
BINDING POLITICAL COMMITMENTS

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INTRODUCTION

The recent unprecedented rift, in particular between the US and its European allies, in the Security Council vis-à-vis the Iran deal can be seen as the culmination of the American First policy of recent years. The United States decided to ignore the UN Security Council's overwhelming rejection on its move to snap back the UN sanctions on Iran and proceeded unilaterally with the UN sanctions.¹ This means that the United States plans to enforce UN Security Council resolutions that other members of the same council believe are terminated.² Relatedly and more importantly, the stand-off can also be seen as the culmination of years of framing international law away from basic notions of law and though notions of soft law and political commitments. Contrary to the US position, which is partly premised on the nonbinding characterization of the deal, this short piece argues that the deal is binding while outlining the inadequacy of the prevailing approaches in framing international commitments.³

On August 20, 2020 the US submitted its notification to the UN Secretary General and the Security Council President that the US is initiating the *snap back* mechanism of the Iran deal due to "Iran's significant non-performance."⁴ This

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1. *Compare* UN Security Council rejects US demand to 'snapback' sanctions on Iran, DEUTSCHE WELLE, <https://www.dw.com/en/un-security-council-rejects-us-demand-to-snapback-sanctions-on-iran/a-54697653> [<https://perma.cc/JM6Z-KCRG>] (last visited Oct. 2, 2020) *Compare with* Secretary Pompeo (@SecPompeo), TWITTER (Aug. 27, 2020, 8:07 AM), <https://twitter.com/SecPompeo/status/1299000560431988736> [<https://perma.cc/7AGQ-ZB5L>] ("If any member of the @UN Security Council introduces a resolution to continue sanctions relief, the U.S. will oppose it. If no resolution is introduced, the sanctions on Iran will still return on September 20. That's how UNSCR 2231 works.").

2. *Compare* Letter from Ambassador Kelly Craft, Representative U.S. to United Nations to Ambassador Abdou Abarry, President of United Nations Sec. Council (Sept. 21, 2020) (on file with author) ("...the provisions terminated by resolution 2231 (2015) shall be re-applied...if the Security Council does not adopt a resolution to continue in effect the terminations within the specified time period.") *with* Letter from Christoph Heusgen et al., Permanent Representative of Germany, to Ambassador Abdou Abarry, President of United Nations Sec. Council (Sept. 18, 2020) (on file with author) ("the provisions of [previous related resolutions] will continue to be terminated[.]").

3. Previously, I wrote a piece about the nature of the deal in April 2015 before its finalization, Farshad Ghodoosi, *Defining the Relationship*, FOREIGN AFFAIRS (Apr. 5, 2015), <https://www.foreignaffairs.com/articles/united-states/2015-04-05/defining-relationship> [<https://perma.cc/7R8Y-HFWC>].

4. Letter from Dept. of State to Ambassador Dian Triansyah Djani, President of United Nations Sec. Council (Aug. 20, 2020) (on file with author).

notification was immediately faced by strong rejections of other permanent members of the Security Council. In response to the President of the Security Council inquiry, E3 (France, Germany, UK) foreign ministers stated that US is no longer a JCPOA participant state “as a matter of fact” because it “ceased to fulfill its commitments” under the deal.⁵ China’s spokesperson stated that “[t]he US demand has no legal ground and common sense.”⁶ Russia stated that the notification “is legally void” because “[o]ne cannot reject one’s obligations under a treaty while demanding the rights it provides.” It warned that the US is “trying to pull other Security Council members into depth where the light of the international law does not shine.”⁷ Iran also responded, stating that the US has no right to reapply the previous terminated resolutions because, *inter alia*, it terminated its participation in the JCPOA, abrogated its right, breached the resolution, and did not act in good faith.⁸

The main point of contention is whether the US which explicitly “ceased its participation in the JCPOA” can trigger the snapback mechanism stipulated in the deal and the Security Council 2231. The majority of the permanent and non-permanent states of the Security Council believe that the US is not a JCPOA participant, and therefore cannot invoke the dispute resolution mechanism. However, much less discussed is the issue of *bindingness* of international commitments which lies at the core of US’s argument. The United States’ position rests on the argument that JCPOA is merely a political commitment and thus does not impose any binding obligations on the US. Neither does the Resolution 2231.⁹ The only binding part of the Resolution is the dispute resolution mechanism which the United States can trigger “unconditionally.”¹⁰ The dichotomy between political commitments (gentlemen’s agreements) and a binding agreement have played a major role in the US legal position whereby it can avoid its commitment (quid) under the deal (*i.e.* removal of sanctions), but is entitled to receive the quo (snap back mechanism). The argument is that the US obligations are enshrined in the JCPOA—a political document—but its rights are vested via a Security Council Resolution where it uses the word “decides” for the snapback mechanism.¹¹ This argument begs fundamental questions about the nature of

5. Letter from Anne Gueguen et al., Chargé d’Affaires a.i. of France, to Ambassador Dian Triansyah Djani, President of United Nations Sec. Council (Aug. 20, 2020) (on file with author).

6. *Spokeperson’s Comment on US Demand for Snapback on Iran in Security Council*, PERMANENT MISSION PEOPLE’S REPUBLIC CHINA TO UN (Aug. 20, 2020), <https://www.fmprc.gov.cn/ce/ceun/eng/hyyfy/t1807957.htm> [<https://perma.cc/TG2X-T9WA>].

7. *US’s Notification of Restoration of Sanctions Against Iran Legally Void, Moscow Says*, TASS (Aug. 21, 2020, 6:43 AM), <https://tass.com/politics/1192545> [<https://perma.cc/L6EG-563Z>].

8. *Factsheet on the Illegitimate and Felonious U.S. Attempt to Re-Impose U.N Sanctions on Iran*, IRAN MINISTRY FOREIGN AFFS., (Aug. 21, 2020), <https://en.mfa.ir/files/Pdf/0607425-newsExporte82ee27c7dd9438084958118efe167de.pdf> [<https://perma.cc/BB8T-2BUE>].

9. *Secretary Michael R. Pompeo at a Press Availability*, U.S. DEP’T STATE (Aug. 20, 2020), <https://www.state.gov/secretary-michael-r-pompeo-at-a-press-availability-11/> [<https://perma.cc/ZJ88-HYV9>]; Richard Goldberg, *FAQ: The “Snapback” of UN Sanctions on Iran*, FOUND. FOR DEF. DEMOCRACIES (July 9, 2020), <https://www.fdd.org/in-the-news/2020/07/09/faq-the-snapback-of-un-sanctions-on-iran/> [<https://perma.cc/9TG9-C9G3>].

10. *Id.*

11. *Id.*

international commitments: how is the bindingness of commitments determined in international relations? Is it based on the initial intent or the subsequent conduct? Can a subsequent binding Security Council Resolution turn a political document into a binding instrument?

JCPOA AND THE INNOVATIVE “SNAP BACK”

What is known as the Iran deal, is the Joint Comprehensive Plan of Action (JCPOA), reached between the six countries (*viz* China, France, Germany, the Russian Federation, the United Kingdom, and the United States as well as the High Representative of the European Union for Foreign Affairs and Security Policy) and Iran regarding Iran’s controversial nuclear program on July 14, 2015. The JCPOA was a result of at least 20 months of negotiations which resulted in the initial Joint Plan of Action in November 2013,¹² a framework deal in April 2015,¹³ and ultimately the JCPOA. The JCPOA was endorsed by the United Nations Security Council Resolution (UNSCR) 2231, which, *inter alia*, provided for termination of previous UNSCR resolutions imposing sanctions on Iran and designated Iranian entities subject to “reapplication of the provisions of terminated resolutions” or as some call it snap back of sanctions.¹⁴ The snap back refers to an innovative method designed by the JCPOA which can be triggered upon disagreement on compliance with obligations set forth under the JCPOA by which “the UN Security Council, in accordance with its procedures, shall vote on a resolution to continue the sanctions lifting.”¹⁵ Under this scenario, it takes only a state with veto power to prevent continuation of sanctions relief for the Iranian government, which inevitably results in reapplication of the UN sanctions regime.¹⁶

VIEWS ON THE LEGAL NATURE OF JCPOA

From the outset, the nature of JCPOA was highly controversial. The 159-page document itself is painstakingly detailed and yet nowhere does it include anything about its binding nature. The negotiators themselves had divergent views on the nature of the JCPOA. Secretary of State Kerry believed that it would be no more than a political commitment.¹⁷ His Iranian counterpart, Foreign

12. *Joint Plan of Action*, EUR. EXTERNAL ACTION (Nov. 24, 2013), http://eeas.europa.eu/archives/docs/statements/docs/2013/131124_03_en.pdf [<https://perma.cc/9KT6-EN7Y>].

13. Laura Rozen, *Iran, P5+1 Reach ‘Historic’ Framework Deal*, AL MONITOR (Apr. 2, 2015), <https://www.al-monitor.com/pulse/originals/2015/04/zarif-iran-deal-reactions-lausanne-nuclear-talks.html> [<https://perma.cc/ANY9-KZFF>].

14. S.C. Res. 2231, ¶7; Joint Comprehensive Plan of Action, July 14, 2015, <https://2009-2017.state.gov/documents/organization/245317.pdf> [<https://perma.cc/YCG6-ZQY3>]; see also Jean Galbraith, *Ending Security Council Resolutions*, 109 AM. J. INT’L L. 806 (2015).

15. *Id.*

16. *Id.*

17. Bradley Klapper, *Kerry Says Congress Would Not Be Able to Change Terms of Iran Deal*, PBS NEWSHOUR (Mar. 11, 2015, 1:41 PM), <http://www.pbs.org/newshour/rundown/kerry-says-congress-able-change-terms-iran-deal> [<https://perma.cc/A5MK-NEFU>] (“We’ve been clear from the beginning: We’re not negotiating

Minister Zarif, contended that the deal would be binding under international law and that any repudiation by the US would constitute a “blatant violation.”¹⁸ Russian officials suggested that a United Nations Security Council Resolution incorporate the deal to render it secure, a position that was reflected in the Joint Statement as well and was ultimately implemented.¹⁹ Several U.S. senators²⁰ and House lawmakers²¹ have opined that the agreement is nonbinding. In the open letter by several GOP senators, they called the JCPOA “nothing more than an executive agreement between President Obama and Ayatollah Khamenei.”²²

The debate among academics has also been heated. Regarding the domestic characterization of the deal, some argued that the Iran deal—similar to the majority of US international commitments such as American’s commitments to IMF, the World Bank, NAFTA, and the World Trade Organization—is binding because of the Congress authorizing legislation and democratic principles.²³ Other vigorously disagreed arguing that “[t]he Review Act simply sets up a disclosure and timetable regime for the President’s disclosure of his foreign affairs activities that he wouldn’t otherwise have to disclose to Congress.”²⁴ A third group argued that the deal is unconstitutional because it is a treaty and it requires the advice and consent of the senate.²⁵ From the international law perspective, many soon concluded that the deal takes “the political commitment form”²⁶ and that the United States has “no international law obligation to comply with the

a, quote, legally binding plan . . .”). Joel Gehrke, *State Department: Iran Deal Is Not ‘Legally Binding’ and Iran Didn’t Sign It*, NAT’L REV. (Nov. 25, 2015, 12:35 AM), <https://www.nationalreview.com/2015/11/state-department-iran-deal-not-legally-binding-signed/> [https://perma.cc/6SJB-22AC].

18. Eline Gordts, *Iran’s Foreign Minister to U.S. Senators: ‘The World Is Not the United States’*, HUFFINGTON POST (Mar. 9, 2015, 5:22 PM), http://www.huffingtonpost.com/2015/03/09/zarif-senators-letter_n_6834296.html [https://perma.cc/5TAM-C2DE].

19. *Iran Nuclear Deal Can Be Secured by UN Security Council Resolution—Russian Diplomat*, TASS (Apr. 16, 2015, 13:24), <https://tass.com/world/789966> [https://perma.cc/LLP8-QYQS].

20. See *infra* note 22.

21. See Alexandra Jaffe, 367 House Lawmakers Warn Obama on Iran, CNN (March 23, 2015, 2:58 PM), <https://www.cnn.com/2015/03/23/politics/house-letter-obama-iran/index.html> [https://perma.cc/EV6J-P63B].

22. An Open Letter to the Leaders of the Islamic Republic of Iran, U.S. SENATE (Mar. 9, 2015), <https://data.bloomberglp.com/assets/sites/2/150309-Cotton-Open-Letter-to-Iranian-Leaders.pdf> [https://perma.cc/X8PK-XXHJ].

23. Bruce Ackerman & David Golove, *Can the Next President Repudiate Obama’s Iran Agreement?* ATLANTIC: POLS. (Sept. 10, 2015), <https://www.theatlantic.com/politics/archive/2015/09/can-the-next-president-repudiate-obamas-iran-agreement/404587/> [https://perma.cc/983U-5J7W]; see also Bruce Ackerman & David Golove, *Guest Post: The Lawless President of Marco Rubio—A Reply to Professor Ku*, OPINIOJURIS (Sept. 16, 2015), <https://opiniojuris.org/2015/09/16/guest-post-the-lawless-presidency-of-marco-rubio-a-reply-to-professor-ku/> [https://perma.cc/5Q5U-VGRZ].

24. Julian Ku, *President Rubio/Walker/Trump/Whomever Can Indeed Terminate the Iran Deal on “Day One”*, OPINIO JURIS (Oct. 9, 2015), <http://opiniojuris.org/2015/09/10/president-rubiowalkertrumpwhomever-can-indeed-terminate-the-iran-deal-on-day-one/> [https://perma.cc/Y5DN-549H].

25. Michael Ramsey, *Is the Iran Deal Unconstitutional?*, ORIGINALISM BLOG (July 15, 2015), <https://originalismblog.typepad.com/the-originalism-blog/2015/07/is-the-iran-deal-unconstitutionalmichael-ramsey.html> [https://perma.cc/5FS7-P73Q].

26. Duncan B. Hollis, *The Iran Deal as a Political Commitment*, OPINIOJURIS (Feb. 4, 2015), <https://opiniojuris.org/2015/04/02/the-iran-deal-as-a-political-commitment/> [https://perma.cc/MP9X-RR7A].

agreement.”²⁷ Others unequivocally concluded that “the Iran Deal is a treaty.”²⁸ For some, the endorsement of the Security Council Resolution of the JCPOA created a grey area that can be a basis for the commitments to be binding under international law.²⁹ The debate also extends to the language used in the Resolution 2231. For example, some argue that the phrase “calls upon” is softer than “decide” and hortatory, and therefore, member states are not obligated to “take [] actions [] to support the implementation of the JCPOA.”³⁰ Seemingly, based on this view, the only language that renders a Security Council resolution a binding obligation is the word “decide” accompanied by reference to Chapter VII of the United Nation Charter.³¹ As a result of this view and the word choice, the US does not have any obligation to implement the deal but can benefit from its snap-back mechanism because the former is nonbinding, and the latter is binding. Others, to the contrary, believe that “call upon” is an example of a language associated with binding intent.³²

27. Jack Goldsmith, *How a U.N. Security Council Resolution Transforms a Non-Binding Agreement with Iran Into a Binding Obligation Under International Law (Without Any New Senatorial or Congressional Vote)*, LAWFAREBLOG: IRAN (Mar. 12, 2015), <https://www.lawfareblog.com/how-un-security-council-resolution-transforms-non-binding-agreement-iran-binding-obligation-under> [https://perma.cc/7BUQ-TX77]; see also Interview by John B. Bellinger III with Zachary Laub, *How Binding is the Iran Deal?*, COUNCIL ON FOREIGN RELS. (July 23, 2015), <https://www.cfr.org/interview/how-binding-iran-deal> [https://perma.cc/B6KE-5QXA].

28. Iulia E. Padeanu, *Is the Trump Administration Bound by the Iran Deal?*, YALE J. INT'L L. (Dec. 1, 2016), <https://www.yjil.yale.edu/is-the-trump-administration-bound-by-the-iran-deal/> [https://perma.cc/296L-B8TY] (“The Iran Deal has all the characteristics of an international treaty: written document, buy-in from a number of states, and firm commitments. As such, under international law, the Agreement is presumptively legally binding.”).

29. Jack Goldsmith & Marty Lederman, *The Case for the President’s Unilateral Authority to Conclude the Impending Iran Deal Is Easy Because It Will (Likely) Be a Nonbinding Agreement Under International Law*, JUST SECURITY (Mar. 11, 2015), <https://www.justsecurity.org/20963/case-presidents-unilateral-authority-conclude-impending-iran-deal-easy-likely-nonbinding-agreement-international-law/> [https://perma.cc/NKC7-56MF]; Stephen P. Mulligan, *Withdrawal from International Agreements: Legal Framework, the Paris Agreement, and the Iran Nuclear Agreement*, CRS REPORT (May 4, 2018), <https://fas.org/sgp/crs/row/R44761.pdf> [https://perma.cc/D3MM-CSK7] (“Whether Resolution 2231 creates an obligation under international law for the United States to continue to withhold its domestic secondary sanctions or to comply with the JCPOA more broadly is a more complex question.”).

30. John Bellinger, *The New UNSCR on Iran: Does it Bind the United States (and Future Presidents)?* LAWFARE: IRAN (July 18, 2015, 4:58 PM), <https://www.lawfareblog.com/new-uns-cr-iran-does-it-bind-united-states-and-future-presidents> [https://perma.cc/8FRT-7ABW]; S.C. Res. 2231, ¶7 (July 16, 2015).

31. Stephen P. Mulligan, *Withdrawal from International Agreements: Legal Framework, the Paris Agreement, and the Iran Nuclear Agreement*, CRS REPORT (May 4, 2018), <https://fas.org/sgp/crs/row/R44761.pdf> [https://perma.cc/JD4Y-ZXRZ] (“Resolution 2231 appears to contain a combination of non-binding recommendations and binding decisions. It seems clear that the Security Council intended the provisions that lifted its prior sanctions to be binding, as these paragraphs begin with the statement that the Security Council ‘Decides, acting under Article 41 of the Charter of the United Nations’ that its prior resolutions are terminated subject to certain conditions.”) (emphasis in original).

32. Kwadwo Appiagyei-Atua, *United Nations Security Council Resolution 1325 on Women, Peace, and Security—Is it Binding?*, 18 HUM. RTS. BRIEF 2, 3 (2011), <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1169&context=hrbrief> [https://perma.cc/9PY3-GMWY].

INTERNATIONAL LAW & POLITICAL COMMITMENTS

In part, divergent views on the legal nature of the JCPOA emanate from the context in which it was negotiated, and the multilateralism involved in the process. For instance, it is no secret that the Obama Administration's characterization of the deal as nonbinding was (most likely) to avoid Congressional vote.³³ Had the deal been concluded in the first term of the Obama Administration at the time when Democrats controlled both houses, the characterization would have likely been different. However, neither the domestic circumstantial events nor the language should play such an outsized role in the characterization of international commitments.³⁴ For instance, the Congress could have limited the scope and definition of "Agreement" under the Review Act to nonbinding agreements.³⁵ The parties (P5+1)—all sophisticated parties benefiting from highly trained legal experts—could have used explicit language in the JCPOA to expressly mention that the commitments are nonbinding.³⁶ The Security Council did not have to endorse the JCPOA. Nor did it need to call upon the member states to support implementation of the deal. The Security Council Resolution could have been much shorter and only include language for the termination of the previously adopted resolutions and the snapback mechanism. These are some examples showing that circumstantial evidence and the language used cannot be enough nor satisfactory. Relatedly, following the language game, the snapback mechanism can also be called into question since the Resolution uses the word "terminate" for the previously adopted resolution instead of "suspend." Any "re-application" of resolutions that have already been terminated (void of effects) requires new voting (Article 27 of the UN Charter) and arguably cannot be brought back with the snapback mechanism.

It is also important to note the pivot to the "twilight" of nonbinding international agreements.³⁷ The problem of increasing non-binding international agreements came to the fore following the signature of the Final Act of the

33. *Press Briefing by Press Secretary Josh Earnest, 1/29/15*, WHITE HOUSE: OFF. PRESS SEC'Y (Jan. 29, 2015, 1:15 PM), <https://obamawhitehouse.archives.gov/the-press-office/2015/01/29/press-briefing-press-secretary-josh-earnest-12915> [<https://perma.cc/XCU3-TAGQ>] ("But a congressional vote on a nonbinding instrument is not required by law and could set an unhelpful precedent for other negotiations that result in other nonbinding instruments.").

34. Relatedly, Article 26 of Vienna Convention on Law of Treaties states that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331.

35. Iran Nuclear Agreement Review Act of 2015, ch.114, 129 STAT. 201 (2015), <https://www.congress.gov/114/plaws/publ17/PLAW-114publ17.pdf> [<https://perma.cc/XYD5-38BX>]. The White House seemingly also did not notify the Congress of "all aspects of Iranian compliance" in accordance with the Act. It only refused to certify which does not necessarily mean that it violated the deal. It is therefore ironic that the US has sent notification to the Society Council based on Iran's non-compliance while it has not fulfilled its reporting requirement under the Act.

36. JCPOA uses the word voluntary 5 times but it also uses terms such as commit and commitment more than 33 times.

37. Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296, 303 (1977).

Helsinki Conference in 1975.³⁸ Despite its grave importance and sixty-five-page length, the signatories made it abundantly clear that they did not intend it to be a binding treaty.³⁹ In spite of the explicit language, at the time, a leading international law scholar emphasized that non-binding agreements “can be authoritative and controlling for the parties”. He further argued that it is wrong to believe that these “undertakings are illusory because they are not legal.”⁴⁰

This issue has not been settled since then. A few scholars believe that every commitment made by states is inevitably legal.⁴¹ They believe that states cannot elect their agreements to stay outside of international legal order. The case between Qatar and Bahrain before the International Court of Justice serves as a good example. In that case, the Court found the minutes simply exchanged between the ministries of Qatar, Bahrain and Saudi Arabia as a legally binding agreement.⁴² As emphasized by some legal scholars, the decision by the Court “struck the final death blow to theses holding that, in one way or another, states can conclude agreements outside of legal order.”⁴³

Other scholars have doubted this approach emphasizing the importance of political commitments in international law.⁴⁴ Proponents of the existence of the political commitment category under international law refer to the long history of its practice as well as its necessity in international law. States do not desire to engage in legally binding treaties in most circumstances even though agreements might be as important as the Strategic Arms Reduction Treaty (START) between the US and the Soviet Union.⁴⁵ Furthermore, to counterbalance the case of *Qatar v. Bahrain* they refer to an earlier case. In *Greece v. Turkey*, the International Court of Justice did not find a formal communiqué between the Greek and Turkish Foreign ministers binding between parties and held that it was not sufficient to confer jurisdiction on the Court.⁴⁶

Some scholars have suggested several “methods” to gauge whether an agreement is merely a political commitment or a binding agreement under international law. One can look at the language, context, intent of states as well as substance of the agreements.⁴⁷ But, these metrics can also fall short in understanding the nature of commitments related to JCPOA. On the intent prerequisite,

38. Final Act of the Conference on Security and Cooperation in Europe, 14 ILM 1293 (1975).

39. “The Government of the Republic of Finland is requested to transmit to the Secretary-General of the United Nations the text of this Final Act, which is not eligible for registration under Article 102 of the Charter of the United Nations, with a view to its circulation to all the members of the Organization as an official document of the United Nations”. *Id.*

40. Schachter, *supra* note 36, at 303.

41. JAN KLABBERS, THE CONCEPT OF TREATY IN INTERNATIONAL LAW 163–164 (1996).

42. Maritime delimitation and territorial questions between Qatar and Bahrain (*Qatar v. Bahrain*), 1994 I.C.J. 112, ¶31–39 (Jurisdiction and Admissibility).

43. KLABBERS, *supra* note 40, at 165.

44. Duncan Hollis & Joshua Newcomer, “Political” Commitments and the Constitution, 49 VA. J. INT’L L. 507, 517–518 (2008).

45. *Id.* at 519.

46. Aegean Sea Continental Shelf Case (*Greece v. Turk.*), 1978 I.C.J. 3, ¶100–106 (Dec. 19).

47. *Id.* at 516–525; Schachter, *supra* note 36, at 296–300. See also similar criteria enumerated in the International Agreement Regulations Apr. 27, 1981 by the State Department implementing the Case Act (1 U.S.C. 112b(a)).

as discussed above, both sides of the table seem to diverge on the issue that the document is legally binding.⁴⁸ The text itself does not unequivocally lend itself to a position and the word choices—such as “will” versus “shall”—may not help. In fact, it has been the US position that word choices of this nature do not determine the nature of a commitment as a political commitment or a treaty.⁴⁹

Moreover, some prior cases show that under international law even unilateral statements can bind states. Most notably, in the *Nuclear Tests* case (Australia v. France) in 1974, the International Court of Justice found that a unilateral declaration by France imposed a legally binding obligation on that state.⁵⁰ Earlier in 1933, Permanent Court of International Justice also considered that “a reply [] by the Minister of Foreign Affairs on behalf of his government [] is binding.”⁵¹ Moreover, consent does not always necessarily play a key role in determining obligations under international law. The *Oil Platform Case* before the International Court of Justice and the *Loewen Case* before a NAFTA tribunal serve as good examples in which the tribunals proceeded to adjudicate the matter even though they did not effectively find jurisdiction.⁵²

OBJECT & PURPOSE

The indeterminacy related to the JCPOA coincides with a few developments. On the one hand, in the US, the landscape is shifting away from (constitutional) treaty-making as most of its international commitments are concluded via congressionally-authorized or sole-executive decisions.⁵³ The domestic contentious politics of the US makes it increasingly unlikely that future commitments can also take the form of a treaty as treaties require 2/3 vote of the

48. Compare RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 301(1) (1987) (defining “international agreement” as any agreement between two or more states or international organizations that is “intended to be legally binding and is governed by international law”) with Vienna Convention of Law of Treaties Art. 2 (“Treaty” means an international agreement concluded between States in written form and governed by international law[.]”).

49. Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 INT’L & COMP. L. Q. 787, 800 (1986).

50. *Nuclear Tests (Australia v. France)*, 1974 I.C.J. Rep. 253, ¶ 43 (Dec. 20) (“When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking... In these circumstances, nothing in the nature of a *quid pro quo*, nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect . . .”).

51. *The Legal Status of Eastern Greenland (Norway v. Denmark)*, 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5); see also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, 2006 I.C.J. Rep. 6, ¶ 50 (Feb. 3) (“a statement of this kind can create legal obligations only if it is made in clear and specific terms.”).

52. *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, 1996 I.C.J. Rep. 803, ¶ 52 (Dec. 12); *The Loewen Group, Inc. and Raymond L Loewen v. U.S.*, ICSID Case No. ARB (AF)/98/3, Award, (June 23, 2006). The Tribunal assessed the criteria of exhaustion of local remedies (¶ 172-217) even though it did not find jurisdiction to hear the case (¶ 240).

53. See e.g., Hathaway, Oona A. *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L. J. 1236, 1288 (2007). During the last two decades of the 20th century, only 4% of US arms control agreements took the form of a treaty. *Id.* at 1257–1258; see also Jean Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. CHI. L. REV. 1675 (2017).

Senate.⁵⁴ In parallel, as treaty-making declined, academics and international law scholars have touted and brought soft law and nonbinding commitments to the center of international law.⁵⁵ In other words, increasingly international law is viewed from the angle of a body of nonbinding unenforceable norms. It is correct that international law generally suffers from lack of enforceability.⁵⁶ However, the framing of the nature of the obligations does not have to follow their modes of enforceability (or lack thereof).

JCPOA, like many other international commitments, should be viewed in the light of its object and purpose. Article 31 of Vienna Convention of the Law of Treaties serves as a guiding principle which is rooted in customary international law. Interpretations shall be done “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁵⁷ Ordinary meaning is not decoupled from good faith; Nor is it detached from the context of agreement and its object and purpose. The JCPOA came about as a result of decades of escalation between Iran and other countries and resolved one of the most contentious international issues in the post-Cold War. It is excruciatingly detailed in terms of parties’ commitments and it involved major powers, each with their own internal laws and internal dynamics. The excessive word hair-splitting (*e.g.* shall *v.* will or decide *v.* call upon) undermines international rulemaking and defies common sense.⁵⁸ The deal is binding even if its violations (by the US principally) may not lead to concrete consequences.⁵⁹ The US approach accompanied by international law experts who dismissed the deal as a mere political commitment and the Resolution as a

54. Relatedly, the US courts increasingly narrowed the scope of enforceability of the international law in US domestic legal order. *Medellin v. Texas*, 552 U.S. 491, 508 (2008) (interpreting Article 94 of the U.N. Charter, under which each U.N. Member “undertakes to comply” with decisions of the International Court of Justice (ICJ), as not transforming judgments of the ICJ into law which is automatically judicially enforceable by the domestic courts of U.N. Members, but instead establishing a commitment on the political branches of U.N. Members to take future action to comply with an ICJ decision); *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976) (reasoning that a specific Security Council resolution was not self-executing because it did not “by [its] terms” confer rights upon individuals)

55. Andrew Guzman, *Against Consent*, 52 VA. J. INT’L L. 747 (2012) (arguing that soft law is a solution to the consent problem and status quo bias of international law). For the opposite view, see Michael Reisman, *Soft Law and Law Jobs*, 2 J. OF INT’L DISP. SETTLEMENT 25 (2011) (“The adjective ‘soft’, when used to modify the word ‘law’, brings to mind the adverb ‘slightly’, when used to modify the word ‘pregnant’. For all of these law jobs, the notion that, besides ‘law’, there is also something out there called ‘soft’ or ‘slightly’ law is not helpful”)

56. John Bolton famously said that “Treaties are ‘law’ only for U.S. domestic purposes. In their international operation, treaties are simply ‘political,’ and not legally binding.” Frederic L. Kirgis, *Treaties as Binding International Obligation*, AM. SOC. OF INT’L L. (May 14, 1997), <https://www.asil.org/insights/volume/2/issue/4/treaties-binding-international-obligation> [https://perma.cc/8DRJ-3BLT].

57. Vienna Convention on the Law of Treaties art. 3, May 23, 1969, 1155 U.N.T.S. 331.

58. Larry D. Johnson, *Pompeo’s Attempt to “Snapback” UN Security Council Sanctions on Iran—“Cut That Out!”*, OPINIOJURIS (Aug. 21, 2020), <http://opiniojuris.org/2020/08/21/pompeos-attempt-to-snapback-un-security-council-sanctions-on-iran-cut-that-out/> [https://perma.cc/CA4W-F3C3].

59. Some believe that the US violated the 2231 Resolution because it reimposed the sanctions that were supposed to be terminated unilaterally. *Id.*

mere recommendation may only, as a leading scholar of international law stated in another context, give international law a bad name.⁶⁰

60. See W. Michael Reisman, *Law, International Public Policy (So-called) and Arbitral Choice in International Commercial Arbitration*, in *International Arbitration 2006: Back to Basics?* 849 (2006).