

JCPOA Provisions for Access to Suspect Sites: The IAEA, Iran, and P5+1 Risks

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Introduction

Over the course of negotiations on the Iranian nuclear issue, one recurrent central question was: How could the parties to a signed deal access sites that are suspected of Iranian nuclear activity? For the P5+1 states, the core purpose of the agreement was to place limits on Iran's nuclear program. This could be accomplished through repurposing and monitoring Iran's known sites and nuclear-related materials. Still, the Iranians could cheat, turning to sites and materials unknown to outside actors. For that reason, those skeptical or critical of Iran demanded a rigorous process for access to suspect sites, and P5+1 governments responded by bargaining for an access and inspection process.

The final bargain disappointed and angered skeptics and critics. They (and the US administration as well)¹ had called for "anytime, anyplace" inspections, whereby inspectors could enter a suspected site anywhere in Iran without prior notice. Until the final stage of negotiations, P5+1 governments pledged to stand firm on the "anytime, anyplace" condition. In the end, they settled instead for "managed access," an inspection process that provides for prior notice to Iran before an inspection and denies inspectors all access to what Iran deems "military" sites.

The Joint Comprehensive Plan of Action (JCPOA) "managed access" process involves a number of steps. First, the International Atomic Energy Agency (IAEA) presents Iran with a set of questions and seeks Iranian clarification.² Iran then provides its reply.³ At that point, if not satisfied by Iran's explanations, the IAEA delivers a request for access to the site.⁴ That, in turn, starts a 24-day process during which Iran can offer objections, the

parties to the agreement reach a decision (by majority vote) on whether to allow the inspection to proceed, and then the inspection takes place.⁵

As a matter of policy, the P5+1 parties may not be eager to pursue a suspect site inspection that could endanger the continuity of the nuclear deal. Even if a P5+1 party does seek an inspection, though, the agreement's managed access provisions present a set of core risks. These risks arise because the agreement grants a number of actors significant control over the suspect site access process. More specifically, the agreement presents three risks: the IAEA could refuse to try to access the site; Iran could substantially delay the inspection process; and three members of the EU/E3+3 (the P5+1 plus the European Union) could side with Iran and together block an inspection. To see an inspection process through, an interested P5+1 party would need to exercise leverage against each of these actors, as any one of them can torpedo the process.

This article explains, actor by actor – the IAEA, Iran, and the P5+1 – the role that each plays in the process, and the tools a P5+1 party that seeks an inspection could use to exercise leverage. Some of these tools might also be instruments Israel could use, even though it is not one of the P5+1. After analyzing the different dynamics, the article offers an overall assessment of how the inspection process would likely unfold – and how the potential disagreements could undermine the Iran nuclear agreement as a whole.

The IAEA Risk

The IAEA has a central role in the JCPOA process for access to suspect sites – no less than a monopoly over access requests. In other words, the IAEA is the only actor charged with initiating the access process. As Paragraph 75 of the JCPOA's Annex I reads, “*if the IAEA has concerns regarding undeclared nuclear materials or activities, or activities inconsistent with the JCPOA, at locations that have not been declared under the comprehensive safeguards agreement or Additional Protocol, the IAEA will provide Iran the basis for such concerns and request clarification*” (emphasis added).⁶

The IAEA first “must have concerns” and then “provide” Iran with the information. A P5+1 government (or any other government) may not initiate an inspection on its own. For that reason, decision making at the IAEA could prove crucial. Should a P5+1 party want to act within the framework of the JCPOA and see inspections through, it would need to secure IAEA assent. Moreover, Paragraph 78 of Annex I further permits the IAEA to agree

with Iran on “alternative arrangements” – i.e., other than inspections – for verifying Iranian compliance with the deal.⁷ Here, too, the IAEA wields considerable authority. And beyond the formal process described in the Annex I text, the IAEA would also likely report on its findings directly to P5+1 governments or through the agency’s Board of Governors, and thereby influence governments’ decisions.

In all these steps, the agency’s decision making would prove crucial. In the past decade, the IAEA has won some respect for its professionalism, including from those critical of the Iran nuclear deal.⁸ This reputation may well have been a factor leading the P5+1 states to delegate to the IAEA such substantial authority in JCPOA implementation. That said, the JCPOA will remain in force for an extended period, and institutional dynamics can change. While the presumption of IAEA professionalism may be sound, those interested in the Iran nuclear issue should at least be aware of the risks and potential consequences of changes in the IAEA’s approach.

The agency’s decision making involves internal technical and policy discussions among IAEA staff. Still, critical decisions surrounding access to a suspect Iranian site would presumably require, in the first instance, authorization from the agency’s top official, its director-general, to whom agency staff ultimately report. The orientation of the director-general, then, could have a significant impact on JCPOA implementation. If it is able to persuade the director-general, or if there is a like-minded director-general already in office, an interested P5+1 state could have reasonable confidence that the IAEA would not obstruct an inspection that should be carried out.

For that reason, the question of who serves as director-general will be a crucial one throughout the term of the JCPOA. The director-general is appointed to a four-year term⁹ by a two thirds vote of the IAEA Board of Governors,¹⁰ composed of member state representatives designated or elected to one or two-year terms.¹¹ Once the Board of Governors appoints a director-general candidate, that candidate must be approved at the IAEA’s general conference, composed of all IAEA member states (currently 165).¹² Both the Board of Governors and general conference votes are decided on a one-state, one-vote basis, leading to the choice of a new director-general.¹³

The current director-general, Yukiya Amano, has historically been viewed as close to the United States,¹⁴ and in the run-up to Amano’s initial election in 2009, US diplomats, mindful of the high stakes, invested substantial energy in bolstering his candidacy.¹⁵ Perhaps because of that closeness, the issue of

“IAEA risk” – the risk that the agency would scuttle JCPOA enforcement – has not figured prominently in the debate over the agreement. But the JCPOA may well outlast Amano. Indeed, Amano’s current term expires on November 30, 2017,¹⁶ and the 2017 IAEA election could be a seminal event garnering significant policy and media attention. Interested parties in the JCPOA – whether the P5+1 states, Iran, or third parties such as Israel – can be expected to devote energy and resources toward the election process. In order to have confidence that the IAEA would not obstruct an attempt to inspect an Iranian site, P5+1 governments seeking implementation of the JCPOA will likely invest considerable energy in seeing a favorable candidate selected as director-general.

The director-general, then, makes initial decisions, including a decision whether or not to inspect a suspected Iranian nuclear site. Nonetheless, even the director-general lacks ultimate authority in the IAEA. That authority is conferred on the Board of Governors itself. As set out in the Statute of the IAEA, “The Director General shall be responsible for the appointment, organization, and functioning of the staff *and shall be under the authority of and subject to the control of the Board of Governors*. He shall perform his duties *in accordance with regulations adopted by the Board*” (emphasis added).¹⁷ The IAEA’s Board of Governors rules add that the director-general “shall be guided by the policy of the Agency” and “shall bring to the Board’s notice as a matter of urgency any fact which may require its intervention, in order to enable it to take any necessary action within the scope of its functions.”¹⁸

The IAEA Board of Governors thus holds the ultimate keys to agency decision making, whether through the selection of the director-general, or through the placement of the director-general “under [its] authority and subject to [its] control,” or through “regulations adopted” or Agency policies that “guide” him. Another important geopolitical context, therefore, is who sits on the Board of Governors. The annual selection of new Board members each September¹⁹ is thus important an event, as significant as (or perhaps even more than) the director-general selection. Particularly significant is the September 2016 stage in determining the Board for 2017, since that Board will both exercise the usual supervisory function and also appoint a director-general (for the new term beginning December 2017).

Members of the Board of Governors are selected through the IAEA Statute’s complex formula, designed both to incorporate states most advanced

in nuclear technology and to guarantee regional diversity.²⁰ Most members of that 2017 Board are already known. The list of states most advanced in nuclear technology – designated as Board members without standing for election – is unlikely to change materially. Eleven additional states were chosen in September 2015 to serve two-year terms that run through September 2017.²¹ The Board’s 2017 composition will be completed in September 2016 with the election of member states to 2016-2018 Board terms. That election and future votes should garner attention from P5+1 states, given the authority of the Board over JCPOA implementation – and the fate of inspections in particular.

Beyond acting to influence the selection of the director-general and Board of Governors, the P5+1 could wield leverage through their funding of the IAEA. Unlike Board or director-general selections, this leverage could be exercised at the time of an inspection request itself. That is, while a director-general is selected for a four-year term (and is then replaced only with difficulty) and Board members are elected to two-year terms, leverage over funding can be exercised at least on a yearly basis. A threat to withhold funding could be leveraged to influence IAEA decision making. Under the IAEA’s system of “mandatory assessed contributions,” the United States is responsible for providing more than 25 percent of the agency’s 2016 budget.²² Combined, the P5+1 supply nearly half of the budget (including significant contributions from Britain, France, and Germany).²³ Murmurs of withholding funding already came from Capitol Hill when the IAEA refused to disclose its side agreement with Iran over Parchin inspections.²⁴

These sources of potential leverage over the IAEA could give a complaining P5+1 state some influence over the agency’s inspections decision. Nonetheless, the IAEA’s role in the inspection process is clouded with two primary wild cards: a director-general who otherwise controls decision making and is difficult to remove, and a Board of Governors with so many states as members. “IAEA risk,” then, is a significant – and not fully appreciated – element in the effort to contain the Iranian nuclear program. The agency’s record of professionalism provides a basis for confidence that the risk will not materialize. However, were the risk to materialize, the complexity of managing it could prove an Achilles’ heel for the JCPOA regime as a whole.

The Iran Risk

Unlike the risk posed by potential IAEA obstruction, Iran's role in the inspection process was a prominent issue in the debate over the nuclear deal. Still, while the risks are well understood, commentators have devoted too little attention to management of those risks.

A key locus of Iranian leverage within the JCPOA document has been well-identified. While the Obama administration has described inspections as a 24-day process, the document stipulates otherwise. Before the 24-day clock begins to tick, Iran must reply to a set of IAEA questions – and the inspection provisions set no deadline by which Iran must present its answers.²⁵ To be sure, the agreement's good faith clauses provide some textual support for limiting Iranian obfuscation. Paragraph 28, for example, commits each party to “implement this JCPOA in good faith and in a constructive atmosphere, based on mutual respect, and to refrain from any action inconsistent with the letter, spirit and intent of this JCPOA that would undermine its successful implementation.”²⁶ Were Iran, hypothetically, not to respond for ten years, it would be breaking this promise, and thus any reasonable reading of the document would likely demand a deadline at some point.

That said, the document still does not set a specific deadline, potentially sending the parties down a rabbit hole of ambiguity. In their July op-ed on the inspections provisions, Hillel Fradkin and Lewis “Scooter” Libby assumed that Iran would need a well-founded reason for delay but could still point to several rationales. “Iran will presumably want to know what prompted the IAEA's concern,” they noted. “The suspect site identified by the IAEA is likely to be remote, and Iran will no doubt say that it must gather skilled people and equipment to responsibly allay IAEA concerns. Iran may offer explanations in stages, seeking IAEA clarifications before ‘completing’ its response. That could take a while.”²⁷ Others joined in their criticism.²⁸ Iran, then, could well delay inspections for a time while remaining within the parameters of the good faith clause.

Given this risk of obstruction, what leverage could an inspection-seeking P5+1 state use to ensure Iranian cooperation? The JCPOA itself provides one answer: avoiding the inspections process altogether and triggering the agreement's termination (or “dispute resolution”) clause in Paragraph 36 of the main text. If the IAEA has approached Iran with a request for access, the origin of that request may well have been from a P5+1 state that approached the IAEA. If a P5+1 state approaches the IAEA, then that state believes that

Iran is using a site to violate the deal and thus that Iran is “not meeting its commitments under this JCPOA.”²⁹ That enables the P5+1 state to skip the inspections process altogether and proceed directly to what the agreement labels as a “dispute resolution” process. In practice, the dispute resolution process is a way for a state to threaten to terminate the deal, at least in part. Once a party sits through 30-35 days of meetings, it can leave the agreement (again, either in whole or in part).³⁰

The JCPOA has no exhaustion clause, no provision that requires a “complaining party” – to use the Paragraph 36 phrase – first to inspect and only then to complain. Some might argue that a requirement to inspect is imposed by the JCPOA’s good faith clauses cited above: according to this argument, the inspection provisions are part of the deal and were a focus of attention. They must mean something. If so, the United States – or another of the P5+1 – would have some duty at least to try to inspect. Yet while there is merit to this argument, the perception of Iranian obfuscation or lack of good faith eclipses the prior need to inspect. In any event, the complaining state need not prove its argument before a court, but rather have a serious argument that gives it sufficient legitimacy to act.

Many have questioned whether in practice the threat of termination would exert real pressure on Iran, especially in the later years of the term of the JCPOA,³¹ once the main benefit to Iran – the lifting of sanctions – would have occurred years earlier. Prior long term business deals would be permitted to continue under the agreement’s grandfather clause.³² Full termination and snapback sanctions, even in part, would prove difficult for the P5+1. It might be that a P5+1 state might not view exiting the agreement, even in part, as consistent with its interests. However, the option exists, with a reasonable argument that inspections are not needed if Iran obfuscates. While interests and circumstances change over time, that element of the document is now frozen in place.

Still, as with the IAEA, the option of exiting the deal might not prove sufficient leverage for managing the potential risk of Iranian obstruction. The document may provide Iran with sufficient means to delay IAEA access enough to avoid meaningful inspections. In that case, securing Iranian cooperation would require a broader use of carrots and sticks, essentially a renegotiation of the terms of the agreement that could include, for example, concessions on Iran’s geopolitical standing in the Middle East.

The P5+1 Risk

Another actor that can impact on the inspections process is the P5+1 group of states and the European Union, sitting as part of the Joint Commission. That Joint Commission is the body established by the JCPOA as its implementation and dispute resolution forum, with representation by each of the P5+1 states, the European Union, and Iran.³³ Under Annex I, an inspection cannot proceed if four or more members of the Joint Commission object.³⁴ For Western governments, the intent of this provision was to blunt Russia and China's capacity, on their own, to block an inspection. The JCPOA provision meets that requirement since it requires an inspection to go forward even if only five Joint Commission members – for example, the United States, Britain, France, Germany, and the European Union – seek it. Nonetheless, an inspection-seeking P5+1 state cannot, on its own, force an inspection. This presents the risk that other P5+1 parties would block an inspection that should take place.

The JCPOA governs relations between Iran on the one hand, and the P5+1 on the other, such that the document itself offers little direction on how the P5+1 can resolve internal disagreements. This, in fact, has fueled some of the main criticism of the deal: the concern, for example, that the financial interests of European companies would prevent European governments from taking action needed for meaningful implementation.³⁵ In fact, the document offers little recourse for a lone complaining P5+1 state other than exiting the agreement under the Paragraph 36 termination clause.

Thus, an inspections disagreement would become not a legal issue but a diplomatic one, folded into the overall bilateral and multilateral relationships among the P5+1 states. A P5+1 state seeking an inspection would need to bargain with others in the P5+1 (and European Union) to secure the additional four votes needed to pass Joint Commission review. That bargaining could include the full scope of issues in broad and complex bilateral and multilateral relationships. Because of the wide scope of issues and the changing natures of the bilateral relationships involved, the nature of the bargaining is hard to assess prospectively.

Assessment

Implementation of the Iran nuclear agreement carries risks for those seeking to block Iran's path to nuclear arms. Identifying those risks is only the first stage, however; policymakers must also concentrate on how best to

manage them. The inspections provisions involve risks not only of Iranian obstructionism but also of potential lack of cooperation from the IAEA or P5+1 governments. In particular, the risk of IAEA non-cooperation has received too little attention. The identity and orientation of future directors-general and the Boards of Governors could prove crucial. Equally plausible are threats to exit the agreement and moves at renegotiation, and here too the document provides only limited guidance on how to manage the Iran risk and the P5+1 risk. For the Iran risk, the only real solution offered by the document is an exit ramp toward termination. For the P5+1 risk, the document offers no guidance at all.

A document such as the JCPOA is most durable if it sets out clear instructions for handling sensitive issues, hashing out contested points in a manner that reduces friction and makes smooth implementation more likely. However, the document's inspections provisions supply little recourse (and, for the Iran risk, even provide a textual basis for Iranian obduracy). Instead, remedies lie outside the framework of the agreement. That means either leaving the agreement (in favor of sanctions or military force) or negotiating in order to secure everyone's participation.

Negotiation could be limited to the issue at hand (i.e., the proposed inspection), or it could expand to include wider issues of the nuclear deal or of geopolitics. A common perception is that the Iranian nuclear issue will be governed for ten to fifteen years (or beyond) by fixed terms in the JCPOA. Those terms, though, are susceptible to renegotiation in the wake of a disagreement over how to handle inspections. Such disagreement could be not only with Iran but with the IAEA and P5+1 as well.

The inspections provisions demonstrate a fundamental instability in the nuclear accord. For enforcement, the JCPOA relies on IAEA verification, Iranian cooperation, and some measure of P5+1 concord. The absence of any of these could render the deal's terms unenforceable, or at least ripe for renegotiation. Managing the risks of the JCPOA might be achieved only by terminating or renegotiating the deal. That may give policymakers some tools, but the outcome is unpredictable and unstable. The P5+1 might well succeed in blocking the covert path to an Iranian bomb, but at what cost? What would Iran – or the IAEA or P5+1 – demand in return? We do not know.

Notes

- 1 David E. Sanger and Michael R. Gordon, “Future Risks of an Iran Nuclear Deal,” *New York Times*, August 23, 2015, <http://www.nytimes.com/2015/08/24/world/middleeast/in-pushing-for-the-iran-nuclear-deal-obamas-rationale-shows-flaws.html>; Jim Snyder and Indira A. R. Lakshmanan, “Inspectors Need Full Access in Iran Nuclear Deal, Moniz Says,” *Bloomberg Politics*, April 20, 2015, <http://www.bloomberg.com/politics/articles/2015-04-20/inspectors-need-full-access-in-any-iran-nuclear-deal-moniz-says>.
- 2 Joint Comprehensive Plan of Action, Ann. I, Para. 75.
- 3 JCPOA, Ann. I, Para. 75.
- 4 JCPOA, Ann. I, Para. 76.
- 5 JCPOA, Ann. I, Paras. 77-78.
- 6 JCPOA, Ann. I, Para. 75.
- 7 JCPOA, Ann. I, Para. 78.
- 8 For example, deal critic Matthew Kroenig has in the past praised the IAEA as “independent” and “well-respected.” Matthew Kroenig, Video, “IAEA Iran Report Decoded,” November 8, 2011, <http://www.cfr.org/iran/iaea-iran-report-decoded/p26451>.
- 9 IAEA Rules of Procedure of the Board of Governors, Rule 48.
- 10 IAEA Rules of Procedure of the Board of Governors, Rules 36(b).
- 11 IAEA Statute, Art. VI. C-VI.D.
- 12 IAEA Statute, Art. VII.A.
- 13 IAEA Statute, Arts. V. C, VI.E.
- 14 Julian Borger, “Nuclear Wikileaks: Cables Show Cosy US Relationship with IAEA Chief,” *The Guardian*, November 30, 2010, <http://www.theguardian.com/world/julian-borger-global-security-blog/2010/nov/30/iaea-wikileaks>.
- 15 “IAEA/DG: Amano Sketches Ambitious Transition Agenda,” Public Library of US Diplomacy, July 10, 2009, https://wikileaks.org/plusd/cables/09UNVIEVIENNA331_a.html (Wikileaks cable noting that “Amano attributed his election to support from the U.S., Australia and France, and cited U.S. intervention with Argentina as particularly decisive”).
- 16 IAEA, “IAEA Board of Directors Appoints Director General Amano to Second Term,” March 6, 2013, <https://www.iaea.org/newscenter/multimedia/videos/iaea-board-directors-appoints-director-general-amano-second-term>.
- 17 IAEA Statute, Art. VII.B.
- 18 IAEA, Rules and Procedures of the Board of Governors, Rule 8(a).
- 19 IAEA, General Conference, <https://www.iaea.org/about/policy/gc>; IAEA, Rules of Procedure of the General Conference, Rules 83-84.
- 20 IAEA Statute, Art. VI.A.
- 21 IAEA 59th General Conference, Summary of Meetings Held on Thursday, 17 September 2015, <https://www.iaea.org/About/Policy/GC/GC59/Journal/>

summary4-2015.pdf; IAEA General Conference, GC(59)/8, Election of Members to the Board of Governors, June 17, 2015.

- 22 IAEA General Conference, GC(59)/13, Ann. I, Scale of Assessment of Member States' Contributions Towards the Regular Budget for 2016, July 16, 2015.
- 23 Ibid.
- 24 Kathleen Miller and David Lerman, "Lindsey Graham Says He'll Cut IAEA Money Unless It Shares Iran Documents," *Bloomberg Politics*, August 13, 2015, <http://www.bloomberg.com/politics/articles/2015-08-13/graham-says-he-ll-cut-iaea-money-unless-it-shares-iran-documents>.
- 25 JCPOA Ann. I, Paras. 75-76.
- 26 JCPOA Para. 28; see also JCPOA Preamble and General Provisions, Para. viii.
- 27 Hillel Fradkin and Lewis Libby, "Iran Inspections in 24 Days? Not Even Close," *Wall Street Journal*, July 21, 2015, <http://www.wsj.com/articles/iran-inspections-in-24-days-not-even-close-1437521911>.
- 28 Emily B. Landau, "What 29 Top US Scientists Don't Know," *Times of Israel*, August 10, 2015, <http://blogs.timesofisrael.com/what-29-top-us-scientists-dont-know/>.
- 29 JCPOA Para. 36.
- 30 JCPOA Para. 36.
- 31 Mark Dubowitz and Annie Fixler, "The Fundamental Flaws of the Emerging Nuclear Deal," Foundation for Defense of Democracies Policy Brief, June 19, 2015, <http://www.defenddemocracy.org/media-hit/sunsets-and-snapbacks/>. Although Dubowitz and Fixler published their analysis in advance of the JCPOA, the dynamic they identify (that "effectiveness of the snapback will diminish as Iran builds a more powerful and resilient economy") is reflected in the JCPOA's terms.
- 32 JCPOA Para. 37 (providing that sanctions snapback "would not apply with retroactive effect to contracts signed between any party and Iran or Iranian individuals and entities prior to the date of application").
- 33 JCPOA Ann. IV, Paras. 1-2.
- 34 JCPOA Ann. I, Para. 78.
- 35 Chuck Schumer, "My Position on the Iran Deal": "It is reasonable to fear that, once the Europeans become entangled in lucrative economic relations with Iran, they may well be inclined not to rock the boat by voting to allow inspections." See *Medium*, August 7, 2015, <https://medium.com/@SenSchumer/my-position-on-the-iran-deal-e976b2f13478#.9dlhfq2jb>.