

'The dynamic of action and reaction' and the implementation of the Iran nuclear deal

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1. Introduction

The Joint Comprehensive Plan of Action (JCPOA) – a 159-page agreement reached by Iran with the E3/EU+3 (China, the Russian Federation, the United States, France, Germany, the United Kingdom with the European Union) in July 2015¹ and later endorsed by the UN Security Council² – seemed to conclude a decade of international tensions with respect to the nuclear programme of Tehran: a remarkable achievement, considering that the deal sets up a step-by-step approach based on agreed limitations on Iran's nuclear capabilities and the comprehensive lifting of sanctions. Not only did the final agreement on the JCPOA address a highly sensitive issue for international peace and security through detailed and comprehensive commitments, but it also succeeded in gathering together a diverse set of state parties, with varying levels of antipathetic relations among them in previous years.³

Despite the US withdrawal in May 2018, the JCPOA has entered its fifth year of implementation: the remaining participants have so far confirmed their determination to continue all efforts to preserve the agreement, by underlining ‘the importance of the full and effective

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¹ Joint Comprehensive Plan of Action (Vienna, 14 July 2015) <www.europarl.europa.eu/cmsdata/122460/full-text-of-the-iran-nuclear-deal.pdf>.

² UNSC Res 2231, UN Doc S/RES/2231(2015).

³ D Joyner, ‘The United States’ ‘Withdrawal’ from the Iran Nuclear Deal’ E-International Relations (21 August 2018) <www.e-ir.info/2018/08/21/the-united-states-withdrawal-from-the-iran-nuclear-deal/>.

implementation of the JCPOA by all sides'.⁴ As a matter of fact, the US decision to abandon the nuclear deal has triggered a complex web of action and reaction sequences. The arguments raised by the parties to justify their conduct manifest different understanding regarding the legal nature of the JCPOA as well as the application of other relevant rules of international law. It is important to disentangle the dynamics between the participants to the deal, which also reflect the ambivalence of an accord oscillating between bilateralism and community interests: based on 'reciprocal commitments', it is also aimed at contributing to 'regional and international peace and security'.

2. *The 'action and reaction' sequences: United States – Iran*

In announcing the US withdrawal from the JCPOA in May 2018, President Donald Trump issued a presidential memorandum re-imposing 'all United States sanctions lifted or waived in connection with the JCPOA'⁵ within 180 days. That decision marked the end of the coordinated lifting of nuclear related sanctions endorsed by the UN Security Council with resolution 2231 (2015).

The Islamic Republic of Iran has consistently sought to insert its response to the US withdrawal within the framework of the dispute resolution mechanism under paragraph 36 of the Iran nuclear deal: Tehran referred the issue of US non-compliance to the JCPOA Joint Commission – the body consisting of representatives of all parties with the task of overseeing the implementation of the deal – on the assumption that the withdrawal was unlawful and represented the 'most blatant material breach'⁶ of the deal. In its application instituting proceedings against the

⁴ Implementation of the Joint Comprehensive Plan of Action: Joint Ministerial Statement (25 September 2019) <https://eeas.europa.eu/headquarters/headquarters-homepage/67905/implementation-joint-comprehensive-plan-action-joint-ministerial-statement_en>.

⁵ Presidential Memorandum, 'Ceasing U.S. Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon' (8 May 2018) <www.whitehouse.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additional-action-counter-irans-malign-influence-denry-iran-paths-nuclear-weapon>.

⁶ 'Letter dated 11 May 2018 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General' UN Doc A/72/869 – S/2018/453 (22 May 2018).

USA before the International Court of Justice (ICJ), Iran further clarified that the underlying reasons for re-imposing sanctions were misconceived: ‘Since 2015, the International Atomic Energy Agency has consistently verified that Iran has been in full compliance with its obligations under the Safeguards Agreement, as well as with its voluntary nuclear-related commitments under the JCPOA and the Additional Protocol’.⁷

It is to be noted that Iran developed an argument based on the contrariety of the US re-imposition of sanctions with the JCPOA, as endorsed by resolution 2231 (2015), by qualifying the US conduct as a serious breach of its legal obligations under the UN Charter. Iran’s Ambassador to the UN⁸ relied the binding nature of paragraph 2 of resolution 2231 (2015), in which the UN 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 out in the JCPOA and this resolution and by refraining from actions that undermine implementation of commitments under the JCPOA’. This raises the vexed question whether the verb ‘call upon’ might be interpreted in certain circumstances as indicating a legally binding decision.

It goes without saying that Iran could not make reference to any provisions of the JCPOA when it filed the application before the ICJ, as it sought to found the jurisdiction on the 1955 Treaty of Amity, Economic Relations, and Consular Rights:⁹ in the order on the request for provisional measures, the Court observed that the re-imposition of sanctions – including the revocation of licences and authorizations granted for certain commercial transactions, the ban on trade of certain items, and

⁷ Application Instituting Proceedings Filed in the Registry of the Court on 16 July 2018, *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America)* <www.icj-cij.org/files/case-related/175/175-20180716-APP-01-00-EN.pdf>.

⁸ G Khoshroo, ‘Trump’s Sanctions Against Iran Are a Clear Breach of International Law’ The Guardian (8 August 2018) <www.theguardian.com/commentisfree/2018/aug/08/donald-trump-sanctions-iran-international-law>.

⁹ Treaty of Amity Economic Relations and Consular Rights between the United States and Iran (15 August 1955) 284 UNTS 93.

limitations to financial activities – might be regarded as relating to certain rights and obligations of the Parties under the 1955 Treaty.¹⁰

3. European Union – United States

The EU qualified its own contribution to the successful outcome of the negotiation process as that of a ‘bridge builder’: a facilitating and mediating role that continued in the implementation phase of the JCPOA. The challenge posed to the nuclear deal by the Trump administration since its beginning, put the EU in the ‘uncomfortable position of having to choose between its role as guardian of the JCPOA, protecting it from interpretative drift, and confronting the US on the issue of good faith in living up to its multilateral commitments’.¹¹ Already in October 2017, the EU High Representative for Foreign Affairs and Security Policy, Federica Mogherini, clarified that the nuclear deal was to be considered as multilateral rather than bilateral agreement: ‘[it] does not belong to one country – it belongs to the international community, to the United Nations system’.¹²

By expressing its deep regret for the US announcement, the EU declared to remain committed to the continued full and effective implementation of the nuclear deal, as long as Iran continued to implement its nuclear related commitments.¹³ Moreover, the UE reacted to the re-imposition of the so-called secondary sanctions by the US with the update the

¹⁰ *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America)* (Request for the Indication of Provisional Measures: Order) <www.icj-cij.org/files/case-related/175/175-20181003-ORD-01-00-EN.pdf>.

¹¹ S Blockmans, A Viaud, ‘EU Diplomacy and the Iran Nuclear Deal: Staying power?’ CEPS Policy Insight No 2017-28 (14 July 2017) 12.

¹² Statement by High Representative/Vice-President Federica Mogherini on the latest developments regarding the implementation of the Joint Comprehensive Plan of Action (Iran nuclear deal) (13 October 2017) <https://eeas.europa.eu/headquarters/headquarters-homepage/33921/statement-high-representativevice-president-federica-mogherini-latest-developments-regarding_en>.

¹³ Declaration by the High Representative on behalf of the EU Following US President Trump’s Announcement on the Iran Nuclear Deal (JCPOA) (9 May 2018) <www.consilium.europa.eu/en/press/press-releases/2018/05/09/declaration-by-the-high-representative-on-behalf-of-the-eu-following-us-president-trump-s-announcement-on-the-iran-nuclear-deal-jcpoa>.



1996 blocking regulation:¹⁴ a form of countermeasure in order to protect EU operators against the effect of the extraterritorial application of US legislation.¹⁵

Insofar as the blocking statute was aimed to protect ‘the established legal order, the interests of the Union and the interests of natural and legal persons’,¹⁶ it is to be considered as an act of self-help to respond to a breach of a bilateral legal relationship with the US: the EU counteraction points to the unlawful character of the secondary sanctions, because of their contrariety with the principle of non-intervention. There is no reference to the violation of the commitments under the nuclear deal. It remains that the EU also qualified the update of the 1996 regulation as part of its support to the continued, full and effective implementation of the JCPOA, by sustaining legitimate trade and economic relations between the EU and Iran, which were normalised when nuclear-related sanctions were lifted as a result of the JCPOA.

The update of the 1996 blocking regulation apparently conveys the message of a continuity in the position of EU countries. However, in the period 2010-2012, EU member States seem to manifest acquiescence *vis-à-vis* the extraterritorial dimension of the US comprehensive Iran sanctions adopted at that time. Following the adoption of UNSC resolution 1929 (2010)¹⁷ – less than a month after President Obama signed the Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA) – the EU widened the scope of its restrictive measures against

¹⁴ Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom [2018] OJ L199I/1.

¹⁵ In an attempt to resist the extraterritorial reach of secondary sanctions, the EU even initiated WTO dispute settlement proceedings, complaining that the extraterritorial effects of the 1996 Helms-Burton Act were inconsistent with the international obligations of the US under GATT 1994 and GATS. In April 1997, the US and EU decided to settle the dispute by concluding a series of ‘understandings’ aimed at suspending the effects of Helms-Burton on European companies. European Union-United States: Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act, reproduced in (1997) 36 Int'l Legal Materials 529. See S Smis, K Van der Borght, ‘The EU-U.S. Compromise on the Helms-Burton and D’Amato Acts’ (1999) 93 AJIL 227.

¹⁶ Guidance Note: Questions and Answers: adoption of update of the Blocking Statute [2018] OJ C 277I/4.

¹⁷ UNSC res 1929, UN Doc S/RES/1929 (2010).

Iran, in order not only to implement the UN sanctions but also to introduce ‘accompanying measures’, focusing ‘on the areas of trade, the financial sector, the Iranian transport sector, key sectors in the oil and gas industry’.¹⁸ Moreover, following intense negotiations with the US,¹⁹ the EU Council agreed on additional restrictive measures in 2012, which definitely mirrored those imposed by the US.²⁰ Interestingly, Regulation 267/2012 prohibited specialised financial messaging providers, such as SWIFT, from providing services to EU-sanctioned Iranian banks.²¹

It is a shared view that such practice of the EU should not be read as an overall acceptance of extraterritorial sanctions as legitimate in all circumstances. As a matter of fact, the EU avoided the question of whether US sanctions apply to nationals of EU member States by imposing almost the same restrictions itself.²² The EU considered the additional restrictive measures adopted in 2010-2012 as a tool aimed at strengthening the existing UN sanctions, given the dissatisfaction as to their impact and effects. The point was made that the legal basis for most of the supplementary measures was the very same resolution 1929 (2010) where it called upon states to ‘exercise vigilance’. At that time, the EU Council stressed that ‘Iran continues to refuse to comply with its international obligations and to fully cooperate with IAEA to address concerns on its nuclear programme, and instead continues to violate those obligations’.²³ It goes without saying that China and Russia expressed strong opposition against the practice of unilateral sanctions, as it contravened the principle of

¹⁸ Council Decision 2010/413/CFSP of 26 July 2010 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP [2010] OJ L195/39.

¹⁹ For an analysis of the factors influencing the convergence of EU-US sanction policies against Iran in the period 2006-2012, see S Lohmann, ‘The Convergence of Transatlantic Sanction Policy against Iran’ (2016) 29 Cambridge Rev Intl Affairs 930.

²⁰ Council Decision 2012/35/CFSP of 23 January 2012 amending Decision 2010/413/CFSP concerning restrictive measures against Iran [2012] OJ L19/22.

²¹ Council Regulation (EU) No 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2010 [2012] OJ L88/1.

²² See Q Genard, ‘European Union Responses to Extraterritorial Claims by the United States: lessons from trade control cases’ Non-proliferation Paper No 3 (2014) <www.nonproliferation.eu/european-union-responses-to-extra-territorial-claims-by-the-united-states-lessons-from-trade-control-cases-2/>.

²³ EU Council Conclusion on Iran, 3142th Foreign Affairs Council meeting (23 January 2012) para 2.

sovereign equality of UN Member States, undermine the authority of the UNSC and be counterproductive to crisis resolution.²⁴

4. Iran – E3/EU

There is no doubt that a structured and functional EU-Iran relationship is contingent on the survival and successful implementation of the nuclear deal.²⁵ In a statement issued at the meeting of the JCPOA Joint Commission on 6 July 2018, the five remaining participants identified a series of commitments aimed at maintaining ‘the normalisation of trade and economic relations with Iran’.²⁶ Complaining about the failures in achieving that objective has been a key element of the Iranian strategy *vis-à-vis* E3/EU – the EU and the three members participating in the deal, France, Germany and UK – which has also served the purpose of justifying its subsequent initiatives against them.

In late 2018, Iran started manifesting its dissatisfaction with respect to the effectiveness of the EU measures aimed at limiting the impact of secondary sanctions, particularly in the areas of oil sales and banking relationships. In an effort of developing ‘practical proposals to maintain and develop payment channels, notably the initiative to establish a special purpose vehicle, to facilitate payments related to Iran’s exports (including oil) and imports, which will assist and reassure economic operators pursuing legitimate business with Iran’.²⁷ France, the UK and Germany, with help from the European Commission and the EEAS, had indeed launched a new mechanism for facilitating legitimate trade between European economic operators and Iran, called ‘Instrument in Support of Trade Exchanges’ (INSTEX) in January 2019, although only limited to

²⁴ See UNSC Verbatim Record (25 November 2014) UN Doc S/PV.7323; UNSC Verbatim Record (11 February 2016) UN Doc S/PV.7620.

²⁵ See R Alcaro, A Dessi, ‘A Last Line of Defence: A Strategy for Europe to Preserve the Iran Nuclear Deal’ IAI Papers No. 19/14 (June 2019) <www.iai.it/sites/default/files/iaip1914.pdf>.

²⁶ Statement from the Joint Commission of the Joint Comprehensive Plan of Action (6 July 2018) <https://eeas.europa.eu/headquarters/headquarters-homepage/48076/statement-joint-commission-joint-comprehensive-plan-action_en> paras 7 and 8.

²⁷ Implementation of the Joint Comprehensive Plan of Action: Joint Ministerial Statement (24 September 2018) <https://eeas.europa.eu/headquarters/headquarters-homepage/51036/implementation-joint-comprehensive-plan-action-joint-ministerial-statement_en>.



trade in humanitarian goods (medicine, medical devices and food).²⁸ However, Iran stated that it would never accept what it considered ‘humiliating conditions’²⁹ for the enforcement of the mechanism, particularly as regards the implementation of FATF standards or anti-money laundering and combating the financing of terrorism as well as Iran’s ballistic missile activity.³⁰ It remains to be seen whether decision by the governments of Belgium, Denmark, Finland, the Netherlands, Sweden and Norway to join INSTEX would contribute to the goals of facilitating legitimate business with Iran and the preservation of the plan.³¹

In the three-year period between January 2016 and February 2019, the IAEA has verified and monitored Iran’s implementation of its nuclear-related commitments in accordance with the modalities set out in the JCPOA, ‘consistent with the Agency’s standard safeguards practices, and in an impartial and objective manner’.³² In May 2019, one year after the US withdrawal, Iranian President Hassan Rouhani announced that Iran would no longer adhere to two of its nuclear commitments: specifically, it was suspending compliance with the JCPOA-set limits on the production of low-enriched uranium and heavy water. Iran justified the decision to cease performing such commitments, as exercise of its rights under paragraphs 26 and 36 of the JCPOA. In particular, Iran claimed that it was implementing in good faith the part of the deal which provides

²⁸ Press Release ‘New mechanism to facilitate trade with Iran: joint statement’ (31 January 2019) <www.gov.uk/government/news/joint-statement-on-the-new-mechanism-to-facilitate-trade-with-iran>.

²⁹ ‘Iran’s top judge: EU preconditions for non-dollar trade channel “unacceptable”’ Reuters (4 February 2019) <www.reuters.com/article/us-iran-nuclear-europe/irans-top-judge-eu-preconditions-for-non-dollar-trade-channel-unacceptable-idUSKCN1PT1DE>.

³⁰ France, Germany and the United Kingdom have argued that Iran’s failed launch of the Simorgh satellite launch vehicle in January 2019 was inconsistent with para 3 of annex B to resolution 2231 (2015), where ‘Iran is called upon not to undertake any activity related to ballistic missiles designed to be capable of delivering nuclear weapons’: see ‘Letter dated 22 February 2019 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council’ UN Doc S/2019/177 (25 February 2019); UN Doc S/2019/911 (21 November 2019).

³¹ See the briefing by the UN Under-Secretary-General for Political and Peacebuilding Affairs, Rosemary DiCarlo, before the Security Council, UN Doc S/PV.8695 (19 December 2019).

³² IAEA, ‘Verification and monitoring in the Islamic Republic of Iran in light of United Nations Security Council resolution 2231 (2015): Report by the Director General’ IAEA Doc GOV/2019/10 (22 February 2019).

for remedies in cases of significant non-performance: on the basis of reciprocity, paragraph 36 of the JCPOA states that should Iran believe that any of the other parties ‘were not meeting their commitments’ under the deal, after a series of consultations, it would have ‘grounds to cease performing its commitments’. It goes without saying that whereas Iran has constantly protested about the E3/EU non-compliance, it has complained very little about the positions taken by the other two participants to the deal, i.e. Russia and China.

In two reports issued in July 2019, the IAEA confirmed that Iran had exceeded the authorized limit for its stock of low-enriched uranium and begun enriching uranium beyond the authorized threshold.³³ Despite Iran’s claim that the other JCPOA participants could not trigger anymore the dispute resolution mechanism under paragraph 36, because it had been already exhausted, its activation has increasingly been considered as an option by the E3/EU. Europeans contested the Iran’s conduct on both substantive and procedural grounds: in particular, they rejected the argument of EU non-compliance, by intending their JCPOA commitments essentially in terms of sanctions lifting. As a consequence, they affirmed, on their part, the ‘readiness to consider all mechanisms in the JCPOA, including the dispute resolution mechanism’.³⁴ In January 2020, the E3 finally took to the decision to refer the Iran’s non-compliance to the JCPOA Joint Commission, as set out in paragraph 36, with the overarching objective of preserving the deal, i.e. ‘to bring Iran back into full compliance with its commitments’.³⁵

³³ IAEA, ‘Verification and monitoring in the Islamic Republic of Iran in light of United Nations Security Council resolution 2231 (2015): Report by the Director General’ IAEA Doc GOV/INF/2019/8 (1 July 2019); Id, IAEA Doc GOV/INF/2019/9 (9 July 2019).

³⁴ Joint Statement by the Foreign Ministers of France, Germany and the United Kingdom and the EU High Representative on the JCPOA (11 November 2019) <https://eeas.europa.eu/headquarters/headquarters-homepage/70265/joint-statement-foreign-ministers-france-germany-and-united-kingdom-and-eu-high-representative_en>.

³⁵ Joint statement by the Foreign Ministers of France, Germany and the United Kingdom on the Joint Comprehensive Plan of Action (14 January 2020) <www.gov.uk/government/news/e3-foreign-ministers-statement-on-the-jcpoa-14-january-2020>.

5. How about the other JCPOA participants? On the position of Russia and China

Since May 2019, Tehran has taken five incremental steps to expand its nuclear-related activities, each of them aimed at breaching one or more of the JCPOA commitments. Although the first two steps seem to be designed to preserve rather than undermine the deal – as they are reversible, with a limited impact in the reduction of the ‘breakout time’, i.e. the time required to produce enough fissile material needed for a nuclear weapon – the subsequent decisions of lifting the limitations on its nuclear research and development activities, in September, of resuming uranium enrichment at its underground Fordow site, in November 2019, as well as of abandoning limits on number of centrifuges, in January 2020, appear an ‘acceleration of Iran’s disengagement from commitments under the JCPOA’.³⁶ Nevertheless Iran has constantly confirmed its full cooperation with IAEA, particularly with respect to the provisional application of the Additional Protocol to its Safeguards Agreement,³⁷ that gives the Agency broader access to information and locations to verify the peaceful use of all nuclear material in the country.

This is a crucial aspect to be considered when evaluating the position that the other two participants have taken *vis-à-vis* Iran’s escalation. On several occasions, both China and Russia expressed the conviction that ‘the only reasonable way is for the parties to continue complying with their obligations’³⁸ and called upon ‘not to test the limits of the agreement’³⁹ and ‘to exercise restraint and step up dialogue to prevent a spiral of escalation of tensions’⁴⁰. Even after the announcement of the fifth and final step in January 2020, Russia continue to remain sympathetic with Iran’s action, on the consideration that Tehran’s abandonment of restrictions in developing its uranium enrichment capabilities does not

³⁶ Joint Statement (11 November 2019) (n 34).

³⁷ See the full text of the 2003 Additional Protocol, IAEA Doc INF/CIRC/214/Add.1 (4 March 2016) <www.iaea.org/sites/default/files/infirc214a1.pdf>.

³⁸ ‘Putin calls on all parties to comply with JCPOA on Iran’s nuclear program’ Tass (15 June 2019) <<https://tass.com/politics/1063955>>.

³⁹ ‘Russia calls on all parties to Iranian nuclear deal not to test its limits’ Tass (8 November 2019) <<https://tass.com/world/1087683>>.

⁴⁰ ‘Foreign Ministry Spokesperson Geng Shuang’s Regular Press Conference on May 8, 2019’ <www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1661701.shtml>.

pose any threat in itself in terms of proliferation of nuclear weapons.⁴¹ Significantly, China too made a reference to the existing non-proliferation regime to further demonstrate Iran's 'restraint and political will to implement the JCPOA effectively and in full', by noting that Teheran 'has not violated its obligations under the NPT'.⁴²

6. *The US abandonment of the JCPOA as the withdrawal from a political accord*

One of the most relevant aspects of the JCPOA has been the introduction of a 'snap back' procedure which ensures sanctions re-imposition in case of significant non-performance of the commitments under the deal: this mechanism provides that, on the basis of the notification of 'a JCPOA participant State', the UN Security Council deliberates on a resolution to continue the termination of its sanctions. The consequence of a failure in adopting the decision – for instance, because of the negative vote of a permanent member – is the re-introduction of the sanctions regime.⁴³ The risk of 'snap-back' represented a relevant variable which influenced decisions on business opportunities in Iran: companies were advised to introduce specific contractual protections in order to manage risks of snapback.

However, the US administration did not rely on a 'snap-back' mechanism. The concept of proportionality was, on the contrary, invoked in the context of the re-imposition of what the US regarded only as suspended sanctions against Iran. President Trump's decision to decertify the nuclear deal in October 2017 was made on the assumption that the suspension of sanctions was not 'appropriate and proportionate'⁴⁴ to the steps that Iran has taken to end its illicit nuclear activities. The position of the US administration has been consistent over the last four years. The nuclear deal 'is not a treaty or an executive agreement, and is not a signed

⁴¹ 'Russia remains committed to Iranian nuclear deal - Foreign Ministry' Tass (6 January 2020) <<https://tass.com/politics/1105901>>.

⁴² Statement by the Foreign Ministry Spokesperson, Geng Shuang (6 January 2020) <https://twitter.com/MFA_China/status/1214132226448748544>.

⁴³ See J Galbraith, 'Ending Security Council Resolutions' (2015) 109 AJIL 806, 809.

⁴⁴ Remarks by President Trump on Iran Strategy (13 October 2017) <www.whitehouse.gov/briefings-statements/remarks-president-trump-iran-strategy/>.

document. The JCPOA reflects political commitments between [the parties].⁴⁵ From a US perspective, this was also due to domestic reasons: the Obama administration would have had difficulties in getting congressional or senatorial approval.⁴⁶ Moreover, the assumption that political commitments are not legally binding between the participants would lead to the conclusion that a party can withdraw at any time without violating international law.⁴⁷

In the view of an author, the ‘intention to create obligations under international law’ is the essential criterion to distinguish treaties from political commitments: the way negotiating states indicate their intention is through the chosen form and terminology as well as the circumstances in which the instrument was concluded.⁴⁸ In this respect, the legally non-binding nature of the JCPOA seems to find confirmation in the intention of the parties during the negotiations, reflected in the specific title – plan of action – and in the circumstance that the parties did not sign it. Moreover, the point has been made that the political character of the commitments contained in the deal is not affected by its content, despite ‘detailed recitations of agreed terms and a schedule for their implementation, [...] a highly proceduralized dispute settlement mechanism, and a pre-agreed process [of snap-back]’.⁴⁹

A political undertaking, according to US practice, ‘is not governed by international law and there are no applicable rules pertaining to compliance, modification, or withdrawal’: as a consequence, a party may extricate ‘itself from its ‘political’ undertaking [...] without legal penalty’.⁵⁰

⁴⁵ Letter for the US Department of State to the Honorable Mike Pompeo (19 November 2015) <https://foia.state.gov/searchapp/DOCUMENTS/Dec16Jan17/F-2015-17118/DOC_0C06101326/C06101326.pdf>; see H Koh, ‘Triptych’s End: A Better Framework To Evaluate 21st Century International Lawmaking’ (2017) 126 *Yale L J* 338, 354.

⁴⁶ See ‘Contemporary Practice of the US: Agreement on Iran Nuclear Program Goes into Effect’ (2015) 109 *AJIL* 874.

⁴⁷ SP Mulligan, ‘Withdrawal from the Iran Nuclear Deal: Legal Authorities and Implications’ Congressional Research Service LSB10134 (17 May 2018) 2 <<https://fas.org/sgp/crs/nuke/LSB10134.pdf>>.

⁴⁸ A Aust, ‘Alternatives to Treaty-Making: MOUs as Political Commitments’ in D Hollis (ed) *The Oxford Guide to Treaties* (OUP 2012) 46, 48.

⁴⁹ D Joyner (n 3).

⁵⁰ US Department of State, Article-by-Article Analysis of START Documents 352 (1991), reproduced in JH McNeill, ‘International Agreements: Recent US-UK Practice Concerning the Memorandum of Understanding’ (1994) 88 *AJIL* 821, 823-824.

Such reconstruction of US withdrawal from the JCPOA with the re-imposition of secondary sanctions seems to neglect the question of the characterization of these measures under general international law: whether they may be regarded as acts of retorsion once they constitute ‘unfriendly’ conduct not inconsistent with any international obligation; otherwise, if unlawful, they need to be justified as countermeasures.

Moreover, the decision to abandon the nuclear deal has additional legal consequences with respect to the ‘snap-back’ mechanism. Under paragraph 11 of resolution 2231 the procedure before the Security Council can be activated through the notification by ‘a JCPOA participant State’ of a significant non-performance: the question whether Washington has kept that right should be answered in the negative, despite the explicit wording of paragraph 10 of the deliberation that includes US among the participants.⁵¹ On the contrary, the US withdrawal obviously does not affect the exercise of its voting right within the Security Council.

Finally, the US withdrawal from the Iran nuclear deal needs to be understood against the background of the current arms control crisis, due to re-emergence of strategic tensions between the major powers.⁵² Whereas arms control efforts of both the US and Russia have so far been devoted to maintaining the legacy of the Cold War, nowadays there is the concrete risk that the legal edifice of cooperative security aimed at avoiding an arms race through mutual confidence and reducing inadvertent escalation of tensions in and around Europe is deteriorating. The fate of the INF Treaty, the 1987 bilateral agreement on the elimination of intermediate-range and shorter-range missiles, is paradigmatic: the US decided to withdraw from the treaty,⁵³ due to material breach by Russia, on the basis of the *inadimplenti non est adimplendum* principle enshrined in Article 60 of the Vienna Convention on the Law of Treaties.

⁵¹ Cf R Einhorn, R Nephew, ‘*Constraining Iran’s Future Nuclear Capabilities*’ (March 2019) 36 <www.brookings.edu/wp-content/uploads/2019/03/FP_20190321_nuclear_capabilities_WEB.pdf>.

⁵² UN Office for Disarmament Affairs, *Securing Our Common Future: An Agenda for Disarmament* (New York, 2018)

⁵³ US Withdrawal from the INF Treaty on August 2, 2019: Press Statement by Michael R. Pompeo, Secretary of State (2 August 2019) <www.state.gov/u-s-withdrawal-from-the-inf-treaty-on-august-2-2019/>.

7. Alternative approaches on the legal effects of the JCPOA

The position of Iran *vis-à-vis* the nature of the JCPOA focuses on the specific legal consequences of the adoption of resolution 2231: by virtue of the endorsement made by the UN Security Council, the JCPOA commitments have become legally binding under the UN Charter. That issue is also addressed by Judge *ad hoc* Momtaz in his Declaration attached to the order on the request for provisional measures in the case of the *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights*, in which he argued that '[i]t is absolutely clear from the opening of the resolution's operative part, immediately preceded by a reference in its preamble to Article 25 of the Charter, that the Security Council intended to establish binding obligations for all Member States, including the United States'.⁵⁴

The E3 countries, when expressing their concern with respect to the US withdrawal, seemed to take a more nuanced approach with respect to the legal effect of resolution 2231, focusing on the dispute settlement mechanism rather than : by recalling that 'the JCPOA was unanimously endorsed by the UN Security Council', they stressed that '[the] resolution remains the binding international legal framework for the resolution of the dispute about the Iranian nuclear programme'.⁵⁵

The question whether resolution 2231 created an international obligation for the US to comply with the JCPOA turns the attention to the long-standing debate on which expressions in the text of a Security Council deliberation signal legally binding measures. Paragraph 2 of resolution 2231 uses the verb 'calls upon' to introduce the general requirement 'to take such actions as may be appropriate to support the implementation of the JCPOA'. Those emphasizing the hortatory character of that language follow the prevailing view among scholars, according to which 'call upon' 'is not generally intended to indicate a legally binding decision. It

⁵⁴ Declaration of Judge *ad hoc* Momtaz, unofficial translation para 10 <www.icj-cij.org/files/case-related/175/175-2018003-ORD-01-02-EN.pdf>.

⁵⁵ Joint Statement from Prime Minister May, Chancellor Merkel and President Macron following President Trump's statement on Iran (8 May 2018) <www.gov.uk/government/news/joint-statement-from-prime-minister-may-chancellor-merkel-and-president-macron-following-president-trumps-statement-on-iran>. See 'President Trump Withdraws the United States from the Iran Deal and Announces the Reimposition of Sanctions' (2018) 112 AJIL 514.

has more the sense of strongly urging'.⁵⁶ Others seem to favor a broader set of binding terms, by invoking the findings of the ICJ in the *Namibia* advisory opinion⁵⁷ and arguing that exceptions might be possible depending on both the context and preparatory work.⁵⁸

The uncertainties regarding the effects of the endorsement by the UN Security Council lead to consider the question of the legal status of the JCPOA from a different perspective, to affirm its nature of 'an international agreement governed by international law'. After the US withdrawal from it, the EU High Representative Federica Mogherini declared that: 'the nuclear deal is not a bilateral agreement and it is not in the hands of any single country to terminate it unilaterally'.⁵⁹ It has been observed that such declaration of the High Representative would announce a confrontation with the US to be held within the framework of international law. In the first place, the EU position seemed to imply that not only does the JCPOA possess the nature of a treaty governed by international law, but the deal is also a multilateral agreement designed to pursue collective objectives. Second, the EU has a legal interest in the implementation of the JCPOA and is entitled to claim compliance with it. It follows that only a breach of its commitments by Iran may justify a corresponding breach by the other parties.⁶⁰ Such an alternative view of the JCPOA as a multilateral treaty seems to be based on a different reading of the expression 'governed by international law' under the Vienna Convention on the Law of Treaties, which focuses on the element that a treaty has to 'establish a

⁵⁶ M Wood, 'The Interpretation of Security Council Resolutions Revisited' (2017) 20 Max Planck YB United Nations L 1, 18.

⁵⁷ ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep 16, 56.

⁵⁸ Cf JD Fry, 'Dionysian Disarmament: Security Council WMD Coercive Disarmament Measures and Their Legal Implications' (2008) 29 Michigan J Intl L 197, 229; G Fox, K Boon, I Jenkins, 'The Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law' (2018) 67 American U L Rev 649.

⁵⁹ Remarks by HR/VP Mogherini on the statement by US President Trump regarding the Iran nuclear deal (JCPOA) (8 May 2018) <https://eeas.europa.eu/delegations/iran/44238/remarks-hrvp-mogherini-statement-us-president-trump-regarding-iran-nuclear-deal-jcpoa_en>.

⁶⁰ E Cannizzaro, 'Editorial: The Iran Nuclear Deal and the Future of the European Foreign Policy' (2018) 3 European Papers 3.

relationship under international law'.⁶¹ It follows that the legally binding character of the nuclear deal would emerge from both the content of its commitments – including that of lifting the UN sanctions against Iran – and its peculiar system of implementation.

This position, which has attracted neither much attention in the literature nor much support among the JCPOA parties, has nonetheless the merit of pointing to the difficulties in justifying a unilateral repudiation of the nuclear deal: under Article 60 of the Vienna Convention on the Law of Treaties, the termination of a multilateral treaty as a consequence of a breach by one of its parties requires a concerted response by all the other parties. In addition, as for the realm of the legal consequences, the qualification of the JCPOA as a multilateral agreement designed to pursue collective objectives would imply that every party was entitled to claim that the US unilateral abandonment of the nuclear deal had no effect under international law and that the re-imposition of secondary sanctions would amount to wrongful conduct, justifying protective counter-measures by the other JCPOA participants.

8. Conclusion

When the US withdrew from the JCPOA in May 2018, the Trump administration inaugurated a ‘maximum pressure’ strategy toward Iran: a combination of sanctions and other diplomatic as well as military initiatives, designed to place unprecedented pressure on the country in order to negotiate a new comprehensive deal aimed at permanently preventing Teheran from acquiring a nuclear weapon, ceasing the development of ballistic missiles, and addressing ‘the totality of Iran’s malign activities’.⁶²

The actions taken by Iran over the past year suggest that the preservation of the JCPOA is still in the interest of the country. In November 2019 President Rouhani offered further explanation of the country’s strategy with respect to the arms embargo which expires five years after

⁶¹ See P Gautier, ‘1969 Vienna Convention: Article 2’ in O Corten, P Klein (eds) *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP 2011) 33, 40-43.

⁶² ‘President Donald J Trump Is Cutting Off Funds the Iranian Regime Uses to Support Its Destructive Activities Around the World’ White House Fact Sheet (8 May 2019) <www.whitehouse.gov/briefings-statements/president-donald-j-trump-cutting-off-fundsiranian-regime-uses-support-destructive-activities-around-world/>.

the so called ‘Adoption day’, on October 2020: ‘If we stay in the JCPOA according to Resolution 2231, Iran’s arms embargo will be lifted next year and we can easily buy or export our required weapons, which is one of the major effects of the nuclear deal’.⁶³

The debate on the nature of the JCPOA commitments have specific legal consequences, as regards the effects of a unilateral withdrawal as well as the right of the other participants to invoke responsibility and to enact countermeasures. However, it should not be forgotten that the nuclear deal reflects international obligations already existing under both customary and treaty law. In particular, the JCPOA needs to be read within the framework of the nuclear non-proliferation system based on the 1968 NPT. The text of the deal makes it clear that its successful implementation ‘will enable Iran to fully enjoy its right to nuclear energy for peaceful purposes under the relevant articles of the nuclear Non-Proliferation Treaty (NPT) in line with its obligations therein, and the Iranian nuclear programme will be treated in the same manner as that of any other non-nuclear-weapon state party’. Significantly, after Iran’s announcement that it would no longer abide by stockpile limits, the EU high representative and the foreign ministers of France, Germany and the UK stated that they ‘will assess Iran’s compliance on the basis of Iran’s performance regarding its nuclear-related commitments under the JCPOA and the NPT’.⁶⁴

In their relationship with Iran, the E3/EU parties have so far made every effort to preserve the nuclear deal: not only because they recognized that it was the US withdrawal that triggered the subsequent action-reaction dynamic, but also because they have feared that punishing Iran would only prompt Tehran to escalate further.⁶⁵ In June 2019, High Representative Mogherini had already recognized that ‘it has become

⁶³ ‘President addressing the bumper crowd of people in Rafsanjan’ (11 November 2019) <www.president.ir/en/112215>.

⁶⁴ Joint statement by High Representative of the European Union and the Foreign Ministers of France, Germany and the United Kingdom on the JCPOA (9 May 2019) <https://eeas.europa.eu/headquarters/headquarters-homepage/62093/joint-statement-high-representative-european-union-and-foreign-ministers-france-germany-and_en>.

⁶⁵ See Michael Singh, ‘A Better Iran Deal Is Within Reach: How to Force Tehran Back to the Table’ Foreign Affairs (15 November 2019) <www.foreignaffairs.com/articles/iran/2019-11-15/better-iran-deal-within-reach>.

increasingly difficult for all to keep the nuclear deal fully implemented'.⁶⁶ The last steps taken by Iran to expand its nuclear-related activities have been perceived as a fundamental disengagement from its JCPOA commitments: this has meant a change of attitude particularly by the E3 countries, which eventually led to the activation of the dispute resolution mechanism. Although that decision has been seen as a way to preserve the deal rather than to finally terminate it, it remains to be seen what the Iranian reaction will be and whether the E3/EU will be able to keep a united position vis-à-vis the other current (or former) participants.

⁶⁶ Remarks by High Representative/Vice-President Federica Mogherini at the press conference following the Foreign Affairs Council (17 June 2019) <https://eeas.europa.eu/delegations/iran/64238/remarks-high-representativevice-president-federica-mogherini-press-conference-following_en>.

