given Iran’s long history of sanctions evasion and financial crimes, cannot be excluded—then there would be an even harsher response from international financial institutions with respect to the risk of doing business in the country.

As unsatisfying as it may be, time may be the most important element of Iran’s return to a more normal relationship with the international economy. Time will permit Iran’s compliance with its nuclear obligations to continue to be established and international companies and banks to regain their confidence in doing business in the country. Time will also enable Iran to make the kind of regulatory and bureaucratic reforms necessary for the Iranians to have the kind of economy that they appear to desire, at least at the level of government technocrats. Unfortunately, time may also not be on the side of these Iranian leaders, facing as they do claims that they were suckered in their negotiations with the United States and the rest of the P5+1. The trick, therefore, will be to ensure that Iran is able to make some progress, even if halting, in its reintegration into the global economy and the rigorous monitoring of its progress.

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