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## THE INTERNATIONAL LAW AND POLITICS OF THE TRUMP ADMINISTRATION'S IRAN POLICY

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**THE INTERNATIONAL LAW AND  
POLITICS OF THE TRUMP  
ADMINISTRATION’S IRAN POLICY**

*By Nedim Hovic\**

*Abstract: Donald Trump’s promise to lead an “America first” foreign policy captured the attention of both American and international legal scholars. This paper aims to join that debate by examining the international legal challenges of Trump administration’s policy towards Iran. It does so by examining two main approaches of the administration: the exercise of unilateral sanctions towards Iran and the negotiation strategy deployed by Donald Trump personally. In examining the former, the paper relies on doctrinal legal research. In examining the latter behavioral approach to international law and economics, I use a relatively novel approach borrowing insights from political psychology and behavioral economics to explain many of the high-risk choices that the Administration took over the course of events. I find that after the cancellation of the Joint Comprehensive Plan of Action (the “Iran nuclear deal”), unilateralism—as one of the main characteristics of this policy—failed to coerce Iran into negotiating a new deal. Instead, the unilateral exercise of sanctions reduced the “weaponized interdependence” of the sanctions’ regime into a negotiation leverage. Despite being almost unchallengeable before a legal forum, the lack of wider support for the sanctions led to considerations of their evasion from the European Union and other international actors. The negotiation style coupled Trump’s calls for a new deal with bold threats of military might and failed to lead to reconsideration of Iran’s approach to regional security. By staying within the Iran nuclear deal, Iran managed to strengthen its immediate negotiation position. Ultimately, after two and a half years of such policy, both the United States and international actors have launched a number of multilateral initiatives that are to remedy the damage done by high-risk negotiation tactic deployed by the administration and the then President Trump personally.*

I.	INTRODUCTION.....	60
II.	U.S. SANCTIONS TOWARD IRAN AND THE JCPOA....	68
	A. The sanctions and their mechanism .....	68
	B. The negotiations and commitments of the JCPOA.....	71
	C. Challenging the sanctions before the U.S. courts and international fora.....	76
	1. Presumption against extra-territoriality and U.S. sanctions legislation .....	76
	2. Challenging the sanctions before international adjudication bodies .....	80

D. The EU's response to U.S. withdrawal from JCPOA and to secondary sanctions.....	83
III. COERCING IRAN: AN INSIGHT INTO THE DEALMAKING WORLD OF DONALD TRUMP .....	88
A. The United States' demands on Iran.....	88
B. Behavioral Approach to International Law and Economics .....	90
C. The Framing Effect of Trump's Administration View of International Law and Policy .....	94
D. President Trump and negotiations with Iran after the cancellation of the JCPOA .....	98
D. The use of force .....	104
E. BACK TO THE JCPOA? .....	107
IV. CONCLUSION .....	111

## I. INTRODUCTION

The 2016 election campaign of Donald Trump promised significant changes to the United States' (U.S.) foreign policy, changes that would purportedly rectify the (perceived) exploitation of U.S. power by other countries. While all post-World War II U.S. presidents have taken far-reaching actions that have shaped the theory and practice of international law, few, if any, have been so negative in their assessment of the effects of the international legal order on U.S. interests. Has this negativity led to a relocation of the United States within the international legal order and, if so, what were the consequences of these actions? This issue is currently debated by prominent international legal scholars and policy practitioners.<sup>1</sup>

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<sup>1</sup> HAROLD HOGJU KOH, *THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW* (2018); Eric A. Posner, *Liberal Internationalism and the Populist Backlash*, 49 *ARIZ. ST. L.J.* 795 (2016); Jack L. Goldsmith & Shannon Mercer, *International Law and Institutions in the Trump Era*, 61 *GER.Y.B INT'L.L.* 11 (2019); Joseph S. Nye, *The Rise*

One interesting strain of this debate is taken by two former legal advisors of U.S. presidents, Professor Harold Koh of Yale Law School and Professor Jack Goldsmith of Harvard Law School. Their differing takes on Trump's presidency stem from diverging views of U.S. domestic law, particularly presidential powers in foreign affairs and fundamentally different understandings of international law. For Koh, as well as other transnational legal process advocates, the unilateralist agenda of the U.S. president is dangerous to the international legal order because it seems to reject important international legal commitments of the United States, focusing instead solely on the administration's understanding of national interests.<sup>2</sup> Consequently, all the renegotiations or unilateral withdrawals from the international legal commitments that Donald Trump had carried out should and will result in the opposition of other actors of the transnational legal process: states, international organizations, private actors and nongovernmental organizations. Such opposition, in turn, will challenge interest, identity, interactions, and internalization as the pillars of the transnational legal process, which could bring about instability, insecurity, and other undesired consequences on the international plane.<sup>3</sup>

Goldsmith, who bases his views of international law primarily on the realist approach, views the states primarily as unitary, rational actors that try to maximize their gains and protect their interests, cooperating with other states if it is in their interest.<sup>4</sup> Skeptical toward

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*and Fall of American Hegemony from Wilson to Trump*, 95 INT'L AFF. 63 (2019); Jonathan Havercroft et al., *Donald Trump as Global Constitutional Breaching Experiment*, 7 GLOBAL CONST. 1 (2018); Clare F. Moran, *Crystallising the International Rule of Law: Trump's Accidental Contribution to International Law*, 56 WASHBURN L.J. 491 (2017); Rachel Brewster, *The Trump Administration and the Future of the WTO*, 44 YALE J. INT'L L. ONLINE. 6 (2018). *But see* Bosco, "We've Been Here Before: The Durability of Multilateralism", 70 J. INT'L AFF. 9 (2017); Andrea Birdsall & Rebecca Sanders, *Trumping International Law?*, 21 INT'L STUD. PERSPECT. 275 (2020).

<sup>2</sup> See Harold Hogju Koh, *The Trump Administration and International Law*, 56 WASHBURN L. J. 413 (2017).

<sup>3</sup> Harold Hogju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 207 (1996).

<sup>4</sup> JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005). While the publications of Posner and Goldsmith have been very influential in shaping the law and economics approach to international law, they

the “unfounded doctrinal descriptions and prescriptions of traditional legal scholarship,”<sup>5</sup> this view of international law resembles that of a patchwork of pledges the states follow if it is in their interest to do so.<sup>6</sup> Thus, Trump’s rhetoric may hurt international law, but as long as other states find it does not challenge their interests, they will follow it and cooperate. If we take into account some other explanations of those in favor of such an approach, we find that they view Trump’s actions not as a driver of the crisis; rather, they are a response to the inevitable backlash against the globalization of the 1990s,<sup>7</sup> which produced winners and losers in both the center and the periphery of the globalization process.<sup>8</sup> Pressures arising out of this question of political economy and the global redistribution of global public goods may indeed require a new, unilateral approach. Both approaches are closely related to theories of international relations. The transnational legal process has been inspired by constructivism and (to a lesser extent) liberal internationalism while the realist approach to international law has been strongly inspired by a synonymous approach to international relations and to some extent by law and economics.<sup>9</sup> As such, the two approaches differ not only in their understanding of what international

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should not be viewed as representing an affirmative perception of the Trump administration’s policy toward Iran or as exemplary of the vast body of thought that law and economics-oriented scholars have developed in the field of international law. Goldsmith and Posner initially dubbed their approach “New International Law Scholarship,” but this name did not stick to this normative view of international law they offered. See Jack Goldsmith & Eric A. Posner, *The New International Law Scholarship*, 34 GA. J. INT’L & COMP. L. 463 (2005). Therefore, I use the term “realist” to denote their particular view of international law. For the application of this term in such a way. See Oliver Jütersonke, *Realist Approaches to International Law*, in THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 337–342 (Anne Orford, Florian Hoffmann & Martin Clark eds., 2016).

<sup>5</sup> Andrea Bianchi, INTERNATIONAL LAW THEORIES: AN INQUIRY INTO DIFFERENT WAYS OF THINKING 267 (2016).

<sup>6</sup> GOLDSMITH & POSNER, *supra* note 4.

<sup>7</sup> Posner, *supra* note 1, at 11.

<sup>8</sup> BRANKO MILANOVIC, GLOBAL INEQUALITY: A NEW APPROACH FOR THE AGE OF GLOBALIZATION (2016).

<sup>9</sup> Jutta Brunnée & Stephen J. Toope, *Constructivism and International Law*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 119, 131–32 (Jeffrey L. Dunoff & Mark Pollack eds., 2013).

law is and what it ought to be but also in how they address the relationship between the law and politics.

For the transnational legal process, the boundary between international law and politics is fluid,<sup>10</sup> which is why the approach was criticized as an extension of the influence of international relations over international law, especially the American liberal strain of this theory that was dominant in the 1990s concerning law.<sup>11</sup> Professors Eric Posner and Goldsmith do not take a firm view on the distinction between law and politics, either; they view international law as politics by other means,<sup>12</sup> while the distinction between law and politics becomes clearer in their view of domestic politics, in particular the power that the U.S. president has in foreign affairs.<sup>13</sup> In Goldsmith's view, the presidential power to enter or terminate international agreements is "suboptimal" because it often lacks transparency but is wide, giving the president enough power to operate through "political commitments" without authorization from Congress.<sup>14</sup> This power may be constrained, not necessarily through acts of other branches of government but through acts of those who mobilize public opinion.<sup>15</sup>

Koh, to the contrary, believes that the executive does not have such unilateral power because other branches of government may

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<sup>10</sup> Dominika Svarc, *Using Force in International Affairs: The Role of International Law in Contemporary International Politics*, in INTERNATIONAL LAW IN A MULTIPOLAR WORLD 68 (Matthew Happold ed., 2012).

<sup>11</sup> Or, as Roth-Isigkeit put it, the "law is about what works." See David Roth-Isigkeit, *The Blinkered Discipline?: Martti Koskenniemi and Interdisciplinary Approaches to International Law*, 9 INT'L THEORY 410 (2017).

<sup>12</sup> Cf. Anne van Aaken, *To Do Away with International Law? Some Limits to 'The Limits of International Law'*, 17 EUR. J. INT'L L. 289 (2006) (offering a view of their book as reductionist towards international law).

<sup>13</sup> Eric Posner & Daniel Abebe, *Foreign Affairs Legalism: A Critique*, (U. Chi. Pub. L. & Legal Theory Working Paper No. 291, 2010), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1551300](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551300).

<sup>14</sup> Curtis A Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 HARV. L. REV. 1201 (2018).

<sup>15</sup> See JACK L. GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 (2012) (explaining how the public opinion influenced the constraining of strong presidencies). Cf. ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2011) (arguing for accepting of strong presidency as an inevitable product of contemporary politics).

constrain its exercise.<sup>16</sup> Consequently, the two approaches favor different types of foreign policy engagements; the transnational legal process favors the multilateral and, while the realists do not necessarily favor the unilateral, they see very little added value in multilateralism. These differences explain why Goldsmith and other advocates of realism, like Posner, view Trump's impact on international law as a unilateral response to the global populist wave.<sup>17</sup> Contrary to this, transnational legal process advocates see his actions as an attempt to ride this wave and disrupt the global legal order.

It is beyond the scope of this paper to settle this debate or act as an arbiter between these different views. Instead, it aims to join the debate, understanding it as a part of a wider inquiry on the effects of Trump's presidency, one that encompasses questions of the stability and usefulness of the international legal order and the role that populist governments as actors aim to play in it.<sup>18</sup> It does so by analyzing the actions taken by the Trump administration toward Iran with regard to the cancellation of the Joint Comprehensive Plan of Action (JCPOA), a multilateral framework agreement governing Iran's disengagement from the nuclear armament program.

This withdrawal has created different international legal problems: it brought the United States before the International Court of Justice,<sup>19</sup> initiated a withdrawal of multinational companies from Iran,<sup>20</sup> led to a reconsideration of the status of the dollar as a global reserve currency,<sup>21</sup> and further complicated the existing stand-off between the European Union (EU) and the United States in the World Trade Organization.<sup>22</sup> Both countries engaged in cyberwarfare operations against one another<sup>23</sup> and used military force, most notably in the targeted killing of Iranian general Soleimani and the response of

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<sup>16</sup> See Harold Hogue Koh, *Presidential Power to Terminate International Agreements*, 128 YALE L.J.F. 432 (2018).

<sup>17</sup> See Posner, *supra* note 1, at 16.

<sup>18</sup> Heike Krieger, *Populist Governments and International Law*, 30 EUR. J. INT'L L. 971 (2019).

<sup>19</sup> See *infra*, Part II B.

<sup>20</sup> See *infra*, Part II C.

<sup>21</sup> See *infra*, part II D.

<sup>22</sup> See *infra*, part II D.

<sup>23</sup> See *infra*, part III B.

the Iranian Revolutionary Guards Corps to this attack, which brought Iran and the United States to the verge of a full-out war.<sup>24</sup> Recognizing that an analysis of the administration's action covers the fields of both international law and international relations and recollecting the overlapping agenda of both fields,<sup>25</sup> I draw upon insights from both disciplines in the approach to this research.<sup>26</sup> In so doing, I identify the salient points of departure that give identity to the international law and policy views of this administration.

The paper is divided into two parts. In the first part, I provide a background summary concerning the JCPOA's political and legal negotiation history, the sanctions toward Iran, and United States withdrawal from JCPOA. Acknowledging that the United States has traditionally used sanctions as a statecraft tool,<sup>27</sup> I argue that the "weaponized interdependence"<sup>28</sup> of the global governance mechanisms in global finance—coupled with a strong enforcement practice from the Office of Foreign Asset Control (OFAC)<sup>29</sup>—led to extremely high compliance with the sanctions regime.<sup>30</sup> Furthermore,

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<sup>24</sup> See *infra*, part III B.

<sup>25</sup> See Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Inter-Disciplinary Scholarship*, 92 AM. J. INT'L L. 367 (1998); Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARVARD INT'L L. J. 437 (1997).

<sup>26</sup> Certainly, these are not the only two approaches that a legal or political analysis of the U.S.-Iran developments in the past few years may take. For example, an approach that would focus more on foreign policy issues or the national security interests is undoubtedly equally possible and relevant. But the scope of this paper does not allow us to engage these perspectives.

<sup>27</sup> SANCTIONS AS ECONOMIC STATECRAFT: THEORY AND PRACTICE (Steve Chan & A. Cooper Drury eds., 2000); DANIEL DREZNER, *THE SANCTIONS PARADOX: ECONOMIC STATECRAFT AND INTERNATIONAL RELATIONS* (1999).

<sup>28</sup> Henry Farrell & Abraham L. Newman, *Weaponized Interdependence: How Global Economic Networks Shape State Coercion*, 44 INT'L SECURITY 42 (2019).

<sup>29</sup> David Restrepo Amariles & Matteo Winkler, *U.S. Economic Sanctions and the Corporate Compliance of Foreign Banks*, 51 INT'L LAWYER 497 (2018). See also REFINITIV, *Fines for Banks that Breached U.S. OFAC Sanctions*, [https://www.refinitiv.com/content/dam/marketing/en\\_us/documents/infographics/fines-for-banks-that-breached-us-sanctions-infographic.pdf](https://www.refinitiv.com/content/dam/marketing/en_us/documents/infographics/fines-for-banks-that-breached-us-sanctions-infographic.pdf) (last accessed Mar. 12, 2022) (providing a detailed overview of the fines issued by the OFAC).

<sup>30</sup> Sascha Lohmann, *The Convergence of Transatlantic Sanction Policy Against Iran*, 29 CAMB. REV. INT'L AFF. 930 (2016).

the sanctions imposed on Iran in 2010, given their U.N. backing and EU support as well as the negotiation process and the legal mechanism of the JCPOA, were a display of a multilateral engagement and transnational legal process. Thus, the withdrawal from the JCPOA and reinstatement of sanctions created immediate global legal consequences that we discuss and explain. These consequences are not limited to the virtual cut-off of the Iranian regime from the global trade and the financial markets but have a global reach, owing to the extraterritorial application of the U.S. sanctions. I explain why these sanctions were widely held illegal yet were—and remain—virtually unchallengeable.

The second part of the article draws heavily from a relatively novel approach to international law called behavioral international law and economics (BIntLE).<sup>31</sup> I use this approach because it is exceptionally suited to discussing those issues that fall between domestic law, international law, and international relations as it fills the gap between these disciplines. Since the actions of Trump's administration towards Iran require a legal analysis that naturally overlaps with the negotiations between the two countries as well as different political considerations, this approach is both appropriate and necessary. Therefore, I first introduce this approach to international law, explaining that it proposes that the actions of international actors

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<sup>31</sup> See Anne van Aaken, *Behavioral International Law and Economics*, 55 HARVARD INT'L L. J. 421 (2014); Tomer Broude, *Behavioral International Law*, 163 U. PA.L. REV. 1099 (2015); Anne van Aaken, & Tomer Broude, *The Psychology of International Law: An Introduction*, 30 EUR. J. INT'L LAW. 1225 (2019). I will primarily rely on these texts in explaining the BIntLE approach to international law. A warning should be given at this stage: while the name "behavioural law and economics" has both an economic and a psychological component to it, it should be understood that many insights of BIntLE rely heavily on psychology, in particular political psychology. However, I use the term BIntLE and not a term that would emphasize the psychological insights per se, as BIntLE has become the term used to describe this analysis. As van Aaken explained, "The psychological insights we use are commonly named behavioral *economics*, given that this research tests and challenges the rational choice hypothesis to a hitherto unknown extent." (emphasis in original) Anne van Aaken, *Guest Post: Behavioral International Law and Economics: Benchmark and Applications*, OPINIO JURIS (Oct. 30, 2013), <https://opiniojuris.org/2013/10/30/guest-post-behavioral-international-law-benchmark-applications/>.

may be explained through their bounded rationality by studying the information and cognitive framework within which they operate. Using the concepts introduced by the behavioural approach to international law and economics, such as the framing effect, status quo bias, hawkish bias, and the endowment effect, I explain how the Trump administration attempted to use its so-called “maximum pressure” campaign to re-negotiate a deal with Iran that would be more favorable to what it perceived as its long-term strategic goals.

I find that a view of international law strongly influenced by the realist approach different inasmuch as it favors U.S. exceptionalism, which had a framing effect influencing Trump’s decision to abandon the JCPOA and re-impose sanctions unilaterally. As a result, the JCPOA was understood not as an international legal commitment or even a functional tool for détente in the Middle East—it was simply reduced to a bad policy choice, a “bad deal.” This framing effect, I argue, played a crucial role in its cancellation because the high risks taken were to be justified by an aversion to loss that the status quo—in the administration’s view—represented.

Consequently, the JCPOA was replaced by a high-risk negotiation tactic deployed by the administration and Donald Trump personally. The ultimate goals of this strategy were to use coercive measures such as sanctions and other elements of the maximum pressure campaign to coerce Iran into renegotiating its position as a regional power in the Middle East. The insights of negotiation scholars combined with the unprecedented transparency of Trump’s decision-making processes and his (nominally) co-authored book on the subject<sup>32</sup> allowed analysis of the bounded rationality of these actions and identification of a hawkish bias and other traits of Trump’s negotiation style. Thus, I view some of the main aspects of the diplomatic-military stand-off, such as cyberwarfare operations and the use of force between the two countries, as elements of a negotiation process that ultimately failed in the realization of the goals through unilateral actions.

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<sup>32</sup> Eugene B. Kogan, *Art of the Power Deal: The Four Negotiation Roles of Donald J. Trump*, 35(1) NEGOT. J. 65 (2019); DONALD J. TRUMP, & TONY SCHWARTZ, *TRUMP: THE ART OF THE DEAL* (1987).

I argue that the combination of an exceptionalist view of international law and a high-risk negotiation tactic characterized by loss aversion is what defined the Trump administration's approach to international law and policy toward Iran. I conclude by synthesizing the findings of the sanctions and diplomatic–military engagement between the United States and Iran, fitting them back into the debate between the different views on U.S. international law and the U.S. presidential powers. I find that, ultimately, none of the proclaimed goals of the cancellation of sanctions or the negotiation process were achieved through unilateral actions. Instead, the United States was faced with a realistic possibility of further military strengthening of Iran contributing to a strengthening of Iran's negotiating position. Because of this, the United States opted for a return to multilateral initiatives by attempting to use different mediators and agents to compel Iran to negotiate and called upon the states that have remained within the JCPOA to prevent a further rearmament of Iran.<sup>33</sup>

## II. U.S. SANCTIONS TOWARD IRAN AND THE JCPOA

### A. The sanctions and their mechanism

Traditionally, states use unilateral sanctions as a tool of their foreign policy and statecraft.<sup>34</sup> The approach finds its modern expression in the U.S. sanctions against Cuba, Iran, North Korea, and, to a lesser extent, Russia. These sanctions are often unilateral—one recent overview of the U.S. sanctions program found only eleven out of thirty-five programs to be related to a U.N. sanctions regime.<sup>35</sup> But these sanctions rarely, if ever, target only the country subjected to a sanctions regime. Ever since World War One, trading with the enemy represents a legitimate concern to which U.S. legislators or the president respond.<sup>36</sup> The sanctions on some of these countries do not just prevent U.S. citizens and companies from doing business with

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<sup>33</sup> See *infra*, part III.

<sup>34</sup> For an evolution of sanctions from World War One to the present day, see KERN ALEXANDER, *ECONOMIC SANCTIONS: LAW AND PUBLIC POLICY* 8–29 (2009).

<sup>35</sup> Devika Hovell, *Unfinished Business of International Law: The Questionable Legality of Autonomous Sanctions*, 113 AM. J. INT'L UNBOUND 140 (2019).

<sup>36</sup> See DREZNER, *supra* note 27.

entities located in the targeted countries. Starting from the sanctions imposed on Cuba after the adoption of the Cuban Liberty and Democratic Solidarity Act (also known as the Helms–Burton Act<sup>37</sup>) in 1996, the sanctions also have a so-called secondary effect—that is, extraterritorial application to other countries and individuals who are considered to be in breach of the sanctions if they use currency, products, parts of products, or financial institutions that are American to make payments or provide goods and services to sanctioned countries. This secondary effect is the first primary source of power of unilateral U.S. sanctions. Furthermore, the sanctions prevent access to global financial markets, prevent trade from being executed in U.S. dollars (as the most reliable global reserve currency), and penalize not only the sanctioned state and companies based therein, but also all others who fail to comply with these prohibitions.<sup>38</sup> Despite the behavior in question being conducted abroad, the jurisdictional nexus for the Office of Foreign Asset Control to act relies on the fact that the transactions—although executed abroad—have been made in U.S. dollars. Every such transaction entails the usage of a U.S.-based correspondent bank and such a usage constitutes what has been dubbed “correspondent bank jurisdiction.”<sup>39</sup> The legislative measures that strengthen these sanctions evolved greatly during Obama’s presidency. The 2007 amendment to the International Economic Powers Enforcement Act made it unlawful for any person to engage in conduct, including conduct abroad, that causes others to violate U.S. sanctions.<sup>40</sup> Thus, access to the global financial markets and the limitation of banking transactions represent the second major source of the power of the sanctions. The development of these sanctions during the 2000s was heavily influenced not just by attempts to curtail Iran and North Korea but also to prevent terrorist financing.

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<sup>37</sup> Cuban Liberty and Democratic Solidarity Act of 1996, 22 U.S.C. §§ 6021–6091 (1996).

<sup>38</sup> Susan Emmenegger, *Extraterritorial Economic Sanctions and their Foundation in International Law*, 33 ARIZ. J. INT’L & COMP. L. 631 (2016).

<sup>39</sup> *Id.* at 659.

<sup>40</sup> *Id.* at 654.

Both the effect and the legality of these sanctions are disputed. Sanctions inflict great pain on societies and their economic power,<sup>41</sup> but they often fail to coerce the states toward a desired behavior, as the cases of Serbia, Iraq, Cuba, and, more recently, Russia, Sudan, and Venezuela testify.<sup>42</sup> When enjoying multilateral support, as was the case with the EU's accession to the U.S. sanctions regime on Iran in 2010, the probability of a change in the behavior of a regime or the overthrow of the regime increases.<sup>43</sup> But, when used against regimes that have strong claims of legitimacy or that are able to project the illegitimacy of the sanctions as an outside attack on the population, their effectiveness declines.<sup>44</sup> Unilateral sanctions, in contrast, seldom lead to a change of the behavior of states or a change in the compliance of the regimes. Therefore, the creation of the JCPOA, an agreement between Iran and the P5+1 countries<sup>45</sup>, which ended the sanctions' regime against Iran in exchange for the establishment of limitations on the Iranian nuclear program and the establishment of an oversight and verification mechanism by the International Atomic Energy Agency (IAEA), could be understood as a success of the sanctions' regime. The sanctions' regime, however, was not an end unto itself; the restrictions were intended to change the behavior and, potentially, upset the stability of the Iranian regime. In this sense, it is much harder to assess their effectiveness. While they did not upset the stability of the Iranian political system, they created a different internal dynamic contributing to internal divisions within the Iranian political class over

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<sup>41</sup> See Idriss Jazairy (U.N. Secretary General), *Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on Enjoyment of Human Rights: Note*, U.N. Doc. A/73/175 (July 17, 2018).

<sup>42</sup> See Dursun Peksen, *When Do Imposed Economic Sanctions Work? A Critical Review of the Sanctions Effectiveness Literature*, *Defence and Peace Economics*, (2019), 1–13 (offering an overview of the effectiveness of sanctions in the literature)

<sup>43</sup> Lohmann, *supra* note 30, at 933.

<sup>44</sup> Julia Grauvogel & Christian von Soest, *Claims to Legitimacy Count: Why Sanctions Fail to Instigate Democratisation in Authoritarian Regimes*, 53 *EUR. J. POLIT. RES.* 635 (2014). *But see* DREZNER, *supra* note 27, at 124 (claiming that such an argument lacks an empirical foundation).

<sup>45</sup> The P5+1 refers to UN Security Council's five permanent members plus Germany.

whether to comply with the demands of the international community led by the United States.<sup>46</sup>

#### B. The negotiations and commitments of the JCPOA

The JCPOA was not solely a successful result of the sanctions. It was also a success for the negotiators from both Iran and the P5+1 countries who were not only in the business of protecting the interests of their respective nations but also, in the case of Iran and the United States, of overcoming the domestic and regional opposition to the deal. The JCPOA was preceded by a full decade of negotiations that involved not only the two countries but European leaders and the IAEA.<sup>47</sup> The negotiations were a result of the fear and opposition led primarily by the United States, but also by the three major European countries (Germany, France, and the United Kingdom), toward the development of the Iranian nuclear program.<sup>48</sup> The two central actors of the negotiations, Iran and the United States, held historical grievances against each other—Iran, perceiving itself as a victim of the 1953 foreign-backed coup and Iraqi aggression of the 1980s, which was supported by the Western countries, and the United States, a country that not only had been traumatized by the 1979 hostage crisis but has also eluded any bilateral engagement with Iran ever since.<sup>49</sup>

Originally launched in the 1950s under the U.S.-led “Atoms for Peace” initiative, the Iranian nuclear program entered the international spotlight in 2003 when the unwillingness of the Iran leadership to allow the inspections requested by the International Atomic Energy Agency forced a declaration that the country was in breach of the Nuclear Non-Proliferation Treaty (NPT) and that Iran

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<sup>46</sup> See Pejman Abdolmohammadi & Giampiero Cama, *Iran as a Peculiar Hybrid Regime: Structure and Dynamics of the Islamic Republic*, 42 BRITISH J. OF MIDDLE E. STUDIES 558, 573-74 (2015).

<sup>47</sup> See generally, DANIEL H. JOYNER, *IRAN'S NUCLEAR PROGRAM AND INTERNATIONAL LAW: FROM CONFRONTATION TO ACCORD* (2016) (explaining the evolution of the negotiations over attempts to bring the Iranian nuclear program in line with international law).

<sup>48</sup> *Id.*

<sup>49</sup> See FRANZ CEDE, *UNFINISHED BUSINESS: WHY INTERNATIONAL NEGOTIATIONS FAIL* 66–68 (2012) (providing insight into how these perceptions have shaped the positions of the Iranian negotiators).

may well have been on a course of developing nuclear weapons.<sup>50</sup> The negotiations were triggered when the Iranian authorities, in violation of the provisions of the NPT—to which it was a party—failed to notify the IAEA of its nuclear program and allow its inspectors to conduct a review of the Iranian facilities, in the period between 2003 and 2008. This behavior increased a suspicion that the declared civilian purpose of the Iranian nuclear program differed from the actual purpose—development of nuclear warheads. This was a legitimate concern, as Iran historically had sent mixed signals over its intention to use nuclear weapons as a means of nuclear deterrence,<sup>51</sup> despite its main religious leader issuing a fatwa against their use.<sup>52</sup> The lack of progress in the 2003–2010 negotiations of the remedies to this issue served as a pretext for the United States to enact the Comprehensive Iran Sanctions, Accountability and Divestment Act in 2010, after which any access of a foreign bank to Iran involved the risk of a heavy fine as well as the loss of access to the U.S. financial market, thereby effectively imposing a financial embargo.<sup>53</sup> At that point, the EU enacted its own, similar sanctions regime,<sup>54</sup> which led to a convergence of two major geopolitical actors against Iran.<sup>55</sup> From 2003 to 2013, the U.N. Security Council not only condemned the Iranian noncompliance with the treaty but imposed sanctions and made illegal the development of the ballistic missile program<sup>56</sup>—development that was important not only with relation to the nuclear capabilities but overall military deterrence capability of Iran. The financial isolation that resulted did not extract significant concessions from the Iranian regime until a change of

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<sup>50</sup> FARHAD REZAEI, *IRAN'S NUCLEAR PROGRAM 1979–2015: A STUDY IN PROLIFERATION AND ROLLBACK* 92–95 (2015).

<sup>51</sup> JOYNER, *supra* note 47, at 13.

<sup>52</sup> *Id.* at 14.

<sup>53</sup> RICHARD NEPHEW, *THE ART OF SANCTIONS: A VIEW FROM THE FIELD* 77 (2017).

<sup>54</sup> While similar in scope, the sanctions of the EU against Iran were not extraterritorial in their application. See Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 AM. J. COMP. L. 87 (2014).

<sup>55</sup> CEDRIC RYNGAERT, *JURISDICTION IN INTERNATIONAL LAW* 118 (2d ed. 2015) (noting that “[t]he apparent acceptance, at least by the EU, of the extraterritorial dimension of the U.S. Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA), for instance, may be explained by a shared perception of the danger emanating from Iran”).

<sup>56</sup> U.N. S.C. Res. 1929 (Jun. 9, 2010).

government occurred in Iran in 2013. Hawkish President Ahmadinejad, a candidate of the conservatives who advocated for the acquisition of nuclear weapons as a means of deterrence<sup>57</sup>, was replaced by moderate President Rouhani. This signaled a different attitude in the population, which was suffering tremendously under the weight of the sanctions, as evidenced by a 25% contraction of the Iranian citizen purchasing power between 2011 and 2013.<sup>58</sup>

The crucial outcome of the agreement and the negotiation process was that Iran agreed to delay its process of uranium enrichment, keeping the level of enrichment well below that needed to produce nuclear weapons and allowing full access and monitoring of its facilities to the IAEA experts.<sup>59</sup> In addition to full monitoring, the IAEA was permitted to deploy cybersleuthing, install particle sensors, collect samples from known nuclear development sites, and assist in the unofficial monitoring coming from Israel and the United States.<sup>60</sup> Any noncompliance or denial of access to the monitors and other IAEA staff was agreed to be referred to a Joint Commission that could, by a majority of votes, reimpose sanctions under the so-called snapback provisions.<sup>61</sup> Unlike U.N. Security Council resolution 1929, U.N. Security Council Resolution 2231, passed after the adoption of the JCPOA, made the development of the ballistic missile program legal with the embargo on the development of ballistic missiles capable of using a nuclear warhead substituted by the declaration, “Iran is called upon not to undertake any activities related to development of ballistic missiles capable of delivering nuclear weapons . . . until the date eight years from JCPOA Adoption date.”<sup>62</sup>

In neither Iran nor the United States has there been a broad consensus among the policy stakeholders that entering into the JCPOA was the right course of action. Among U.S. foreign policy

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<sup>57</sup> See Max Fisher, *The real reasons Iran is so committed to its nuclear program*, VOX (Feb 25, 2015), <https://www.vox.com/2015/2/25/8101383/iran-nuclear-reasons>.

<sup>58</sup> Bijan Khajepour, *Iran's Economic Suffering*, ASPEN INST. ITALIA (2012).

<sup>59</sup> FARHAD REZAEI, IRAN'S FOREIGN POLICY AFTER THE NUCLEAR DEAL 27–29 (2019).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> U.N. S.C. Res. 2231, annex B, ¶ 3 (July 20, 2015).

stakeholders, there seems to be a consensual view of the sanctions as a “core instrument of national power.”<sup>63</sup> However, different U.S. administrations have had a different view of what constitutes the demonstration of national power. The Obama administration believed that the JCPOA struck a fair balance between Iran’s desire to pursue a nuclear program and a limitation of its future nuclear military capability and that sanctions as such have served the purpose of coercing Iran to the agreement.<sup>64</sup> In contrast, the U.S. Republican Party, influenced by powerful Washington lobbyists,<sup>65</sup> viewed the JCPOA as an agreement that simply allowed Iran to prolong the uranium enrichment needed to produce nuclear warheads for ballistic missiles for ten to fifteen years.<sup>66</sup> This is why, during the last stages of the JCPOA negotiations, forty-seven congresspersons sent a letter to their Iranian counterparts stating that, as an executive agreement, the agreement can be struck down by a stroke of the pen, and urged them not to adopt it.<sup>67</sup> Such a lack of support in the Congress meant that the United States would accede to the JCPOA as an executive agreement of the United States President and not a treaty, whose ratification by the president would require an unfeasible legislative procedure.<sup>68</sup> Such a distinction meant that the treaty was no more than a political commitment making its eventual

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<sup>63</sup> Nephew, *supra* note 53, at 144.

<sup>64</sup> *The Historic Deal That Will Prevent Iran from Acquiring a Nuclear Weapon*, OBAMA WHITE HOUSE ARCHIVE, <https://obamawhitehouse.archives.gov/issues/foreign-policy/iran-deal> (last visited Apr. 19, 2022).

<sup>65</sup> See DENNIS C. JETT, *THE IRAN NUCLEAR DEAL: BOMBS, BUREAUCRATS, AND BILLIONAIRES* 42–122 (2017) (providing an overview of the efforts of lobbyists both supporting and opposing the deal).

<sup>66</sup> Sarah Begley, *Donald Trump’s Speech to AIPAC Members*, TIME MAGAZINE, <http://time.com/4267058/donald-trump-aipac-speech-transcript/> (last accessed Mar. 12, 2022); Jerome H. Kahan, *Revisiting the Iran Nuclear Deal*, 61 ORBIS 109 (2017).

<sup>67</sup> Peter Baker, *G.O.P. Senators’ Letter to Iran About Nuclear Deal Angers White House*, N.Y. TIMES (Mar. 9, 2015), <https://www.nytimes.com/2015/03/10/world/asia/white-house-faults-gop-senators-letter-to-irans-leaders.html>; Mark Fitzpatrick, *Assessing the JCPOA*, 57 ADELPHI SERIES, no. 466–467, 2017, at 19.

<sup>68</sup> Jack L. Goldsmith, & Eric A. Posner, *International Agreements: Rational Choice Approach*, 44 VA. J. INT’L L. 113 (2003).

future cancellation easier.<sup>69</sup> What also allowed such a move was the failure of the Obama Administration to require that the U.N. Security Council bind states (including the United States) not to impose sanctions on Iran unless there is clear non-compliance with the JCPOA. Thus, after the conclusion of the JCPOA, the Council only lifted the U.N. sanctions but did not mandate that the United States end its sanctions.<sup>70</sup>

Whether the United States made a diplomatic effort to renegotiate the JCPOA in the period between Trump's inauguration in early 2017 and May 2018, when the JCPOA was cancelled, is unclear at this point.<sup>71</sup> What is clear is the existence of fears that Iran would not commence its civilian nuclear program but rather buy time and attempt a "breakout" from the deal after a few years, which would afford Iran enough time to acquire military nuclear capability. The lifting of the sanctions, however, did not create economic opportunities for U.S. businesses because the extensive network of prohibitions enacted by the Congress during the decades of hostility with Iran has remained in place.<sup>72</sup>

Thus, in mid-2018, after failing to certify Iran's obligation toward the states' parts of the JCPOA, the United States unilaterally withdrew from the treaty, announcing reimposition of the sanctions toward Iran.<sup>73</sup> By doing so, Trump's administration did not violate the

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<sup>69</sup> This can be seen as a crucial development that led to it being removed. See Jamil N. Jaffer, *Elements of Its Own Demise: Key Flaws in the Obama Administration's Domestic Approach to the Iran Nuclear Agreement*, 51 CASE WEST. R.J. INT'L L. 77 (2019).

<sup>70</sup> Bradley & Goldsmith, *supra* note 14, at 1242.

<sup>71</sup> See Koh, *supra* note 2, 443–47 nn. 132–134 (providing an overview of news reports and speculations of this issue).

<sup>72</sup> See Meredith Rathbone et al., *Sanctions, Sanctions Everywhere: Forging Path Through Complex Transnational Sanctions Laws*, 44 GEO. J. INT'L L. 1055, 1081–93 (2013) (providing an overview of the extensive U.S. sanctions toward Iran that were operational before the cancellation of the JCPOA).

<sup>73</sup> *Trump Abandons Iran Nuclear Deal He Long Scorned*, N.Y. TIMES (May 8, 2018), <https://www.nytimes.com/2018/05/08/world/middleeast/trump-iran-nuclear-deal.html>.

JCPOA, for the treaty's sunset provisions<sup>74</sup> envisaged no sanction in case the United States withdrew from it, nor did it violate U.S. domestic law.<sup>75</sup> Following the withdrawal, the president reactivated the complex legal and financial mechanism of isolation of the Iranian economy and regime.<sup>76</sup> The move was not greeted with support outside of the United States<sup>77</sup>, and this lack of support would mean that the sanctions were to remain unilateral and considered as illegitimate and illegal by most in the global community. Challenging them legally, however, was, and still is, a very complex matter.

### C. Challenging the sanctions before the U.S. courts and international fora

#### 1. Presumption against extra-territoriality and U.S. sanctions legislation

One of the basic presumptions for understanding the application of legislation enacted by the United States Congress is that Congress legislates primarily with domestic concerns in mind.<sup>78</sup> This means that the U.S. courts presume the U.S. laws are not to be applied extraterritorially unless there is a clear legislative intent of the lawmaker for such an application. This doctrine, stemming from the *Charming Betsy* canon of decisions<sup>79</sup> and the 1909 case, *American Banana Co. v.*

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<sup>74</sup> See Robert J. Goldston, *Iran after sunset*, BULLETIN OF THE ATOMIC SCIENTISTS (Apr. 25, 2018), <https://thebulletin.org/2018/04/iran-after-sunset/> (explaining the sunset provisions of the JCPOA treaty).

<sup>75</sup> Josh Rubin, *No, Making the Iran Deal a Treaty Wouldn't Have Stopped Trump from Withdrawing from It*, JUST SECURITY, (May 25, 2018) <https://www.justsecurity.org/56999/no-making-iran-deal-treaty-wouldnt-stopped-trump-withdrawing/>.

<sup>76</sup> See Lesley Wroughton & Parisa Hafezi, *U.S. reimposes Iran sanctions, Tebran decries 'bullying'*, REUTERS (Nov 5, 2018), <https://www.reuters.com/article/us-usa-iran-sanctions-idUSKCN1NA0ZR>.

<sup>77</sup> See Hassan Rouhani, *World leaders react to US withdrawal from Iranian nuclear deal*, AL JAZEERA (May 9, 2018), <https://www.aljazeera.com/news/2018/5/9/world-leaders-react-to-us-withdrawal-from-iranian-nuclear-deal>

<sup>78</sup> *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991).

<sup>79</sup> See William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582, (2019) (providing the genesis of development of presumption against extraterritoriality as a form of statutory interpretation of US law).

*United Fruit Co.*<sup>80</sup>, was reaffirmed by the 1991 *EEOC v. Arabian American Oil Co.*<sup>81</sup>, finding its refinement in the “two-step” tests established by the U.S. Supreme Court in the relatively newer *Morrison* and *RJR Nabisco v. European Community* cases.<sup>82</sup> The first step is to inquire whether the presumption against extraterritoriality is rebutted, and if not, whether the case involves a domestic application of the statute by looking at the “focus of the statute.”<sup>83</sup> But, when U.S. courts look at the focus of the statute they do so to assess legislative intent because Congress is “likely to have superior informational and technical expertise on how to make [a] determination whether a statute should have extraterritorial application.”<sup>84</sup>

Stopping the statute “at the border” might have useful implications for Congress allowing to legislate with little but domestic concerns in mind. However, some finer aspects of the reasoning of the court and the composition of the majorities that upheld each one of these decisions gave some observers ground to believe that, following a string of U.S. Supreme Court decisions that reinterpreted the presumption against extraterritoriality in a more narrow way,<sup>85</sup> future conservative justice appointees might be more inclined to overturn the decisions guiding the principles of review of extraterritorial application of the statutes.<sup>86</sup> After all, in *Hartford Fire Insurance Co. v. California*, a case on the extraterritorial application of U.S. antitrust laws, the U.S. Supreme Court concluded that “the practice of using international law

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<sup>80</sup> *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909)

<sup>81</sup> *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991); Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179 (1991).

<sup>82</sup> *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010); *RJR Nabisco Inc. v. European Community* 579 U.S. 325 (2016).

<sup>83</sup> William S. Dodge, *The Presumption Against Extraterritoriality in Two Steps*, 110 AJIL UNBOUND 45 (2017).

<sup>84</sup> RYNGAERT, *supra* note 55, at 70 n. 122.

<sup>85</sup> These decisions are the U.S. Supreme Court judgments in the *Morrison*, *Nabisco*, and *Kiobel* cases. See Austen L. Parrish, *Fading Extraterritoriality and Isolationism: Developments in the United States*, 24 IND. J. GLOBAL LEGAL STUD. 207 (2017) (providing the development of the argument on this basis generally).

<sup>86</sup> Sascha Lohmann, *Extraterritorial U.S. Sanctions: Only Domestic Courts Could Effectively Curb the Enforcement of U.S. Law Abroad*, SWP COMMENT (May 2019), <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-61664-8>.

to limit the extraterritorial reach of statutes is firmly established in our jurisprudence.”<sup>87</sup>

However, this maxim does not seem to apply to the legislative provisions of the sanctions and their secondary effects, as defined in U.S. legislation. Explaining jurisdictional reasonableness, the Restatement (Fourth) of Foreign Relations Law (2018) makes it clear that “[i]nterference with the sovereign authority of foreign states may be reasonable if application of federal law would serve the legitimate interests of the United States.”<sup>88</sup> This is why, despite a plethora of instances in which the Office for Foreign Asset Control and the U.S. Department of Justice have issued fines for the breach of sanctions, no court cases challenging these decisions have been initiated.<sup>89</sup> A recent attempt to challenge the extraterritorial application of U.S. law regarding sanctions came in a criminal proceeding against Reza Zarrab, a businessman who developed a network of shell companies and businesses to help trade between Turkey and Iran, thus violating U.S. sanctions against Iran.<sup>90</sup>

Zarrab’s defense argued that the case represents “a prosecutorial overreach of the first order” because the International Emergency Economic Powers Act applies only to U.S. persons and that the jurisdictional nexus cannot be based solely on the fact that some of the transactions were conducted in U.S. dollars.<sup>91</sup> The court, however, rejected the motion to dismiss the indictment by reaffirming

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<sup>87</sup> RYNGAERT, *supra* note 55, at 75.

<sup>88</sup> Restatement (Fourth) of Foreign Relations Law § 405 cmt. b (Am. L. Inst. 2018); William S. Dodge, *Jurisdiction in the Fourth Restatement of Foreign Relations Law*, 18 Y.B. PRIVATE INT’L L. 143 (2017).

<sup>89</sup> David Restrepo Amariles & Matteo Winkler, *U.S. Economic Sanctions and the Corporate Compliance of Foreign Banks*, 51 INT’L LAW. 497 (2018). See *REFINITIV, Fines for Banks that Breached U.S. OFAC Sanctions*, [https://www.refinitiv.com/content/dam/marketing/en\\_us/documents/infographics/fines-for-banks-that-breached-us-sanctions-infographic.pdf](https://www.refinitiv.com/content/dam/marketing/en_us/documents/infographics/fines-for-banks-that-breached-us-sanctions-infographic.pdf) (last accessed Mar. 12, 2022) (providing a detailed overview of fines).

<sup>90</sup> Indictment, *United States v. Zarrab*, No. 1:15-cr-00867 (RMB) (S.D.N.Y. Dec. 15, 2015).

<sup>91</sup> Mem. of Law in Support of Def. Reza Zarrab’s Mot. to Dismiss the Superseding Indictment at 9, *United States v. Zarrab*, No. 1:15-cr-00867 (RMB) (S.D.N.Y. July 18, 2016).

that the transfer of funds from a U.S. bank is understood to mean the “exportation of a service.”<sup>92</sup> In so doing, the court found that assertion of jurisdiction by the U.S. government does not constitute an issue of extraterritorial application of U.S. law but rather of the territorial constitution of jurisdiction via the link established through the U.S. dollar transactions, thus removing the dilemma of extraterritorial application of U.S. law altogether.<sup>93</sup> Thus, in the strictest sense the Zarrab case is not a precedent because it did not answer the question of whether Zarrab is a “U.S. person” within the sense of the sanction legislation and because—since the trial ended in a plea bargain with the defendant cooperating with the U.S. Department of Justice—the appellate courts did not hear the case.<sup>94</sup>

Such a stance of the U.S. courts explains the reluctance of corporate entities to challenge the sanctions before U.S. courts. We can be safe in concluding that the courts would find that Congress intended provisions of this legislation to apply extraterritorially despite the fact that the criminal proceedings in *Zarrab v U.S.* are the only instance where the presumption of extraterritoriality solely regarding sanctions has been tested before the courts.<sup>95</sup> Even if the court would ignore the criteria of the two-step test of the focus and the intent of the statutes, whether the behavior of an individual or a company “touched or concerned” the United States “with a sufficient force” would remain important.<sup>96</sup>

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<sup>92</sup> United States v. Zarrab, No. 15 Cr. 867 (RMB) 2016 WL 6820737, at \*7 (S.D.N.Y. Oct. 17, 2016).

<sup>93</sup> Emmenegger calls this a “correspondent bank jurisdiction” after the role that the correspondent banks have regarding international sanction-breaching transactions that were made in U.S. dollars. See Susan Emmenegger & Thirza Döbeli, *The Extraterritorial Application of U.S. Sanctions Law*, in U.S. LITIGATION TODAY: STILL A THREAT FOR EUROPEAN BUSINESSES OR JUST A PAPER TIGER? 231, 244 (Jun. 23, 2017).

<sup>94</sup> Dennis Boyle, *Extra-Territoriality and U.S. Economic Sanctions*, 36 IELR 101 (2020).

<sup>95</sup> United States v. Zarrab, No. 15 Cr. 867, (RMB), 15, 2016 WL 6820737 (S.D.N.Y. Oct. 17, 2016).

<sup>96</sup> Hannah L. Buxbaum, *Extraterritoriality in the Public and Private Enforcement of U.S. Regulatory Law*, in THE CONTINUING RELEVANCE OF PRIVATE INTERNATIONAL LAW AND ITS CHALLENGES 3 (F. Ferrari & D. Fernandez Arroyo

Originally developed as a part of the effects doctrine, it was further refined in *Kiobel v. Dutch Petroleum*<sup>97</sup> in which the court relied on the presumption of extraterritoriality in declining to recognize that federal statutes may be applicable to violations of a customary international law.<sup>98</sup> Writing for the majority, Justice Roberts concluded that the behavior that “touches or concerns” the United States with “sufficient force” may exclude the presumption of extraterritoriality of the statute.<sup>99</sup> This echoes the Restatement’s comment that “[i]f whatever is the focus of the provision occurred in the United States, then application of the provision is considered domestic and is permitted.”<sup>100</sup>

## 2. Challenging the sanctions before international adjudication bodies

In its opposition to U.S. secondary sanctions, the EU has clearly stated, both in the 1990s and in 2018, that “by their extra-territorial application, such instruments violate international law.”<sup>101</sup> But in the 1990s, though the EU was in the position to initiate proceedings before the dispute settlement bodies of the WTO, these were ended by an amicable settlement in which the United States suspended the application of sanctions in exchange for more alignment of the EU countries toward the strengthening of the transatlantic

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eds. forthcoming 2019) (Ind. Legal Studies Res. Paper No. 408), <https://ssrn.com/abstract=3369847>.

<sup>97</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013).

<sup>98</sup> Carlos M. Vazquez, *Things We Do with Presumptions: Reflections on Kiobel v. Royal Dutch Petroleum*, 89 NOTRE DAME L. REV. 1719 (2014).

<sup>99</sup> Dodge *supra* note 83.

<sup>100</sup> Restatement (Fourth) of Foreign Relations Law § 404 cmt. c (Am. L. Inst. 2018).

<sup>101</sup> Commission Delegated Regulation 2018/1100 of Jun. 6, 2018, Amending the Annex to Council Regulation (EC) No. 2271/96 Protecting Against the Effects of Extra-Territorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom, 2018 O.J. (L 199). See Alexandra Hofer, *The ‘Curiouser and Curiouser’ Legal Nature of Non-U.N. Sanctions: The Case of the U.S. Sanctions against Russia*, 23 J. CONFLICT SEC. L. 75 (2018) (providing a wider discussion concerning the approach of international law to sanctions on a “case-by-case” basis).

partnership.<sup>102</sup> This is in stark contrast to the situation during Trump's presidency in which the WTO found itself under attack from an U.S. administration, which wants to renegotiate or withdraw from this international institution.<sup>103</sup> By vetoing the appointment of members of the dispute settlement bodies of the WTO, this organization is prevented from resolving disputes. But even if it were operational, it is very doubtful whether its dispute resolution mechanism would help to overcome this problem because the United States opposes one of its key recent interpretations, the security exception. The security exception clause contained in Article XXI of the General Agreement on Trade and Tariff (GATT) holds that states may invoke trade barriers for security reasons.<sup>104</sup> In one of its recent decisions, the panel of the dispute settlement body found that the application of such an exception can be reviewed by the WTO.<sup>105</sup> Contrary to this, the United States contends that security exceptions are unilateral and discretionary.<sup>106</sup> Even if a case against the United States would be brought before the WTO dispute settlement mechanism, it is doubtful there would be—at least under an administration that wanted a comprehensive reform of the organization—compliance with a decision that would go against U.S. interests and interpretation of this clause. Therefore, the WTO cannot serve as an international forum in which the effects of the U.S. sanctions could be legally reviewed and, in any event, the WTO agreements do not contain a clause explicitly binding the secondary sanctions despite a “gut feeling” that there must be something illegal about them.<sup>107</sup>

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<sup>102</sup> Stefaan Smis & Kim van der Borgh, *The EU–U.S. Compromise on the Helms-Burton and D'Amato Acts*, 93 AM. J. INT'L L. 227, 231–33 (1999).

<sup>103</sup> Rachel Brewster, *The Trump Administration and the Future of the WTO*, 44 YALE J. INT'L L. ONLINE 6 (2018).

<sup>104</sup> General Agreement on Trade and Tariffs, Art. XXI (Oct 30, 1947) 55 U.N.T.S. 194.

<sup>105</sup> Appellate Body Report, *Russia—Measures Concerning Traffic in Transit*, WT/DS512/R (adopted April 26, 2019).

<sup>106</sup> Third Party Oral Statement of the United States, *Russia—Measures Concerning Traffic in Transit* WT/DS512 (Jan. 25, 2018).

<sup>107</sup> See Tom Ruys & Cedric Ryngaert, *Secondary Sanctions: A Weapon Out of Control? The International Legality of, and European Responses to, U.S. Secondary Sanctions*, BRITISH Y.B. OF INT'L L., 32 (2020).

Could the International Court of Justice (ICJ) be the venue of last resort? Iran has challenged the sanctions, their effect, and the unilateral withdrawal of the United States from the JCPOA, claiming such behavior violates a 1955 agreement on friendship between Iran and the United States before the International Court of Justice.<sup>108</sup> But, since Iran challenges the legality of the sanctions on the basis of a treaty and not on the grounds of violation of customary international law,<sup>109</sup> it is unclear whether the resolution of the case would offer a review of the legality of the sanctions. In October 2018, the Court issued a preliminary order against the United States under which the country is to refrain from preventing the import of food, medicine, agriculture commodities, spare parts, and other equipment and services necessary for the safety and maintenance of civil aviation to Iran.<sup>110</sup> With the final resolution of the adjudication at least a few years away, there is a small degree of certainty that the court proceeding would settle the matter between the two countries, especially given the United States' history of noncompliance with the court's orders and judgments.<sup>111</sup> In any event, in October 2018, the United States withdrew from the Treaty of Amity with Iran, which could effectively undermine the jurisdiction of the ICJ in the case, as it stemmed from Article XXI of the treaty.<sup>112</sup>

Thus, the international legal system cannot provide us with a clear answer on the question of legality and scope of unilateral sanctions that go beyond the scope of a U.N. Security Council-imposed sanctions regime. The issue remains contentious in international law. Authors observe that the word "sanction" is not an international legal term but rather a term widely accepted as a countermeasure against the behavior of a state seen as illegal or

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<sup>108</sup> See Elena Chachko, 58 INT'L LEGAL MATERIALS 71 (2019).

<sup>109</sup> Antonios Tzanakopoulos, *State Responsibility for Targeted Sanctions*, 113 AJIL UNBOUND 135 (2019).

<sup>110</sup> Alleged Violations Of The 1955 Treaty Of Amity, Economic Relations, And Consular Rights (Islamic Republic Of Iran V. United States Of America) Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018, p. 623

<sup>111</sup> John Quigley, *The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases: Reasons and Consequences*, 19 DUKE J. COMP. INT'L L. 263 (2009).

<sup>112</sup> Jean Galbraith, *Contemporary Practice of the United States Relating to International Law*, 113 AM. J. INT'L LAW. 133 (2019).

illegitimate.<sup>113</sup> But, whether measures that are meant to, for example, limit the state's ability to trade in oil and gas conform to the principle of proportionality in international law in comparison to the alleged violations of nuclear non-proliferation remain something to be tested.<sup>114</sup> Additionally, the international legal system lacks standards to determine which illegitimate, hostile, or dangerous behaviors should be repressed by sanctions and whether sovereign states have a right to be free from economic coercion.<sup>115</sup> Thus, given the vast scope of the effects of U.S. secondary sanctions, it seems that a state representing the interests of its own traders and exporters unable to trade with Iran would have a greater chance of succeeding before an international forum. However, neither has such an action been undertaken nor does it seem realistic.<sup>116</sup>

#### D. The EU's response to U.S. withdrawal from JCPOA and to secondary sanctions

Believing that the JCPOA and its commitments should be honored, the EU took measures to protect the deal. It responded to the anticipated effects of secondary U.S. sanctions by establishing the Instrument in Support of Trade Exchange (INSTEX), a special purpose vehicle designed to facilitate trade in goods exempt from U.S. sanctions.<sup>117</sup> It also re-invoked the EU Blocking Regulation originally

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<sup>113</sup> *Id.*

<sup>114</sup> Alexander Orakhelashvili, *The Impact of Unilateral EU Economic Sanctions on the U.N. Collective Security Framework: The Cases of Iran and Syria* in ECONOMIC SANCTIONS UNDER INTERNATIONAL LAW 18 (Ali Z. Marossi & Marisa R. Basset eds., 2015).

<sup>115</sup> Tom Ruys, *Sanctions, Retortions and Countermeasures: Concepts and International Legal Framework*, in RESEARCH HANDBOOK ON UN SANCTIONS AND INTERNATIONAL LAW (Larissa Van Den Herik ed., Edward Elgar Publishing 2016).

<sup>116</sup> *Cf.* Ruys & Ryngaert, *supra* note 107, at 78 (discussing the limited use and relevance of a potential ICJ advisory opinion on the matter).

<sup>117</sup> Joint statement on the creation of INSTEX, the special purpose vehicle aimed at facilitating legitimate trade with Iran in the framework of the efforts to preserve the Joint Comprehensive Plan of Action (JCPOA), (Jan 31, 2019) <https://instex-europe.com/about-us/founding-statement/>

enacted to counter U.S. sanctions against Cuba in 1996 by punishing corporate EU entities complying with the sanctions.<sup>118</sup>

INSTEX was supposed to operate as a barter mechanism; it would not process direct payments to Iranian banks or commercial entities but operate as a clearinghouse.<sup>119</sup> This means that, for example, a hypothetical EU exporter of medical goods to Iran receives payments from the importer of Iranian goods to the EU while the Iranian importer of medical goods receives payments from the exporter of Iranian goods. The role of INSTEX as a special-purpose vehicle is merely the coordinator of such payments.<sup>120</sup> The United States warned against the usage of INSTEX and also expanded the scope of its sanctions by designating the Islamic Revolutionary Guard Corps (IRGC) as a terrorist organization and banning trade with different sectors of Iranian industry, including all military, oil, insurance, financial, energy, shipping, shipbuilding, port operating, and metal producing sectors and metal-related products.<sup>121</sup> By this, the risk of non-compliance with U.S. sanctions became even greater as many Iranian entities are under IRGC control. Even before these events, many high-profile law firms and business advisory services advised their clients to refrain from doing business with Iran, citing risks of U.S. sanctions as the main reason.<sup>122</sup> The extension of the U.S.

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<sup>118</sup> The EU Blocking Regulation itself was inspired by the previous opposition of regulators in EU member states to the extraterritorial effects of U.S. antitrust law of the 1980s. See Edward Gordon, *Trends: Extraterritorial Application of United States Economic Laws: Britain Draws the Line*, 14 INT'L LAW. 151 (1980); *Developments in the Law: Extraterritoriality*, 124 HARV. L. REV. 1226, 1255 (2011).

<sup>119</sup> Mazahir Bootwala, *The Iran problem: an evaluation of US sanctions on Iran and global reactions*, 21 GEO. J. OF INT'L AFF. 136, 138 (2020).

<sup>120</sup> See generally Grégoire Mallard et al., *The Humanitarian Gap in the Global Sanctions Regime: Assessing Causes, Effects, and Solutions*, 26 GLOB. GOV. 121 (2020) (providing an overview of the mechanism that allows the functionality of INSTEX).

<sup>121</sup> U.S. Officially Designates Iran's Revolutionary Guards a Terrorist Group, REUTERS (Apr. 15, 2019), <https://www.reuters.com/article/us-usa-iran/u-s-officially-designates-irans-revolutionary-guards-a-terrorist-group-idUSKCN1RR1BE>.

<sup>122</sup> Satish M. Kini et al., *U.S. Sanctions v. EU Blocking Regulation: Conflicting Landscape Poses Challenge for Compliance*, DEBEVOISE & PLIMPTON (Oct. 17, 2018), <https://www.debevoise.com/insights/publications/2018/10/us-sanctions-v-eu-blocking-regulation>; Adam Smith et al., *The "New" Iran E.O. and the "New" EU Blocking Statute—Navigating the Divide for International Business*, GIBSON DUNN (Aug. 9,

sanctions to the Central Bank of Iran created insecurity in the circles of EU institutions on whether INSTEX and its members might find themselves the target of the U.S. sanctions, which led to continuous delays in the beginning of INSTEX operations.<sup>123</sup> Initially expected to start operating in mid-2019,<sup>124</sup> INSTEX's first two transactions occurred only in April 2020.<sup>125</sup> However, INSTEX transactions remained limited to humanitarian goods such as food and medicine.<sup>126</sup>

The establishment of INSTEX did not help EU companies escape a particular position of inter-legality<sup>127</sup>; if they comply with U.S. sanctions they will be targeted by EU law, but if they ignore U.S. sanctions they risk losing access to U.S. financial markets and enormous fines. Because compliance with EU Blocking Regulations is legislated by the individual EU member states, the fines and regulation of noncompliance greatly varied with some countries, such as the United Kingdom, regulating as criminal offences, others, such as Italy, regulating them as administrative offences and some, such as France and Luxembourg, not regulating them at all.<sup>128</sup> Notwithstanding these differences, compliance with the U.S. sanctions presented a much lower risk than compliance with the Blocking Regulation. These are

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2018), <https://www.gibsondunn.com/new-iran-e-o-and-new-eu-blocking-statute-navigating-the-divide-for-international-business/>.

<sup>123</sup> Maria Aftalion, *INSTEX, A GAME CHANGER?* 9 (Vienna Center for Disarmament and Non-Proliferation 2020) available at [https://www.nonproliferation.eu/wpcontent/uploads/2020/04/Marie-Aftalion-INSTEX-Paper\\_Final-1.pdf](https://www.nonproliferation.eu/wpcontent/uploads/2020/04/Marie-Aftalion-INSTEX-Paper_Final-1.pdf).

<sup>124</sup> Laurence Norman, *Europeans Plan to Inject Capital into Iranian Trade Effort*, WALL STREET J. (Jun. 26, 2019), <https://www.wsj.com/articles/europeans-plan-to-inject-capital-into-iranian-trade-effort-11561590898>.

<sup>125</sup> Alexandra Brzozowski, *EU's INSTEX Mechanism Facilitates First Transaction with Pandemic-Hit Iran*, EURACTIV (Apr. 1, 2020), <https://www.euractiv.com/section/global-europe/news/eus-instex-mechanism-facilitates-first-transaction-with-pandemic-hit-iran/>.

<sup>126</sup> Aftalion *supra* note 123 at 9.

<sup>127</sup> THE CHALLENGE OF INTERLEGALITY (Jan Klabbers & Gianluigi Palombella eds., 2019).

<sup>128</sup> Justine Walker, *The EU Blocking Regulation – Issues and Considerations for the Financial Services Sector*, UK FINANCE (July 11, 2018), <https://www.ukfinance.org.uk/system/files/UK-Finance-paper-EU-Blocking-Regulation-11-July-2018-FINAL.pdf>.

the reasons why the mere reannouncement of sanctions stopped almost all major foreign investment operations in Iran.<sup>129</sup>

Therefore, the enactment of the Blocking Statute and the inception of INSTEX did little to ensure that the EU companies are safe from U.S. retaliation; they were more of a signal to the Iranian government that the EU is willing to uphold its obligations to JCPOA and that, likewise, it expects Iran to do the same.<sup>130</sup> Perhaps sensing a willingness of the EU to concede more ground to preserve the deal, Iran announced that it would withdraw from the JCPOA unless constraints on its financial sector were loosened.<sup>131</sup> To this, the EU responded with demands that Iran comply with the demands made by the Financial Action Task Force (FATF), an international standard-setting body in the field of banking regulations pertaining to money laundering and banking regulations that repeatedly warned Iran due to its support of terrorist organizations.<sup>132</sup> As we will see in Part III, on the one hand, Iran did not withdraw from the JCPOA, opting instead to legitimize its position using the increasing enrichment of uranium as a leverage for more lenient standards from the EU toward trade with Iran.<sup>133</sup> Compliance with FATF, (which blacklisted Iran in February 2020) meant significant changes to the legislative framework of the Iranian financial system necessary to enable the country's leading

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<sup>129</sup> See DAVID ADESNIK & SAEED GHASSEMINEJAD, FOREIGN INVESTMENT IN IRAN: MULTINATIONAL FIRMS' COMPLIANCE WITH US SANCTIONS (Foundation for Defense of Democracies 2018), available at [https://www.fdd.org/wpcontent/uploads/2018/09/MEMO\\_CompaniesinIran.pdf](https://www.fdd.org/wpcontent/uploads/2018/09/MEMO_CompaniesinIran.pdf).

<sup>130</sup> Ellie Geranmayeh, Deputy Director, European Council on Foreign Relations, Speech at the Expert Dialogue on the EU Blocking Regulation and Extraterritorial U.S. Sanctions (Apr. 18, 2019).

<sup>131</sup> Patrick Wintour, *Iran announces partial withdrawal from nuclear deal*, GUARDIAN (May 8, 2019), <https://www.theguardian.com/world/2019/may/07/iran-to-announces-partial-withdrawal-from-nuclear-deal>.

<sup>132</sup> *Global watchdog gives Iran till June to comply with anti-money laundering rules*, MIDDLE EAST MONITOR (Jan. 23, 2019), <https://www.middleeastmonitor.com/20190223-global-watchdog-gives-iran-till-june-to-comply-with-anti-money-laundering-rules/>.

<sup>133</sup> See *infra*, Part III.

exporters to stop doing business on the black market.<sup>134</sup> Iran's reluctance to comply with FATF demands had to do with the insecurity of the Iranian authorities regarding the value of such an operation. Whatever was done, it was feared, could be undermined by U.S. lobbying within FATF itself, which would prevent Iran from being delisted. Thus, Iran would give away the funding of Iranian regional allies, such as Hezbollah, without gaining anything in return.<sup>135</sup>

INSTEX's limitation on trade exempt from U.S. sanctions meant that Iran's trade in oil, its main export product, remained excluded from the system. The only option to continue oil trade with Iran was to avoid the use of the global banking system and U.S. currency. This confirmed the unchallenged status of the dollar as a global reserve currency but also a currency of choice in international trade and the source of strength of the U.S. financial sanctions.<sup>136</sup> Although leading European politicians spoke of the need to promote the euro as a currency of international trade, and despite Iranian efforts to develop cryptocurrencies to bypass the effects of U.S. sanctions on its financial sector,<sup>137</sup> the relevance of the dollar has not been undermined. Thus, it seemed that what was left to Iran was to trade with the countries that would either use barter or payment mechanisms, thus bypassing the global effect of U.S. financial sanctions, or use intermediaries that would willingly break sanctions and risk U.S. prosecution in exchange for huge fees. The former was the case with China, which had more opportunities to continue trade with Iran because some of its banks were not exposed to the U.S. financial markets,<sup>138</sup> and the latter with Turkish Halkbank, which found

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<sup>134</sup> Steven Terner, *Does Iran want to be removed from the FATF blacklist?*, GULF STATE ANALYTICS (Apr. 1, 2021), <https://gulfstateanalytics.com/does-iran-want-to-be-removed-from-the-fatf-blacklist/>

<sup>135</sup> James M. Dorsey, *Iran and North Korea Highlight Pitfalls of Trump's "Maximum Pressure" Strategy*, BESA (Mar. 4, 2019), <https://besacenter.org/iran-north-korea-trump/>.

<sup>136</sup> Joshua P. Zoffer, *The Dollar and the United States' Exorbitant Power to Sanction*, 113 AM. J. INT'L L. UNBOUND 152 (2019).

<sup>137</sup> SHERRI SCOTT, CRYPTOCURRENCY COMPLIANCE: AN AML PERSPECTIVE 8 (2018).

<sup>138</sup> Elli Geranmayeh & Maneul L. Rapnouil, *Meeting the Challenge of Secondary Sanctions*, EUROPEAN COUNCIL ON FOREIGN RELATIONS (Jun. 25, 2019), [https://ecfr.eu/publication/meeting\\_the\\_challenge\\_of\\_secondary\\_sanctions/](https://ecfr.eu/publication/meeting_the_challenge_of_secondary_sanctions/).

itself under OFAC investigation for facilitating up to US \$20 billion in payments toward Iran.<sup>139</sup>

### III. COERCING IRAN: AN INSIGHT INTO THE DEALMAKING WORLD OF DONALD TRUMP

#### A. The United States' demands on Iran

Once the United States withdrew from JCPOA, Trump's administration was faced with a much more difficult task: getting Iran to re-negotiate its status as a regional power and its military deterrence capabilities. The United States' demands may be divided into three groups: 1) those dealing with Iran's support of the regional and global activities of paramilitary organizations and the development of its own military capabilities, 2) those dealing with Iran's nuclear capabilities, and 3) those focused on detainees and unneighborly relations.<sup>140</sup> The first group of demands contained mandates to end the proliferation of ballistic missiles; cease supporting Hezbollah, Shia militias in Iraq, and Houthi rebels in Yemen; limit the global activities of the Islamic Revolutionary Guards Corps, especially its Quds units; and withdraw forces from Syria.<sup>141</sup> The second group included demands to effectively limit the development of Iran's nuclear program altogether by turning off the hard water reactor and granting unlimited access to IAEA inspectors.<sup>142</sup> The third group required Iran to release all U.S. and foreign nationals and stop the threats and use of force, including cyberattacks, against neighbors.<sup>143</sup> The officials of the administration referred to the measures contained in the sanctions' regime as well as the aggressive public relations strategy aimed at both the domestic

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<sup>139</sup> U.S. Superseding Indictment at 3, *United States v. Turkiye Halk Bankasi A.S.*, S6 15 Cr. 857 (RMB).

<sup>140</sup> Mike Pompeo, U.S. Secretary of State, *After the Deal: A New Iran Strategy* (May 21, 2018), <https://www.heritage.org/defense/event/after-the-deal-new-iran-strategy>.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

constituency and the Iranian citizens as the “maximum pressure strategy.”<sup>144</sup>

The opposition to these demands from Iran was not the only high-risk aspect of this approach. Rather, what was specific to these actions was that they were taken in negation of the previous negotiation strategy vis-à-vis Iran that, from 2003 onwards, was never solely an Iran–United States affair but always had an international component.<sup>145</sup> As we have seen, the functionality of the sanctions relied on global compliance and the unilaterality of the U.S. approach of both pressuring and negotiating with Iran caused a rift with the traditional U.S. allies. Demands toward Iran, particularly those concerning ballistic missile capabilities as Iran’s ultimate military deterrent, can be understood as challenges to Iran’s sovereignty. Even if Iran was to give in to the U.S. demands to cease its support of the rebels in Yemen or Shia militias in Iraq, sole guarantees from the United States would hardly be enough to secure the stabilization of the region. Such distrust of the Iranian leaders towards the U.S. led them to believe that the true intention of these actions in exchange for suspension of the sanctions was to overthrow the Iranian regime and not stabilize the region.<sup>146</sup> This, however, did create a rift within Iran. While President Rouhani supported compliance with FATF regulations, the Iranian parliament controlled by the Iranian religious elite did not have the majority needed to pass the legislative changes demanded by FATF.<sup>147</sup>

Thus, Iran rejected the demands and characterized the U.S. maximum pressure campaign as an attempt to “Sovietize Iran” by isolating it and making it more vulnerable to domestic rifts. The maximum pressure campaign itself was, aside from the sanctions, very risky, as it seemed clear that it might be of limited use and indefinite

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<sup>144</sup> Michael R. Pompeo, *Confronting Iran*, 97 FOREIGN AFF. 60 (2018).

<sup>145</sup> For example, Russia and the EU countries were heavily involved in the negotiations over the Iranian nuclear programme since 2003.

<sup>146</sup> *Iran says U.S. ‘action group’ will fail to overthrow Iranian state*, REUTERS (Aug 19, 2018), <https://www.reuters.com/article/us-iran-nuclear-usa-idUSKBN1L4080>

<sup>147</sup> Jubin Katiraie, *FATF Raises New Infighting Among Iran’s Officials*, IRAN FOCUS (Jan. 1, 2020), <https://www.iranfocus.com/en/economy/34178-fatf-raises-new-infighting-among-iran-s-officials>.

duration. While the JCPOA was feared to be a pathway for the Iranian break out toward nuclear military capability, maximum pressure could easily lead to military escalations, regional instability, and a slow but certain loss of support for U.S.-led sanctions from the other states in the international community. While the effects of the sanctions were crippling, Iran had its own strategies for mitigating their effect. And even if Iran was brought to the negotiating table, who could guarantee that these negotiations would lead to a new deal?

In the following section, we will use the BIntLE and political psychology to assess what drove the actions in implementing the maximum pressure strategy and the responses to the strategy from Iran and the international community.<sup>148</sup>

## B. Behavioral Approach to International Law and Economics

As previously stated, much of the law and economics approach to international law relies on rational choice theory, which essentially equates rationality with perceived self-interest. But, how is self-interest perceived by actors? The behavioral approach to international law (BIntLE), an enriched model of the rational choice paradigm that has informed much of the law and economics approach to international law, aims to explain this. In so doing, it questions the legal and policy choices of actors (states or individual decision-makers) by explaining their actions through bounded rationality.<sup>149</sup> Bounded rationality is a concept developed through observations of human behavior, which, under the influence of social preferences and cognition, deviates from

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<sup>148</sup> Some International Relations scholars consider the application of political psychology vis-à-vis Trump's behaviour and the usage of prospect theory to be a "fool's errand" because all his moves are reactions and his behaviour is unpredictable and, as such, he has no bounded rationality to be analysed. See Michael N. Barnett, *What is International Relations Theory Good For?*, in *CHAOS IN THE LIBERAL ORDER: THE TRUMP PRESIDENCY AND INTERNATIONAL POLITICS IN THE TWENTY-FIRST CENTURY* 9–10 (Robert Jervis et al., eds., 2018). Even if we concede the point that the behaviour of Trump defies rationality as such, this still does not mean that the administration's efforts are without a traceable pattern of internal logic.

<sup>149</sup> Tae Jung Park, *Behavioral Economics in International Investment Law: Bounded Rationality and the Choice of Reservation List Modality*, 5 *PENN. ST. J. L. & INT'L AFF.* 398, (2017).

the formal requirements of rational models.<sup>150</sup> In the traditional law and economics approach to international law, deviations from the rational choice paradigm are understood as mistakes, not as behavioral patterns.<sup>151</sup> Rationality is, however, seen as a model, not as a description of reality, which is why it is described as “thin rationality.”<sup>152</sup> BIntLE, on the other hand, wants to describe the nature of this rationality by viewing the behavior that deviates from rational models not as irrational mistakes but as behavioral patterns.<sup>153</sup> In so doing, it aims not to do away with the rational choice paradigm altogether “but to use its improvements to inspire new theories and empirical research about international law.”<sup>154</sup>

There are several key concepts of the behavioral approach to international law and economics that need to be explained to fully grasp its explanatory potential and identify its departure from the rational choice paradigm. The first such concept is the prospect theory developed by Tversky and Kahneman, which explains how individuals perceive outcomes through a simplified analysis of immediate gains and losses that can arise out of a certain decision or choice.<sup>155</sup> But, what counts as a gain or a loss? That depends on the reference point, which is usually, but not necessarily, the status quo. Understanding the reference point relies on an understanding of both the framing effect and the endowment effect. The framing effect is the effect created by the definition of certain information. The framing effect is used to describe the change in people’s choices when different descriptions of the same choice problem influence their beliefs.<sup>156</sup> The framing of a situation as a gain or a loss motivates different behavior from decision

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<sup>150</sup> See John Conlisk, *Why Bounded Rationality?*, 34 J. ECON LIT. 669, 692 (1996).

<sup>151</sup> Tomer Brode, *Behavioral International Law*, 163 U. PA. L. REV. 1099, 1122–26 (2015).

<sup>152</sup> *Id.* at 1108–09.

<sup>153</sup> Anne van Aaken, *Behavioral International Law and Economics*, 55 HARV. INT’L L. J. 421 (2014).

<sup>154</sup> *Id.* at 480.

<sup>155</sup> Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47(2) ECONOMETRICA 263 (1979).

<sup>156</sup> Anne van Aaken & Jürgen Kurtz, *Beyond Rational Choice: International Trade Law and the Behavioral Political Economy of Protectionism*, 8 J. INTL ECON. L. 601, 610 (2019).

makers. Losses and gains are not perceived evenly because they are not perceived through the prism of their respective rational utilities. A loss counts more than a gain, which is why when people perceive possible gains, they tend to be risk-averse and when they perceive losses, they tend to be more risk-oriented. Thus, the frame of a decision depends not just on objective elements of the problem but also on the risk propensity of an individual.

The endowment effect represents the different perceptions of certain goods depending on whether they are possessed by an individual or not. The perception of different reference points by states or individuals as endowments results in differing understandings of fairness. In international conflicts, this will lead to differing perceptions of distributional issues.<sup>157</sup>

Also important is whether one presents a hawkish bias, which represents an inclination toward less cooperation and conflict resolution, marked by more aggressive, imposing behavior.<sup>158</sup> It leads to differences in the perception of threats coming from adverse actors and to reactions more likely to produce unnecessary conflict. Those susceptible to hawkish biases are confident of winning a conflict.<sup>159</sup> When negotiating, they view negotiations as having distributive effects and not as a tool for creation of value.<sup>160</sup>

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<sup>157</sup> van Aaken, *supra* note 153, at 463.

<sup>158</sup> I describe these three concepts in detail as they are prescient of my analysis, but they are far from being the only concepts existing in BIntLE. In fact, the literature referenced herein identifies many other related concepts.

<sup>159</sup> van Aaken & Kurtz, *supra* note 156, at 611.

<sup>160</sup> Daniel Kahneman & Jonathan Renshon, *Why Hawks Win*, FOREIGN POLY (Oct. 13, 2009), <https://foreignpolicy.com/2009/10/13/why-hawks-win/>.

The use of BIntLE has been, unlike the application of the behavioral approach in international relations,<sup>161</sup> recent and sporadic.<sup>162</sup> Its primary value has been recognized in its potential to influence lawmakers and policy developers to create solutions that would inform treaty design and lead to greater compliance with international law.<sup>163</sup> However, van Aaken and Broude, as the primary developers of BIntLE, do not, believe that those are the limits to the method, but that it may serve to open up grounds for an empirical analysis of international law in different areas, including the behavior of individual stakeholders, domestic legislation,<sup>164</sup> negotiation,<sup>165</sup> and international cooperation.<sup>166</sup> Thus, it has also recently been used to map some recent trends in international law, like explaining the Trump administration's tariff policy as a communication strategy toward voters in international trade law.<sup>167</sup>

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<sup>161</sup> See WILLIAM A. BOETCHER III, *PRESIDENTIAL RISK BEHAVIOUR IN FOREIGN POLICY: PRUDENCE OR PERIL?* (Palgrave Macmillan 2005); see also Jack S. Levy, *Prospect Theory and International Relations: Theoretical Applications and Analytical Problems*, 13 *POLIT. PSYCHOL.* 283 (1992); Robert Jervis, *Political Implications of Loss Aversion*, 13 *POLIT. PSYCHOL.* 187 (1992); Robert Jervis, *The Implications of Prospect Theory for Human Nature and Values*, 25 *POLIT. PSYCHOL.* 163 (2004); ROSE McDERMOTT, *POLITICAL PSYCHOLOGY IN INTERNATIONAL RELATIONS* (Univ. of Michigan Press 2004).

<sup>162</sup> See Cedric Ryngaert, *Domestic Criminal Accountability for Dutch Corporations Profiting from North Korean Forced Labour* (2018) in Remco E. Breuker and Imke B.L.H. Van Gardinen (eds.) *People For Profit North Korean Forced Labour on a Global Scale 204,205*. (using BIntLE to explain the absence of prosecutions of crimes against humanity committed against perpetrators of North Korean slave labour).

<sup>163</sup> Armin Steinbach, *The Trend towards Non-Consensualism in Public International Law: A (Behavioural) Law and Economics Perspective*, 27(3) *EUR. J. INT'L L.* 643, 660 (2016);

<sup>164</sup> They also point out that many elements of the BIntLE approach have been used in assessing domestic legislation. See e.g., EYAL ZAMIR, *LAW, PSYCHOLOGY, AND MORALITY: THE ROLE OF LOSS AVERSION* 138–42 (2015).

<sup>165</sup> Duke Univ. School of L., *Anne van Aaken, Behavioral International Law and Economics*, YOUTUBE (Sep. 11, 2013), [https://www.youtube.com/watch?v=wh6RGA3Ay-s\\_](https://www.youtube.com/watch?v=wh6RGA3Ay-s_)

<sup>166</sup> Anne van Aaken, *Behavioral Aspects of the International Law of Global Public Goods and Common Pool Resources*, 112(01) *AM. J. INT'L L.* 67 (2018).

<sup>167</sup> van Aaken & Kurtz, *supra* note 153, at 616.

### C. The Framing Effect of Trump's Administration View of International Law and Policy

President Trump viewed the JCPOA as “one of the worst and most one-sided transactions the United States has ever entered into.”<sup>168</sup> This statement seems consistent with his approach to foreign policy. Since the early 1980s, Trump has had a strong interest in foreign policy and in raising awareness of the situations in which other countries can take advantage of the United States.<sup>169</sup> His views on Iran, in particular, were informed by one of the most traumatic events of U.S. foreign policy, the hostage crisis of 1979.<sup>170</sup> Notably, Trump referenced the hostage crisis of 1979 threatening that, in the event of a further military escalation, he would order destruction of fifty-two Iranian cultural monuments, symbolizing every U.S. hostage taken in 1979.<sup>171</sup> Coupled with an assumption that Iran would violate its commitments and continue to enrich uranium and become capable of building nuclear weapons, this adversarial view towards Iran framed Trump's decision-making. Certainly, an element of “speaking to the base”—the senators and donors of the Republican Party who have strongly opposed the deal—was also present in this decision.<sup>172</sup> At the same time, we should not ignore the wider legal and political context in which the decision was made. The re-enactment of sanctions was followed by a vivid public relations campaign targeting the domestic audience dubbed the

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<sup>168</sup> Mark Landler & David E. Sanger, *Trump Disavows Nuclear Deal, but Doesn't Scrap It*, N.Y. TIMES (Oct. 13, 2017), <https://www.nytimes.com/2017/10/13/us/politics/trump-iran-nuclear-deal.html>.

<sup>169</sup> ALLEN SALKIN, THE METHOD TO THE MADNESS: DONALD TRUMP'S ASCENT AS TOLD BY THOSE WHO WERE HIRED, FIRED, INSPIRED--AND INAUGURATED 7–10 (2019).

<sup>170</sup> In fact, of the first publicly stated foreign policy views of Donald Trump was that of the Iran hostage crisis. See BRENDAN SIMMS & CHARLIE LADERMAN, DONALD TRUMP: THE MAKING OF A WORLD VIEW 18–19 (2017).

<sup>171</sup> See Evan Semones, *Trump vows to target '52' sites if Iran retaliates for Soleimani death*, POLITICO (Jan. 4, 2020), <https://www.politico.com/news/2020/01/04/trump-iran-targets-soleimani-detah-093758>.

<sup>172</sup> See JETT, *supra* note 65, at 51–55; see also Brian Schwartz, *Megadonor Sheldon Adelson rewards GOP candidates in tight races who opposed Iran deal*, CNBC (Jun. 26, 2018), <https://www.cnbc.com/2018/06/25/adelson-backs-candidates-who-oppose-iran-deal-a-week-after-withdrawl.html>.

“maximum pressure campaign.”<sup>173</sup> Since the United States under Trump seems to be pursuing a selective engagement strategy, by limiting its involvement in global affairs to strategic areas such as Eurasia, the Middle East, and the Far East,<sup>174</sup> Trump’s stance toward Iran as a part of this global approach was important. The traditional law and economics approach argues that the “three Rs” (reputation, reciprocity, and retaliation) lead to greater compliance with international law.<sup>175</sup> The framing of the JCPOA as a negative reference point, however, led to exactly opposite actions; it was U.S. abandonment of the JCPOA that improved the United and the Trump administration’s reputation. In any event, Trump’s admission that he is an “American nationalist,” also shared by some of his key staff members, including his national security advisors,<sup>176</sup> expresses the realist theories of domestic and international law. Since the late 1980s, all administrations have been influenced to a certain extent by a realist strain of thinking about international law and foreign policy, embodied in the recourse to unilateral actions<sup>177</sup> as well as the application of the Unitary Executive Theory to foreign policy. Unitary Executive Theory views the president, as the head of the executive branch, as less bound in decision-making concerning the engagement of U.S. troops and intelligence abroad, than in domestic policy.<sup>178</sup> Such a stance is explained through the executive branch’s superior knowledge and its ability to reach swift and flexible decisions.<sup>179</sup> As I have argued in Part I, there is no doubt that the U.S. president had the authority to cancel

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<sup>173</sup> Mohammed Nuruzzaman, President Trump’s ‘Maximum Pressure’ Campaign and Iran’s Endgame. 44 *Strategic Analysis* 6 (2020): 570-582.

<sup>174</sup> JOHN DAVIS, TRUMP’S WORLD: PERIL AND OPPORTUNITY IN US FOREIGN POLICY AFTER OBAMA 171 (2019).

<sup>175</sup> ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 33 (2008).

<sup>176</sup> For an overview of national security advisors of the Trump administration, see Dov S. Zakheim, *Can Trump Take Advice?*, CTR. FOR INT’L REL. & SUSTAINABLE DEV., <https://www.cirsd.org/en/horizons/horizons-winter-2020-issue-no-15/can-trump-take-advice> (last visited Mar. 12, 2022).

<sup>177</sup> See DAVID M. MALONE & YUEN FOONG KHONG, UNILATERALISM AND U.S. FOREIGN POLICY: INTERNATIONAL PERSPECTIVES 8–10 (2003).

<sup>178</sup> Bradley & Goldsmith, *supra* note 14, at 1280-1281; see also Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J. L., Econ, and ORG. 132, 137 (1999).

<sup>179</sup> *Id.*

the JCPOA as it was a political commitment. At the same time, some of the realist international law proponents' views have strengthened his decision. As in, "The Limits of International Law"<sup>180</sup> or "Is There Really Law in International Affairs,"<sup>181</sup> the approach sees international law as not impacting the behavior of states other than through a rational choice paradigm. The law's efficiency, which is crucial for the economic approach to law generally, is absent in international affairs, and the interests of states are best protected through unilateral actions. Doctrinally, this line of reasoning comes from the economic analysis of law, which views international law as an incomplete contract freed from normative preferences that would inform us for what it should be used.<sup>182</sup> Due to the lack of a global world government, international law cannot establish any kind of rule of law because it lacks a constituency.<sup>183</sup> As unitary actors, only states are the true subjects of international law. The intellectual roots of this school of thought lie in the realist view of international relations and are inextricably linked with the works of Hans Morgenthau<sup>184</sup>—itself developed much as a skeptical response to the failures of international law to prevent the escalation of war in the period between the two world wars.<sup>185</sup> Therefore, to take the tenets of the behavioral approach to international law and economics as an explanation for the actions of the Trump administration is to explain them in their own terms—as actors that view rationality as the self-interest of states bounded by information, time, and cognitive frameworks that strive for independence from, not interdependence with, other states. Applied to the case of the cancellation of the JCPOA, such an approach to international law would argue—just like the Republican senators—that international law and its instruments lack the power to coerce Iran into

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<sup>180</sup> GOLDSMITH & POSNER, *supra* note 4.

<sup>181</sup> John Bolton, *Is There Really "Law" in International Affairs?*, 10 TRANSNATIONAL L. CONTEMPORARY PROBLEMS 1 (2000).

<sup>182</sup> Bianchi, *supra* note 5, at 277–86.

<sup>183</sup> Posner, *supra* note 1, at 14–15.

<sup>184</sup> Goldsmith & Posner, *supra* note 4, at 170.

<sup>185</sup> Having said this, we must observe that many who favour a realist approach to international relations do not favour a confrontation with Iran, pointing out instead that even a nuclear Iran could, under certain circumstances, be acceptable to the United States. See Kenneth N. Waltz, *Why Iran Should Get the Bomb: Nuclear Balancing Would Mean Stability*, 91 FOREIGN AFF. 2 (2012).

respecting non-nuclear proliferation. The key provisions of the JCPOA regarding the oversight and development of Iranian nuclear facilities are technical and rely on expert monitoring to be conducted by the IAEA, a multilateral organization. In choosing whether to accept the cost of staying within the JCPOA versus the perceived relatively low costs of exiting, the realist thinking influenced the President to choose the latter. Exiting the agreement would mean a chance to prevent Iran from obtaining nuclear weapons. Contrary to this, staying within the JCPOA would bring two main benefits to Iran: a chance to acquire nuclear weapons following the expiration of the agreement and a chance to renege on its commitments by cheating.

Thus, just as the creation of JCPOA was in the transnational legal process view of international law and policy, the withdrawal from the JCPOA, as well as the usage of sanctions as negotiation leverage and not weaponized interdependence, is an expression of commitment to realist approach to international law and policy. The JCPOA was understood as a reference point, a perceived loss, a negatively framed standing both normatively and methodologically against the style of international governance that President Trump and his advisors shared. It was the deal that was abandoned by an administration that sought to establish its reputation by re-negotiating with the world and distancing itself from its predecessor, President Obama, viewed by Trump as a weak dealmaker.<sup>186</sup> Additionally, Trump's actions were reinforced by his advisors' shared view of his perception of international law and the situation regarding Iran, and thus he was not being challenged or influenced by different opinions.<sup>187</sup>

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<sup>186</sup> *New leak claims Trump scrapped Iran nuclear deal 'to spite Obama.'*, BBC NEWS (Jul. 14, 2019), <https://www.bbc.com/news/uk-48978484>.

<sup>187</sup> As I will observe later, once those views began differing, Trump responded by firing some of the advisors, in the case of Iran, John Bolton. But, the initial framing of the JCPOA as a "bad deal" was unchallenged regardless of the cabinet shuffles. For the importance of the influence of advisors on the worldview of decision-makers, see ROSE MCDERMOTT, *RISK-TAKING IN INTERNATIONAL POLITICS: PROSPECT THEORY IN AMERICAN FOREIGN POLICY* 22–25 (2001).

#### D. President Trump and negotiations with Iran after the cancellation of the JCPOA

“Summery” and “positive” are how negotiation experts have described President Trump’s approach to negotiation<sup>188</sup> outlined in the book he co-authored on the subject.<sup>189</sup> Published in 1987 and 1997, the books *The Art of the Deal* and *The Art of the Comeback* represent his thoughts on negotiations in the real estate business, but the negotiation experts demonstrate their validity for use in assessing his foreign policy negotiation as well.<sup>190</sup> The books depict an individual constantly communicating his desires to his adversaries, business partners, and staff. While doing so, Trump exercises different negotiating roles: an observer who zooms in on the negotiation partner, a performer who elevates his reputation, a controller who does not let others influence his views, and a disruptor, prepared to do the unexpected.<sup>191</sup> As a negotiator, Trump primarily engages in risky behavior to coerce his interlocutors into averting losses.<sup>192</sup> Loss aversion was also crucial in his understanding of the JCPOA as a deal that brings nothing to the United States. Thus, the sanctions against Iran have been reduced merely to the role of leverage, a primary asset of any negotiation.

Trump negotiates to establish a reputation both for himself and the country he is leading, a reputation different from the shattered powerless image that was, in his view, projected by his predecessor and which led to his quest to “make America great again.” As Kurtz and von Aaken observed, in this slogan the focus is on the word “again,” meaning that the grandeur has been lost.<sup>193</sup> As evidenced by his response to different issues across the policy spectrum, such as the rise of China, the issues concerning international trade, or building a wall on the U.S.-Mexico border, Trump’s approach is always focused on dealmaking. This dealmaking is not always *l’art pour l’art* as Trump

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<sup>188</sup> I. William Zartman, *International Diplomacy after Trump, with Antecedents*, 35 NEGOTIATION J. 111, 111 (2019).

<sup>189</sup> TRUMP & SCHWARTZ, *supra* note 32.

<sup>190</sup> Kogan, *supra* note 32; Joel Kutcher-Gerschenfeld et al., *The Risks and benefits of Unilaterally Changing the Rules of the Game*, 35(1) NEGOT. J. 93, 93–95 (2019).

<sup>191</sup> Kogan, *supra* note 32.

<sup>192</sup> Zartman, *supra* note 188, at 113.

<sup>193</sup> van Aaken & Kurtz, *supra* note 156, at 616.

himself liked to claim.<sup>194</sup> For example, in the area of trade where Trump made the biggest apparent policy shift—from free trade to the weaponized use of tariffs—a closer look reveals that this move is both a negotiation tactic and an attempt to please his base—the voters of the “rust belt” in the U.S. Midwest struck by the loss of manufacturing jobs.<sup>195</sup>

In dealing with Iran, the messages sent by the highest U.S. officials, including former President Trump, were focused on getting Iran to re-negotiate its standing as a regional power in the Middle East. Iran was to diminish its nuclear program, ballistic missile development, and support to regional military organizations in exchange for economic development, a presumably better global reputation, and more certainty in international dealings.<sup>196</sup> Threats of military use were combined with praises of Iran as a great nation whose leaders should just call in order to reach “a deal, a fair deal.”<sup>197</sup> A comparison with Trump’s behavior in the case of North Korea’s nuclear tests from 2017 reveals a similar pattern; while Trump threatened a “locked and loaded” military, his significant diplomatic effort led to an established rapport with the North Korean nuclear leader.<sup>198</sup> Labelled as “maximum pressure” and projected both as an image for a domestic constituency and as a strong message abroad, the campaign and the rhetoric aimed to demonstrate the willingness of the United States to not only negotiate but also to take political and even military action.<sup>199</sup> But in dealing with Iran, Trump miscalculated Iran’s own perceptions of reputation.

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<sup>194</sup> SCHWARTZ & TRUMP, *supra* note 32, at 3.

<sup>195</sup> Adriano Cozzolino, *Trumpism as nationalist neoliberalism: A critical enquiry into Donald Trump’s political economy*, 4(1) INTERDISC. POL. STUD. 47, 49 (2018).

<sup>196</sup> See *Mike Pompeo speech: What are the 12 demands given to Iran?*, AL JAZEERA (May 21, 2018), <https://www.aljazeera.com/news/2018/5/21/mike-pompeo-speech-what-are-the-12-demands-given-to-iran>.

<sup>197</sup> Nahal Toosi, *Trump to Iran: Call me, maybe*, POLITICO (May 9, 2019), <https://www.politico.com/story/2019/05/09/trump-to-iran-call-me-maybe-1315747>.

<sup>198</sup> *Trump warns North Korea: U.S. military ‘locked and loaded’*, CNN (Aug. 11, 2017), <https://www.bbc.com/news/world-us-canada-40901746>.

<sup>199</sup> See Mohammed Nuruzzaman, *President Trump’s ‘Maximum Pressure’ Campaign and Iran’s Endgame*, 44 STRATEGIC ANALYSIS 1 (2020).

Although the JCPOA did not enjoy universal support in Iran, Iran's compliance with the JCPOA led to an increase in the plan's reputation in the country. Therefore, had Iran responded to Trump's call for negotiations, it would have created two major problems—the problem of domestic credibility for Iran's government and the potential loss of international and regional standing. Instead, Iran chose to demonstrate its willingness to stay within the JCPOA. This enabled further diplomatic engagement from the EU which, as we have observed, has offered to continue trade with Iran using the mechanism of INSTEX. However, when the first short-term effects of INSTEX failed to materialize, Iran resumed uranium enrichment, pushing it over the limits specified by the JCPOA.<sup>200</sup> Iran claimed that since the EU, as a result of the sanctions, is unable to perform many of the commitments from the deal, the EU became noncompliant, which provides grounds for Iran to also abandon some of its commitments.<sup>201</sup> However, Iran did not initialize the dispute resolution mechanism provisions of Article 36 of the JCPOA. This Article specifies that a Joint Commission in which representatives of all sides have one member shall decide on the breach and submit a report to the U.N. Security Council.<sup>202</sup> Obviously, this mechanism was created with Iran's and not the United States' noncompliance in mind, as the United States can veto any action against itself in the U.N. Security Council. By using enrichment as a response to U.S. non-compliance, Iran also engaged in a risky negotiation tactic. If the EU were to give up on the creation of INSTEX, instead referring reversible enrichment as a JCPOA violation to the U.N. Security Council, it would risk losing what leverage it had over Iran's behavior and would align itself with the U.S. administration, whose behavior it sought to counter. Additionally, Iran argued that any of its enrichment could be degraded to a lower concentration—an assessment not disputed by the

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<sup>200</sup> Jonathan Marcus, *Iran nuclear deal: Government announces enrichment breach*, BBC NEWS (July 7, 2019), <https://www.bbc.com/news/world-middle-east-48899243>.

<sup>201</sup> Tamer El-Ghobashy et al., *Iran announces it will stop complying with parts of landmark nuclear deal*, WASHINGTON POST (May 8, 2019), [https://www.washingtonpost.com/world/iran-to-take-steps-to-reduce-its-commitment-to-landmark-nuclear-deal/2019/05/07/90cc3b1c-70fe-11e9-9331-30bc5836f48e\\_story.html](https://www.washingtonpost.com/world/iran-to-take-steps-to-reduce-its-commitment-to-landmark-nuclear-deal/2019/05/07/90cc3b1c-70fe-11e9-9331-30bc5836f48e_story.html).

<sup>202</sup> S.C. Res. 2231, ¶ 11 (Jul. 20, 2015).

observers.<sup>203</sup> This allowed Iran to successfully exploit the divide between Western allies created by the unilateral acts of Trump's administration.

Still, this created a fear among the European countries that Iran would, eventually, pull out of the JCPOA and pursue a nuclear weapon. Germany, France and the UK governments responded to this by referring Iran's noncompliance to the dispute resolution mechanism of the JCPOA.<sup>204</sup> However, the committee meetings to decide on the matter were repeatedly prolonged from January 2020 when the procedure was initiated as the EU sought more room for diplomatic efforts.<sup>205</sup> Aside from INSTEX, one such initiative was to extend a credit line to Iran. The credit line was to be guaranteed by future Iranian oil exports and was reportedly worth half of the Iranian annual oil exports.<sup>206</sup> But, while the idea of the credit line promised a path to negotiations, Iran's exports were conditioned by a waiver from the U.S. sanctions, as it would directly breach them, if the funds were derived from an EU-based financial institution or wired directly to Iran.<sup>207</sup> Despite the efforts of President Macron, Iran conditioned the beginning of any talks—even informal phone conversations—upon the removal of sanctions.<sup>208</sup> At the same time, Trump was unwilling to

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<sup>203</sup> *Iran's Breaches of the Nuclear Deal*, UNITED STATES INSTITUTE FOR PEACE, <https://iranprimer.usip.org/blog/2019/oct/02/iran%E2%80%99s-breaches-nuclear-deal> (last updated July 7, 2021).

<sup>204</sup> Press Release, E3 foreign ministers' statement on the JCPOA (Jan. 14, 2020), <https://www.gov.uk/government/news/e3-foreign-ministers-statement-on-the-jcpoa-14-january-2020>.

<sup>205</sup> *Timeline of Nuclear Diplomacy With Iran*, ARMS CONTROL ASS'N, <https://www.armscontrol.org/factsheets/Timeline-of-Nuclear-Diplomacy-With-Iran> (last visited Mar. 12, 2022).

<sup>206</sup> *France pushes \$15 billion credit line plan for Iran, if U.S. allows it*, REUTERS (Sep. 3, 2019), <https://www.reuters.com/article/us-iran-usa-france/france-pushes-15-billion-credit-line-plan-for-iran-if-u-s-allows-it-idUSKCN1VO1AF>.

<sup>207</sup> Siobhan Dowling, *INSTEX: Doubts linger over Europe's Iran sanctions workaround*, AL JAZEERA (Jul. 1, 2019), <https://www.aljazeera.com/economy/2019/7/1/instex-doubts-linger-over-europes-iran-sanctions-workaround>.

<sup>208</sup> Farnaz Fassihi & Rick Gladstone, *How Iran's President Left Trump Hanging, and Macron in the Hall*, N.Y. TIMES (Sep. 30, 2019), <https://www.nytimes.com/2019/09/30/world/middleeast/iran-trump-rouhani-call-macron.html>.

meet with the Iranian Foreign Minister on the margins of the G7 meeting despite the fact that President Macron invited the Iranian Foreign Minister for this very reason.<sup>209</sup> Thus, the preferences of both sides, on the side of Iran to have the sanctions removed before the commencement of the talks and on the side of Trump to negotiate with Rouhani directly excluded the possibility of negotiations.

Why was this personal approach so important? Simply put, it allowed Trump the opportunity to establish rapport. As evidenced by his previous negotiation record and dealings with North Korea and attempts to strike a deal with the Taliban, Trump's preferred method of dealmaking involves direct contact with foreign dignitaries in which he openly shares his concerns regarding domestic reactions to his international deals.<sup>210</sup> This allows him to focus on the preferences of the negotiation partner, a strategy deployed by many skillful negotiators,<sup>211</sup> and to exhibit his powers of persuasion. Instead of exploiting Trump's preference and choosing to play to his weakness by opening a prolonged negotiation process or a series of talks<sup>212</sup> from which the United States would not be able to easily backtrack, Iran decided to play to its own strengths. Iran knew that its economy would not crumble immediately under the reimposed sanctions. More importantly, China kept buying Iranian oil and gas in defiance of the U.S. sanctions, thus easing their effect,<sup>213</sup> but also provoking U.S.

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<sup>209</sup> Rym Momtaz & David M. Herszenhorn, *Macron takes gamble by meeting Iran foreign minister amid G7*, POLITICO (Aug. 26, 2019), <https://www.politico.eu/article/macron-takes-gamble-by-meeting-iran-foreign-minister-amid-g7/>.

<sup>210</sup> For example, in the transcript of President Trump's conversation with the President of Mexico and Australia, he remarks, "This deal will make me look terrible." See *"This deal will make me look terrible": Full transcripts of Trump's calls with Mexico and Australia*, WASHINGTON POST (Aug. 3, 2017), <https://www.washingtonpost.com/graphics/2017/politics/australia-mexico-transcripts/>.

<sup>211</sup> JAMES K. SEBENIUS ET AL., *KISSINGER THE NEGOTIATOR: LESSONS FROM DEALMAKING AT THE HIGHEST LEVEL* 194–96 (2018).

<sup>212</sup> See JOHN BOLTON, *THE ROOM WHERE IT ALL HAPPENED A WHITE HOUSE MEMOIR* 340–51 (2020).

<sup>213</sup> Timonthy Gardner & Arshad Mohammed, *U.S. "deeply concerned" about untrackable China ships carrying Iran oil: officials*, REUTERS (Oct. 16, 2019), <https://www.reuters.com/article/us-usa-iran-china-tankers/u-s-deeply-concerned-about-untrackable-china-ships-carrying-iran-oil-officials-idUSKBN1WV0SE>.

sanctions on Chinese companies.<sup>214</sup> Iran's allies in the region—Hezbollah in Lebanon, Assad's regime in Syria, and the Houthi rebels in Yemen—fared well in the respective conflicts in which participated, giving Iran some leverage that might influence future negotiations.<sup>215</sup> This left little effect for Trump's rhetoric on the course of actions in Iran, reducing his comment to nothing more than a performance for the global and domestic audiences. Iran's approach, however, was not without its weaknesses. Such an approach has an expiration date as Iran will ultimately have to renegotiate its commitment to the nuclear non-proliferation deal if the country continues to enrich uranium, as sanctions continue to damage the Iranian economy.<sup>216</sup> But, post-JCPOA cancellation, Iran managed to strengthen its immediate negotiating position. Iran also counted on the possibility that Trump could be a one-term president and that his successor might not be willing to risk so much in his or her future dealings within Iran. Given the previous divisions concerning the internal support for JCPOA within Iran,<sup>217</sup> the political body appeared more consolidated due to the waning support for the JCPOA and the majority support for a withdrawal.<sup>218</sup> It is difficult to measure the extent to which the endowment effect, created by entering into JCPOA, contributed to such a posture and to what extent this was a reaction to a high-risk negotiation strategy deployed by President Trump, but there are grounds to claim that it influenced Iran's behavior.

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<sup>214</sup> Ian Talley & Courtney McBride, *U.S. Sanctions Chinese Firms for Allegedly Shipping Iranian Oil*, WALL ST. J., <https://www.wsj.com/articles/u-s-sanctions-chinese-firms-for-allegedly-shipping-iranian-oil-11569424569> (last visited Mar. 12, 2022).

<sup>215</sup> See Robin Wright, *Iran Entrenches Its "Axis of Resistance" Across the Middle East*, NEW YORKER (Sep. 19, 2019), <https://www.newyorker.com/news/our-columnists/iran-entrenches-its-axis-of-resistance-across-the-middle-east>.

<sup>216</sup> *IMF Sharply Cuts Iran, Saudi Growth Forecasts*, FRANCE 24 (Oct. 15, 2019), <https://www.france24.com/en/20191015-imf-sharply-cuts-iran-saudi-growth-forecasts>.

<sup>217</sup> See Abdolmohammadi & Cama *supra* note 46.

<sup>218</sup> See *Iran: Majority of Iranians Support Withdrawing from JCPOA, Poll Finds*, STRATFOR REV. (Oct. 17, 2019), <https://worldview.stratfor.com/situation-report/iran-majority-iranians-support-withdrawing-jcpoa-polls-finds>.

## D. The use of force

Over the course of what is now a four-year standoff, both the United States and Iran have used force against one another. The first serious incident was Iran's downing of a U.S. unmanned aerial vehicle over the Persian Gulf.<sup>219</sup> Iran argued that the vehicle entered its airspace—which would make Iran's actions legal under international law—while the United States argued that it had not, which would most likely qualify the action as a frontier incident, in which its legality becomes more complex.<sup>220</sup> In response to this, the U.S. military prepared a strike against Iranian aerial defense sites that was personally canceled by Trump twenty minutes before the action was to commence.<sup>221</sup> Here, Trump demonstrated his controller side; he opposed the hawkish views of his national security advisor, John Bolton, (later firing him) and set aside the military option, believing it would compromise the chances for negotiations.<sup>222</sup> Thus, what many perceived as a hawkish bias was instead posturing for the domestic audience, more a communication strategy than an outline of a concrete military action.

Instead, Trump authorized a cyberwarfare operation that, allegedly, hurt the Iranian capabilities to target ships sailing through the Persian Gulf.<sup>223</sup> This created an additional legal problem;

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<sup>219</sup> *Strait of Hormuz: US confirms drone shot down by Iran*, BBC NEWS (Jun. 20, 2019), <https://www.bbc.com/news/world-middle-east-48700965>.

<sup>220</sup> Mohamed Helal, *The Global Hawk Incident: Self-Defense against Aerial Incursions – Reflections on the Applicable Law*, OPINIONJURIS (Apr. 7, 2019), <http://opiniojuris.org/2019/07/04/the-global-hawk-incident-self-defense-against-aerial-incursions-reflections-on-the-applicable-law/>.

<sup>221</sup> Bill Chappell, *Trump Says He Called Off Strike On Iran Because He Didn't See It As 'Proportionate'*, NPR (Jun. 21, 2019), <https://www.npr.org/2019/06/21/734683701/trump-reportedly-orders-strike-on-iran-then-calls-off-attack-plan>.

<sup>222</sup> See Trita Parsi, *What Would It Take for Iran's President to Meet With Trump?*, FOREIGN AFFAIRS (Sep. 18, 2019), <https://www.foreignaffairs.com/articles/iran/2019-09-18/what-would-it-take-irans-president-meet-trump>.

<sup>223</sup> Julian E. Barnes, *U.S. Cyberattack Hurts Iran's Ability to Target Oil Tankers, Officials Say*, N.Y. TIMES (Aug. 28, 2019), <https://www.nytimes.com/2019/08/28/us/politics/us-iran-cyber-attack.html?module=inline>.

international law is unclear whether and how a state may respond to cyberwarfare operations.<sup>224</sup> Furthermore, in light of the previous cyberwarfare operations between Iran and the United States, it is unclear to what extent this attack was proportional to the Iranian cyber operations against Saudi and U.S. targets between 2013 and 2019.<sup>225</sup>

For Iran, options for military engagement were available through the actions of its allies in the region. The 2019 attack on Saudi oil-producing facilities, widely believed to have been carried out either by Houthi rebels of Yemen with the support of Iran or by its forces, led to condemnation from both the EU and the United States.<sup>226</sup> The immediate response was an increase in the military presence of forces capable of striking Iran within Saudi Arabia.<sup>227</sup>

However, Trump did authorize the targeted killing of General Qassim Soleimani, commander of the IRGC's Quds force.<sup>228</sup> Accomplished through a drone operation in early January 2020, the operation was presented as a response to a series of armed incidents in which Shia militias funded and equipped by Iran operating on the territory of Iraq targeted U.S. forces in Iraq.<sup>229</sup> Did the series of Shia militia attacks against the U.S. forces represent an adequate legal basis for the killing of Soleimani to be considered an act of self-defense and did that killing breach the U.S. President's powers to use military forces abroad? These questions strongly divided the legal community in both

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<sup>224</sup> See Troy Anderson, *Fitting a Virtual Peg into a Round Hole: Why Existing International Law Fails to Govern Cyber Reprisals*, 34 ARIZ. J. INT'L & COMP. L. 135, 140 (2017).

<sup>225</sup> Dan Efrony, & Yuval Shany, *A Rule Book On The Shelf? Tallinn Manual 2.0 on Cyberoperations and Subsequent State Practice*, 112 AM. J. INT'L LAW 583, 598, 620 (2018).

<sup>226</sup> Ben Hubbard et al., *Two Major Saudi Oil Installations Hit by Drone Strike, and U.S. Blames Iran*, N.Y. TIMES (Sep. 14, 2019), <https://www.nytimes.com/2019/09/14/world/middleeast/saudi-arabia-refineries-drone-attack.html>.

<sup>227</sup> See *Saudi Arabia oil attacks: U.S. to deploy thousands of extra troops*, BBC NEWS (Oct. 11, 2019), <https://www.bbc.com/news/world-us-canada-50021138>.

<sup>228</sup> See Helene Cooper et al., *As Tensions With Iran Escalated, Trump Opted for Most Extreme Measure*, N.Y. TIMES (Jan. 4, 2020), <https://www.nytimes.com/2020/01/04/us/politics/trump-suleimani.html>.

<sup>229</sup> *Id.*

the United States and abroad. The answer depends on whether the three demands for their legality—namely proportionality, necessity, and imminence—of an Iranian attack were present. Given the series of attacks on U.S. personnel in Iraq, the strike was presented as not needing to satisfy the criteria of imminence, and the legality of the attack was broadly justified by the invocation of the right to self-defense of Article 51 of the U.N. Charter.<sup>230</sup>

However, regardless of how we view the attacks, they were not an expression of a hawkish bias or a strategic move meant to counter the growing Iranian regional threat. Neither their legal basis nor the technique by which they were conducted was an innovation of any kind.<sup>231</sup> Rather, it was the moment of their deployment and the following de-escalation that was unique. More than a message that the United States was ready to counter the growing Iranian regional military presence by targeting one of its main architects, the attack was a message that further military escalation would not be tolerated. Iran's retaliation, limited to firing ballistic missiles at a U.S. base, was delivered after the Iraqi officials made certain that U.S. personnel were warned.<sup>232</sup>

The failure of these incidents to lead to a further escalation meant that neither side was willing to conduct a full military confrontation. For President Trump, military action would go against both his swaggering negotiation strategy that impresses with military might, but is averse to its use and against his commitments to refrain from initiating war in the Middle East. To this extent, President Trump has also influenced Israel—a country that views Iran's nuclear

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<sup>230</sup> The U.S. position on the legality of the strike is best summarized in DOD General Counsel Remarks at BYU Law School. See Paul C. Ney, Jr., General Counsel of the Department of Defense, Legal Considerations Related to the U.S. Air Strike Against Qassem Soleimani, (Mar. 4, 2020), available at <https://www.defense.gov/Newsroom/Speeches/Speech/Article/2181868/dod-general-counsel-remarks-at-byu-law-school/>.

<sup>231</sup> For the evolution of the views of recent U.S. presidents concerning targeted killings, see Jack L. Goldsmith, *The Contributions of the Obama Administration to the Practice and Theory of International Law*, 57 HARV. INT'L L. J. 455 (2016).

<sup>232</sup> *Iran missile attack: Did Tebran intentionally avoid U.S. casualties?*, BBC (Jan. 8, 2020), <https://www.bbc.com/news/world-middle-east-51042156>.

capability as an existential threat and has been contemplating an attack on its nuclear facilities since 2004—not to get involved militarily.<sup>233</sup>

Thus, President Trump projected his reputational understanding onto both North Korea and Iran. The approach worked with the first but failed with the latter for two reasons. First, while individual leaders are unitary entities, the states they lead are not.<sup>234</sup> Unlike the leader of North Korea, the president of Iran and Iran's foreign minister face significant domestic constraints in foreign affairs matters. Second, Iran's understanding of losses and gains is opposite to what was expected. Simply, Iran did not view the imposition of the sanctions as a loss to be averted at any cost, worth entering negotiations at any cost. This has directly clashed with Trump's hope that he could renegotiate or exchange the JCPOA for a different deal through a personal relationship with the Iranian head of state.

#### E. BACK TO THE JCPOA?

Instead, the United States has resorted to calls for JCPOA compliance. Following the approach of the expiration date of the ban on Iran's arms embargo, set for October 2020 as per JCPOA, the United States began lobbying for a new approach to keep Iran committed to the JCPOA by alleging that Iran's violations of its agreement warrant an extension of the arms embargo on the country as well as reinstatement of the U.N.'s previous sanctions.<sup>235</sup> Under U.N. Security Council Resolution 2231, any JCPOA party may demand

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<sup>233</sup> See JOYNER, *supra* note 47, at 43 (explaining the history of Israel's considerations of forceful prevention of the development of Iran's nuclear program); see also *The Secret History of the Push to Strike Iran*, N.Y. TIMES (Sep 4, 2019), <https://www.nytimes.com/2019/09/04/magazine/iran-strike-israel-america.html> (explaining Trump's reluctance to military engagement with Iran); Susan B. Glaser, "You're Gonna Have a Fucking War": Mark Milley's Fight to Stop Trump from Striking Iran, NEW YORKER (July 15, 2021) (explaining how in the final days of Trump's administration some of the leading US generals intervened in preventing a military stand-off between Iran and the United States).

<sup>234</sup> Broude, *supra* note 151, at 1122–23.

<sup>235</sup> David E. Sanger, *To Pressure Iran, Pompeo Turns to the Deal Trump Renounced*, N.Y. TIMES (Apr. 26, 2020), <https://www.nytimes.com/2020/04/26/world/middleeast/us-iran-nuclear-deal-pompeo.html>.

that the sanctions on Iran be reinstated in the event of non-compliance.<sup>236</sup> The non-compliance meant herein relates to Iran's stockpiling of uranium enrichment. Having exited the agreement in 2018, the United States bases its claim on the interpretation that any party to the JCPOA held the right to initiate such proceedings before the U.N. Security Council.<sup>237</sup> Be that as it may, the lack of support from the standing members of the U.N. Security Council<sup>238</sup> made the point moot.

An alternative negotiation initiative introduced by two U.S. senators, Lindsey Graham and Robert Menendez, also gained traction.<sup>239</sup> Their plan envisaged a wider multilateral initiative that would encompass the whole region and would essentially be dedicated not only to the Iranian nuclear program but to regional stability as a whole. Iran would continue the development of its nuclear program with a stricter guarantee of its civilian purposes, but unlike the JCPOA, this future agreement would be designed as a treaty and not a political commitment.<sup>240</sup> Thus, this agreement would evade one of the key problems of the JCPOA—the ability of any U.S. administration to cancel it. Senator Rand Paul also offered his diplomatic services, apparently receiving support to serve in this capacity.<sup>241</sup> None of these initiatives yielded any result.

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<sup>236</sup> S.C. Res. 2231, ¶ 11 (Jul. 20, 2015).

<sup>237</sup> Jarret Blanc, *Can Pompeo Trap a Future President Biden in Trump's Self-Imposed Iran Crisis?*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (May 9, 2020), <https://carnegieendowment.org/2020/05/09/can-pompeo-trap-future-president-biden-in-trump-s-self-imposed-iran-crisis-pub-8176>.

<sup>238</sup> Indicative in this sense was the statement from the Russian foreign ministry stating that neither the US is still a party to the JCPOA nor was Russia willing to support the extension of the arms embargo. *See Russian envoy blasts US for claiming to be part of Iran nuclear deal*, TASS (Apr. 30, 2020), <https://tass.com/politics/1151789>.

<sup>239</sup> *See* Josh Rogin, *Two Senate Iran hawks are pushing a new nuclear deal*, WASHINGTON POST (Feb. 25, 2020), <https://www.washingtonpost.com/opinions/2020/02/25/two-senate-iran-hawks-are-pushing-new-nuclear-deal/>.

<sup>240</sup> *Id.*

<sup>241</sup> Eliana Johnson & Nahal Toosi, *Rand Paul Angles to Become Trump's Emissary to Iran*, POLITICO (Jul. 17, 2019),

Following the defeat of Donald Trump in the 2020 U.S. Presidential election, the road for the return to the JCPOA seemed open as President Biden claimed it would be one his foreign policy priorities.<sup>242</sup> However, the changed dynamics of both the United States relations to its allies and the internal relations within Iran prevented this move from occurring swiftly. Israeli intelligence service Mossad assassinated the leading Iranian scientist working on its nuclear program and the state of Israel continued to openly oppose the deal.<sup>243</sup> Only in September 2021, following a months-long coalition building process did the new Israeli government support negotiations with Iran.<sup>244</sup> It has sought, however, assurances that both Israel and the international community will remain open to isolation and military actions against Iran.<sup>245</sup> Elections also happened in Iran where Hassan Rouhani, a moderate who sought a swift renegotiation of the deal<sup>246</sup>, was replaced by Ebrahim Raisi, the deal's staunch opponent.<sup>247</sup> That promoted a change in the Iran's negotiation strategy. After a swift renegotiation of terms concerning technical demands made by the IAEA

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<https://www.politico.com/story/2019/07/17/rand-paul-iran-talks-donald-trump-1418075>.

<sup>242</sup> *Returning to the Iran Nuclear Deal Is Essential For Biden's Foreign Policy Agenda*, NPR (Apr. 9, 2021), <https://npr.org/2021/04/09/985860495/returning-to-tge-iran-nuclear-deal-is-essential-for-bidens-foreign-policy-agenda>.

<sup>243</sup> Ronen Bergman & Farnaz Fassihi, *The Scientist and the A.I.-Assisted, Remote-Control Killing Machine*, N.Y. TIMES (Sep. 18, 2021), <https://nytimes.com/2021/09/18/world/middleeast/iran-nuclear-fakhrizadeh-assassination-israel.html>.

<sup>244</sup> *Why Israel (Sort of) Misses the Iran Deal*, The Washington Institute for Near East Policy, (Dec 6, 2021), <https://www.washingtoninstitute.org/policy-analysis/why-israel-sort-misses-iran-deal>

<sup>245</sup> Annie Karni, *Biden Vows 'Unshakable partnership' With Israel in Meeting With Bennett*, N.Y. TIMES (Aug. 27, 2021), <https://www.nytimes.com/2021/08/27/us/politics/biden-naftali-bennett-meeting.html>.

<sup>246</sup> *Rouhani rues missed chance over Iran Nuclear Deal and Lifting Sanctions*, IRAN INT'L (Jul. 14, 2021), <https://iranintl.com/en/world/rouhani-rues-missed-chance-over-iran-nuclear-deal-and-lifting-sanctions>.

<sup>247</sup> *Iran's New President Ebrahim Raisi consolidates hard-line grip as reformers pushed aside*, WASHINGTON POST (Jun. 19, 2021), [https://washingtonpost.com/world/iran-president-ebrahim-raisi-rouhani-nuclear-deal-/2021/06/19/ea7681e4-cf8a-11eb-a224-bd59bd22197c\\_story.html](https://washingtonpost.com/world/iran-president-ebrahim-raisi-rouhani-nuclear-deal-/2021/06/19/ea7681e4-cf8a-11eb-a224-bd59bd22197c_story.html).

that focused on the monitoring and surveillance<sup>248</sup>, the negotiations stalled for months without progress. The EU and the United States openly called on Iran to negotiate in a more expedient manner, only for Iran to retort with demands that the United States should—having been the first to exit the JCPOA—return to it by withdrawing the unilateral sanctions.<sup>249</sup>

Important changes occurred in the negotiation teams on both the Iranian and the U.S. sides. Iranians replaced its perceived moderate negotiators with interlocutors less willing to compromise on Iran's regional presence and ballistic missile capability, two matters leftover from Trump's negotiations.<sup>250</sup> The United States team included, President Biden's National Security Advisor Sullivan, one of the original JCPOA key negotiators and an expert in the sanctions regime<sup>251</sup> who claims that a nuclear-free Iran is a U.S. priority.<sup>252</sup> Therefore, both sides found themselves in a peculiar position; Iran is openly violating the JCPOA through uranium enrichment, demanding that the United States return to it by suspending sanctions and the United States claims to seek a return to the JCPOA without willing to concede on the point of sanctions until it is not certain that Iran will cease the uranium enrichment. Further complications to the JCPOA re-negotiation came from Russia which sought to retaliate to the sanctions imposed on the country in response to its aggression on

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<sup>248</sup> See *Iran and Watchdog Reach deal Over Nuclear Site Monitoring*, BBC NEWS (Sep. 12, 2021), <https://bbc.com/news/world-middle-east-58536850>.

<sup>249</sup> Maziar Motamedi, *Iran's Khamenei reiterates nuclear deal stance in new year speech*, AL JAZEERA (Mar. 21, 2021), <https://aljazeera.com/news/2021/3/21/irans-khamenei-remains-steadfast-on-nuclear-deal-stance>.

<sup>250</sup> *Iran replaces deputy foreign minister Araqchi who led nuclear talks*, REUTERS (Sep. 14, 2021), <https://www.reuters.com/world/middle-east/iran-replaces-deputy-foreign-minister-araqchi-who-led-nuclear-talks-2021-09-14/>

<sup>251</sup> See Jason Rezaian, *Don't believe the wild rumours on the Iran talks. Here's the real story*, WASHINGTON POST (May 12, 2021), <https://washingtonpost.com/opinions/2021/05/12/iran-taks-biden-team-nuclear-negotiations/>.

<sup>252</sup> Felicia Sonmez et al., *National security adviser Jake Sullivan says preventing Iran from obtaining nuclear weapon is 'paramount priority' for United States*, WASHINGTON POST (Jun. 20, 2021), [https://www.washingtonpost.com/politics/sullivan-iran-nuclear-weapons/2021/06/20/20fa0c26-d1d0-11eb-ae54-515e2f63d37d\\_story.html](https://www.washingtonpost.com/politics/sullivan-iran-nuclear-weapons/2021/06/20/20fa0c26-d1d0-11eb-ae54-515e2f63d37d_story.html).

Ukraine by demanding exemptions that would allow it to continue economic engagement with Iran.<sup>253</sup>

Thus, the re-negotiation strategy used by President Trump has failed in its effort to bring about a new deal for Iran. A resort to multilateral action remained a necessary precondition not only for opening potential future negotiations between the two countries but also for preventing the further growth of Iranian military power, which is expected to strengthen following the expiration of the U.N. arms embargo.<sup>254</sup> However, even such multilateral engagement remains uncertain in bridging a widened gap in trust. The United States now has less reasons to believe that Iran will not seek to secretly develop nuclear weapons than it had in 2015, when the original JCPOA was made. Iran has less reasons to believe that a future change in government will not bring another end to the JCPOA, if it is reinstated. Both sides have played to their domestic audiences rather than to build a multilateral deal. Additionally, changes in the international order have made the renegotiation of the deal more difficult. None of this makes the deal redundant as there are legitimate mutual interests to be protected through its renegotiation but its questionable durability and stability greatly increase the political risk of its renegotiation for all parties involved.

#### IV. CONCLUSION

The law can, as David Kennedy has argued, be understood as a performative art,<sup>255</sup> and President Trump has, in the case of his dealmaking with Iran, indeed performed as if he wanted to re-establish his credo, “Deals are my art form.”<sup>256</sup> His actions emphasized the

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<sup>253</sup> *Iran, Russia and the JCPOA: Is a year of negotiations at risk?*, ISPI (Mar. 18, 2022), <https://www.ispionline.it/it/pubblicazione/iran-russia-and-jcpoa-year-negotiations-risk-34174>.

<sup>254</sup> See U.N. Arms embargo on Iran, STOCKHOLM INTERNATIONAL PEACE AND RESEARCH INSTITUTE, [https://sipri.org/databases/embargoes/un\\_arms\\_embargoes/iran](https://sipri.org/databases/embargoes/un_arms_embargoes/iran) (last visited Mar. 12, 2022).

<sup>255</sup> David Kennedy, *When Renewal Repeats: Thinking Against The Box*, 32 N.Y.U.J. INT'L L. & POL. 335, 337 (2000).

<sup>256</sup> TRUMP & SCHWARTZ, *supra* note 32.

United States' use of its own law to govern transnationally,<sup>257</sup> however, this governance is now challenged in a way it had not been challenged since the 1990s and the EU–U.S. stand-off concerning the unilateral sanctions against Cuba.<sup>258</sup> The challenge will not necessarily be legal as the forums for a possible legal resolution remain unavailable or associated with reputational or financial costs but technical, as the creation of INSTEX testifies. Thus, commentators with a preference for a constitutionalist understanding of international law may rejoice, as President Trump's actions have provoked countermoves, making the challenged norms a site of contestation.<sup>259</sup>

Although Koh presents a strong argument for the resilience of the transnational legal process<sup>260</sup> seems, it cannot instill optimism regarding the future stability of the international legal system. While the combinations of outreach, sanctions, and the use of force via cyberwarfare and targeted killing operations have characterized the relations of the two states pre-JCPOA, the two countries' reduction of the negotiation process into a zero-sum game represents a major change reflected in the U.S. policy shift towards Iran under President Trump.

President Trump's approach to international law and policy is best defined not by what it brings to the table but by what it excludes. It inverts interdependence into a weakness and not a strength. It imposes sanctions that lack legitimacy and are not a multilateral tool relying on interdependency. More importantly, as his negotiation approach demonstrates, it changes the way in which states and other international legal actors interact with each other. That, as we see, does not stop the transnational legal process from happening, but it will make it a less accurate map of the territory of international law. By claiming that the patterns of behavior of states would internalize the

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<sup>257</sup> See Nico Krisch, *More equal than the rest? Hierarchy, equality and U.S. predominance in international law in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW* 137 (2003).

<sup>258</sup> See Ruys & Ryngaert, *supra* note 107, at 100–11 (outlining a set of diverse policy options considered by the EU and other international actors).

<sup>222</sup> See Jonathan Havercroft et al., *Editorial: Donald Trump as global constitutional breaching experiment*, 7 *GLOB. CON.* 1, 9, 11 (2018).

<sup>260</sup> See Koh, *supra* note 2, at 463.

norms of external conduct, the theory of transnational legal process predicted that obeying international law would by itself have a liberalizing impact on the domestic legal system and politics.<sup>261</sup> President Trump's negotiation approach to Iran therefore represents a snapshot of the moment in which an international actor takes an exactly opposite path. It is a moment in which domestic policies—a support to the base and from the base—become internationalized. In this sense, Trump's presidency can be understood as a kind of anti-Dag Hammarskjold moment: the behavior of an impresario who aims to deconstruct much of the international legal system and legitimize his nationalist policies through a grand bargaining game.<sup>262</sup> Recent action of Iran, following the recommencement of the negotiations in 2021, display a similar attitude.

By such actions, international actors undermine the foundations of the liberal international order and thereby open a space for an examination, for which the behavioral approach to international law and economics is an appropriate assessment tool. By examining how the elements of political psychology, international law, and international relations play out in these complex situations, this approach may help us to translate into law and/or explain the demands and actions of those leaders rooted in a commitment to the populist discourse. After all, it is not for nothing that some proponents of the realist approach to international law and international relations, although themselves skeptical of Trump, exhibit a certain degree of satisfaction with the loss of constituency experienced by the liberal international order. Perhaps not surprisingly, this satisfaction<sup>263</sup> is driven by the belief that the evolution of international law was mistaken for an ideological assumption about its normative pull and a sense that the fall of the liberal hegemony could have already been

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<sup>261</sup> Gregory Shaffer, *Transnational Legal Process and State Change*, 37 L. & SOC. INQ. 229, 234–35 (2012).

<sup>262</sup> For the contribution of Dag Hammarskjold to understanding and evolution of international law and policy generally, see Oscar Schachter, *Dag Hammarskjold and the Relation of Law to Politics*, 56 AM. J. INT'L L. 1 (1962); see also Anne Orford, *On international legal method*, 1 LONDON REV. INT'L L. 166 (2013).

<sup>263</sup> See Posner, *supra* note 1, at 818–19.

predicted when it began in the 1990s.<sup>264</sup> This, however, should not mean that what we are witnessing reflects a return of power politics. First, because power politics never really went away and second because the “false promise of international institutions” and the ideological bias of liberalism cannot so easily be replaced by nationalism. The reason for the latter is that international cooperation and international law as its language remain irreplaceable for most other countries. Even if we accept the realist critique that the international law relies on ideological assumptions, we should not expect that it will suddenly become de-ideologized because one of its main actors is undergoing a transformation as the result of an identity crisis triggered by domestic concerns over political economy.

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<sup>264</sup> See John J. Mearsheimer, *Back to the future: Instability in Europe after the Cold War*, 15 INT'L. SEC. 5 (1990).