



The Art of Sticking with the Nuclear Deal: Why Europe should defy Trump on Iran

Steven Blockmans

Key points for policymakers

Rather than try to placate the Trump administration by re-opening discussions on an international agreement that has already proved its worth, the EU should make common cause with China and Russia and push back diplomatically to keep the Iran nuclear deal intact. It would do well to buttress the Joint Comprehensive Plan of Action (JCPOA) with additional arrangements on arms control and regional security. At the same time, the EU should prepare to protect investors and economic operators against the extra-territorial effect of new US sanctions.

Policy recommendations

Strategic posture

Institutions and member states should follow the 2016 Global Strategy and serve the EU's collective interests, independently of the US. The EU should protect its diplomatic achievements; build its own defences; live up to its legal obligations and common positions; promote international law and the authority of the Security Council; and insist that all signatories of the JCPOA remain fully committed to implementing a deal that is working.

Individual member states should resist US pressure to revise parts of the agreement. They have a duty to cooperate loyally with the rest of the EU. This also applies to Brexiting Britain.

Ahead of the expiry of the statutory deadline for the US president to waive nuclear-related sanctions, the EU should continue to actively lobby the US administration and Congress to re-certify the agreement with Iran.

It is in the interests of the EU and the P4+1 to keep Iran wedded to the deal by creating an environment whereby Iran can still receive most of the benefits promised by the JCPOA, even if the US walks away from it. For its part, the EU should stick to the implementation of the 2016 Joint Communiqué to boost bilateral socio-economic relations. Financial and administrative hurdles that have hindered the development of commercial ties should be removed (see below). Iran must finally agree to the opening of an EU Delegation in Tehran.

Steven Blockmans is Head of EU Foreign Policy at CEPS and Professor of EU Law and Governance at the University of Amsterdam. The author would like to thank James Moran for his comments and suggestions.

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Contingency planning

At the same time, the EU ought to prepare for a snap-back of US secondary sanctions. Preventive diplomacy should aim to create exemptions from enforcement for European companies.

The EU High Representative/Vice President, supported by the EEAS and the European Commission, could help member states to coordinate their contingency plans. EU-level mechanisms could protect the legitimate interests of European investors in case the US re-imposes financial sanctions.

The Commission should consider proposing a 'blocking regulation', making it illegal for European companies to pay fines for violating US extra-territorial sanctions. Such a regulation could go hand-in-hand with a system to reimburse damages incurred by European companies in the US by imposing penalties on US assets in the EU, and the prospect of legal proceedings against the US before the WTO.

A new EU feasibility study would allow the Commission to negotiate a long-term energy partnership and a bilateral investment agreement with Iran.

The European Bank for Reconstruction and Development should help small and medium-sized enterprises conduct due diligence procedures in Iran to ensure that their local partners are not targeted by any remaining sanctions.

If the EU could expedite its evaluation of extending the third-country lending mandate of the European Investment Bank to Iran, this would enhance the availability of finance and the possibility of blending loans with grants for private-sector and infrastructure development in Iran.

Flanking security arrangements

Finally, the EU should engage Iran in talks about further arms control and regional security. Conflict resolution in Yemen may prove to be the path of least resistance; it would offer humanitarian relief to the starving population and stave off a threat to the sea lanes from the Houthis in the Bab al-Mandeb Strait. Such a confidence-building measure could provide the impetus for wider international cooperation with Iran on security arrangements flanking the nuclear deal.

Slow-motion train wreck

In the theatrical style of a capricious reality TV show host, Donald Trump has been building up suspense over whether or not to withdraw the US from the Iran nuclear deal. By law, the US president is obliged to periodically certify to Congress that Iran is complying with its nuclear obligations and renew waivers issued under various sanctions statutes. If he fails to make the certification or advises Congress that Iran has materially breached its obligations, then the statute provides for rapid congressional consideration of legislation re-imposing sanctions.

The Joint Comprehensive Plan of Action (JCPOA) was negotiated during Barack Obama's presidency by the five permanent members of the UN Security Council + Germany (P5+1) under the auspices of the EU. Candidate and (later) President Trump has consistently called the agreement an "embarrassment" that is not in the US national interest and needs to be "corrected". The reference here is to the JCPOA's 'sunset' clauses, expiry dates after which Iran could resume enrichment (no sooner than 2025). The US is looking for an extension of that date, possibly indefinitely. The inspection regime under which the International Atomic Energy Agency (IAEA) verifies Iran's compliance with its commitments is also considered as being too light. During negotiation of the agreement, the US had pushed for the IAEA to have 24/7 access to declared and undeclared sites ("anytime, anywhere"). Instead, the JCPOA provides detailed procedures for "managed access" of the IAEA to inspect sensitive and often highly secured sites. Under the terms agreed, such access – which includes military locations – needs to be requested from Iran and "kept to the minimum necessary to effectively implement the verification responsibilities under this JCPOA" (Annex I, paras. 74-78). Critics have pointed out that this leaves the Iranian authorities too much leeway to cheat IAEA inspectors, and thus the international community.

The fact that Tehran has ramped up its ballistic missile testing and increased its meddling in Syria, Yemen, Iraq and Lebanon is an additional thorn in the side of the Trump administration which has, for its part, shown its unequivocal support of Iran's two arch enemies, Saudi Arabia and Israel – the former with a \$110 billion arms deal, the largest in history; the latter with the unilateral decision to recognise Jerusalem as its capital.

Facing a previous cliff-hanger on the re-certification of the deal, Trump passed the buck to Congress, only to discover that it was too divided to deal with the issue. It then landed back in his lap. When Trump grudgingly approved the sanctions waiver in January he threatened:

This is the last chance (...). I hereby call on key European countries to join with the United States in fixing significant flaws in the deal, countering Iranian aggression, and supporting the Iranian people. If other nations fail to act during this time, I will terminate our deal with Iran. (...) If Iran does not comply with any of these [new] provisions, American nuclear sanctions would automatically resume.¹

¹ White House, Statement by the President on the Iran Nuclear Deal, 12 January 2018.

To reinforce the president's message, the US Treasury Department announced new targeted sanctions against 14 entities and people, including the Head of Iran's judiciary, Sadeq Amoli Larijani, a close ally of Iran's Supreme Leader, Ayatollah Ali Khamenei.

Trump's hard line is not entirely shared in the wider US administration, including the 'top brass' of the National Security Council and the Department of Defense, which, while certainly sceptical of Iran's policies and intentions, continue to hold the view that maintaining the JCPOA is in the US' fundamental strategic interest. But they have accepted that the president must be, if not appeased, then placated, and that something significant has to be delivered. Given that November's mid-term elections could see the Republicans losing their majority in both chambers, this would upset the legislative agenda in the second half of the presidency. The window for Trump to deliver on one of his campaign promises may thus be closing. All in all, mainly driven by domestic political considerations and the president's close relationship with the Israeli government and Saudi Arabian Crown Prince, there is a very real prospect that the US could walk away from the Iran nuclear deal when the statutory deadline for re-certification expires on 12 May 2018.

Trump's ultimatum, and Iran's response that the US would pay a high price for breaking the JCPOA, pile pressure on Europe to prevent the international agreement and hence regional security from being plunged into even more uncertainty. Some have argued that it should not cave in to Trump's blackmailing. Others say that Europe should try as best it can to comply with the demands from its biggest security partner.

Appease Trump?

The JCPOA has been touted, not least by High Representative Federica Mogherini, as one of the signature successes of EU foreign policy at the high diplomatic table:

As we were indispensable to reach the deal with Iran, we are and we will still be indispensable to preserve the deal in the difficult weeks and months ahead - in unity as we reaffirmed [time and again].²

The deal's collapse would not only undermine the perception that Europe's citizens and partners have of the EU's role as a successful international mediator, but also erode its image as one of the last standard bearers of international law and multilateral institutions in an increasingly disorderly world.

So far, the mantra of the EU has been that it will remain "fully committed" to implementing the nuclear deal – just as Iran is, according to no fewer than ten reports issued by the IAEA since the agreement took effect. In the absence of a dramatic change in circumstances from those under which the JCPOA was concluded, an American *Alleingang* (solitary path) would, indeed, fly in the face one of the classic canons of international law: *pacta sunt servanda*

² Speech by Federica Mogherini at the award ceremony of the Kaiser-Otto-Preis 2017, Magdeburg, EEAS press release 171017_16, 17 October 2017.

(agreements must be kept). It would also undermine the authority of the UN Security Council that endorsed the agreement by annexing it to a legally binding resolution adopted unanimously. The EU High Representative has tried to convey the message that nixing the deal is not in the interests of anyone, including the US, especially when there is a heightened nuclear threat from North Korea. Mogherini has, rightly, underlined the point that the JCPOA is a key element of the international non-proliferation architecture whose nuclear focus should not be sullied by attempts to import other issues such as ballistic missile control and regional security, which can be addressed in other formats and fora. Arguably, threatening to derail the nuclear deal by insisting that parts of it are “corrected” distracts from Iran’s poor human rights record and popular discontent over economic and political stagnation – frustrations that have led to widespread protests over the past few weeks.³ Finally, it is highly unlikely that a stronger accord could be built on the ashes of the JCPOA, which was the culmination of more than a decade of delicate multilateral talks conducted under the auspices of three successive EU High Representatives. The EU28 have long stood united on these issues.

Going by several independent reports, however, it seems that France, Germany and the UK have since decided to assuage President Trump’s concerns in an attempt to discourage him from withdrawing the US from the nuclear deal. Brexiting Britain appears most pliable to American pressure. After meeting with Prime Minister Theresa May and Foreign Secretary Boris Johnson, US Secretary of State Rex Tillerson announced that they had agreed to set up an expert group on “fixing flaws” in the JCPOA (*Public Broadcasting Service*). Conversely, France and Germany are looking for ways to accommodate Trump while leaving the JCPOA – and the EU common positions in support thereof – intact. Following President Emmanuel Macron’s lead (*TIME*) and speaking alongside Mr Tillerson last December, Foreign Minister Yves Le Drian said that France and the United States were determined to “vigorously” raise pressure on Iran over its ballistic missile programme, including possibly through sanctions (*Reuters*). While Iran has firmly rejected any negotiations, Le Drian has announced that he will visit Iran in March to discuss its ballistic missile programme directly. Meanwhile, Germany is reportedly lobbying other EU member states to agree new sanctions to punish Iran for its missile programme and its interventions in Syria and Yemen (*Der Spiegel*).

As Peter Jenkins, a former British Ambassador to the IAEA, has observed:

It is hard to make sense of this decision to appease. (...) President Trump will be as dismissive of his allies’ efforts three months from now as he has been of their arguments for continued US participation in the JCPOA. He will say that they have failed to fix the “flaws” or even to check Iran’s ballistic missile programme. This is foreseeable because Iran has made clear that it will not offer further nuclear concessions, or negotiate restrictions to its sovereign right to develop and possess missiles for defensive purposes.⁴

³ See A. Ehteshami (2017) *Iran: Stuck in Transition*, London: Routledge.

⁴ P. Jenkins, “Europe, Don’t Go All Wobbly on the JCPOA”, *Lobe Log*, 28 January 2018.

Unlike Jenkins, I am not of the view that actions such as those reportedly undertaken by France and Germany could be construed by Iran as being against the spirit and letter of the JCPOA.⁵ After all, efforts to curtail Iran's ballistic missile programme and support for armed proxies in the region go beyond the exclusively nuclear nature of the JCPOA, a basic argument that should be able to count on Tehran's acquiescence. Moreover, new restrictive measures would come on top of an existing embargo of all types of arms included in the EU common military lists and sanctions that the EU maintains in relation to missile technology. While these measures have coloured the discussions in the Joint Commission overseeing the implementation of the JCPOA, they have not led to a deadlock. In fact, new non-nuclear sanctions could help encourage Iran to talk about further arms control. It is not without precedent that existing regimes are reinforced with new security agreements (cf. Strategic Arms Reductions Treaty I, II and negotiations on START III).

EU strategic independence from the US

As in 2003, when member states infamously split over the invasion of Iraq, EU unity is again being stress-tested by a US president. Extensive soul-searching back then led to the adoption of the first-ever European Security Strategy. This document was replaced by a more comprehensive Global Strategy for the European Union's Foreign and Security Policy in 2016. Europe might do well to heed lessons from the past, live up to its redefined doctrine, serve its own strategic interests and adopt a stand on global governance issues independently of the US.

Europe stepped up to the plate when Donald Trump withdrew the US from the Paris climate agreement and UNESCO. EU institutions and member states joined the international consensus in condemnation of the new US position. But the EU wobbled over Team Trump's unilateral decision to recognise Jerusalem as the capital of Israel. Croatia, Czechia, Hungary, Latvia, Poland and Romania broke ranks by abstaining from the vote on a UN General Assembly resolution that declared any actions intended to alter Jerusalem's character, status or demographic composition as "null and void" and calling on states to comply with all relevant Security Council resolutions and work to reverse the "negative trends" imperilling a two-state resolution of the Israeli-Palestinian conflict.⁶

When they ratified the Lisbon Treaty, EU institutions and member states swore to respect and promote international law and good global governance. This explains why some member states balk at the idea of catering to the whims of Donald Trump when he demands they clap for an 'America First' policy that in effect translates as an 'America Alone' reality. They have a duty to cooperate loyally with each other in upholding those global goods, as indeed previous EU common positions. The EU should not be held hostage for fear of losing American 'protection', through NATO or otherwise. It would do better to protect its diplomatic

⁵ On the spirit of the JCPOA, see S. Blockmans, "The nuclear deal with Iran: *Le moment suprême?*", CEPS Commentary, 16 July 2015; and S. Blockmans and A. Viaud, "EU Diplomacy and the Iran Nuclear Deal: Staying power?", CEPS Policy Insight No. 2017-28, 14 July 2017, pp. 2-4.

⁶ See, further, A. Rettman, "EU diplomats plot against Trump on Jerusalem", *EU Observer*, 1 February 2018.

achievements, build up its defences, uphold its principles, promote international law and the authority of the Security Council, and insist that all parties to the JCPOA stick to a deal that is working.

The EU, whose High Representative chairs the Joint Commission that oversees the implementation of the nuclear deal, should make common cause with Russia and China, fellow signatories of the JCPOA that prize the agreement, and much of the rest of the international community that champions the nuclear non-proliferation regime. Russia has previously said that it would not support a US bid to change the nuclear agreement with Iran, while China – which is exercised by a nuclear North Korea sabre-rattling on its doorstep, has pledged to continue playing a constructive role in maintaining and implementing the deal.

If, together, the EU and the P4+1 manage to keep Iran wedded to the JCPOA, then the deal stands a chance of surviving. They will have to persuade Tehran that, as long as it continues to honour its side of the bargain, Iran can remain in receipt of most of the benefits promised by the JCPOA, even if the US ceases to be a party. For its part, the EU ought to facilitate the implementation of the 2016 Joint Communiqué by Mogherini and Foreign Minister Javad Zarif to boost socio-economic relations between the EU and Iran.⁷ Statements like the one issued after the foreign ministers of the EU/E3 and Iran met on the eve of Trump's January decision are to be welcomed.⁸ Financial and administrative hurdles that have hindered the development of commercial ties should be removed (see below). In this respect, Iran could be persuaded to finally agree to the opening of an EU Delegation in Tehran. But more is needed to soothe the nerves of the business community that has invested in the success of the nuclear deal.

Contingency planning

If and when new US sanctions come into effect, European companies may well face a binary choice between doing business with Iran or continuing operations with a US dimension. This is due to the extraterritorial effect of US sanctions, under which non-US companies cannot engage in transactions with Iran that involve the (re-)export of US goods or services.⁹ For European banks, this harks back to bad memories of the pre-JCPOA age, when severe penalties were imposed by US financial authorities for their dealings with Iran.¹⁰ Without protection of their investments against the long arm of US sanctions policy, many European companies are likely to stop trading with Iran.

⁷ European Commission, Statement/16/1441, 16 April 2016.

⁸ Remarks by High Representative/Vice-President Federica Mogherini at the press statements following a meeting of EU/E3 and Iran on the implementation of the JCPOA, EEAS Press Release No. 180111_5, 11 January 2018.

⁹ See J. Modrall, "Iran Sanctions Compliance after 'Implementation Day'", in S. Blockmans, A. Ehteshami and G. Bahgat, (eds.) (2016) *EU-Iran Relations After the Nuclear Deal*, Brussels: CEPS e-book, pp. 38-42.

¹⁰ BNP Paribas received a \$9 billion fine in 2014 for violating US sanctions.

As several experts have argued, the EU should push back against the US administration's attempts to impose tighter terms for trade with Iran, restrictive measures that would hit European companies disproportionately hard since they were the first to move in after the JCPOA was signed.¹¹ Preventive diplomacy and active lobbying of US officials and members of Congress should aim to create exemptions from enforcement for any European company that might be impacted by new US sanctions. Failing that, Europe would need to prepare for damage limitation.

Some member states have already adopted contingency plans. France, for instance, will start offering euro-denominated export guarantees to Iranian buyers of French goods and services (*Middle East Monitor*). By structuring the financing through vehicles without a US link, whether to the currency or otherwise, the aim is to avoid the extraterritorial reach of US sanctions legislation and protect €1.5 billion in potential contracts from interested French exporters. Italy, for its part, has agreed a framework credit agreement to fund investments in Iran worth up to €5 billion (*Reuters*). Germany, Austria and Belgium are said to be working on similar mechanisms that would shield their companies from exposure to new US sanctions.

It is not clear how closely coordinated these efforts are. Arguably, EU-level mechanisms should be created to protect the legitimate interests of European investors and economic operators in case the US re-imposes tough financial sanctions. It would be up to the Commission to prepare such plans and to have them ready when needed.

One idea would be to pursue the line set out in the 2016 Joint Statement on Energy and explore the objectives and modalities of a long-term energy partnership and a bilateral investment agreement with Iran.¹² Another idea would be for the Commission to consider initiating a proposal for a 'blocking regulation' like the one that made it illegal for European companies to adhere to the 1996 Helms-Burton Act imposing US extra-territorial financial sanctions prohibiting trade with Cuba, Iran and Libya.¹³ Such an EU regulation could again be accompanied by a retaliatory system to reimburse damages incurred by European companies in the US by imposing penalties on US assets in the EU.¹⁴ But as Geranmayeh, an active proponent of the idea, has observed, this could trigger a trade conflict with a protectionist Trump-led White House; one that the EU may want to avoid, unless it considered the cost of angering Washing-

¹¹ See A. Vaez, "Can Europe Save the Iran Deal? Time for It to Consider a Plan B", *Foreign Affairs*, 16 January 2018; and E. Geranmayeh, "Europe Must Fight to Preserve the Iran Deal", *Foreign Policy*, 23 January 2018.

¹² The Joint Statement was issued on 17 April 2016, i.e. one day after the above-mentioned Joint Communiqué, and is available at http://eeas.europa.eu/archives/docs/statements-eeas/docs/iran_agreement/eu_iran_joint_statement_on_energy_cooperation.pdf.

¹³ Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, Official Journal of the EU, L 309, 29 November 1996, 1-6.

¹⁴ A survey conducted by the International Crisis Group (ICG) among more than 60 senior executives at multinational companies that are actively pursuing opportunities in Iran found that 54% indicated that "assuming Iran remains committed to the nuclear deal," the enforcement of an EU blocking regulation would "positively affect the decision to invest in Iran." See ICG, "The Iran Nuclear Deal at Two: A Status Report", Middle East Report No. 181, 16 January 2018, p. 22.

ton acceptable to avoid a situation whereby Iran resumed its nuclear programme and the US or Israel then had to resort to military action to stop it. Past experience has taught the EU that threatening the US with legal proceedings before the WTO might deter Washington from enforcing new sanctions.¹⁵

Third, the European Bank for Reconstruction and Development (EBRD) could help small and medium-sized enterprises conduct the often costly and cumbersome due diligence in Iran to ensure that their local partners are not targeted by the remaining EU or UN sanctions.¹⁶ Finally, the EU could expedite its evaluation of extending the third-country lending mandate of the European Investment Bank (EIB) to Iran, which would enhance the availability of finance and the possibility of blending loans with grants for private-sector and infrastructure development in Iran.¹⁷

Flanking security arrangements

As Trump's countdown-clock ticks towards May 12th, diplomatic activity is picking up to limit the fall-out from a US withdrawal from the JCPOA and the re-imposition of nuclear-related sanctions against non-US companies trading with Iran. Rather than simply insisting that all parties should stick to the JCPOA, the EU should make a concerted effort and adopt an integrated approach to protect the JCPOA. It should also push Iran on its ballistic missile programme and its role in regional security. In view of Tehran's intransigence on missile defence, it is the latter that could provide an opening for a confidence-building security arrangement alongside the nuclear deal. With Hezbollah on the defensive ahead of the general elections in Lebanon and hard-fought gains of Iranian(-backed) troops in Syria, it is the systematic denial of active support to the Houthi movement in Yemen that could prove to be Tehran's soft spot.

Yemen is not a 'core interest' for Iran. It is there largely to bolster resistance to Saudi regional force projection. Prestige notwithstanding, Tehran has little to lose from disengagement. Other than finding a much-needed solution to the humanitarian catastrophe affecting the civilian population, the EU's strategic interest in the country is limited, although the threat to the sea lanes from the Houthis in the Bab al-Mandeb Strait is real and growing, as Saudi and Emirati forces approach the critical Houthi-occupied port of Hodeida. China, which also depends on the Red Sea route for much of its maritime trade, is very worried too. Engaging Iran, perhaps through existing UN auspices on a regional solution, could allow both Riyadh and Tehran to save face when retreating from a war that neither side nor its proxies can win. It is far from certain that this would satisfy the hawkish US administration enough to back off on Iran, but at the very least it could widen the international community's cooperation with Iran on the security arrangements flanking the nuclear deal.

¹⁵ See International Legal Materials, 36 I.L.M. 530 (1997); and R. Ginsberg (2001) *The European Union in International Politics: Baptism by Fire*, Lanham: Rowman and Littlefield Publishers, pp. 239-244.

¹⁶ Cf. Vaez, op. cit.

¹⁷ See European Commission, Statement/16/1441, 16 April 2016.