

## ISSUE FOCUS

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# The US' Withdrawal from the Iran Nuclear Agreement: A Legal Analysis with Special Reference to the Denuclearization of the Korean Peninsula

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*The so-called Iran nuclear agreement, officially known as the Joint Comprehensive plan of Action, is an agreement between Iran and the five permanent members of the UN Security Council as well as Germany and the EU to ensure that Iran's nuclear program will be exclusively peaceful. Praised as an historic diplomatic achievement that resolved a decade-long crisis, the 2015 agreement is distinctive in its comprehensive provisions and innovative solutions to various legal and technical issues. However, US President Donald Trump's controversial decision to withdraw the US from the agreement in May 2018 has put its future in peril. This paper attempts to analyze the legal aspects of the US' decision to withdraw from the Iran nuclear agreement with special reference to the currently on-going US-North Korea deal for the complete denuclearization of the Korean Peninsula. In the course of this study, special attention is given to the lessons learned from the Iran nuclear agreement.*

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### Keywords

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## I. Introduction

On May 8, 2018, US President Donald Trump delivered a TV speech from the White House in which he announced the withdrawal of the US from the so-called “Iran nuclear agreement,”<sup>1</sup> formally known as the Joint Comprehensive Plan of Action (“JCPOA”).<sup>2</sup> Immediately after this announcement, President Trump issued National Security Presidential Memorandum No.11 (“NSPM-11”),<sup>3</sup> which in addition to “[e]nding the US Participation in the JCPOA,”<sup>4</sup> directed the US Secretaries of State and Treasury “to re-impose all United States sanctions [against Iran] that were lifted or waived in connection with the JCPOA.”<sup>5</sup> As of this writing, Iran and the other participants of the JCPOA insisted they would continue to comply with their commitments under the agreement. However, efforts to ‘save’ the JCPOA seem halfhearted at best. Indeed, given the intensifying effects of the US’ extraterritorial sanctions, Iran’s eventual withdrawal from the agreement is a distinct possibility.<sup>6</sup>

The JCPOA is an agreement concluded on July 14, 2015 between Iran and the ‘E3/EU+3’ group, namely China, France, Germany, the Russian Federation, the UK, and the US with the High Representative of the EU for Foreign and Security Policy (hereinafter EU High Representative).<sup>7</sup> The UN Security Council endorsed this agreement through Resolution 2231, adopted on July 20, 2015 (SC Resolution 2231).<sup>8</sup> The JCPOA reflects a ‘step-by-step approach’ whereby the two sides made ‘reciprocal

<sup>1</sup> In the US, this instrument is often referred to as the “Iran Nuclear Deal.” It has also been called the “Iran Nuclear Accord,” the ‘Iran Deal,’ the ‘Vienna Accord,’ etc.

<sup>2</sup> See full text of the JCPOA including its five annexes, available at <https://www.state.gov/e/eb/tfs/spi/iran/jcpoa> (last visited on July 27, 2018).

<sup>3</sup> See full text of NSPM-11, available at <https://fas.org/irp/offdocs/nspm/nspm-11.pdf> (last visited on July 27, 2018).

<sup>4</sup> *Id.* § 2.

<sup>5</sup> *Id.* § 3.

<sup>6</sup> See Sec. IV.B.1 of this paper.

<sup>7</sup> JCPOA, *supra* note 2, Preface, ¶ 1 and pmbl. and General Provisions, ¶ i. In the US, this group is usually called the ‘P5+1,’ which refers to the five permanent members of the UN Security Council plus Germany.

<sup>8</sup> S.C. Res 2231, U.N. Doc. S/RES/2231 (July 20, 2015), available at [http://undocs.org/S/RES/2231\(2015\)](http://undocs.org/S/RES/2231(2015)) (last visited on July 27, 2018).

commitments<sup>9</sup> that were, and at the time of writing still are, to be implemented in a multi-stage, multi-year process. The essential purpose of this process is to “ensure the exclusively peaceful nature of Iran’s nuclear programme”<sup>10</sup> by placing various restrictions on nuclear activities in Iran under the verification and monitoring of the International Atomic Energy Agency (“IAEA”). On the other hand, the JCPOA “enable[s] Iran to fully enjoy its right to nuclear energy for peaceful purposes,”<sup>11</sup> in addition to removing sanctions imposed on the country by the Security Council, the US, and the EU in connection with its nuclear program.<sup>12</sup>

This research aims to analyze the legal aspects of the US’ decision to withdraw from the Iran nuclear agreement with special reference to the complete denuclearization of the Korean Peninsula.<sup>13</sup> Certainly, there are major differences between the Iranian and North Korean nuclear programs.<sup>14</sup> Moreover, North Korea has a long history of nuclear negotiations with the US-including several failed agreements, exemplified by the 1994 Agreed Framework<sup>15</sup>-that provide ample lessons for future negotiations between the two countries. However, as we will see, both the Iran nuclear agreement and its uncertain future provide important lessons.

This paper is composed of five parts including Introduction and Conclusion. Part two will briefly overview of the historical and political background of the JCPOA to contextualize the US’ decision to withdraw from the agreement. Part three will focus on the scope and binding force of the agreement. Part four will examine the legal implications of the US’ withdrawal from the agreement.

<sup>9</sup> JCPOA, *supra* note 2, pmb1. and General Provisions, ¶ i.

<sup>10</sup> *Id.* pmb1. and General Provisions, ¶ ii.

<sup>11</sup> *Id.* pmb1. and General Provisions, ¶ iii.

<sup>12</sup> *See* Sec. IV.A.1 of this paper.

<sup>13</sup> A month after his decision to withdraw from the JCPOA, on June 12, 2018, President Trump held an historic summit with Kim Jong Un, the Leader of North Korea, in Singapore. At the end of this summit, a joint statement was signed by the two leaders (hereinafter Trump-Kim Statement), in which North Korea committed to “work towards complete denuclearization of the Korean Peninsula.” *See* full text of the Trump-Kim Statement, *available at* <https://www.reuters.com/article/us-northkorea-usa-agreement-text/trump-and-kims-joint-statement-idUSKBN1J80IU> (last visited on July 27, 2018).

<sup>14</sup> Unlike North Korea, Iran does not possess nuclear weapons. It has merely been accused of violating its safeguards obligations. *See infra* note 18. Furthermore, while North Korea has withdrawn from the Treaty on the Non-Proliferation of Nuclear Weapons 1968 (“NPT”), Iran is a state party as a non-nuclear weapon state.

<sup>15</sup> *See generally* J. Young & E. Kim, *The Agreement after the Six-Party Talks: Are There No Alternatives to the Modified Version of the 1994 Geneva Agreed Framework*, 21 TEMP. INT’L & COMP. L. J. 177-203 (2007).

## II. Historical and Political Background of the JCPOA

### A. The Negotiating History of the Agreement

The Iran nuclear agreement was the outcome of almost two years of laborious negotiations between Iran and the E3/EU+3. Although the JCPOA negotiations began in late 2013, Iran had been involved in negotiations about its nuclear program since 2003, shortly after it was revealed in August 2002 that it had failed to declare sensitive nuclear activities to the IAEA.<sup>16</sup> This revelation exposed Iran to accusations that it had a covert nuclear weapons program. Iran has always rejected these accusations. While Iran's failure to declare some of its nuclear activities were inconsistent with its Comprehensive Safeguards Agreement of June 19, 1973 with the IAEA (hereinafter 1973 Safeguards Agreement),<sup>17</sup> it is emphasized that the IAEA has never found evidence of the diversion of nuclear materials in Iran to nuclear weapons.<sup>18</sup>

Following the 2002 revelations, Iran entered a decade of intermittent nuclear negotiations, first with the E3 (France, Germany, and the UK) and after 2006, with the P5+1, called the E3+3 group of States led by the EU High Representative who also represents the EU; it will be thus referred to as 'E3/EU+3.' These negotiations failed to settle the dispute, as the divergences were too wide to be bridged.<sup>19</sup> However, the crisis deepened as Iran advanced its nuclear program and Western powers increased their pressure on Iran. During the period 2006 to 2010, the UN Security Council passed six Chapter VII resolutions on the Iranian nuclear issue.<sup>20</sup> The Security Council repeatedly demanded that Iran suspend all activities related to enrichment and reprocessing. Iran refused to comply with the Security Council's demands, arguing that they were illegal.<sup>21</sup> In response, the Security Council adopted numerous sanctions against Iran. More significantly, from 2010 onward, the US and the EU imposed

<sup>16</sup> S. Mahmoudi, *The Iran Nuclear Deal: Some International-Law Aspects*, in *THE INTERNATIONAL LEGAL ORDER: CURRENT NEEDS AND POSSIBLE RESPONSES: ESSAYS IN HONOUR OF DJAMCHID MOMTAZ 24-5* (J. Crawford et al. eds., 2017).

<sup>17</sup> See the full text of the 1973 Safeguards Agreement, IAEA Doc. INFCIRC/214, available at <https://www.iaea.org/sites/default/files/publications/documents/infcircs/1974/infcirc214.pdf> (last visited on Aug. 1, 2018).

<sup>18</sup> P.-E. Dupont, *Compliance with Treaties in the Context of Non-proliferation: Assessing Claims in the Case of Iran*, 19 J. CONFLICT & SECURITY L. 187-205 (2014). See also D. Joiner, *The Security Council as Legal Hegemon*, 43 GEO. J. INT'L L. 242-4 (2012).

<sup>19</sup> Mahmoudi, *supra* note 16, at 25-9.

<sup>20</sup> See Sec. IV.A.1 of this paper.

<sup>21</sup> See Letter of the Foreign Minister of Iran Mr. Motaki to the Secretary General of the United Nations regarding the United Nations Security Council Resolutions on Iran's nuclear issues, dated March 24, 2008, IAEA Doc. INFCIRC. 727, available at <https://www.iaea.org/sites/default/files/publications/documents/infcircs/2008/infcirc724.pdf> (last visited on Aug. 3, 2018). For details, see Dupont, *supra* note 18, at 188-94; Joiner, *supra* note 18, at 244-8.

various economic/financial sanctions on Iran, which severely affected its economy.<sup>22</sup>

The breakthrough in the negotiations seemingly came with the election of Hassan Rouhani as the President of Iran in June 2013. Mr. Rouhani advocated a more flexible approach on the part of Iran and called for the resumption of negotiations, the latest round of which had failed in April of that year. On October 15, 2013, negotiations between Iran and the E3/EU+3 were resumed in Geneva. From then onward, several rounds of negotiations were conducted until an interim agreement, the Joint Plan of Action (“JPOA”),<sup>23</sup> was reached on November 24, 2013. According to the JPOA, Iran agreed to temporarily freeze key parts of its nuclear program in exchange for limited sanctions relief, while negotiations for a long-term agreement continued. Thereafter, negotiations led to the joint statement on April 2, 2015 - known as the Lausanne Statement - whereby the main parameters of the final agreement were determined.<sup>24</sup> In the intense negotiations that followed, details of the final agreement were adopted. The final round of negotiations ended on July 14, 2015, when the EU High Representative and Iranian foreign minister announced the conclusion of the JCPOA in Vienna.<sup>25</sup>

## B. Political Opposition to the Agreement

At the time of its announcement, it was hoped that the successful implementation of the JCPOA would definitively resolve the Iranian nuclear issue. However, even before the conclusion of the agreement, there were doubts about its long-term viability. While the negotiations were ongoing, opponents of the Obama Administration including leaders of the Republican Party in the US Congress expressed their vehement opposition to the prospective agreement under negotiation. Indeed, a few months before the conclusion of the JCPOA, Republican Senator Tom Cotton and 46 other Senators published an open letter (hereinafter Cotton Letter) to “The Leaders of the Islamic Republic of Iran.” In this letter, they qualified the agreement under negotiation as an “executive agreement”<sup>26</sup> and forewarned that “the

<sup>22</sup> See Sec.IV.B.1 of this paper.

<sup>23</sup> See the full text of the JPOA, available at [http://www.isisnucleariran.org/assets/pdf/Joint\\_plan\\_24Nov2013.pdf](http://www.isisnucleariran.org/assets/pdf/Joint_plan_24Nov2013.pdf) (last visited on Aug. 3, 2018).

<sup>24</sup> See full text of the Lausanne Statement, available at [https://eeas.europa.eu/headquarters/headquarters-homepage/3477/joint-statement-eu-high-representative-federica-mogherini-and-iranian-foreign-minister-javad\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/3477/joint-statement-eu-high-representative-federica-mogherini-and-iranian-foreign-minister-javad_en) (last visited on Aug. 3, 2018).

<sup>25</sup> See Joint Statement by EU High Representative Federica Mogherini and Iranian Foreign Minister Javad Zarif, dated July 14, 2105, available at [http://collections.internetmemory.org/haeu/content/20160313172652/http://eeas.europa.eu/statements-eeas/2015/150714\\_01\\_en.htm](http://collections.internetmemory.org/haeu/content/20160313172652/http://eeas.europa.eu/statements-eeas/2015/150714_01_en.htm) (last visited on Aug. 3, 2018).

<sup>26</sup> See, e.g., S. Estreicher & S. Menasha, *Taking Steel Seizure Seriously: The Iran Nuclear Agreement and the Separation*

next president could revoke such an executive agreement with the stroke of pen.”<sup>27</sup>

Shortly afterward, the US Congress passed the Iran Nuclear Agreement Review Act of 2015 (“INARA”),<sup>28</sup> because “Congress thought it was being unfairly sidelined from Iran policy and desperately wanted to reclaim some role in the process.”<sup>29</sup> According to INARA, the US president was required to transmit the agreement, once reached, to the US Congress for review. During a 60-day review period, Congress could pass a joint resolution of disapproval, which would have effectively prevented the Obama Administration from providing Iran with sanctions relief under the JCPOA.<sup>30</sup> “As it happened, a majority in the House [of Representatives] voted to disapprove the JCPOA, while, in the Senate, Democrats prevented a resolution of disapproval from reaching a vote.”<sup>31</sup> In other words, a joint resolution of disapproval was avoided through parliamentary maneuvers, not because it did not have majority support in both houses of the US Congress.<sup>32</sup>

The Cotton Letter and INARA are only two examples of the depth of opposition to the Iran nuclear agreement in the US. Admittedly, there was some opposition to the JCPOA in Iran as well,<sup>33</sup> but this paled in comparison to the intense criticisms of the agreement by the American Right.<sup>34</sup> Prominent among the agreements critics was John Bolton,<sup>35</sup> who as national security advisor to President Trump, would go on to play an important role in the decision to withdraw the US from the JCPOA.<sup>36</sup> As for Mr. Trump, he had made lambasting the ‘Iran Deal’ a mainstay of his presidential

*of Powers*, 86 *FORDHAM L. REV.* 1199-250 (2017); H. Koh, *Triptych’s End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 *YALE L. J. F.* 352-5 (2017).

<sup>27</sup> See full text of the Cotton Letter, available at [https://www.cotton.senate.gov/?p=press\\_release&id=120](https://www.cotton.senate.gov/?p=press_release&id=120) (last visited on Aug. 3, 2018).

<sup>28</sup> See full text of INARA, available at <https://www.congress.gov/114/plaws/pub117/PLAW-114pub117.pdf> (last visited on Aug. 3, 2018).

<sup>29</sup> Estreicher & Menasha, *supra* note 26, at 1243.

<sup>30</sup> INARA, *supra* note 28, §§ (a)(1), (b)(1)-(5) & (c)(2)-(3).

<sup>31</sup> Estreicher & Menasha, *supra* note 26, at 1243.

<sup>32</sup> K. Daugirdas & J. Mortensen, *Contemporary Practice of the US Relating to International Law*, 109 *AM. J. INT’L L.* 874-7 (2015).

<sup>33</sup> T. Erdbrink, *Iranian Hard-Liners Say Accord Crosses Their Red Lines*, *N.Y. TIMES*, July 17, 2015, at A10, available at <https://www.nytimes.com/2015/07/17/world/middleeast/iranian-hard-liners-say-nuclear-accord-crosses-their-red-lines.html> (last visited on Aug. 3, 2018).

<sup>34</sup> See generally D. JETT, *THE IRAN NUCLEAR DEAL: BOMBS, BUREAUCRATS, AND BILLIONAIRES* (2017).

<sup>35</sup> During the JCPOA negotiations, Mr. Bolton openly called for bombing Iran’s nuclear installations instead of finding a diplomatic solution to the issue. See J. Bolton, *To Stop Iran’s Bomb, Bomb Iran*, *N. Y. TIMES*, Mar. 26, 2015, at A23, available at <https://www.nytimes.com/2015/03/26/opinion/to-stop-irans-bomb-bomb-iran.html> (last visited on Aug. 3, 2018).

<sup>36</sup> T. Collina, *The Path of Broke Nuclear Agreements*, *NAT’L INTEREST*, available at <https://nationalinterest.org/feature/the-path-broke-nuclear-agreements-25891> (last visited on Aug. 3, 2018).

campaign, asserting, “My no. 1 priority is to dismantle the disastrous deal with Iran.”<sup>37</sup> There was also opposition from the governments of Israel and Saudi Arabia.<sup>38</sup> Both these governments reportedly influenced the decision-making process that led the US’ withdrawal.<sup>39</sup>

In retrospect, it seems apparent that the intense hostility toward the agreement in the US should have been taken more seriously. As discussed later, notwithstanding the legal effect of SC Resolution 2231, the JCPOA is a political rather than legally binding agreement. The durability of commitments made under such agreements is always subject to domestic political fluctuations, since it is much easier to violate or disaffirm a non-legal agreement. Regarding such ‘nonlegal instruments,’ it is always important to evaluate whether those negotiating them enjoy the broad support if not the consensus of the political establishment of the state they are representing. In the case of the JCPOA, this was clearly not the case: “As the Iran deal illustrates, consequential political commitments of this form, [...], may be less stable [...] because they can be made without the broad domestic support needed for long-term compliance.”<sup>40</sup>

Regarding the nascent US-North Korean negotiations, while there is a certain degree of institutionalized hostility against North Korea in the US,<sup>41</sup> today, the negotiations following the Trump-Kim Summit in Singapore in June 12, 2018 have not had the polarizing effect of the nuclear agreement with Iran, because critics of the Iran nuclear agreement are now allied to the Trump Administration.

<sup>37</sup> S. Sengupta & R. Gladstone, *On Issue after Issue Trump’s Statements Conflict with U.N. Positions*, N. Y. TIMES, Nov. 20, 2016, at A26, available at <https://www.nytimes.com/2016/11/20/world/americas/united-nations-trump-climate-change-iran-cuba.html> (last visited on Aug. 3, 2018).

<sup>38</sup> D. Haupt, *Legal Aspects of the Nuclear Accord with Iran and its Implementation: International Law Analysis of Security Council Resolution 2231 (2015)*, in *NUCLEAR NON-PROLIFERATION IN INTERNATIONAL LAW* 406 (J. Black-Branch & D. Fleck eds., 2016).

<sup>39</sup> D. Sanger & D. Kirkpatrick, *A Risky Bet on Breaking Tehran’s Will*, N.Y. TIMES, May 9, 2018, at A1, available at <https://www.nytimes.com/2018/05/08/us/politics/trump-iran-nuclear-deal-news-analysis-.html> (last visited on Aug. 3, 2018).

<sup>40</sup> C. Bradley & J. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1296 (2018).

<sup>41</sup> Collina, *supra* note 36.

### III. The Scope and Binding Force of the Agreement

#### A. Scope of the Agreement

##### 1. Structure of the JCPOA and SC Resolution 2231

To fully understand the scope of the JCPOA, it is necessary to know about its structure.<sup>42</sup> The JCPOA participants strove to find a long-term and comprehensive solution to the Iranian nuclear issue. To achieve this goal, a 159-page document was drafted.<sup>43</sup> The text of the JCPOA is subdivided into three parts: Preface, Preamble, and General Provisions. Furthermore, the substantive part includes 36 paragraphs under 4 headings, namely Nuclear, Sanctions, Implementation Plan, and Dispute Resolution Mechanism. The JCPOA also comprises five technical annexes: Annex I (Nuclear-related measures), Annex II (Sanctions-related measures), Annex III (Civil Nuclear Cooperation), Annex IV (Joint Commission), and Annex V (Implementation Plan). The commitments of Iran and the E3/EU+3 participants are outlined in general terms in the Nuclear and Sanctions sections. The details of Iran's commitments under the Nuclear section are set out in Annex I (Nuclear-related measures). The commitments of the E3/EU+3 under the Sanctions section are detailed in Annex II (Sanction-related measures). These commitments are to be implemented in the timeframe outlined in the Implementation Plan section and methodically detailed in Annex V (Implementation Plan). Under Annex IV (Joint Commission), a joint commission is established to monitor the implementation of the JCPOA. In the last section, Dispute Resolution Mechanism, a procedure to settle disputes regarding compliance issues is provided.<sup>44</sup>

As mentioned, the JCPOA has been endorsed by SC Resolution 2231.<sup>45</sup> The text of the JCPOA and its annexes is appended to SC Resolution 2231 as Annex A.<sup>46</sup> In addition, a statement by the E3/EU+3 states is appended to SC Resolution 2231 as Annex B,<sup>47</sup> in which they stress: "Their participation in the JCPOA is contingent upon the United Nations Security Council adopting a new resolution that would [...] require States to comply with the provisions in this statement [...]"<sup>48</sup> This condition

<sup>42</sup> For details, see Mahmoudi, *supra* note 16, at 30-3.

<sup>43</sup> See generally JCPOA, *supra* note 2.

<sup>44</sup> The JCPOA dispute resolution mechanism does not entail binding decisions. See Haupt, *supra* note 38, at 432-4.

<sup>45</sup> SC Resolution 2231, *supra* note 8, ¶ 1.

<sup>46</sup> *Id.* Annex A (Joint Comprehensive Plan of Action).

<sup>47</sup> *Id.* Annex B (Statement).

<sup>48</sup> *Id.* Annex B (Statement), pmb1.

was fulfilled by paragraph 7 (b) of SC Resolution 2231.<sup>49</sup> The statement in Annex B contains provisions “the implications of which either fall beyond the material ambit of the JCPOA or were not acceptable to Iran within the framework of the JCPOA.”<sup>50</sup>

These provisions impose various restrictions on Iran in terms of supply, sale, and transfer of conventional arms and various nuclear and ballistic missile-related items, materials, equipment, goods, and technology.<sup>51</sup> More importantly, in paragraph 3 of the statement, “Iran is called upon not to undertake any activity related to ballistic missiles designed to be capable of delivering nuclear weapons, including launches using such ballistic missile technology [...]”<sup>52</sup> Iran’s compliance with the provisions of this paragraph and not the JCPOA has been a point of contention among Iran, the US and E3 States.<sup>53</sup>

## 2. Substantive Scope of the Agreement

Despite its elaborate structure and meticulously detailed provisions, the scope of the JCPOA is strictly limited to Iran’s nuclear program. Under the JCPOA, Iran has undertaken specific commitments that severely restrict its nuclear program. These limitations effectively prevent Iran from producing fissile material for nuclear weapons at its declared nuclear facilities and increase its so-called ‘breakout time’ from two-three months to a year. A wide-ranging inspection and verification regime is provided by the JCPOA, so that the IAEA can monitor and verify Iran’s compliance with its commitments. This regime ensures that Iran will not be able to acquire nuclear weapons capability at undeclared facilities, i.e., ‘sneak out’ by means of a covert nuclear program.<sup>54</sup>

However, even though the nuclear issue has long overshadowed Iran’s relationship with the international community, it is not the only problem underlying the difficult relationship between Iran and the West, especially with the US. Many issues divide Iran and the US including Iran’s ballistic missile program and American efforts to contain and isolate Iran. Faced with this reality, the negotiators of the JCPOA took

<sup>49</sup> *Id.* ¶ 7(b).

<sup>50</sup> Haupt, *supra* note 38, at 417.

<sup>51</sup> SC Resolution 2231, *supra* note 8, Annex B: Statement, ¶¶ 2 & 4-6. *See also* Haupt, *supra* note 38, at 417-22.

<sup>52</sup> *Id.* Annex B (Statement), ¶ 3.

<sup>53</sup> *See, e.g.*, Report of the Secretary-General on the implementation of Security Council resolution 2231 (2015), § IV (Implementation of ballistic missile-related provisions), ¶¶ 19-23, at 6-7, U.N. Doc. S/2016/589 (July 12, 2016), available at <https://undocs.org/S/2016/589> (last visited on Aug. 3, 2018). *Cf.* Haupt, *supra* note 38, at 450-4.

<sup>54</sup> For details on how the JCPOA blocks Iran’s potential pathways to acquiring nuclear weapons capability, *see* S.-E. Fikenscher, *Will Iran Cheat? The Reliability of the Joint Comprehensive Plan of Action*, 11 *YALE J. INT’L AFF.* 9-19 (2016), available at [http://yalejournal.org/article\\_post/will-iran-cheat](http://yalejournal.org/article_post/will-iran-cheat) (last visited on Oct. 20, 2018). *See also* Haupt, *supra* note 38, at 455-62.

what seemed like the only practicable course and decided to exclusively focus on Iran's nuclear program, as discussion of other issues would have rendered agreement on the nuclear issue almost impossible.<sup>55</sup> However, critics in the US argued that by agreeing to the JCPOA, the Obama Administration deprived the US of its most effective tool to counter Iran, namely economic and financial sanctions, without resolving the other issues they considered equally important.<sup>56</sup> This was also the main criticism leveled at the agreement by the Trump Administration.<sup>57</sup>

Key here is that with rare exceptions, in terms of resolving disputes between adversaries such as Iran and the US, it would be very difficult to find a long-term solution to a single issue separated from the context of a hostile relationship involving various other disputes. This is especially true when the separated issue has been resolved through a political rather than legally binding agreement. The experience of the 1994 Agreed Framework between North Korea and the US confirms this assertion.<sup>58</sup> The Trump-Kim Statement on June 12, 2018 suggests that the two sides are aware of this necessity, as they have committed to "establish new U.S.-DPRK relations in accordance with the desire of the peoples of the two countries for peace and prosperity."<sup>59</sup> Of course, this will not be an easy task. Indeed, the 1994 Agreed Framework established precise parameters for resolving various differences between North Korea and the US,<sup>60</sup> but its failure resulted in North Korea's nuclear weapons arsenal.<sup>61</sup> On the other hand, the Iran nuclear agreement demonstrates that resolving one issue, even though a comprehensive agreement like the JCPOA, without improving the overall relationship is not workable in the long run.

### 3. The Temporal Scope of the Agreement

Another criticism about the Iran nuclear agreement is its temporal limitations. As mentioned earlier, the JCPOA participants have undertaken to implement their

<sup>55</sup> Daugirdas & Mortensen, *supra* note 32, at 875.

<sup>56</sup> See, e.g., E. Cohen, E. Edelman & R. Takiyeh, *Time to Get Tough on Iran: Iran Policy after the Deal*, 95 FOREIGN AFF. 64-75 (2016), available at <https://www.foreignaffairs.com/articles/iran/2015-12-14/time-get-tough-tehran> (last visited on Oct. 20, 2018).

<sup>57</sup> See NSPM-11, *supra* note 3, p.mbl. & § 1. See also M. Pompeo, *After the Deal: A New Iran Strategy*, Address of the US Secretary of State at the Heritage Foundation (May 21, 2018), available at <https://www.heritage.org/defense/event/after-the-deal-new-iran-strategy> (last visited on Aug. 10, 2018).

<sup>58</sup> Young & Kim, *supra* note 15, at 191-193.

<sup>59</sup> Trump-Kim Statement, *supra* note 13, ¶ 1.

<sup>60</sup> See full text of the Agreed Framework of October 21, 1994 between the United States of America and the Democratic People's Republic of Korea, IAEA Doc. INFCIRC/457, available at <https://www.iaea.org/sites/default/files/publications/documents/infcircs/1994/infcirc457.pdf> (last visited on Aug. 10, 2018).

<sup>61</sup> Collina, *supra* note 36. See also Young & Kim, *supra* note 15, at 193.

commitments within a multi-stage, multi-year timetable called the Implementation Plan. The Implementation Plan is based on five temporal parameters: Finalization Day, Adoption Day, Implementation Day, Transition Day, and Termination Day. The Finalization Day was on July 14, 2015, when negotiations ended and the JCPOA was announced. Adoption Day was on October 18, 2015 (90 days after the JCPOA was endorsed by SC Resolution 2231). On this day, the JCPOA came into effect. The Implementation Day was on January 16, 2016, when the IAEA Director General presented a report to the Agency's Board of Governors and the Security Council. The report confirmed that Iran had implemented key measures under the JCPOA such as reducing the number of centrifuges and its stockpile of enriched uranium.<sup>62</sup> Transition Day will take place on October 18, 2023 (eight years from Adoption Day) or sooner if the IAEA Director General issues the so-called "Broader Conclusion Report" to the IAEA Board of Governors and the Security Council confirming that "all nuclear material in Iran remains in peaceful activities." After Transition Day, Iran, the US, and the EU will begin implementing their final commitments under the JCPOA. Finally, the Termination Day will occur on October 18, 2025 (10 years from Adoption Day), when SC Resolution 2231 will terminate and the Security Council will no longer be seized of the Iran nuclear issue.<sup>63</sup>

In short, the Implementation Plan means that if the JCPOA is successfully enforced, Iran's nuclear file will be closed on October 18, 2025 or earlier if the IAEA Director General issues the Broader Conclusion Report sooner.<sup>64</sup> Moreover, the JCPOA's restrictive provisions on Iran's nuclear activities are mostly subject to sunset clauses that last 10 or 15 years. Once these clauses expire, the restrictions are removed.<sup>65</sup>

These temporal limitations led critics to argue that once the restrictions are lifted, Iran will be able to acquire nuclear weapons. It was specifically maintained: "The JCPOA establishes Iran as a threshold nuclear power today and paves the way for an eventual Iranian bomb."<sup>66</sup> However, this criticism ignores the underlying logic of the agreement. As Koh rightly points out, "the Iran Nuclear Deal is a confidence-

<sup>62</sup> See Report by the Director General on Verification and Monitoring in the Islamic Republic of Iran in light of United Nations Security Council Resolution 2231 (2015), dated January 16, 2016, U.N. Doc. S/2016/57, available at <http://www.undocs.org/en/S/2016/57> (last visited on Aug. 10, 2018).

<sup>63</sup> SC Resolution 2231, *supra* note 8, ¶ 8. See also JCPOA, *supra* note 2, ¶ 34 (v) & Annex V (Implementation Plan), ¶ 24.

<sup>64</sup> For details, see Haupt, *supra* note 38, at 426-31.

<sup>65</sup> See, e.g., JCPOA, *supra* note 2, ¶¶ 2-3, 5, 10, 12 & Annex I (Nuclear-related measures), ¶¶ 14, 18-28, 31-32, 35-40 & 45-46.

<sup>66</sup> Cohen et al., *supra* note 56, at 65.

building device designed to shift from a pattern of confrontation toward a pattern of cooperation with Iran.”<sup>67</sup> In the JCPOA, “Iran reaffirms that under no circumstances will Iran ever seek, develop or acquire any nuclear weapons.”<sup>68</sup> This is, of course, a reaffirmation of Iran’s legal obligation under Article II of the NPT. By accepting and complying with restrictions imposed by the JCPOA over the course of 10 to 15 years, Iran intends to restore the international community’s trust in its nuclear program. More critically, the verification and monitoring regime of the agreement will continue after its restrictions have been removed. As of the Implementation Day, Iran returned to provisionally applying the 2003 Additional Protocol<sup>69</sup> to its 1973 Safeguards Agreement and has undertaken to ratify it since Transition Day.<sup>70</sup> Iran has also undertaken to comply with modified Code 3.1 of the Subsidiary Arrangements<sup>71</sup> to its 1973 Safeguards Agreement.<sup>72</sup> Moreover, Iran has agreed to additional ‘transparency measures’ by the IAEA that last 20 or 25 years.<sup>73</sup> For inspections of undeclared facilities in Iran for the detection of covert nuclear activities, the JCPOA provides the IAEA with enhanced access that goes far beyond the 2003 Additional Protocol.<sup>74</sup>

Regardless, none of these arrangements have satisfied the critics in the US, who simply believe that Iran can never be trusted. This brings us back to the point highlighted earlier. It would be very difficult to establish trust regarding an issue as sensitive as nuclear proliferation when an atmosphere of mistrust and adversity prevails in the overall relationship. The history of nuclear diplomacy between the US and North Korea provides ample evidence of this assertion.<sup>75</sup>

<sup>67</sup> Koh, *supra* note 26, at 354. *See also* JCPOA, *supra* note 2, Preface, ¶ 2.

<sup>68</sup> *Id.* Preface, ¶ 1; pmb. and General Provisions, ¶ iii.

<sup>69</sup> Iran and the IAEA signed an Additional Protocol to the 1973 Safeguards Agreement on December 18, 2003. The 2003 Additional Protocol is based on the so-called 93+2 model protocol. *See* IAEA Doc. INFCIRC/530, available at <https://www.iaea.org/sites/default/files/infirc540c.pdf>. It also grants the IAEA wide-ranging rights of access to information and facilities in Iran to detect undeclared nuclear material and activities. *See* the full text of the 2003 Additional Protocol, IAEA Doc. INFCIRC/214/Add.1, available at <https://www.iaea.org/sites/default/files/infirc214a1.pdf> (all last visited on Oct. 10, 2018).

<sup>70</sup> JCPOA, *supra* note 2, ¶¶ 13 & 34 (iv); Annex I (Nuclear-related measures), ¶ 64.

<sup>71</sup> The Code 3.1 of the Subsidiary Arrangements requires Iran to provide the IAEA with design information on new enrichment facilities “as soon as the decision to construct or to authorize construction has been taken.” *See* Joiner, *supra* note 18, at 241-2.

<sup>72</sup> JCPOA, *supra* note 2, ¶ 13 & Annex I (Nuclear-related measures), ¶ 65.

<sup>73</sup> *Id.* ¶ 15.

<sup>74</sup> *Id.* Annex I (Nuclear-related measures), ¶¶ 74-78. *See also* Mahmoudi, *supra* note 16, at 34-6.

<sup>75</sup> Young & Kim, *supra* note 15, at 185-193.

## B. The Binding Force of the Agreement

### 1. The Legal Nature of the JCPOA

As indicated earlier, the JCPOA is not a treaty within the terms of the 1969 Vienna Convention on the Law of Treaties (“VCLT”).<sup>76</sup> The Action Plan in itself does not constitute a legally binding agreement. The wording of the JCPOA leaves no doubt regarding its non-legal character.<sup>77</sup> The title “Plan of Action” is commonly used for non-binding instruments. The term ‘party’ (or ‘parties’) is never used in the text, as the drafters were aware of how this term is defined in Article 2(1) (g) of the VCLT.<sup>78</sup> Instead, the concluding sides are referred to as ‘participant’ or ‘participants.’ Throughout the text, the term ‘will’ is used to describe participants’ various commitments. It is commonly understood that the term ‘will,’ as opposed to terms such as ‘shall,’ denotes an intention to create non-legal commitments.<sup>79</sup> Indeed, use of the term ‘commitment,’ as opposed to ‘obligation,’ to describe participants’ undertakings can be similarly viewed.<sup>80</sup> Most importantly, the JCPOA’s substantive part begins with this introductory sentence: “Iran and E3/EU+3 will take the following *voluntary measures* within the timeframe as detailed in this JCPOA and its Annexes.”<sup>81</sup> Therefore, all commitments undertaken by the JCPOA participants are merely ‘voluntary measures.’

This plain reading of the JCPOA is confirmed by statements made on behalf of the US and Iranian governments. During the negotiations, the American officials including Secretary of State John Kerry publicly reiterated that the JCPOA was a ‘political’ and ‘non-binding’ agreement.<sup>82</sup> After the JCPOA’s conclusion, in response to a letter by Mike Pompeo - then a member of the US Congress and a fierce critic of the JCPOA - the US Department of State asserted: “The [...] JCPOA is not a treaty or an executive agreement, [...]. The JCPOA reflects political commitments between Iran, the P5+1 [...] and the EU.”<sup>83</sup> Following the adoption of SC Resolution 2231, the

<sup>76</sup> VCLT art. 2(1)(a), 1155 U.N.T.S. 332.

<sup>77</sup> See generally A. Aust, *The Theory and practice of Informal International Instruments*, 35 INT’L & COMP. L. Q. 787-812 (1986); O. Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT’L L. 296-304 (1977).

<sup>78</sup> VCLT art. 2(1)(g). See also Haupt, *supra* note 38, at 435.

<sup>79</sup> Aust, *supra* note 77, at 800.

<sup>80</sup> Mahmoudi, *supra* note 16, at 37.

<sup>81</sup> JCPOA, *supra* note 2, at 6. [Emphasis added]

<sup>82</sup> K. Daugirdas & J. Mortensen, *Contemporary Practice of the US Relating to International Law*, 109 AM. J. INT’L L. 654-5 (2015).

<sup>83</sup> Letter from Julia Frifield, Assistant Secretary for Legislative Affairs, US Department of State to Congressman Mike Pompeo, dated November 19, 2015, available at <http://media.jamnews.ir/Editor/291042867-Letter-from-State->

Iranian government issued a statement circulated as a Security Council document outlining its position on various aspects of the JCPOA.<sup>84</sup> In the statement, Iran explicitly states that its undertakings under the nuclear agreement are ‘voluntary.’<sup>85</sup> As such, the conduct of the participants, who neither signed the JCPOA nor proceeded to ratify it, also suggests that they did not consider the JCPOA a legally binding agreement.

In view of the textual language of the JCPOA and the abovementioned statements and conduct, it is clear that the JCPOA participants did not intend to create legal obligations.<sup>86</sup> However, the non-legal nature of the JCPOA does not mean it cannot give rise to legal consequences. As Aust argued, a non-legal agreement may acquire binding force because of the principle of preclusion, which the International Court of Justice (“ICJ”) developed and applied in the *Temple of Preah Vihear* case.<sup>87</sup> In his separate opinion, Judge Fitzmaurice addressed: “The principle of preclusion is the nearest equivalent in international law to the common-law rule of estoppel.”<sup>88</sup> However, unlike estoppel, the principle of preclusion - founded on the fundamental principle of good faith - is “[...] applied as a rule of substance, and not merely as one of evidence or procedure.”<sup>89</sup> This principle signifies that “where clear statements (or conduct) of one government lead another government *bona fide* and reasonably to act to its own detriment, or to the benefit of the first government, then the first government is estopped from going back on its statements or conduct.”<sup>90</sup>

This seems like the situation with the US’ withdrawal from the Iran nuclear agreement. On the authority of SC Resolution 2231<sup>91</sup> and the JCPOA,<sup>92</sup> the IAEA is the only body charged with monitoring and verifying Iran’s implementation of its commitments under the JCPOA. Since the Implementation Day to the time of writing, the IAEA Director General has reported 11 times to its Board of Governors

Department-Regarding-JCPOA.pdf (last visited on Aug. 14, 2018).

<sup>84</sup> Statement of the Islamic Republic of Iran following the adoption of United Nations Security Council resolution 2231 (2015), U.N. Doc. S/2015/550 (July 20, 2015), available at <https://undocs.org/S/2015/550> (last visited on Aug. 14, 2018).

<sup>85</sup> *Id.* ¶¶ 5 & 9.

<sup>86</sup> This is also the predominant view among legal commentators. See, e.g., Haupt, *supra* note 38, at 435-8; Koh, *supra* note 26, at 352-5; Mahmoudi, *supra* note 16, at 36-7.

<sup>87</sup> *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment, 1962 I.C.J. Rep. 32 (June 15), available at <https://www.icj-cij.org/files/case-related/45/045-19620615-JUD-01-00-EN.pdf> (last visited on Oct. 22, 2018).

<sup>88</sup> *Id.* (Separate Opinion of Judge Gerald Fitzmaurice), at 62.

<sup>89</sup> *Id.*

<sup>90</sup> Aust, *supra* note 77, at 810.

<sup>91</sup> SC Resolution 2231, *supra* note 8, ¶¶ 3-4.

<sup>92</sup> JCPOA, *supra* note 2, pmb. & General Provisions, ¶ x.

and the Security Council that Iran has fully complied with its commitments under the JCPOA.<sup>93</sup> Consequently, it can be argued that since Iran has complied with its commitments under the JCPOA by greatly restricting its nuclear activities, then the US is legally precluded from re-imposing the sanctions it had undertaken to lift in exchange for Iran's commitments. For the US to simply renege on its commitments under the agreement after Iran implemented its side of the bargain would be an affront to the legal principle of 'good faith.' Repeatedly referred to in the JCPOA,<sup>94</sup> the principle of 'good faith' has been called "the golden rule of international law and diplomacy."<sup>95</sup> It simply "demands that each State loyally performs what it has undertaken to do."<sup>96</sup> Furthermore, contrary to its clear commitments under the JCPOA,<sup>97</sup> the US withdrew and re-introduced sanctions without recourse to the dispute settlement mechanism.

## 2. The Binding Effect of SC Resolution 2231

In view of the non-treaty language of the JCPOA, SC Resolution 2231 has assumed a central role in the debate over the legality of the US' withdrawal and re-imposition of sanctions. The Iranian government has persistently described the US' decision to withdraw from the JCPOA as unlawful,<sup>98</sup> asserting that it is "a material breach of Security Council resolution 2231(2015)."<sup>99</sup> As mentioned, in its first operative paragraph, SC Resolution 2231 "[e]ndorses the JCPOA, and urges its full implementation [...]"<sup>100</sup> However, in this respect, the key provision of SC Resolution 2231 is paragraph 2, in which the Security Council:

Calls upon all Members States, regional organizations and international organizations to take such actions as may be appropriate to support the implementation of the JCPOA, including by taking actions commensurate with the implementation plan set

<sup>93</sup> See, e.g., Report by the Director General on Verification and Monitoring in the Islamic Republic of Iran in light of United Nations Security Council Resolution 2231 (2015), dated May 24, 2018, U.N. Doc. S/2018/540 (June 6, 2018), available at <http://www.undocs.org/en/S/2018/540> (last visited on Aug. 14, 2018).

<sup>94</sup> JCPOA, *supra* note 2, ¶¶ 26, 28 & 37.

<sup>95</sup> S. ROSENNE, THE PERPLEXITIES OF MODERN INTERNATIONAL LAW 451 (2004).

<sup>96</sup> *Id.* at 452.

<sup>97</sup> JCPOA, *supra* note 2, ¶¶ 26 & 36-7.

<sup>98</sup> See, e.g., Letter from the Minister of Foreign Affairs of the Islamic Republic of Iran, M. Javad Zarif, to the Secretary General regarding the unilateral and unlawful decision of the US to withdraw from the Joint Comprehensive Plan of Action (hereinafter Zarif Letter), dated May 10, 2018, U.N. Doc. A/72/869-S/2018/453 (May 22, 2018), available at <https://undocs.org/S/2018/453> (last visited Aug. 14, 2018).

<sup>99</sup> *Id.* at 2.

<sup>100</sup> SC Resolution 2231, *supra* note 8, ¶ 1.

out in the JCPOA and this resolution and by refraining from actions that undermine implementation of commitments under the JCPOA.<sup>101</sup>

Iran would argue that, regardless of the JCPOA's language, the Security Council has obligated the US, as a UN Member State, to take appropriate action to support the implementation of the JCPOA, and more importantly, to refrain from "actions that undermine implementation of commitments under the JCPOA."<sup>102</sup> In other words, the substantive effect of paragraph 2 is to transform non-legal commitments in the JCPOA into legal obligations that are binding on all UN Member States under Article 25 of the UN Charter. Of course, this line of reasoning is open to debate. It is generally agreed that not every resolution of the Security Council is legally binding within the terms of Article 25.<sup>103</sup> Some commentators have argued that since paragraph 2 of SC Resolution 2231 "does not use the verb 'decides' and is not adopted under [a]rticle 41 [of the UN Charter],"<sup>104</sup> it is not legally binding. This argument is premised on the assumption that Article 25 of the UN Charter only applies to the resolutions or provisions thereof adopted under Chapter VII. Actually, the usual drafting practices of the Security Council are to refer to Chapter VII or its relevant articles in the last paragraph of the preamble on the resolution, and to use the word 'decides' in the operative paragraphs.<sup>105</sup> This is not the case with SC Resolution 2231, as its last preamble paragraph does not refer to Chapter VII. Instead, only 10 of its 30 operative paragraphs have been adopted under Article 41 of the Charter, and paragraph 2 is not one of them.<sup>106</sup>

However, this interpretation of Article 25 has been dismissed by the ICJ in its advisory opinion in the *Namibia* case. As the Court argued, Article 25 applies to the 'decisions' of the Security Council, not its 'recommendations,' regardless of whether they were adopted under Chapter VII.<sup>107</sup> To discern what amounts to a 'decision,'

<sup>101</sup> *Id.* ¶ 2.

<sup>102</sup> *Id.*

<sup>103</sup> See generally M. Oberg, *The Legal Effects of the Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUR. J. INT'L L. 879-906 (2005).

<sup>104</sup> J. Bellinger, *The New UNSCR on Iran: Does it Bind the US (and future Presidents)?*, Lawfareblog Website (July 18, 2015), available at <https://www.lawfareblog.com/new-uns-cr-iran-does-it-bind-united-states-and-future-presidents> (last visited on Aug. 14, 2018).

<sup>105</sup> M. Wood, *The Interpretation of Security Council Resolutions*, 2 MAX PLANCK Y.B.U.N. L. 82 (1998).

<sup>106</sup> SC Resolution 2231, *supra* note 8, ¶¶ 7-9, 10-13, 16 & 21-23.

<sup>107</sup> See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, Advisory Opinion, 1971 I.C.J. Rep.16, ¶ 114 (June 21), available at <https://www.icj-cij.org/files/case-related/53/053-19710621-ADV-01-00-EN.pdf> (last visited on Aug. 14, 2018). See also R. Higgins, *The Advisory Opinion on Namibia: Which UN Resolutions are Binding under Article 25 of the Charter*, 21 INT'L & COMP. L. Q. 270-86 (1972). See also Wood, *supra* note 105, at 82.

the ICJ observes that “the language of a resolution of the Security Council should be carefully analyzed before a conclusion can be made as to its binding effect.”<sup>108</sup> According to Judge Higgins, “the applicability of Article 25 [to a resolution of provisions therein] depends, quite simply, upon a contextual reading of whether a decision or a recommendation was intended.”<sup>109</sup> Regarding SC Resolution 2231, instead of referring to Chapter VII, its last preamble paragraph explicitly invokes Article 25 by “[u]nderscoring that Member States are obligated under Article 25 of the Charter of the United Nations to accept and carry out the Security Council’s decisions.”<sup>110</sup> It appears that by invoking Article 25 at the end of the preamble, the Security Council is indicating that it is applicable to the entirety of the resolution. Article 41 has been referred to in paragraphs that either lift previously adopted sanctions under Article 41, or impose new restrictions on Iran akin to the enforcement measures provided therein.<sup>111</sup> It would be difficult to imagine the Security Council merely ‘recommending’ the implementation of an agreement that was claimed to have avoided war.<sup>112</sup>

Others have cast doubt on the legal effect of SC Resolution 2231 on the JCPOA by focusing on the phrase ‘calls upon’ in the beginning of paragraph 2. They argue that this phrase “is understood by some commentators as a hortatory, nonbinding expression in Security Council parlance.”<sup>113</sup> Although there has always been some ambiguity regarding the legal significance of the term ‘calls upon,’ the prevailing view is that it bears a mandatory meaning.<sup>114</sup> Fry noted that: “The US [has] acknowledged that provisions that start with ‘calls upon’ create mandatory obligations.”<sup>115</sup> Ironically, he cited a statement by John Bolton, the then US Representative to the United Nations, following the adoption of Security Council Resolution 1696. This was the first resolution the Security Council adopted regarding Iran’s nuclear program. In his statement, Bolton “included the two paragraphs of Resolution 1696 that start with ‘calls upon’ (paragraphs 1 and 5) in the list of

<sup>108</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia, *id.* ¶ 114.

<sup>109</sup> Higgins, *supra* note 107, at 281.

<sup>110</sup> SC Resolution 2231, *supra* note 8, pmb1.

<sup>111</sup> *Id.* ¶¶ 7-9, 8, 11-13, 16 & 21-23.

<sup>112</sup> Haupt, *supra* note 38, at 462.

<sup>113</sup> S. Mulligan, *Withdrawal from International Agreements: Legal Framework, the Paris Agreement, and the Iran Nuclear Agreement*, CRS Rep. R44761 (2018), at 24-5, available at <https://fas.org/sgp/crs/row/R44761.pdf> (last visited on Aug. 14, 2018).

<sup>114</sup> J. Fry, *Dionysian Disarmament: Security Council WMD Coercive Disarmament Measures and Their Legal Implications*, 29 MICH. J. INT’L L. 229-30 (2008).

<sup>115</sup> *Id.* at 230.

mandatory obligations of that resolution for Iran and all UN Member States.”<sup>116</sup> Worth emphasizing is that paragraph 1 of Resolution 1696 ‘calls upon’ Iran to take the steps required by the IAEA Board of Governors regarding suspension of activities related to enrichment and reprocessing.<sup>117</sup> Following the adoption of Resolution 1737, Bolton’s successor Alejandro Wolff “similarly asserted that the three provisions of Resolution 1737 that begin with ‘calls upon’ are among that resolution’s requirements on Iran and Member States,” and that the US “will insist on absolute adherence to its requirements.”<sup>118</sup>

Still, it must be conceded that the phrase ‘calls upon’ is not the strongest instructive word in the “cornucopia of words and phrases” used by the Security Council.<sup>119</sup> Indeed, the ambiguous language of key provisions in SC Resolution 2231, such as paragraph 2, indicates the ambivalence with which the resolution’s American drafters regarded the long-term future of the nuclear agreement.<sup>120</sup>

## IV. Legal Implications of the US’ withdrawal from the Agreement

### A. Re-imposition of Extraterritorial Sanctions by the US

#### 1. The Sanctions Regime on Iran prior to the JCPOA

From 2006 to 2013, a regime of economic and financial sanctions was imposed on Iran to compel the Iranian government to curtail its nuclear program. This regime, which the E3/EU+3 undertook to lift, had three dimensions. The first dimension was the sanctions imposed by the Security Council Resolutions 1696 (2006), 1737 (2007), 1747 (2007), 1803 (2008), 1835 (2008), and most importantly, 1929 (2010). All these sanctions were lifted pursuant to paragraph 7(a) of SC Resolution 2231, which terminated the

<sup>116</sup> *Id.* See U.N. SCOR, 61st Sess., 5500th mtg. at 3, U.N. Doc. S/PV.5500 (July 31, 2006), available at <https://undocs.org/S/PV.5500> (last visited on Aug. 14, 2018).

<sup>117</sup> S.C. Res. 1696, U.N. Doc. S/RES/1696 (July 31, 2006), available at [https://undocs.org/S/RES/1696\(2006\)](https://undocs.org/S/RES/1696(2006)) (last visited on Aug. 14, 2018).

<sup>118</sup> Fry, *supra* note 114, at 230. See U.N. SCOR, 61st Sess., 5612th mtg. at 3-4, U.N. Doc. S/PV.5612 (Dec. 23, 2006), available at <https://undocs.org/S/PV.5612> (last visited on Aug. 14, 2018).

<sup>119</sup> J. Gruenberg, *An Analysis of the United Nations Security Council Resolutions*, 41 CASE W. RES. J. INT’L L. 482-91 (2009).

<sup>120</sup> C. Lynch & J. Hudson, *Obama Turns to U.N. to Outmaneuver Congress*, FOREIGN POL’Y, July 15, 2015, available at <https://foreignpolicy.com/2015/07/15/obama-turns-to-u-n-to-outmaneuver-congress-iran-nuclear-deal> (last visited on Aug. 20, 2018).

six resolutions.<sup>121</sup>

The second dimension was the sanctions imposed on Iran by the EU. Between 2010 and 2012, the EU imposed several rounds of wide-ranging sanctions on Iran, culminating in Council Decision 2012/35 (CFSP) of January 23, 2012. These sanctions severely limited trade and economic relations between Iran and European countries. In line with its commitments under the JCPOA, the EU adopted the necessary legislative acts including Council Decision (CFSP) 2015/1863, Council Implementation Regulation 2015/1862, and Council Regulation (EU) 2015/1861 on Adoption Day. Based on these regulations, which became effective on Implementation Day, all EU nuclear-related sanctions against Iran were either terminated or suspended pending termination on Transition or Termination Day.<sup>122</sup>

However, the third dimension was the most important sanctions regime against Iran imposed by the US. To understand the US' commitments under the JCPOA, it is necessary to recall the extraterritorial feature of the US sanctions on Iran. The US has imposed two types of economic/financial sanctions on Iran, which are termed 'primary' and 'secondary' sanctions. Primary sanctions prevent 'US persons,' namely American companies, citizens, and residents from doing business with Iran. Imposed during the 1980s and 1990s, the cumulative effect of these primary sanctions was the severance of almost all economic and financial relations between Iran and the US.<sup>123</sup>

On the other hand, secondary or extraterritorial sanctions apply to 'non-US persons,' namely companies and citizens of countries other than the US. The purpose of secondary sanctions is to dissuade third states and their nationals from conducting business with Iran. This is accomplished by threatening non-US persons with various sanctions and penalties if they conduct 'sanctionable activities' involving Iran, practically depriving them of doing business in the US or access to its financial system. Crucially, secondary sanctions on Iran are the result of legislative action by the US Congress.

Based on the Iran Sanctions Act of 1995 as amended, and several other legislations enacted by the US Congress, a regime of secondary sanctions was imposed on Iran from 2010 onwards. These sanctions targeted key sectors of Iran's economy such as oil and gas, petrochemical industries, shipping, and insurance. Because of the unique position of the US in the global economy, especially the international financial system,

<sup>121</sup> SC Resolution 2231, *supra* note 8, ¶ 7(a).

<sup>122</sup> See Information Note on the EU sanctions to be lifted under the JCPOA, Brussels, Jan. 23, 2016, available at <https://ec.europa.eu/sites/eeas/files/sn10176-re01.en17.en17.pdf> (last visited on Aug. 20, 2018).

<sup>123</sup> K. Katzman, *Iran Sanctions*, CRS Rep. RS20871 (2018), at 1-10, available at <https://fas.org/spp/crs/mideast/RS20871.pdf> (last visited on Aug. 20, 2018). See also Q. Farrar, *U.S. Energy Sanctions and the Race to Prevent Iran from Acquiring Weapons of Mass Destruction*, 79 *FORDHAM L. REV.* 2353-64 (2011).

the secondary sanctions regime severely affected the Iranian economy. For instance, the sharp decrease in Iran's exports of crude oil between 2011 and 2013 was largely due to the US' secondary sanctions. More significant, Iran was effectively cut off from the international financial system, because of the US' secondary sanctions against its banking and financial sector.<sup>124</sup>

## 2. The Waiver and Re-imposition of the Secondary Sanctions by the US

Under the JCPOA, the US agreed to 'cease' the application of most of its secondary sanctions against Iran.<sup>125</sup> The US also committed to "seek such legislative action as may be appropriate to terminate, or modify to effectuate the termination" of the secondary sanctions after Transition Day.<sup>126</sup> However, given that the termination or suspension of statutory sanctions required legislative action by the US Congress,<sup>127</sup> which had demonstrated its opposition to the agreement, the Obama Administration sought to implement its commitments by exercising the waiver provisions of the various sanctions statutes.<sup>128</sup> It signifies that even after the implementation of the JCPOA, the secondary sanctions regime remained binding in the US. Moreover, the waiver provisions were time-limited, which meant that the sanctions waivers had to be periodically renewed. Therefore, after reluctantly renewing the waivers several times, the Trump Administration was able to reactivate the sanctions regime with relative ease.<sup>129</sup>

From Iran's perspective, even after the implementation of the JCPOA, foreign companies were still cautious about investing in the country. Importantly, foreign banks, especially in Europe, remained reluctant to conduct transactions with Iran or finance such transactions, as they were aware that secondary sanctions against Iran had only been temporarily waived and of the risk of violating the US sanctions not covered by the JCPOA. This reluctance became acute after the Trump Administration assumed office. In October 2017 and January-April 2018, President Trump refused

<sup>124</sup> Katzman, *id.* at 10-36 & 43-57. See also Estreicher & Menasha, *supra* note 26, at 1229-42; Farrar, *id.* at 2364-87.

<sup>125</sup> JCPOA, *supra* note 2, ¶ 21 Annex II § 4. The US also agreed to lift some primary sanctions such as the sale of commercial passenger aircraft and related parts and services to Iran. See *id.* ¶¶ 21-22 & Annex II, § 4.

<sup>126</sup> *Id.* ¶ 23 & Annex V, § 21.

<sup>127</sup> The sanctions statutes give the US President the authority to terminate the statutory sanctions. However, only after certifying to the US Congress that the Iranian government has effectively ceased all the activities and policies the US considers malignant. See Estreicher & Menasha, *supra* note 26, at 1229-41.

<sup>128</sup> See Letter from John F. Kerry US Secretary of State to the US Congress, dated October 19, 2015 on JCPOA Contingent Waivers, available at <https://www.state.gov/documents/organization/248501.pdf> (last visited on Oct. 20, 2018) See also Estreicher & Menasha, *supra* note 26, at 1238-42.

<sup>129</sup> NSPM-11, *supra* note 3, § 3. See also D. Rennack, *Iran: U.S. Economic Sanctions and the Authority to Lift Restrictions*, CRS Rep. R43311 (2018), at 1-4, available at <https://fas.org/sgp/crs/mideast/R43311.pdf> (last visited on Aug. 20, 2018).

to certify Iran's compliance with the JCPOA as required by INARA, indicating that if the other participants did not "fix the terrible flaws of the Iran nuclear deal" he would withdraw from it.<sup>130</sup> By this time, many foreign companies were already re-considering their relationship with Iran.

Assessing extraterritorial sanctions from an international law viewpoint is beyond the scope of this paper. Suffice to say, in terms of *lex specialis*, Iran has claimed that the secondary sanctions violate the 1955 Treaty of Amity between the US and Iran. The Iranian government has brought a case against the US before the ICJ based on this Treaty.<sup>131</sup> Provided this case reaches the merits stage, the Court will address this claim. In terms of general international law, however, it can be strongly argued that secondary sanctions are inconsistent with the principle of non-intervention, as they seek to coerce third states to stop conducting business with the targeted state and extraterritorially applying domestic laws of the sanctioning state.<sup>132</sup> It could be argued that secondary sanctions are incompatible with the fundamental principles of the World Trade Organization ("WTO") in the sense that such sanctions, if imposed by a WTO member like the US, restrict trade with and discriminate against other WTO members and their companies for engaging in trade with the targeted state. This would seem incompatible with Key Provisions of the 1994 General Agreement on Trade and Tariffs ("GATT")<sup>133</sup> as well as the 1994 General Agreement on Trade in Services ("GATS").<sup>134</sup> This action could be thus challenged by recourse to the WTO dispute settlement mechanism.<sup>135</sup>

<sup>130</sup> K. Katzman, P. Kerr & V. Heitshusen, *U.S. Decision to Cease Implementation of the Iran Nuclear Agreement*, CRS Rep. R44942 (2018), at 1-3, available at <https://fas.org/sgp/crs/nuke/R44942.pdf> (last visited on Aug. 20, 2018).

<sup>131</sup> See the full text of Iran's application instituting proceedings in the case of alleged violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights, available at <http://www.icj-cij.org/files/case-related/175/175-20180716-APP-01-00-EN.pdf> (last visited on Aug. 20, 2018).

<sup>132</sup> See generally A. MAROSSÌ & M. BASSET (EDS.), *ECONOMIC SANCTIONS UNDER INTERNATIONAL LAW* (2015).

<sup>133</sup> GATT arts. I, III, V, XI & XIII, Oct. 30, 1947, 55 U.N.T.S. 194, incorporated in General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187.

<sup>134</sup> GATS arts. II, XI, XVI & XVII, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183.

<sup>135</sup> In the past, the EU instituted the WTO dispute settlement proceedings against the US in regard to the latter's extraterritorial sanctions. The EU action, initiated in October of 1996, was in response to the passage by the US Congress of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, better known as the Helms-Burton Act. While the EU argued that the secondary sanctions imposed on Cuba by the Helms-Burton Act were inconsistent with various GATT and GATS provisions, the US asserted that its sanctions were legally justified under the national security exceptions of GATT and GATS and on this basis refused to participate in the case. In the end, the proceedings were suspended before any decision on the merits could be taken by the WTO panel as the two sides reached a compromise. For details, see H. Clark, *Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures*, 25 U. PA. J. INT'L ECON. L. 455-89 (2004). See also J. Spanogle Jr., *Can Helms-Burton Be Challenged under WTO?*, 27 STETSON L. REV. 1313-40 (1998), available at file:///C:/Users/user/AppData/Local/Microsoft/Windows/INetCache/IE/3ILT3G2Q/can-

As North Korea is also subject to a multi-dimensional regime of sanctions, the issue of sanctions relief will, like in the past, play an important role in the denuclearization negotiations. Specifically, as the US has also imposed a regime of secondary sanctions on North Korea,<sup>136</sup> this issue would be the key to the negotiations between the two sides. The US will see these sanctions as a bargaining chip, while North Korea will consider their removal essential.

## **B. Position of the Remaining JCPOA Participants and Implications of Iran's Possible Withdrawal from the Agreement**

### **1. Position of the Remaining JCPOA Participants**

Since the US' withdrawal from the JCPOA, the remaining members of the E3/EU+3 have persistently reaffirmed "their commitment to the full and effective implementation of the nuclear deal."<sup>137</sup> Iran has also affirmed its intention to keep complying with its commitments under the agreement, but has made it clear that its future compliance with the agreement will be conditional upon receiving the economic benefits it was promised.<sup>138</sup> For their part, the remaining JCPOA participants recognize that "the lifting of sanctions, including the economic dividends arising from it, constitutes an essential part of the JCPOA."<sup>139</sup> However, practically, this would require preserving trade and economic relations between Iran and the EU Member States, as Russia and China have never sanctioned Iran and are much less vulnerable to secondary sanctions by the US. To that end, the European Commission has updated Council Regulation (EC) 2271/96, better known as the Blocking Regulation, to include the re-imposed US secondary sanctions on Iran.<sup>140</sup> The Blocking Regulation prohibits European companies from complying with the US' extraterritorial sanctions and provides various measures to protect them from these sanctions. Nonetheless, it seems that the practical effect of the Blocking Statute will

helms-burton-be-challenged-under-wto.pdf (last visited on Oct. 20, 2018).

<sup>136</sup> See Executive Order 13810 of September 20, 2017 Imposing Additional Sanctions with Respect to North Korea, available at <https://www.treasury.gov/resourcecenter/sanctions/Programs/Documents/13810.pdf>. See generally D. Rennack, *North Korea: Legislative Basis for U.S. Economic Sanctions*, CRS Rep. R 41438 (2018), available at <https://fas.org/sgp/crs/row/R41438.pdf> (all last visited on Aug. 20, 2018).

<sup>137</sup> Statement from the Joint Commission of the JCPOA [Ministers of Foreign Affairs], dated July 6, 2018, available at [https://eeas.europa.eu/headquarters/headquarters-homepage/48076/statement-joint-commission-joint-comprehensive-plan-action\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/48076/statement-joint-commission-joint-comprehensive-plan-action_en) (last visited on Aug. 23, 2018). See also Katzman et al., *supra* note 130, at 3.

<sup>138</sup> Zarif Letter, *supra* note 98, at 5.

<sup>139</sup> Statement from the Joint Commission of the JCPOA [Ministers of Foreign Affairs], *supra* note 137.

<sup>140</sup> Delegated Regulation (EU) 2018/1100 of June 6, 2018 amending the Annex to Council Regulation (EC) No 2271/96, available at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32018R1100> (last visited on Aug. 23, 2018).

be limited, as major European companies are determined to avoid the US' secondary sanctions regardless of the EU regulations.<sup>141</sup> Importantly, it is anticipated that US secondary sanctions will substantially affect Iran's oil exports to both Europe and East Asia.<sup>142</sup>

## 2. Implications of Iran's Possible Withdrawal from the Agreement

In view of the foregoing, the question arises as to what will be the implications of Iran's possible withdrawal from the JCPOA. The JCPOA stipulates that if the sanctions removed by the US or the EU are re-imposed, Iran will consider this "as grounds to cease performing its commitments under [the] JCPOA in whole or in part."<sup>143</sup> However, if Iran ceases to perform its commitments, it may activate the so-called 'snap-back mechanism,' which will lead to the re-imposition of sanctions by the Security Council and the EU. According to paragraphs 11 and 12 of SC Resolution 2231, if a JCPOA participant state notifies the Security Council that 'significant non-performance' of commitments under the JCPOA has occurred, then within 30 days, the Council will vote on a draft resolution to continue the termination of the six previous resolutions that were terminated by paragraph 7(a) of SC Resolution 2231. If the Security Council does not adopt such a resolution within 30 days of the notification, all provisions of the terminated resolutions will apply as they did before.<sup>144</sup> It is highly likely that if Iran decides to withdraw from the JCPOA, the E3 States will activate the 'snap-back mechanism.'

The US has lost its ability to trigger the snap-back mechanism, because it is no longer a "JCPOA participant State." However, it can still use its veto to prevent the adoption of the resolution to continue lifting sanctions. In addition to the snap-back of Security Council sanctions, significant non-performance by Iran can lead to the snap-back of the EU's lifted sanctions. Based on paragraph 36 of the JCPOA, the EU has the right to re-impose the sanctions it lifted under the JCPOA in the event of significant non-performance by Iran after having resorted to the JCPOA dispute resolution mechanism.<sup>145</sup>

<sup>141</sup> B. Immenkamp, *Updating the Blocking Regulation: The EU's answer to US extraterritorial sanctions*, EPRS Rep. PE623.535 (2018), available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623535/EPRS\\_BRI\(2018\)623535\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623535/EPRS_BRI(2018)623535_EN.pdf) (last visited on Aug. 23, 2018).

<sup>142</sup> I. Perez, *Iran's Oil-Market Realities: How Buyers Are Positioning for U.S. Sanctions*, BLOOMBERG, Aug. 6, 2018, available at <https://www.bloomberg.com/news/articles/2018-08-06/iran-s-oil-market-realities-how-buyers-are-positioning-for-u-s-sanctions> (last visited on Aug. 23, 2018).

<sup>143</sup> JCPOA, *supra* note 2, ¶¶ 26 and 37. See also SC Resolution 2231, *supra* note 8, ¶ 13.

<sup>144</sup> Haupt, *supra* note 38, at 432-4 & 441-3.

<sup>145</sup> JCPOA, *supra* note 2, ¶ 36.

Still, the extent to which the likelihood of the UN and the EU sanctions snap-back will deter Iran from withdrawing from the JCPOA remains unclear. As Haupt noted, although the Security Council's sanctions on Iran were extensive, they did not profoundly impact Iran's economy, so that the deterrent pressure of their reimposition is limited.<sup>146</sup> Regarding the EU sanctions, it is not unlikely that that US' secondary sanctions will rupture economic and financial relations between Iran and the EU Member States. In this case, the deterrent pressure of the 'EU snap-back' will be neutralized and the Iranian government will have nothing to lose by abandoning the nuclear agreement.

## V. Conclusion

When the Iran nuclear agreement was concluded in 2015, it was described as 'historic.' The agreement had resolved a decade-long crisis that was considered one of the most serious challenges facing the international regime of nuclear non-proliferation. It had achieved a balanced, comprehensive, and definitive solution to the Iranian nuclear issue, or so it seemed at the time. The principal purpose of the JCPOA was to restore trust in Iran's nuclear program. By agreeing to various restrictions on its nuclear activities and an exceptionally robust monitoring and verification regime by the IAEA, Iran demonstrated its commitment to ensuring the peaceful nature of its nuclear program. In exchange, the E3/EU+3 recognized Iran's right to a civilian nuclear program and undertook to remove the sanctions imposed on the country in connection with its nuclear program.

However, the currently uncertain fate of the agreement demonstrates how difficult it is to build trust with respect to a single issue when the overall relationship of the main actors - Iran and the US - is fraught with mistrust and hostility. This was the original flaw, which from the beginning, debilitated the JCPOA despite its meticulously detailed provisions and innovative and effective solutions to various legal and technical issues. This original flaw is reflected in the legal status of the agreement. Both Iran and the US wanted the JCPOA to be a non-legal instrument. It can be argued with cogency that SC Resolution 2231 has legally obligated the JCPOA participants to comply with their commitments under the agreement. However, in this regard, the legal effect of SC Resolution 2231 is open to deferring interpretations,

<sup>146</sup> Haupt, *supra* note 38, at 442.

because of its unclear language.

The mistrust between Iran and the US is also reflected in how the US implemented its commitments under the JCPOA. While the Security Council's sanctions were terminated by SC Resolution 2231 and those of the EU were either terminated or suspended, the US merely ceased to implement its legislative-based secondary sanctions with time-limited waivers that had to be periodically renewed. This was because the termination or suspension of these sanctions required legislative action, which would have been almost unimaginable given the fierce opposition to the agreement in the US Congress.

Nevertheless, the US' decision to unilaterally end its participation in the JCPOA seems objectionable on both legal and policy grounds. By abandoning and subsequently seeking to undermine the agreement, the US has contravened a Security Council resolution it drafted and voted for. The negative effects of such disregard for the authority of the Security Council by one of its permanent members require no explanatory comment. Moreover, even though the JCPOA did not constitute a legally binding agreement, it can be argued that in view of Iran's compliance with its commitments as verified by the IAEA, the US was legally obliged to fulfill its reciprocal commitments based on the principle of preclusion. In particular, this decision is inconsistent with the fundamental principle of good faith. It must be underlined that the principle of 'good faith,' repeatedly referred to in the text of the JCPOA, is not only a principle of law, but also a necessity for maintaining peace and security in the international community entirely. It seems that by unilaterally abandoning an agreement that was faithfully implemented by the other side, the US must have done considerable damage to its credibility. This will likely negatively affect its ability to conduct diplomacy in the future, especially with its rivals and adversaries like North Korea.

