

MEMORANDUM
What You Should Know about “Snapback”
Political Significance and Legal Problems¹

Executive Summary

The Trump administration’s proposal to use the “Snapback” provision of UNSCR 2231 to reimpose sanctions on Iran is a complex issue that raises both political and legal issues. The use of Snapback is likely to impact U.S. relations with Iran, the U.S. elections, the role and authority of the United Nations Security Council (“UNSC”) and U.S. relations with Russia, China, the EU, other members of the Security Council, and other members of the United Nations. Recently, the U.S. Secretary of State and Permanent Representative to the United Nations informed the U.N. Security Council that the United States was “initiating the restoration of virtually all U.N. sanctions on Iran” that were previously lifted under the Joint Comprehensive Plan of Action (“JCPOA”)² and that those sanctions would come back into effect” as early as September 21, 2020.³

The first part of this memorandum addresses the political significance of the proposal; the second explains why the Trump administration’s attempt to impose Snapback sanctions against Iran under U.N. Security Council Resolution (“UNSCR”) 2231 is unlawful. In brief:

1. By explicitly terminating its participation in the JCPOA the United States is no longer a participant in the JCPOA, a reality that both the other members of the UNSC and all the other participants in the JCPOA have now confirmed.
2. Because the JCPOA and UNSCR 2231 are interconnected documents, even if the United States were still considered to be a “JCPOA participant,” the United States has failed to satisfy the procedural requirements necessary to invoke the Snapback mechanism.
3. International law estops the United States from invoking the Snapback provision after it unilaterally withdrew from the JCPOA; the principles of “good faith” and “unclean hands” bar the United States from invoking the Snapback under UNSCR 2231 when it was the U.S. nonperformance of its JCPOA commitments that triggered any subsequent Iranian nonperformance.

¹ This memorandum was prepared by Ambassador Thomas R. Pickering, former U.S. Undersecretary of State for Political Affairs and United States Permanent Representative to the United Nations, and William Luers, former U.S. Ambassador to Venezuela and Czechoslovakia and President of the Iran Project, with the help of Yale Law students Hirsia Amin, Helia Bidad, Natasha Brunstein, Nicole Ng, Michael Loughlin, and Mark Stevens. Its conclusions are endorsed by W. Michael Reisman, Myres S. McDougal Professor of International Law at Yale Law School; David J. Scheffer, U.S. Ambassador at Large for War Crimes Issues (1997-2001); Dr. Mahnoush H. Arsanjani, Senior Research Scholar, Yale Law School, Member of the Institut de Droit International, former Director of the Codification Division of the United Nations Office of Legal Affairs; and Larry D. Johnson, Adjunct Professor, Columbia Law School, former U.N. Assistant Secretary General for Legal Affairs and Legal Adviser of the International Atomic Energy Agency. All titles are provided for identification purposes only, and the views stated here do not necessarily represent the views of the institutions where the individuals are located.

² Larry D. Johnson, *Pompeo’s Attempt to “Snapback” UN Security Council Sanctions on Iran—“Cut That Out!”*, OPINIO JURIS (Aug. 21, 2020), <https://opiniojuris.org/2020/08/21/pompeos-attempt-to-snapback-un-security-council-sanctions-on-iran-cut-that-out>.

³ *Id.*

I. Political Significance

SNAPBACK is an action under a complex U.N. Resolution (“UNSCR 2231”), which is likely to impact the future of the nuclear deal with Iran; the capacity of the United Nations Security Council (“UNSC”) to enforce its resolutions; and U.S. relations with Russia, China, the EU and the other members of the United Nations.

The United States withdrew in May 2018 from the Joint Comprehensive Program of Action (“JCPOA”) between Iran and the five Permanent Members of the UNSC plus Germany.⁴ The consequences of U.S. withdrawal include a deterioration of U.S. relations with other states including close allies; a weakening of the limits on Iran’s nuclear program; and mounting international discord on how to deal with the threats from Iran’s nuclear ambitions.

In October 2015, the JCPOA was endorsed formally by UNSCR 2231, which required all member states to lift all previous UNSC sanctions against Iran. It also provided in one clause that if one of the “participating states” of the JCPOA found that Iran had significantly non-performed its commitments under the JCPOA, that state could trigger the reinstatement of all previous UNSC sanctions against Iran—the “Snapback.” The resolution was written so that any new UNSC resolution to block the Snapback (the only way to do so) would be subject to the veto.

Since its withdrawal from the JCPOA, the United States has sought to undermine further the JCPOA as part of its maximum pressure campaign against Iran.

On August 14, 2020, the UNSC resoundingly defeated (by 13 to 2 votes) a U.S. resolution to reject a provision in UNSCR 2231 that calls for the lifting of a conventional arms embargo set for October 2020 (five years after UNSCR 2231 was enacted). The lifting of the arms embargo was part of the progressive easing of sanctions against Iran provided for in the JCPOA and UNSCR 2231. Following the defeat of this resolution, the United States turned to the Snapback.

On August 20, the United States triggered the “Snapback,” charging Iran with significant non-performance of its commitments under the JCPOA. The Snapback requires the re-establishment of all previous UNSC sanctions against Iran, including the conventional weapons embargo. Nearly all members of the UNSC (excepting the United States and the Dominican Republic) and many member states of the United Nations have made clear that the United States, because of its May 2018 withdrawal from the JCPOA, is no longer a “participant state” and thus lacks standing to pursue “Snapback.”

Israel and some Gulf states will support the United States. The EU states will continue their separate arms embargo for another two years. Russia and China will support the JCPOA and are likely to sell arms to Iran.

The United States has indicated it will “do what it takes” to continue the embargo, raising the possibility of U.S. secondary sanctions against states or firms engaging in conventional arms trade to and from Iran.

These U.S. threats of secondary sanctions have in the past forced states to decide whether to trade with Iran or the United States. The continuing U.S. use of secondary sanctions has negative consequences on U.S. trade; negative consequences on relationships with many states long-friendly with the United States; threatens the dollar as the world reserve currency; and risks weakening further the UNSC, undermining its capacity to enforce its own resolutions. The

⁴ Joint Comprehensive Plan of Action Preamble, July 14, 2015, 55 I.L.M. 98, 108 (2016) [hereinafter JCPOA], <https://www.europarl.europa.eu/cmsdata/122460/full-text-of-the-iran-nuclear-deal.pdf>.

United States' effort to invoke Snapback is part of the Trump administration's determination to eliminate fully the JCPOA, the only effective international restraint on Iran's nuclear program.

II. Legal Analysis

Through a State Department legal memo (**Appendix A**),⁵ the Trump administration has advanced three main legal arguments to support the legality of its proposed use of the Snapback mechanism. The administration argues that (1) the United States remains a "JCPOA participant State," because that term is fixed over time and cannot be affected by United States' actions since the passing of UNSCR 2231; (2) the JCPOA is a distinct instrument from UNSCR 2231; and (3) the United States' decision to "cease performance of commitments" has "no effect on U.S. rights and obligations" under the Resolution.

Each of these assertions is incorrect. First, under international law, the United States is estopped by its own past statements from claiming that it is still a "JCPOA state" long after it "ceased participating" in the JCPOA and acted contrary to its terms. Second, on their face, the JCPOA and UNSCR 2231 are not distinct and separate, but are intertwined. Only a JCPOA State participant can trigger Snapback. A state cannot simultaneously claim to have "terminated participation" in the JCPOA, while also claiming that it retains standing to be a "JCPOA participant State" entitled to invoke the UNSCR's rights. Third, the well-established international law doctrines of estoppel, good faith and unclean hands bar the United States from invoking the snapback provision. The United States' decision to "cease performance of commitments" under the Agreement, including its obligation to exhaust its remedies under the Agreement, bar it from invoking Snapback rights under UNSCR 2231.

A. **Overview: The Snapback Provision as part of the JCPOA.**

The Joint Comprehensive Plan of Action ("JCPOA") seeks to ensure that Iran has an exclusively peaceful nuclear program. The Joint Plan was agreed upon by Iran and the P5+1 (China, France, Germany, Russia, the United Kingdom, the United States, and the European Union). Generally speaking, the JCPOA envisions a progressive lifting of sanctions in exchange for Iran's dismantling of its nuclear weapons capabilities. Within the JCPOA's discussion of its Dispute Resolution Mechanism, Paragraph 37 provides for UNSCR 2231's "Snapback" mechanism⁶: if a participant has made a complaint asserting that Iran is in "significant non-performance" of its commitments under the JCPOA, and certain procedural requirements are met, sanctions would be reimposed on Iran, unless the UNSC comes to a different decision.⁷

The Trump administration withdrew from the JCPOA in May 2018, but has since taken steps to invoke UNSCR 2231's Snapback mechanism to re-impose sanctions on Iran. Most significantly, on August 20, 2020, Secretary of State Mike Pompeo submitted a letter to the U.N. Secretary-General and the President of the U.N. Security Council informing them that the United States was "initiating the restoration of virtually all UN sanctions on Iran" that were previously

⁵ PassBlue on Twitter, "U.S. Letter to #UN Security Council," Aug. 20, 2020.

⁶ JCPOA ¶ 37. *See also infra* Section II.B.

⁷ JCPOA ¶ 37.

lifted under the JCPOA.⁸ The August 20 letter further claimed that this process would lead to the reimposition of sanctions thirty days from that date.⁹

B. By explicitly terminating its participation in the JCPOA, the United States—through formal declarations, diplomatic statements, and years of recent state practice—has confirmed that it is no longer a “Participant” in this arrangement for purposes of UNSCR 2231.

A May 2018 White House Statement announced that: “President Trump is *terminating United States participation* in the JCPOA” and “*Ending United States Participation*” in the JCPOA.¹⁰ In an accompanying May 2018 press briefing, Trump’s then-National Security Advisor, John Bolton, confirmed that “we’re not using [UNSCR 2231] because we’re out of the deal” when discussing the reimposition of sanctions on Iran.¹¹ In August 2018, U.S. government representatives confirmed in official proceedings before the International Court of Justice that the United States had made a “decision to *cease participation* in the JCPOA.”¹²

A participant in an agreement assumes both rights and obligations under the agreement; it cannot choose piecemeal which provisions to respect and which to ignore. Once the United States, by its own terms, unambiguously announced its decision to “terminate” or “cease participation” in a multilateral accord, it cannot plausibly claim to be a continuing “participant” in that same accord, authorized under international law to invoke its rights. Once the United States ceased to participate in the JCPOA, it ceased to be a “participant” under UNSCR 2231, and lost its legal capacity to trigger UNSCR 2231’s Snapback mechanism.

Under international law, declarations of the highest national officials made through unilateral acts intended to have international legal effect bind the state.¹³ The official statements made by President Trump, Secretary Pompeo, and other leading U.S. officials indicate that the administration itself fully understood its actions to end U.S. participation in the nuclear accord, and hence, to end its ability to hold itself out to be a “participant state” in that same accord.

The other members of the U.N. Security Council and the actual remaining participants to the JCPOA have confirmed that the United States is no longer a “participant” of the agreement. To date, thirteen of the fifteen UNSC members, both permanent and nonpermanent, have explicitly opposed U.S. efforts to reimpose sanctions against Iran. Their letters stress that when the Trump administration ceased its participation in the JCPOA, it forfeited its right to invoke the JCPOA’s remedy regarding reimposition of snapback sanctions.¹⁴ A U.N. party’s entitlements under an

⁸ Johnson, *supra* note 2.

⁹ Remarks of Secretary of State Mike Pompeo, *Secretary’s Remarks on Iran Sanctions Renewal*, U.S. VIRTUAL EMBASSY IRAN (Aug. 21, 2020), <https://ir.usembassy.gov/secretarys-remarks-on-iran-sanctions-renewal/>.

¹⁰ *President Donald J. Trump is Ending United States Participation in an Unacceptable Iran Deal*, WHITE HOUSE (May 8, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-ending-united-states-participation-unacceptable-iran-deal> (emphasis added).

¹¹ *Press Briefing by National Security Advisor John Bolton on Iran*, WHITE HOUSE (May 8, 2018), <https://www.whitehouse.gov/briefings-statements/press-briefing-national-security-advisor-john-bolton-iran>.

¹² *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Public Sitting, 2018 I.C.J. Rep. 26, ¶ 25 (Aug. 30), <https://www.icj-cij.org/files/case-related/175/175-20180830-ORA-01-00-BI.pdf> (emphasis added).

¹³ *Nuclear Tests Case (Aust. v. Fr.)* 1974 I.C.J. Rep. 253 ¶ 46 (20 Dec.).

¹⁴ Saheb Sadeghi, *Trump Can’t Have His Cake and Eat It Too on Iran Sanctions*, FOREIGN POL’Y (Aug. 25, 2020), <https://foreignpolicy.com/2020/08/25/trump-pompeo-iran-snapback-sanctions-jcpoa>.

international agreement depend not just on its own interpretation of the agreement, but also on the interpretation given to its provisions by the other parties to the agreement. The “P5+1”—permanent members of the Security Council plus Germany (together with the European Union)—are all parties to the JCPOA and have rejected the U.S. attempt to invoke the Snapback mechanism. The Governments of France, Germany and the United Kingdom released a joint statement indicating their belief that the United States ceased to be a participant to the agreement upon its withdrawal and “cannot therefore support this action.”¹⁵ Russia also rejected the administration’s attempt to invoke an agreement it abandoned. China has stated that the United States violated UNSCR 2231 when it unilaterally withdrew from the agreement and reinstated “illegal unilateral sanctions” against Iran. According to China, having quit the agreement, the United States has “no right to demand the Security Council invoke a Snapback” and its attempt to do so “has no legal ground and common sense.”

C. Because the JCPOA and UNSCR 2231 are interconnected documents, even if the United States were still to be considered a “JCPOA participant State,” the Trump administration has failed to satisfy the procedural prerequisites for invoking UNSCR 2231’s Snapback mechanism.

Contrary to the Trump administration’s claim, the JCPOA and UNSCR 2231 are not distinct, stand-alone texts. In reality, the JCPOA and UNSCR 2231 constitute a textually and structurally interconnected instrument that seeks to govern Iran’s denuclearization pledges to the other signatories. The documents are bound to one another through their reciprocated incorporation of provisions contained in the complementing document.

First, UNSCR 2231 serves to implement and enforce the provisions laid out in the JCPOA. UNSCR 2231 “[e]ndorses the JCPOA, and urges its full implementation.”¹⁶ The provisions of the JCPOA are baked into the Resolution throughout. For example, paragraphs sixteen through twenty all served to execute “JCPOA [i]mplementation.”¹⁷ In addition, UNSCR 2231 includes the full text of the JCPOA as its Annex A.

Second, the JCPOA likewise complements and relies on the measures contained in UNSCR 2231. The JCPOA carefully outlines a detailed, two-part dispute resolution mechanism that reflects the interconnectedness of the documents: parties must begin by utilizing the JCPOA’s “Joint Commission;” then, only after exhaustion of this internal dispute-resolution mechanism, can parties pursue redress through the U.N. Security Council. The two-part dispute resolution mechanism links UNSCR 2231 and the JCPOA both in terms of legal structure and countries’ legal rights.

The exercise of the United States’ rights under UNSCR 2231 presupposes fulfillment of its duties under the JCPOA. The U.S. decision to “cease performance of commitments” under the JCPOA and failure to exhaust its remedies under the JCPOA bar it from invoking Snapback rights which are provided for participating states under UNSCR 2231.

¹⁵ Statement by the Foreign Ministers of France, Germany and the United Kingdom, FRANCE DIPLOMACY (Aug. 20, 2020), <https://www.diplomatie.gouv.fr/en/country-files/iran/news/article/statement-by-the-foreign-ministers-of-france-germany-and-the-united-kingdom-20>.

¹⁶ UNSCR 2231 ¶ 1.

¹⁷ UNSCR 2231 ¶¶ 16-20.

Paragraph 36 of the JCPOA assumes that the Joint Commission will be the first body of dispute resolution, and concludes that “[i]f the issue still has not been resolved to the satisfaction of the complaining participant, . . . then the participant could . . . notify the UN Security Council that it believes the issue constitutes significant non-performance.”¹⁸ Paragraph 37 explicitly establishes that dispute resolution under Paragraph 36 will be pursued and *exhausted* before the dispute resolution mechanism under UNSCR 2231 becomes available: “Upon receipt of the notification from the complaining participant, as described above, including a description of the good-faith efforts the participant made to exhaust the dispute resolution process specified in this JCPOA, the UN Security Council, in accordance with its procedures, shall vote on a resolution to continue the sanctions lifting.”¹⁹

The Trump administration has not invoked the Snapback provision as required, because it has failed to satisfy these dispute-resolution mechanisms. Before a complaining party is entitled to pursue Snapback through the U.N. Security Council, it must comply with paragraph 36 and 37’s requirement that it first exhaust the dispute resolution procedure established by the JCPOA’s Joint Commission. The Trump Administration did not exhaust the dispute resolution process; instead it unilaterally terminated the agreement and ceased its own performance in disregard of the agreement.²⁰ Because the Trump administration has failed to exhaust the Joint Commission procedure, it is barred from pursuing Snapback through UNSCR 2231.²¹

D. International law estops the Trump Administration from invoking the Snapback mechanism after unilaterally withdrawing from the JCPOA.

Given that the Trump Administration unambiguously “ceased,” “ended,” and “terminated” U.S. participation in the JCPOA over a year ago, the administration’s efforts to now invoke the provisions of the agreement violates the bedrock principle of good faith in international law. It is a fundamental principle of the United Nations Charter that “[a]ll Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in *good faith* the obligations assumed by them in accordance with the present Charter.”²² Judgments of the International Court of Justice have affirmed that the presumption of honesty and good faith applies

¹⁸ JCPOA ¶ 36 (emphasis added).

¹⁹ JCPOA ¶ 37.

²⁰ See *infra* Section II.A.

²¹ Additionally, it is worth noting that the USG cannot plausibly argue that paragraph 10 of UNSCR 2231 merely “encourages” parties to utilize the dispute-resolution mechanism outlined through JCPOA paragraph 36. Paragraph 10 should be read as reflecting the built-in understanding that all parties will “exhaust” the mechanism in paragraph 36, even if they cannot “resolve” the dispute through this mechanism. Paragraph 10 “encourages” parties to “resolve” the disputes through the Joint Commission while *assuming* that they *have* to exhaust that dispute-resolution mechanism before Snapback can become available under UNSCR 2231.

²² U.N. Charter art. 2, ¶ 2 (emphasis added). The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the UN General Assembly without opposition, further provides that “[e]very [s]tate has the duty to fulfill in good faith the obligations assumed by it in accordance with the Charter of the United Nations . . . its obligations under the generally recognized principles and rules of international law . . . [and] obligations under international agreements valid under the generally recognized principles and rules of international law.” G.A. Res. 2625 (XXV), at 124 (Oct. 24, 1970).

to contracting parties under international law.²³ As the ICJ noted in the *Nuclear Test Cases*, the principle of good faith governs “the creation and performance of legal obligations, whatever their source,” including those arising from the unilateral declarations of a state.²⁴ Provided the declaration is public, it evidences an intent of the declaring state to bind itself, and the receiving state takes cognizance of the statement, a unilateral declaration can create an international legal obligation, with its binding character resting on good faith.²⁵

The Trump administration’s current attempt to trigger the Snapback mechanism of an agreement it unilaterally ceased participation in more than a year ago constitutes a breach of the duty of good faith under international law. The issue is not whether the JCPOA is a “treaty” under international or U.S. constitutional law. Under international law, the clear 2018 unilateral declarations made by the administration with respect to U.S. future nonparticipation in the JCPOA constitute binding statements governed by the international principle of good faith.

The terms of the JCPOA expressly incorporate the international law principle of good faith. Both the JCPOA’s preamble (paragraph viii) and paragraph 28 provide that the E3/EU+3 and Iran “commit to implement [the agreement] in good faith.” Additionally, in the same paragraphs, the countries “commit . . . to refrain from any action inconsistent with the letter, spirit and intent of this JCPOA that would undermine its successful implementation.” This requirement includes adhering to the specified dispute resolution process in the event participants believe another participant is not complying with the agreement. As paragraph 36 notes, the process entails first raising the alleged compliance issue with the Joint Commission and an Advisory Board before notifying the UN Security Council of this alleged nonperformance. Paragraph 37 makes clear that participants must make “good-faith efforts . . . to exhaust the dispute resolution process specified” in the agreement prior to notifying the Security Council.²⁶

Rather than making a good-faith effort at exhausting the requisite process, the United States committed two unsanctioned actions counter to the agreement. First, it withdrew from the deal unilaterally—taking none of the required dispute resolution steps outlined above; second, it then sought directly to proceed to the final dispute resolution step, even after publicly ceasing its participation in the deal. Undertaking these actions cannot be considered implementing the agreement in “good faith.”

Nor can the United States plausibly rely on the *clausula rebus sic stantibus* principle—which allows a state to consider a treaty inapplicable because of changed circumstances—as an “escape clause” that excused it from implementing the agreement in good faith. As the Vienna Convention on the Law of Treaties specifies, this principle can only be credibly invoked when the changed circumstances could not have been foreseen and when the party seeking to invoke the principle did not precipitate the changed circumstances through its own actions.²⁷ Neither of these

²³ See, e.g., *Lighthouses Case (Fr. v. Greece)*, Judgment, 1934 P.C.I.J. (ser. A/B) No. 62, at 47 (Mar. 17) (Séfériadés, J., separate opinion) (“Contracting parties are always assumed to be acting honestly and in good faith. That is a legal principle, which is recognized in private law and cannot be ignored in international law.”).

²⁴ *Nuclear Test Cases (Austl. v. Fr.)*, Judgment, 1974 I.C.J. 253, ¶ 46 (Dec. 20).

²⁵ See International Law Commission, *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations*, with Commentary Thereto (2006) 58th Session, UN Doc A/61/10; see also Steven Reinhold, *Good Faith in International Law*, 2 UCL J. L. & JURIS. 40, 48-49 (2013) (explaining that “good faith can be a basis for legal obligations” effectuated by a unilateral declaration of a state).

²⁶ JCPOA ¶ 37.

²⁷ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331,

conditions are present here.²⁸ By contrast, another party to the agreement, Iran, in response to the U.S. withdrawal, has initiated the dispute resolution mechanism to allege noncompliance by the United States, rather than withdrawing outright.

The doctrine of “clean hands” provides that a “state which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were . . . provoked by it.”²⁹ Thus, a claimant’s illegal conduct may deny the U.S. government of *locus standi* in this matter and bar the claim for relief.³⁰ Because the United States has acted contrary to the letter and intent of the JCPOA by ceasing its participation unilaterally rather than availing itself of the agreement’s formal dispute resolution process, it lacks the “clean hands” needed to entitle it to lawfully invoke the Snapback provision.

The principle of estoppel bars states from invoking an agreement if they seek to do so having previously breached the agreement. A general principle of international law, estoppel rests on good faith and consistency and serves to protect the legitimate expectations of states by preventing a party from taking a legal position that contradicts its previous representations or conduct that have induced reliance on the part of another party.³¹ Because the United States terminated its participation in the JCPOA over a year ago, and all the continuing participants in the JCPOA, including Iran, have relied on this declaration, estoppel now bars the United States from abruptly claiming that it remains a JCPOA participant for the purposes of invoking the Snapback mechanism.

Finally, the principle of “good faith” bar the United States from invoking the Snapback under UNSC 2231 when U.S. nonperformance of its JCPOA commitments triggered some subsequent Iranian nonperformance. Throughout 2017 and 2018, the United States unilaterally reimposed all of the U.S. sanctions that it had previously lifted under the JCPOA.³² Reimposing these sanctions constituted a breach of the JCPOA, which arguably then licensed Iran’s steps

https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf; Fisheries Jurisdiction (U.K. v. Ice.), Interim Protection Order, 1972 I.C.J. 12 (Aug. 17) (noting that “Article 62 of the Vienna Convention on the Law of Treaties, . . . may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 336 (AM. LAW INST. 1987).

²⁸ The United States’ withdrawal from the agreement plainly precipitated Iranian acts of noncompliance. And it was certainly foreseeable that Iran might not comply with the terms of the JCPOA—as demonstrated by the inclusion of a dispute resolution mechanism in the agreement—once the United States ceased its own reciprocal compliance with the JCPOA and began to breach its terms.

²⁹ Sir Gerald Fitzmaurice, 92 *Recueil des Cours* (1957-II) 119 (citations omitted); *see also* Rahim Moloo, *A Comment on the Clean Hands Doctrine in International Law*, 2010 *INTER ALIA* 39 (2010). While the ICJ has not explicitly endorsed the principle, ICJ decisions have relied on its underlying logic. *See, e.g.*, *Diversion of Water from Meuse* (Neth. v. Belg.), Judgment, 1937 P.C.I.J. (ser. A/B) No. 70, at 77 (June 28) (Hudson, J., individual opinion) (“It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party.”).

³⁰ *See* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 503 (7th ed. 2008).

³¹ *See* Reinhold, *supra* note 11, at 13; *see also* LORD MCNAIR, *THE LAW OF TREATIES* 485 (1961) (“It is reasonable to expect that any legal system should possess a rule to prevent a person who makes . . . a statement upon which another person . . . relies to the extent of changing his position, from later asserting a different state of affairs . . . ‘You cannot blow hot and cold.’”).

³² *See, e.g.*, United States Institute for Peace, *US Sanctions on Iran*, IRAN PRIMER (Sept. 15, 2017), <https://iranprimer.usip.org/blog/2017/jul/31/us-sanctions-iran-2017>; Donna Borak & Nicole Gaouette, *US Officially Reimposes All Sanctions Lifted Under 2016 Iran Nuclear Deal*, CNN (Nov. 5, 2018), <https://www.cnn.com/2018/11/05/politics/iran-sanctions/index.html>.

toward non-compliance. Specifically, Paragraph 26 of the JCPOA specifies that “[t]he U.S. administration, acting consistent with the respective roles of the President and the Congress, will refrain from re-introducing or re-imposing the sanctions specified in Annex II . . . [and] will refrain from imposing new Nuclear Sanctions.”³³ Then, Paragraph 26 gives clear notice that “Iran has stated that it will treat such a re-introduction or re-imposition of the sanctions . . . as *grounds to cease performing* its commitments under this JCPOA.”³⁴

As noted above, Paragraph 36 outlines a dispute resolution process through which all parties—including Iran—can allege violations of JCPOA commitments.³⁵ Paragraph 36 concludes that “[i]f the issue still [at the end of paragraph 36’s procedures] has not been resolved to the satisfaction of the complaining participant . . . *then* that participant could treat the unresolved issue as grounds to cease performing its commitments under this JCPOA in whole or in part.”³⁶ In the summer of 2017, Iran pursued JCPOA’s formal dispute resolution mechanism under paragraph 36.³⁷ Now Iran appears to claim that the issue has not been resolved to its satisfaction, and that it is therefore entitled to treat that unresolved issue as grounds to cease performing its commitments under the JCPOA “in whole or in part” and to cease respecting the JCPOA enrichment limits to which it had previously adhered.³⁸

The causality is clear: United States’ termination of its participation in the JCPOA triggered Iran’s decision to modify its own performance of its provisions (i.e., paragraphs 26, 36). Estoppel bars the United States from unilaterally asserting that Iran’s actions provide a basis for triggering UNSCR 2231’s Snapback provision.³⁹

The diplomatic problems flowing from this unilateral action could be formidable and prove politically costly. The U.S. invocation of the snapback mechanism will likely create two unresolvable conflicts with our allies: first, a conflict over whether a “significant non-performance” has in fact occurred by Iran; and second, a conflict over *whose* non-performance—the United States’ or Iran’s—was more problematic or more obstructive of the object and purpose of the JCPOA. However U.S. allies might choose to resolve these thorny diplomatic conflicts, there can be little doubt that the United States precipitated them, by being the first state to transgress its commitments under the JCPOA.

Conclusion

For all of the reasons detailed above—lack of standing, estoppel, and violation of the principles of good faith and clean hands—the Trump Administration’s current attempt to impose Snapback sanctions against Iran under UNSCR 2231 is unlawful. The Trump administration’s current attempt to impose Snapback sanctions against Iran under UNSCR 2231 is not only barred by international law but may entail costly political consequences in its wake.

³³ JCPOA ¶ 26.

³⁴ *Id.* (emphasis added). Paragraph 37 includes a nearly identical statement. JCPOA ¶ 37.

³⁵ See *Infra* Section III.

³⁶ JCPOA ¶ 36 (emphasis added).

³⁷ Bozorgmehr Sharafedin, *Iran Accuses United States of Breaching Nuclear Deal*, REUTERS (Aug. 1, 2017), <https://uk.reuters.com/article/uk-iran-usa-sanctions-idUKKBN1AH427>.

³⁸ *Explaining Iran’s Nuclear Position: An Interview with Iranian Ambassador Majid Takht Ravanchi*, ARMS CONTROL ASSOC. (Sept. 2020), <https://www.armscontrol.org/act/2020-09/interviews/explaining-irans-nuclear-position-interview-iranian-ambassador-majid-takht>.

APPENDIX A (Undated State Department Memo)

The United States Has an Explicit Right to Initiate Snapback under United Nations Security Council Resolution 2231

The United States has an explicit right under United Nations (UN) Security Council resolution 2231 (2015) (Resolution 2231) to initiate the snapback of UN measures on Iran. Any argument to the contrary would supplant the resolution's plain text with silent conditions, effectively allowing any State's national policy decision to strike critical text from a UN Security Council resolution. Such an approach would create a perilous precedent that could threaten the force of virtually any Security Council decision. * * * Resolution 2231 provides the United States with the right to initiate the "snapback" of UN measures on Iran that had been in place prior to January 2016. That right is available to the United States irrespective of its current position on, or activities in relation to, the Joint Comprehensive Plan of Action (JCPOA), a non-binding political arrangement that is related to but distinct from Resolution 2231. As explained in section I, Resolution 2231 establishes a term, "JCPOA participants," that is fixed in content and fixed over time, and provides the States identified in that term's definition, including the United States, the right to initiate snapback. Resolution 2231 sets no other conditions on the eligibility of such States to initiate snapback. Additionally, as set out in section II, no events subsequent to Resolution 2231's adoption have altered the United States' right to initiate snapback. In particular, the United States' May 8, 2018 announcement that, for national security reasons, it did not intend to continue to provide Iran with relief from U.S. sanctions that had been lifted under the JCPOA had effects only for that non-binding political arrangement. That announcement, and the United States' actions to implement it, did not, and as a legal matter, could not, alter Resolution 2231 and the United States' right to initiate snapback thereunder.

I. The Text of Resolution 2231 Gives "the United States" a Fixed Right to Initiate Snapback "[T]he United States" and any other "JCPOA participant State" may initiate snapback. Operative paragraph (OP) 11 of Resolution 2231 sets out the requirements for initiating snapback. Those requirements are that (i) a "JCPOA participant State" (ii) notify the UN Security Council (iii) of an issue it believes constitutes "significant non-performance" of commitments under the JCPOA.¹ As described further in section II below, non-binding political commitments under the JCPOA are separate and distinct from the legal right to initiate snapback under Resolution 2231. 1 S.C. Res. 2231, ¶ 11, U.N. Doc. S/RES/2231 (July 20, 2015) (UNSCR 2231). –

2 - a. Resolution 2231 Establishes a Fixed Term, "JCPOA Participants," That Expressly Includes "the United States" in Its Definition The text of Resolution 2231 provides the United States with the right to initiate snapback regardless of its current position on, or activities in relation to, the JCPOA's non-binding political commitments. Specifically, OP 10 of Resolution 2231 creates a defined term—"JCPOA participants"—and expressly lists "the United States" as one of those "JCPOA participants," in addition to "China, France, Germany, the Russian Federation, the United Kingdom, ... the European Union (EU), and Iran."² OP 11 explicitly states that a "JCPOA participant State" may initiate snapback.³ That right endures regardless of whether one views the United States as being in non-performance of the commitments it made under the JCPOA or as not currently participating in that political arrangement.

b. Resolution 2231 Places No Other Conditions on the Eligibility of States That Are Among the Named "JCPOA Participants" The Security Council could have defined the term "JCPOA participants"

in OP 10 by means other than a list of named entities. But it did not do so. It fixed a list of entities, including “the United States,” that are eligible to initiate snapback. Similarly, if it had wished to condition the right to initiate the snapback mechanism on more than just that the actor initiating snapback be one of the States identified as “JCPOA participants” in OP 10, it could have done so. But it did not do so. It would have been a simple task for the Council, for example, to have stated that the right to initiate snapback is available only to States considered to be “currently” participating in the JCPOA or in full performance of their JCPOA commitments at the time of the initiation. But it did not do so. Instead, the Council provided the right to initiate the snapback mechanism to States identified as “JCPOA participants” in OP 10. Indeed, the fact that the Council used the phrase “JCPOA participant State” (emphasis added) to purposefully exclude one “JCPOA participant” listed in OP 10—the European Union—from the set of actors that could initiate snapback demonstrates that the Council: (i) clearly contemplated whether the right should be limited in some manner; (ii) was aware of how to draft such a limitation; and (iii) affirmatively decided that the only limitation on the “JCPOA participants” that have that right under OP 11 is that they be one of the States listed by name in OP 10, including the United States. The assertion that the term “JCPOA participant State” in OP 11 should be interpreted independently from the definition of “JCPOA participants” in OP 10 and that paragraph’s express listing of entities within that grouping is also not persuasive. Specifically, this argument overlooks—and gives no force to—the drafters’ purposeful modification in OP 11 of the OP 10 term with the additional word “State” to exclude the European Union from the group given the right to initiate snapback. If the term “JCPOA participants” established in OP 10 were to have 2 UNSCR 2231, ¶ 10 (listing China, France, Germany, the Russian Federation, the United Kingdom, the United States, the European Union, and Iran and then defining the grouping in a parenthetical as “the ‘JCPOA participants’”). 3 UNSCR 2231, ¶ 11.

3 - no relevance in interpreting the meaning of references to a “JCPOA participant” or “JCPOA participant State” in subsequent paragraphs of the resolution—all of which appear in binding provisions

4—then the establishment of that term in OP 10 would be rendered mere surplusage. It should be clear to all that the Council did not intend to waste its words. Whether one calls the term “JCPOA participants” in OP 10 a “defined term,” “shorthand,” or a “label” for a grouping that is then given operative effect in later paragraphs, including in OP 11, is irrelevant. The fact is that OP 10 establishes a term—“JCPOA participants”—that is given a meaning that is fixed in content and fixed over time.

c. Developments Beyond the Four Corners of Resolution 2231 Did Not and Could Not Change the United States’ Right To Initiate Snapback Unilateral statements or other actions by a UN Member State cannot alter the language or meaning of a term defined by the Security Council, nor the rights it created for the States identified. Only the Security Council itself can modify the text of one of its resolutions by adopting a subsequent resolution. One UN Member State, even one Member of the Security Council, cannot unilaterally change the text of a Security Council resolution. For example, UN Security Council resolution 2531 (2020) established the term “the Malian Parties” and defined it as “the Government of Mali and the Plateforme and Coordination armed groups.”⁵ That resolution then proceeds to urge “the Malian Parties” to take certain action.⁶ No Member State has the ability to declare that—due to a changed circumstance or some other reason—one of the three named entities is no longer one of “the Malian parties” to which the resolution Council’s entreaties in resolution 2531 are directed. It is a defined term, with fixed content, used for purposes of that resolution. The only way to adjust the definition of “the Malian parties” for purposes of the Council’s efforts to address the situation in Mali would be through adoption of a subsequent

Security Council resolution amending the definition of the term. Any argument to the contrary aggrandizes power to UN Member States that they simply do not have as a matter of international law. The meaning of OPs 10 and 11 of Resolution 2231 must be determined in accordance with the plain language of the text negotiated, drafted, and adopted by the Council, and that text alone.

II. The May 8, 2018 U.S. Decision To Cease Performance of Commitments It Had Under the JCPOA Had No Effect on U.S. Rights and Obligations under Resolution 2231

a. The JCPOA Is a Non-Binding Political Arrangement, and Resolution 2231 Did Not Change That The JCPOA is a political arrangement consisting of non-binding political commitments, not an international agreement that imposes binding obligations. Resolution 2231 did not 4 UNSCR 2231, ¶¶ 11, 13, and 21. 5 S.C. Res. 2531 ¶ 1, U.N. Doc. S/RES/2531 (June 29, 2020). 6 See, e.g., *id.* at ¶¶ 3, 9, and 11. - 4 - transform the JCPOA from a non-binding political arrangement, despite unfounded claims to the contrary. The JCPOA participants therefore were and are free to cease performing the nonbinding political commitments they had under the nuclear arrangement at any time without violating international law, so long as they comply with international obligations they have that are independent of the JCPOA, including their obligations under Resolution 2231. Ceasing performance of non-binding political commitments under the JCPOA has no effect on Member States' rights and obligations under Resolution 2231. The non-binding JCPOA is distinct from Resolution 2231, even though there is a close relationship between the two, and even though Resolution 2231 makes binding some aspects of the political arrangement—particularly, the nuclear-related “procurement channel.” 7 When the Security Council imposes obligations under Chapter VII, as is the case for Resolution 2231, it does not mean that all of the provisions contained therein are legally binding. Because article 25 of the UN Charter requires Member States to “accept and carry out” the “decisions” of the Security Council, and article 41 of Chapter VII of the Charter authorizes the Security Council to “decide” to impose certain measures, it is generally understood that when the Council uses other verbs, such as “calls upon” or “urges” or even “demands,” it is not imposing legally binding obligations. In Resolution 2231, the Council went to great lengths to make clear which of the resolution’s provisions were intended to impose legal obligations. The Council not only used the word “decides” in Resolution 2231 when it intended to impose obligations on UN Member States, but also took the unusual step of specifying in such provisions that it was “acting under Article 41 of the Charter of the United Nations” to make clear that those provisions of the resolution are legally binding. These legally binding provisions do not include OP 1, which “endorses” the JCPOA, or OP 2, which “calls upon all Member States” to support implementation of the JCPOA. The Security Council’s endorsement of the JCPOA in OP 1 of Resolution 2231 was, consistent with the plain meaning of that word and Council precedent, simply an expression of political support.⁸ Neither that endorsement nor the inclusion of the JCPOA as an annex to the resolution transformed the JCPOA into a set of legal obligations 7 See UNSCR 2231, ¶¶ 16-20. 8 The Council has on many occasions endorsed and/or annexed non-binding documents to its resolutions, but doing so did not render them legally binding. See, e.g., S.C. Res. 2510 (2510), ¶ 2, U.N. Doc. S/RES/2510 (Feb. 12, 2020) (“Endors[ing] the Conference Conclusions as contained in the document circulated as S/2020/63 and notes that these represent an important element of a comprehensive solution to the situation in Libya”); S.C. Res. 2202, ¶ 1, U.N. Doc. S/RES/2202 (Feb. 17, 2015) (in the context of the conflict in eastern Ukraine, endorsing and annexing the “Package of Measures for the Implementation of the Minsk Agreements”); S.C. Res. 750, ¶ 4, U.N. Doc. S/RES/750 (Apr. 10, 1992) (in the context of Cyprus, endorsing “the set of ideas described in paragraphs 17 to 25 and 27 of the Secretary-General’s report as an appropriate basis for reaching an overall framework agreement, subject to the work that needs to be done on the outstanding issues, in particular on territorial

adjustments and displaced persons, being brought to a conclusion as an integrated package mutually agreed upon by both communities”); S.C. Res. 668, ¶ 1, U.N. Doc. S/RES/663 (Sept. 20, 1990) (endorsing “the framework for a comprehensive political settlement of the Cambodia conflict and encourag[ing] the continuing efforts of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America in this regard”). - 5 - binding on either the JCPOA Participants or other UN Member States.⁹ The text of Resolution 2231 itself makes clear that the annexes to the resolution are not automatically rendered legally binding. OP 7(b) of Resolution 2231 specifies that certain provisions of Annex B are legally binding; if the entire annex were automatically legally binding by annexation, then OP 7(b) would serve no purpose. Similarly, in OP 2, the Council issued a non-binding request that “calls upon” Member States to support implementation of the JCPOA rather than a binding directive that “decides” Member States shall do so. Other Member States have repeatedly pointed out that Iran’s missile launches do not violate Iran’s obligations under Resolution 2231 because paragraph 3 of Annex B “call[s] upon” Iran not to undertake certain missile activity, and such “calls upon” provisions are non-binding. Resolution 2231 thus imposes no obligation on Member States as a general matter to implement or support implementation of the non-binding commitments made under the JCPOA.

b. The U.S. Re-Imposition of Sanctions on Iran Did Not Change the United States’ Legal Rights and Obligations under Resolution 2231 Thus, the United States’ decision, announced on May 8, 2018, that the JCPOA failed to protect U.S. national security interests and, therefore, that the United States would immediately begin the process of re-imposing U.S. sanctions on Iran that had been lifted under the political arrangement did not violate any obligations of the United States under international law. Moreover, the United States is in full compliance with its obligations under Resolution 2231, namely the measures in Annex B to the resolution that the Council rendered legally binding through OP 7(b), which place restrictions on nuclear- and missile-related transfers to Iran, as well as transfers of arms in and out of Iran, and establish a targeted asset freeze and travel ban.¹⁰ In disputing the U.S. right to initiate snapback, some have asserted that a State cannot avail itself of legal rights if it is in violation of corresponding legal obligations. Without a hint of irony, those who make this assertion nevertheless recognize that Iran continues to reap significant benefits from Resolution 2231, even though Iran has repeatedly violated the resolution through numerous arms transfers that have been widely recognized as a violation by other JCPOA participants and the international community.¹¹ Even assuming, *arguendo*, that the aforementioned principle applies in this context, the premise that the United States is in violation of international obligations under the JCPOA and/or Resolution 2231 is legally inaccurate. As explained above, the U.S. decision to cease performing the commitments it had under the JCPOA violated no U.S. obligations under international law. Therefore, even on such a theory, it cannot be said that the United States no longer has the right under OP 11 of Resolution 2231 to initiate the snapback of UN measures on Iran. ⁹ Cf., e.g., OP 6 of UN Security Council resolution 2118 (2014), in which the Security Council “decides” that Syria “shall comply” with a decision of the Executive Council of the Organisation for the Prohibition of Chemical Weapons that was annexed to the resolution. S.C. Res. 2118, ¶ 6, U.N. Doc. S/RES/2118 (Sept. 26, 2013). ¹⁰ UNSCR 2231, Annex B, ¶¶ 2, 4, 5, 6(a)-(f). ¹¹ Iran’s violations of Resolution 2231’s arms-related restrictions are a matter of public record. See, e.g. Ninth Report of the UN Secretary-General on the Implementation of Security Council Resolution 2231 (2015), U.N. Doc. S/2020/531 (June 11, 2020), ¶ 11. - 6 - The May 8, 2018 U.S. action—deciding not to perform commitments the United States had under the Plan of Action—in and of itself therefore only had effects for the JCPOA, not Resolution 2231. On that date, the United States announced that it did not intend to provide Iran with relief from U.S. sanctions that had been lifted under the JCPOA, a political agreement, and this announcement of U.S. non-performance of the political arrangement

was simply that. Neither the U.S. President's announcement that day nor any associated documents mention or were addressed to any aspect of Resolution 2231. Nor was there any U.S. notification to the UN Security Council of the steps the United States was taking to re-impose nuclear-related sanctions on Iran. There is a straightforward reason for this: such a notification was not required by Resolution 2231, and the May 8, 2018