

# THE RISE AND FALL OF U.S. SECONDARY SANCTIONS: THE IRAN OUTCASTING AND RE-OUTCASTING REGIME

Pardis Gheibi\*

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## ABSTRACT

The Joint Comprehensive Plan of Action (JCPOA) was the product of aggressive “secondary sanctions”—innovative sanctions that put economic pressure on the target state by punishing states and entities that engage in transactions with the target state. Prior to the JCPOA, the United States used secondary sanctions to “outcast” Iran—isolate it from the international community. After Iran entered into the JCPOA, these sanctions were removed as a reward for its cooperation. In May 2018, however, the United States withdrew from the JCPOA and re-imposed the secondary sanctions in order to “re-outcast” Iran. But unlike the pre-JCPOA outcasting regime, the re-outcasting regime was not imposed in response to any violation of international law by Iran; instead, it was imposed for solely policy reasons. As a result, members of the international community condemned the use of secondary sanctions as politically motivated and illegitimate.

Although the use of secondary sanctions is a relatively new phenomenon, it has become increasingly more prevalent since the Iran sanctions regime, serving as one of the main sources of pressure against nations such as Cuba, North Korea, Russia, and Venezuela. In contrast to the growing prominence of secondary sanctions, however, the academic literature on the topic remains thin. This piece seeks to fill that gap. By comparing the pre-JCPOA outcasting regime with the re-outcasting regime, this piece provides a timely insight into the counter-productive consequences of imposing secondary sanctions for purely policy reasons. This piece highlights that without international law, secondary sanctions are viewed as illegitimate, which leads to defiance by states and creates a “chilling effect” that makes cooperation less attractive for the outcast. Thus, this piece proposes that the United States should only impose secondary sanctions in response to a state’s violation of international law in order to avoid undermining the power of these sanctions in the long run.

## I. INTRODUCTION

On August 5, 2015, President Barack Obama, in a speech at American University, declared: “[w]e built a coalition and held it together through sanctions and negotiations, and now we have . . . a solution that prevents Iran from obtaining a nuclear weapon, without resorting to war.”<sup>1</sup> President Obama made this speech less than one month after the implementation of the historic Joint Comprehensive Plan of Action (JCPOA).<sup>2</sup> The “Iran Deal,” as it is more commonly known, was reached between the Islamic Republic of Iran and China, France, Russia, the United Kingdom, the United States, and Germany (the P5+1).<sup>3</sup> The Deal sought to neutralize the threat of a nuclear-armed Iran and ensure Iran’s compliance with its international-legal obligations.<sup>4</sup>

In his speech, President Obama highlighted the manner in which the international community reached this monumental achievement.<sup>5</sup> Instead of resorting to violence, the international community imposed the most comprehensive economic sanctions regime to date in order to induce Iran’s cooperation.<sup>6</sup> By denying Iran the benefits of cooperation, the international community curbed Iran’s nuclear program and enforced international law without resorting to violence—a process that Oona Hathaway and Scott Shapiro coined as “outcasting.”<sup>7</sup> The United States achieved this goal mainly through “secondary sanctions”: sanctions that seek to pressure the target state (Iran) by punishing *other* states or entities that engage in business with the target state.<sup>8</sup>

Despite this initial success, however, on May 8, 2018, the United States unilaterally withdrew from the JCPOA and re-imposed all previous

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<sup>1</sup> Press Release, Office of the Press Sec’y, Remarks by the President on the Iran Nuclear Deal (Aug. 5, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/08/05/remarks-president-iran-nuclear-deal>.

<sup>2</sup> Joint Comprehensive Plan of Action, July 14, 2015, <https://2009-2017.state.gov/documents/organization/245317.pdf> [hereinafter JCPOA].

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Press Release, *supra* note 1.

<sup>6</sup> *Id.*

<sup>7</sup> Oona A. Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 258 (2011).

<sup>8</sup> GARY SAMORE, BELFER CTR. FOR SCI. & INT’L AFF., SANCTIONS AGAINST IRAN: A GUIDE TO TARGETS, TERMS, AND TIMETABLES 4 (2015), <https://www.belfercenter.org/sites/default/files/files/publication/Iran%20Sanctions.pdf> (detailing that “[t]he Iran Sanctions Act was a “secondary” sanction, meaning companies not based in the U.S. were also subject to sanctions by virtue of a threat: if companies chose to do business with Iran’s energy sector, they could not also do business with the United States.”).

secondary sanctions.<sup>9</sup> Given the unparalleled economic power of U.S. secondary sanctions, their re-imposition virtually “re-outcasted” Iran. But unlike the pre-JCPOA outcasting regime, the re-outcasting regime was not imposed in response to violations of international law; rather, the re-outcasting regime came *despite* Iran’s full compliance with its international legal obligations.<sup>10</sup> As a result, the re-outcasting regime was uniformly condemned by the international community as misguided and purely political.<sup>11</sup> This diplomatic context, in turn, led to two counterproductive results: (1) it encouraged sovereign nations to defy U.S. secondary sanctions in a way that might expose them as empty threats, and (2) it plagued the international private sector with a “chilling effect.”<sup>12</sup> These consequences not only undermine the Iran re-outcasting regime, making it more difficult for the United States to re-engage with Iran, but they will also diminish the power of U.S. secondary sanctions in general, thereby undercutting their role as tools of international engagement.

This piece proposes that in order to prevent further weakening of U.S. secondary sanctions, these sanctions should only be used to outcast nations that are in violation of their international legal obligations. That is because international law legitimizes the use of these sanctions. In light of the rise of U.S. secondary sanctions against foreign states other than Iran, such as Cuba, North Korea, Russia, and Venezuela, this piece seeks to use the Iran sanctions regime as a case study to provide timely insights and suggestions for future uses of these sanctions.

This piece will proceed as follows: Section I will provide historical context for the sanctions by outlining Iran’s nuclear developments; Section II will provide an overview of the pre-JCPOA outcasting regime and highlight the unique role of U.S. secondary sanctions in creating this regime; Section III will explore the way in which sanctions impacted Iran’s economy, how the United States promised a path to reintegration for Iran, and how Iran’s foreign policy changed in response to the sanctions and the diplomatic effort; Section IV will explore the lead-up to and details of the JCPOA as well as Iran’s initial reintegration into the international community; and, finally, Section V will outline the Iran re-outcasting regime, examine its counterproductive nature, and explain the impact of the re-outcasting regime on the fate of the renewed JCPOA negotiations and future outcasting regimes.

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<sup>9</sup> Mark Landler, *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>.

<sup>10</sup> See *infra* Part V.

<sup>11</sup> See *infra* Part V.

<sup>12</sup> See *infra* Part V.

## II. HISTORICAL CONTEXT

The international community's concern about Iran's nuclear program did not emerge in a vacuum; it arose in response to the rise of an aggressive and ideologically motivated Iran. Since the 1979 Islamic Revolution, Iran has been at the center of numerous international conflicts.<sup>13</sup> And while Iran's nuclear program has only been a cause for concern since the mid-2000s, Iran's nuclear capabilities have been decades in the making. This Section will provide a brief overview of this historical context by summarizing the rise of a nuclear Iran and highlighting Iran's aggressive behavior.

In 1957, through its "Atoms for Peace" program, the United States took the first step in creating one of the most dangerous nuclear programs in the world.<sup>14</sup> At the time, President Eisenhower wanted to help spread nuclear technology for peaceful purposes and helped the Shah of Iran create the Tehran Nuclear Research Center (TNRC).<sup>15</sup> In 1970, Iran ratified the Treaty on the Non-Proliferation of Nuclear Weapons (NPT)<sup>16</sup> as a Non-Nuclear Weapon State (NNWS), and in doing so agreed not use its nuclear program to manufacture or otherwise acquire nuclear weapons.<sup>17</sup> Pursuant to Article III of the NPT, Iran signed a Comprehensive Safeguards Agreement (CSA) with the International Atomic Energy Agency (IAEA), which required Iran to be transparent about its nuclear activities and related facilities.<sup>18</sup> For years, Iran developed its nuclear program peacefully and worked closely with the international community. This cooperation, however, ended in 1979 following the Islamic Revolution.

With the inception of the Islamic Republic, Iran's nuclear program became more advanced and secretive.<sup>19</sup> In 2002, the Iranian opposition group

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<sup>13</sup> See, e.g., Bureau of Democracy, Human Rights, and Labor, *2020 Country Reports on Human Rights Practices: Islamic Republic of Iran*, U.S. DEP'T OF STATE (Mar. 30, 2021), <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/iran/> (outlining human rights abuses); *The Iranian Hostage Crisis*, U.S. DEP'T OF ST. OFF. OF THE HISTORIAN, <https://history.state.gov/departmenthistory/short-history/iraniancrises> (last visited Jan. 24, 2022) (summarizing the Iran hostage crisis, during which the United States embassy in Iran was seized and over 50 Americans were taken as hostages).

<sup>14</sup> Ariana Rowberry, *Sixty Years of "Atoms for Peace" and Iran's Nuclear Program*, BROOKINGS (Dec. 18, 2013), <https://www.brookings.edu/blog/up-front/2013/12/18/sixty-years-of-atoms-for-peace-and-irans-nuclear-program>.

<sup>15</sup> *Id.*

<sup>16</sup> Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970) [hereinafter NPT].

<sup>17</sup> *Id.* at art. II.

<sup>18</sup> Agreement for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, I.A.E.A.-Iran, June 19, 1973, 954 U.N.T.S. 91 (entered into force May 15, 1974).

<sup>19</sup> See MICHELE GAJETTA, *THE TRAJECTORY OF IRAN'S NUCLEAR PROGRAM* 53–72 (2015) (discussing Iran's nuclear developments during this time).

*Mojahedin-e-Khalq* (MeK) revealed the existence of two covert nuclear facilities in Iran—Natanz and Arak.<sup>20</sup> This information revealed that Iran was secretly paving the way for two separate paths to a potential nuclear weapon—enriched uranium and plutonium.<sup>21</sup> Natanz was being built to enrich uranium to weapons-grade,<sup>22</sup> while Arak was producing the heavy water that would be used in a nuclear reactor to produce plutonium for a nuclear weapon.<sup>23</sup> Although Iran denied the allegations that it was aiming to weaponize its nuclear program, these revelations sent shock waves throughout the international community.

In order to avoid a U.N. Security Council Resolution against its nuclear program, Iran began negotiations with the EU-3 (France, Germany, and the United Kingdom) regarding its uranium-enrichment program and its centrifuges.<sup>24</sup> These negotiations never bore fruit, however, as Iran was determined to continue some of its nuclear activities, and the EU-3 was not willing to compromise.<sup>25</sup> In June 2006, the U.N. Security Council adopted Resolution 1696, its first Resolution regarding Iran's nuclear program, which, among other things, demanded that Iran halt uranium enrichment.<sup>26</sup> Despite this Resolution, Iran continued to advance its nuclear program under its new conservative President, Mahmoud Ahmadinejad.<sup>27</sup>

In 2009, another opportunity for negotiations arose: as Iran continued its uranium enrichment, it contacted the IAEA to obtain nuclear fuel for civilian medical isotopes.<sup>28</sup> The Obama administration saw this as an opportunity to trade fuel for Iran's enriched uranium, but was concerned that the swap would legitimize Iran's uranium enrichment.<sup>29</sup> As these negotiations began, Iran publicly acknowledged the existence of its Fordow nuclear facility.<sup>30</sup> This facility, built seventy-to-ninety meters inside a mountain,<sup>31</sup> was clearly built to avoid detection, and Iran only acknowledged it after the

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<sup>20</sup> JAY SOLOMON, *THE IRAN WARS: SPY GAMES, BANK BATTLES, AND THE SECRET DEALS THAT SHAPED THE MIDDLE EAST* 114 (2016).

<sup>21</sup> *Id.* at 118.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> DANIEL JOYNER, *IRAN'S NUCLEAR PROGRAM AND INTERNATIONAL LAW: FROM CONFRONTATION TO ACCORD* 31 (2016).

<sup>25</sup> *See id.* at 32–33.

<sup>26</sup> S.C. Res. 1696, ¶ 2 (July 31, 2006).

<sup>27</sup> *See* DAVID PATRIKARAKOS, *NUCLEAR IRAN: THE BIRTH OF AN ATOMIC STATE* 231 (2012).

<sup>28</sup> JOYNER, *supra* note 24, at 44.

<sup>29</sup> TARITA PARSI, *A SINGLE ROLL OF A DICE: OBAMA'S DIPLOMACY WITH IRAN* 116–17 (2012).

<sup>30</sup> *Iran Nuclear Overview*, NUCLEAR THREAT INITIATIVE (Jun. 25, 2020), <https://www.nti.org/analysis/articles/iran-nuclear/>.

<sup>31</sup> GEOFFREY KEMP & JOHN ALLEN GAY, *WAR WITH IRAN: POLITICAL, MILITARY, AND ECONOMIC CONSEQUENCES* 43–44 (2013).

United States, France, and the United Kingdom had detected its existence.<sup>32</sup> Ultimately, the negotiations broke down,<sup>33</sup> and on February 9, 2010, Iran declared that it would begin producing highly-enriched uranium.<sup>34</sup> At that point, Iran's program began racing towards weapons-grade capability. By January 2012, it was estimated that Iran had shrunk its breakout time to twelve months,<sup>35</sup> which meant that it had obtained the capability to produce enough weapons-grade uranium for a nuclear weapon by the beginning of 2013.<sup>36</sup>

As Iran was expanding its nuclear program, it was carrying out another covert effort to develop its human capital. Beginning with a top secret project called the Physics Research Center (PRC),<sup>37</sup> Iran used various institutions, including Iran's prestigious Sharif University, as a front to obtain nuclear physics knowledge from the West.<sup>38</sup> By the mid-1990s, the PRC had 600 members and 12 different divisions.<sup>39</sup> In developing its nuclear scientific community, Iran ensured that Iranian scientists were capable of receiving the necessary training domestically.<sup>40</sup> Currently, it is estimated that thousands of scientists, researchers, and technicians work on Iran's nuclear program.<sup>41</sup>

By the summer of 2015, Iran's nuclear infrastructure and its advanced scientific community gave Iran the ability to divert its nuclear capabilities for military purposes within weeks.<sup>42</sup>

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<sup>32</sup> *Iran Nuclear Overview*, *supra* note 30.

<sup>33</sup> The negotiations broke down for various reasons including the fact that the parties simply could not agree on the terms of the trade. JOYNER, *supra* note 24, at 46.

<sup>34</sup> *Id.*

<sup>35</sup> TRITA PARSİ, *LOSING AN ENEMY: OBAMA, IRAN, AND THE TRIUMPH OF DIPLOMACY* 180 (2017) [hereinafter Parsi 2].

<sup>36</sup> See Olli Heinonen, *Iran's Nuclear Breakout Time: A Fact Sheet*, WASH. INST. NEAR E. POL'Y (Mar. 28, 2015), <http://www.washingtoninstitute.org/policy-analysis/view/irans-nuclear-breakout-time-a-fact-sheet> (defining "breakout time").

<sup>37</sup> SOLOMON, *supra* note 20, at 120.

<sup>38</sup> *Id.* at 120–23.

<sup>39</sup> *Id.* at 123.

<sup>40</sup> See FARHAD REZAEI, *IRAN'S NUCLEAR PROGRAM: A STUDY IN PROLIFERATION AND ROLLBACK* 47–48 (2017); SOLOMON, *supra* note 20, at 123–24.

<sup>41</sup> Juliet Lapidos, *How Many Iranian Nuclear Physicists Are There?*, SLATE (Jan. 12, 2010), <https://slate.com/news-and-politics/2010/01/could-the-assassination-of-a-physicist-stop-iran-s-nuclear-weapons-program.html>.

<sup>42</sup> Heinonen, *supra* note 36 (explaining that "[i]f Iran brought online its other nearly 9,000 IR-1s, breakout time would be about three months with natural uranium feedstock and four to six weeks with 3.5 percent UF<sub>6</sub> feedstock. Iran has also developed the more advanced IR-2m centrifuge, rated at 5 SWU/year. If the 1,000 IR-2ms installed at Natanz were used in conjunction with all 18,000 IR-1s, the respective breakout times would be cut by a third."); Richard Nephew, *Based on Breakout Timelines, the World Is Better Off with the Iran Nuclear Deal than Without it*, BROOKINGS (July 17, 2015), <https://www.brookings.edu/blog/markaz/2015/0-7/17/based-on-breakout-timelines-the-world-is-better-off-with-the-iran-nuclear-deal-than-without-it>.

### III. THE PRE-JCPOA OUTCASTING REGIME

The threat of Iran's nuclear program presented the international community with a difficult dilemma: respond with force or outcast. The international community chose the latter. This Section will review the development of the pre-JCPOA outcasting regime in response to Iran's growing nuclear program and violations of its international legal obligations.

Over the course of a decade, what began as a unilateral effort by the United States turned into a cohesive, focused, and powerful international sanctions regime. This Section will provide a detailed overview of the sanctions regime through three phases: (1) unilateral sanctions by the United States; (2) a more concerted effort by the international community through U.N. Security Council Resolutions; and (3) an all-out economic attack, led by U.S. secondary sanctions, on Iran's financial sector and oil revenue.

#### A. Phase One: Unilateral U.S. Sanctions

Phase one began in the mid-1990s when the United States, concerned about Iran's growing nuclear program, unilaterally imposed sanctions on Iran. Although the international community was not yet aware of Iran's nuclear program, the Clinton administration had grown suspicious and wanted to combat any development through sanctions.<sup>43</sup> In March 1995, President Clinton issued an executive order, banning all U.S. investments in Iran's energy sector,<sup>44</sup> followed by another executive order, which imposed a full trade embargo on Iran.<sup>45</sup>

Frustrated with the international community's failure to impose sanctions on Iran,<sup>46</sup> the United States passed the Iran Sanctions Act (ISA) in 1996.<sup>47</sup> ISA was the first attempt by the United States to impose secondary sanctions on Iran.<sup>48</sup> This particular tool allows a state to leverage its economic power to isolate the target state financially from its trading partners.<sup>49</sup> Using this sanctioning tool, ISA allowed the United States to impose sanctions on any foreign bank that was investing more than \$20 million per year in Iran's energy sector.<sup>50</sup>

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<sup>43</sup> Zachary Laub, *International Sanctions on Iran*, COUNCIL ON FOREIGN REL. (July 15, 2015), <https://www.cfr.org/background/international-sanctions-iran>.

<sup>44</sup> Exec. Order No. 12,957, 60 Fed. Reg. 14,615 (Mar. 15, 1995).

<sup>45</sup> Exec. Order No. 12,959, 60 Fed. Reg. 24,757 (May 6, 1995).

<sup>46</sup> BRYAN R. EARLY, *BUSTED SANCTIONS: EXPLAINING WHY ECONOMIC SANCTIONS FAIL* 91 (2015).

<sup>47</sup> Iran Sanctions Act of 1996, 50 U.S.C. § 1701 (1996), *amended by* 22 U.S.C. §§ 8501–8551 (2010).

<sup>48</sup> SAMORE, *supra* note 8, at 3–5 (outlining the history of early U.S. sanctions on Iran).

<sup>49</sup> *Id.* at 4.

<sup>50</sup> *Id.* Iran Sanctions Act of 1996 § 5(a)(1)(i).

Despite its potentially lethal implications, ISA failed to deter foreign investment in Iran because the United States failed to couple ISA with a successful diplomatic effort. To some in the international community, it seemed as if the United States was replacing a diplomatic effort with this aggressive sanctions regime.<sup>51</sup> The European Union went so far as to threaten to challenge the sanctions at the World Trade Organization (WTO) as “extraterritorial.”<sup>52</sup> Ultimately, the United States was unwilling to face the implications of sanctioning foreign firms, and instead provided waivers to such firms as long as their respective governments agreed to restrict Iranian imports.<sup>53</sup>

These efforts by the United States, however, were not accompanied by any major sanctions by either foreign governments or the United Nations. In fact, many of Iran’s major trading partners, such as countries in the European Union, further expanded their economic ties with Iran in the 1990s and early-2000s.<sup>54</sup>

#### B. Phase Two: U.N. Sanctions

By the mid-2000s, the expansion of Iran’s nuclear program became more publicized. In November 2003, the IAEA reported that Iran had repeatedly failed to comply with many of its CSA obligations by failing to report activities such as importation of natural uranium and failing to provide design information for some of its facilities.<sup>55</sup> In light of these failures, in September 2005, the IAEA Board of Governors decisively found Iran to be in violation of its CSA obligations.<sup>56</sup> As Iran’s nuclear program began to expand and Iran continued to violate its CSA obligations, the international community

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<sup>51</sup> SAMORE, *supra* note 8, at 4; Meghan L. O’Sullivan, *Iran and the Great Sanctions Debate*, 33 WASH. Q. 7, 7 (2010) (stating that some “lamented the poor record of these tools, calling them ‘chicken soup diplomacy’ or ‘feel good’ foreign policy . . . [and] that imposing sanctions did little more than satisfy the U.S. desire to take action”).

<sup>52</sup> SAMORE, *supra* note 8, at 4.

<sup>53</sup> EARLY, *supra* note 46, at 91–92.

<sup>54</sup> *Spider Web: The Making and Unmaking of Iran Sanctions*, INT’L. CRISIS GROUP 12 (2013), <https://d2071andvip0wj.cloudfront.net/138-spider-web-the-making-and-unmaking-of-iran-sanctions.pdf> [hereinafter Crisis Group Report].

<sup>55</sup> YAEL RONEN, THE IRAN NUCLEAR ISSUE 16 (2010) (citing Int’l Atomic Energy Agency, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, ¶ 48, IAEA Doc. GOV/2003/75 (Nov. 10, 2003)).

<sup>56</sup> *Id.* (citing Int’l Atomic Energy Agency, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, ¶ 1, IAEA Doc. GOV/2005/77 (Sept. 24, 2005)). For a more detailed analysis of Iran’s failure to comply with its CSA obligations, see JOYNER, *supra* note 24, at 95–188; see also NAMIRA NEGM, TRANSFER OF NUCLEAR TECHNOLOGY UNDER INTERNATIONAL LAW: CASE STUDY OF IRAQ, IRAN AND ISRAEL 195–225 (2009).

joined the United States in its effort to outcast Iran. On July 31, 2006, the U.N. Security Council passed its first Resolution in response to Iran's growing nuclear program—Resolution 1696.<sup>57</sup> Through this historic move, the United Nations commenced phase two of the pre-JCPOA sanctions regime.

The major features of this phase were the four U.N. Security Council Resolutions that imposed various sanctions on Iran: Resolution 1696,<sup>58</sup> Resolution 1737,<sup>59</sup> Resolution 1747,<sup>60</sup> and Resolution 1803.<sup>61</sup> All of these Resolutions, however, stopped short of imposing sanctions on Iranian banks or major Iranian entities because of the economic significance of Iranian businesses.<sup>62</sup> So, the sanctions remained narrowly targeted at Iran's nuclear program.<sup>63</sup> For instance, Resolution 1696 called upon Members to “prevent the transfer of any items, materials, goods and technology” that could aid Iran's illicit activities,<sup>64</sup> while Resolution 1737 demanded that Members freeze the funds of identified individuals and entities involved in Iran's illicit nuclear activities.<sup>65</sup> And while U.N. Members complied with these sanctions, they did very little to impose their own unilateral sanctions on Iran.<sup>66</sup>

### C. Phase Three: The Turning Point

By 2010, it had become clear that phases one and two were largely ineffective. Although the introduction of international law was vital in uniting the international community in the pre-JCPOA sanctions regime, the sanctions were simply not powerful enough to incentivize Iran to decelerate its nuclear program.<sup>67</sup> To truly curtail Iran's nuclear program, it was necessary to impose what former Under Secretary for Terrorism and Financial Intelligence David Cohen referred to as “truly biting sanctions.”<sup>68</sup> In order to achieve that goal, the United States decided to, once again, utilize secondary

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<sup>57</sup> S.C. Res. 1696, *supra* note 26.

<sup>58</sup> *Id.* ¶ 2.

<sup>59</sup> S.C. Res. 1737 (Dec. 23, 2006).

<sup>60</sup> S.C. Res. 1747 (Mar. 24, 2007).

<sup>61</sup> S.C. Res. 1803 (Mar. 3, 2008).

<sup>62</sup> SOLOMON, *supra* note 20, at 147.

<sup>63</sup> For a detailed discussion of these U.N. Security Council Resolutions, see ENRICO CARSIK ET AL., *THE EVOLUTION OF UN SANCTIONS: FROM A TOOL OF WARFARE TO A TOOL OF PEACE, SECURITY AND HUMAN RIGHTS* 423–28 (2017).

<sup>64</sup> S.C. Res. 1696, *supra* note 26, ¶ 5.

<sup>65</sup> S.C. Res. 1737, *supra* note 59, ¶ 12.

<sup>66</sup> SOLOMON, *supra* note 20, at 147–48.

<sup>67</sup> See *supra* note 19–36 and accompanying text.

<sup>68</sup> Press Release, U.S. Dep't of Treasury, Remarks of Under Secretary for Terrorism and Financial Intelligence David Cohen before the New York University School of Law on “The Law and Policy of Iran Sanctions” (Sept. 12, 2012), <https://www.treasury.gov/press-center/press-releases/pages/tg1706.aspx> [hereinafter Cohen Remarks].

sanctions. But, unlike before, during phase three, the United States grounded its use of secondary sanctions in international law.

By the time the United States had decided to bring back secondary sanctions, Iran's enrichment program was in violation of several U.N. Security Council Resolutions. Specifically, Iran's enrichment program and its work on its heavy-water reactor violated U.N. Security Council Resolutions 1696 and 1737.<sup>69</sup> Resolution 1696, which was adopted after the Security Council determined that Iran's nuclear program was a "threat to the peace, breach of the peace, or act of aggression,"<sup>70</sup> called on Iran to suspend its enrichment-related activities and its work on its heavy-water reactor.<sup>71</sup> The Security Council subsequently adopted Resolution 1737, which once again called on Iran to suspend those nuclear activities.<sup>72</sup> As a Member of the United Nations, Iran was obligated "to accept and carry out the decisions of the Security Council."<sup>73</sup> Iran was thus in clear violation of international law.<sup>74</sup>

In 2010, the Security Council took its efforts one step further by adopting Resolution 1929.<sup>75</sup> While this Resolution imposed many new sanctions on Iran, its most significant consequence was that it guided the United States and the rest of the world to impose far more aggressive unilateral sanctions on Iran.<sup>76</sup> For instance, Resolution 1929 expressed a "need to exercise vigilance over transactions involving Iranian banks, including the Central Bank of Iran, so as to prevent such transactions contributing to proliferation-sensitive nuclear activities, or to the development of nuclear weapon delivery systems."<sup>77</sup> It also "[c]all[ed] upon all States . . . to prevent the provision of financial services . . . of any financial or other assets or resources if they have information that provides reasonable grounds to believe that such services, assets or resources could contribute to Iran's

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<sup>69</sup> S.C. Res. 1696, *supra* note 26, ¶ 2; S.C. Res. 1737, *supra* note 59, ¶ 2.

<sup>70</sup> PAUL K. KERR, CONG. RES. SERV., RS40094, IRAN'S NUCLEAR PROGRAM: TEHRAN'S COMPLIANCE WITH INTERNATIONAL OBLIGATIONS 18 (2021) (quoting U.N. Charter art. 39).

<sup>71</sup> S.C. Res. 1696, *supra* note 25, ¶¶ 1–2.

<sup>72</sup> S.C. Res. 1737, *supra* note 59, ¶ 2.

<sup>73</sup> KERR, *supra* note 70, at 18 (quoting U.N. Charter art. 25).

<sup>74</sup> For its part, Iran countered that the Resolutions were void because they ran contrary to Iran's right under Article IV of the NPT to "develop . . . nuclear energy for peaceful purposes." JOYNER, *supra* note 24, at 205 (quoting NPT, *supra* note 16, art. IV). This argument was unpersuasive because, as the P5+1 pointed out, pursuant to Article 103 of the U.N. Charter, "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligation under the present Charter shall prevail." Michael J. Glennon, *Iran's Right to Enrich*, JUST SECURITY (Dec. 2, 2013), <https://www.justsecurity.org/3937/irans-enrichment> (quoting U.N. Charter art. 103).

<sup>75</sup> S.C. Res. 1929 (June 9, 2010).

<sup>76</sup> Cohen Remarks, *supra* note 68.

<sup>77</sup> S.C. Res. 1929, *supra* note 75, at 3.

proliferation-sensitive nuclear activities . . . .”<sup>78</sup> Encouraged by Resolution 1929, the United States, through the Office of Foreign Assets Control (OFAC) in the Department of Treasury, implemented secondary sanctions on two main fronts. First, it isolated Iran’s financial sector through the Comprehensive Iran Sanctions Accountability and Divestment Act (CISADA).<sup>79</sup> Second, it targeted Iran’s oil revenue, mainly through secondary sanctions on the Central Bank of Iran (CBI) through Section 1245 of the National Defense Authorization Acts for Fiscal Year 2012 (NDAA FY 2012).<sup>80</sup>

*i. Sanctions Targeting Iran’s Financial Sector*

First, the United States financially isolated Iran through the use of CISADA. Through this legislation, the Department of Treasury acted aggressively to target Iran’s financial institutions including Iran’s largest banks such as Mellat and Tejarat.<sup>81</sup> Additionally, the Department of Treasury went further to target Iran’s unofficial financial sector, which was heavily influenced by the Islamic Revolutionary Guard Corps (IRGC).<sup>82</sup> The IRGC—although technically part of Iran’s military—is one of Iran’s largest economic forces and influences over 200 major Iranian companies in the automotive, petroleum, aviation, shipping, and construction sectors.<sup>83</sup> It is estimated that the IRGC and the Office of the Supreme Leader Ayatollah Khamenei directly control at least half of Iran’s economy.<sup>84</sup> The combined effect of the sanctions imposed on Iran’s official and unofficial financial sectors was devastating for Iran.<sup>85</sup>

After the enactment of CISADA, it became clear to the international financial community that the choice between doing business with the United States or doing business with Iran was no choice at all. Foreign banks, such as HSBC and Deutsche Bank, feared the repercussions of being cut off from

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<sup>78</sup> *Id.* ¶ 21.

<sup>79</sup> Comprehensive Iran Sanctions Accountability and Divestment Act, 22 U.S.C. §§ 8501–8551 (2010).

<sup>80</sup> Pub. L. No. 112-81, § 1245, 125 Stat. 1298, 1647–50 (2011).

<sup>81</sup> Josh Rogin, *U.S. Sanctions Another Big Iranian Bank*, FOREIGN POL’Y (Jan. 23, 2012), <https://foreignpolicy.com/2012/01/23/u-s-sanctions-another-big-iranian-bank/>.

<sup>82</sup> *Id.*

<sup>83</sup> EMANUELE OTTOLENGHI ET AL., FOUND. FOR THE DEF. OF DEMOCRACIES, HOW THE NUCLEAR DEAL ENRICHES IRAN’S REVOLUTIONARY GUARD CORPS 11 (2016), [http://www.defenddemocracy.org/content/uploads/documents/IRGC\\_Report.pdf](http://www.defenddemocracy.org/content/uploads/documents/IRGC_Report.pdf) (stating that the authors “have identified at least 229 companies with significant IRGC influence, either through equity shares or positions on the board of directors.”).

<sup>84</sup> *Treasury Targets Billion Dollar Foundations Controlled by Iran’s Supreme Leader*, U.S. DEP’T OF THE TREASURY (Jan. 13, 2021), <https://home.treasury.gov/news/press-releases/sm1234>.

<sup>85</sup> Crisis Group Report, *supra* note 54, at 24–30.

the U.S. financial sector and the risk of further investment in Iran was too high; so, they quickly began to disinvest from Iranian entities that were blacklisted by Treasury.<sup>86</sup> Major transnational firms, including Ernst & Young, Daimler AG, Caterpillar, ENI, and Total, halted all significant transactions with Iran.<sup>87</sup> Indeed, the risk was so grave that it dissuaded investment by firms located in countries that were most hostile to U.S. sanctions. For instance, Chinese oil companies, namely China National Petroleum Company (CNPC) and Sinopec, halted multiple upcoming projects in Iran's energy sector—some of which would have been worth billions of dollars.<sup>88</sup> Moreover, the secondary sanctions on the IRGC and its affiliates meant that foreign financial institutions had to abandon IRGC's powerful affiliates altogether.<sup>89</sup>

These secondary sanctions were also unprecedented in their ability to discourage some of Iran's biggest financial supporters: banks in the Persian Gulf. In the years leading up to the secondary sanctions, the banks in the Persian Gulf, especially those in the United Arab Emirates, had been instrumental in boosting Iran's vital import-export sector.<sup>90</sup> Yet, even those banks abandoned Iran in response to the secondary sanctions.<sup>91</sup> According to Stuart Levey, the former Under Secretary of Treasury for Terrorism and Financial Intelligence, following the threat of secondary sanctions by the United States, there was a "new seriousness" among Middle Eastern banking institutions in their efforts to financially isolate Iran.<sup>92</sup>

The penalties associated with the secondary sanctions were so severe that they created a "chilling effect"; they scared entities away from doing even *unsanctioned* business with Iran.<sup>93</sup> This chilling effect was further amplified by America's robust enforcement practice.<sup>94</sup> For example, in 2012, as a way

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<sup>86</sup> See Robert J. Einhorn, Special Advisor for Nonproliferation and Arms Control, Dep't of State, Keynote Address at the Arms Control Association Briefing Series: Solving the Iran Nuclear Puzzle (Mar. 9, 2011) (transcript available at <https://www.armscontrol.org/events/RoleSanctionsIranNuclear>).

<sup>87</sup> Press Release, Office of the Press Sec'y, Fact Sheet: Sanctions Related to Iran (July 31, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/07/31/fact-sheet-sanctions-related-iran>.

<sup>88</sup> See Shannon Tiezzi, *China's Already Preparing for a Post-Sanctions Iran*, DIPLOMAT (Apr. 8, 2015), <https://thediplomat.com/2015/04/chinas-already-preparing-for-a-post-sanctions-iran>.

<sup>89</sup> Crisis Group Report, *supra* note 54, at 9.

<sup>90</sup> Chip Cummins & Joy Solomon, *U.A.E. Cuts Off Ties to Iran Banks*, WALL ST. J. (Oct. 6, 2010), <https://www.wsj.com/articles/SB10001424052748703298504575534041013995702>.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Joy Gordon, *The Human Costs of the Iran Sanctions*, FOREIGN POL'Y (Oct. 18, 2013), <http://foreignpolicy.com/2013/10/18/the-human-costs-of-the-iran-sanctions>.

<sup>94</sup> *Id.*

to warn the intentional community about its commitment to enforce these sanctions, the United States sanctioned two major international banks—China’s Kunlun Bank and Iraq’s Elaf Islamic Bank—for engaging in financial transactions with designated Iranian banks.<sup>95</sup> In the official statement announcing the imposition of sanctions against these banks, Secretary Cohen warned: “[a]ny bank, anywhere, that seeks to provide a financial lifeline to Iran’s designated financial institutions should know that it will be held accountable and its activity will be exposed.”<sup>96</sup> Less than a month later, the United States accused Standard Charter of engaging in financial transactions with designated Iranian banks.<sup>97</sup> The mere accusation sent more shock waves across the international financial sector.<sup>98</sup> One senior official in Dubai expressed: “all international banks are scared stiff at the moment of having any links to Iranian entities . . . .”<sup>99</sup> By engaging in such aggressive enforcement, the United States was sending a clear message: unlike the secondary sanctions that were merely threatened in the mid-1990s, the new wave of secondary sanctions would be enforced.

This attack on Iran’s financial sector was strengthened by the successive rounds of E.U. sanctions. In 2010, the European Union—encouraged by the U.N. Security Council Resolutions—barred all European investments in Iran’s energy sector.<sup>100</sup> In doing so, it withdrew the much-needed investment in Iran’s energy sector. The European Union also terminated virtually all financial ties between the Society for Worldwide Interbank Financial Telecommunication (SWIFT) and Iran.<sup>101</sup> Prior to this move, SWIFT conducted a large portion of Iran’s international financial transactions. For instance, in 2010 alone, nineteen Iranian banks and twenty-five Iranian banking affiliates had made close to two million transactions using SWIFT.<sup>102</sup> With the SWIFT route closed, Iran was rendered a financial island with almost no ties to the international financial sector.

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<sup>95</sup> Press Release, U.S. Dep’t of Treasury, Treasury Sanctions Kunlun Bank in China and Elaf Bank in Iraq for Business with Designated Iranian Banks (Aug. 16, 2010), <https://www.treasury.gov/press-center/press-releases/Pages/tg1661.aspx> (announcing sanctions on China’s Kunlun Bank due to its transfer of over \$100 million to Tejarat Bank, and sanctions on Iraq’s Elaf Islamic Bank due to its business transactions with sanctioned Iranian banks).

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

<sup>97</sup> Camilla Hall, *Dubai Jittery Over Business with Iran*, FIN. TIMES (Aug. 12, 2012), <https://www.ft.com/content/63c880bc-e23f-11e1-8e9d-00144feab49a>.

<sup>98</sup> *Id.*

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

<sup>100</sup> Council Decision 2010/413, 2010 O.J. (L 195) 39 (EU).

<sup>101</sup> Council Decision 2012/635, 2012 O.J. (L 282) 58 (EU).

<sup>102</sup> *Payments System SWIFT to Cut Off Iranian Banks*, REUTERS (Mar. 15, 2012), <https://www.reuters.com/article/us-eu-iran-sanctions/payments-system-swift-to-cut-off-iranian-banks-idUSBRE82E0VR20120315>.

As a final blow to Iran's financial and banking sector, the European Union also banned the majority of transactions between European and Iranian banks.<sup>103</sup> Although many European banks had by that time already been dissuaded from conducting business with Iranian banks due to the draconian U.S. secondary sanctions, this move by the European Union encouraged many European banks to go above and beyond what the sanctions required in cutting ties with Iran in order to guard against potential expansion of these sanctions in the future.<sup>104</sup>

*ii. Sanctions Targeting Iran's Oil Revenue*

While the attack on Iran's financial sector was bearing fruit, the United States was also attacking another critical part of Iran's economy: its oil revenue.<sup>105</sup> In 2011, oil made up eighty percent of the Iranian government's exports, and approximately sixty percent of the government's total revenue.<sup>106</sup> Naturally, any aggressive sanctions regime had to include Iran's oil sector.

The most effective tool in this fight was Section 1245 of the NDAA FY 2012, which sanctioned any foreign bank that purchased oil or any other goods from CBI, *unless* the home country of that foreign bank had significantly reduced its oil purchases from Iran.<sup>107</sup> CBI was a particularly attractive target for secondary sanctions because pursuant to Iran's domestic regulations, all oil transactions must be cleared through CBI.<sup>108</sup> So, the imposition of Section 1245 essentially meant that any country that wanted to continue buying oil from Iran had to significantly decrease its oil imports to avoid U.S. sanctions.<sup>109</sup> The main purpose of this provision was to force all of Iran's major oil trading partners to gradually turn elsewhere for their oil purchases.<sup>110</sup> This innovative technique was a significant move for the United States. Because the United States had imposed an oil embargo on Iran following the 1979 Revolution,<sup>111</sup> it could not leverage its non-existent oil trade with Iran to increase economic pressure. Moreover, many of Iran's major oil importers—Asian countries in particular—were not open to

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<sup>103</sup> Council Decision 2012/635, *supra* note 101.

<sup>104</sup> CORNELIUS ADEBAHR, *EUROPE AND IRAN: THE NUCLEAR DEAL AND BEYOND* 64 (Richard Whitman & Richard Youngs eds., 2017).

<sup>105</sup> *Sanctions Reduced Iran's Oil Exports and Revenues in 2012*, U.S. ENERGY INFO. ADMIN. (April 26, 2013), <https://www.eia.gov/todayinenergy/detail.php?id=11011>.

<sup>106</sup> *Id.*

<sup>107</sup> Cohen Remarks, *supra* note 68.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Amanda Cooper, *Iranian Oil: 40 Years of Revolution, War, Sanctions and Bans*, REUTERS (Nov. 5, 2018), <https://www.reuters.com/article/us-iran-oil-sanctions/iranian-oil-40-years-of-revolution-war-sanctions-and-bans-idUSKCN1N71YC>.

unilaterally sanctioning Iran's energy sector.<sup>112</sup> So, the United States was able to use Section 1245 to dissuade reluctant countries that continued to purchase oil from Iran to cut down those purchases.<sup>113</sup> For instance, following the passage of Section 1245, Japan, one of Iran's largest oil importers, significantly reduced its oil imports despite its fears of rising oil prices and its dependence on Iran's oil imports.<sup>114</sup> As one Japanese economist put it: the secondary sanctions provided the United States with a "very strong card."<sup>115</sup> Similar to Japan, other Asian countries that had been reluctant to cut their oil imports from Iran (such as India and South Korea) did so to avoid U.S. sanctions.<sup>116</sup> The secondary sanctions even persuaded China, the most reluctant Asian country, to decrease its oil imports from Iran.<sup>117</sup> Although China had expressed vocal opposition to these measures from their inception,<sup>118</sup> it ultimately complied.<sup>119</sup> This compliance translated into a significant loss for Iran because China had been Iran's single largest oil importer at the time.<sup>120</sup>

These secondary sanctions were quickly followed by a second round of E.U. sanctions, which embargoed Iranian oil exports to the European market and banned insurers from providing insurance policies for Iranian oil transportation.<sup>121</sup> Both of these sanctions were devastating for Iran's energy sector. The European oil embargo deprived Iran of its second largest regional buyer.<sup>122</sup> In the years prior to the Embargo, many European countries were

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<sup>112</sup> Osamu Tsukimori & Stanley White, *Japan May Cut Iran Oil Imports by over 20 Percent*, REUTERS (Feb. 22, 2012), <https://www.reuters.com/article/us-japan-usa-sanctions/japan-may-cut-iran-oil-imports-by-over-20-percent-idUSTRE81L28L20120223> (stating that "[i]n addition to Japan, South Korea is seeking to be exempt from U.S. sanctions.").

<sup>113</sup> Pub. L. No. 112-81, *supra* note 80 § 1245.

<sup>114</sup> Tsukimori & White, *supra* note 112.

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

<sup>116</sup> ANTHONY H. CORDESMAN ET AL., U.S. AND IRANIAN STRATEGIC COMPETITION: SANCTIONS, ENERGY, ARMS CONTROL, AND REGIME CHANGE 58 (2013); *India To Cut Oil Purchases from Iran Following US Pressure*, TELEGRAPH (May 15, 2012), <https://www.telegraph.co.uk/news/worldnews/asia/india/9267337/India-to-cut-oil-purchases-from-iran-following-US-pressure.html>.

<sup>117</sup> Itt Thirarath, *China's Crude Oil Imports from Iran*, MIDDLE E. INST. (July 7, 2016), <http://www.mei.edu/content/map/chinas-crude-oil-imports-iran>.

<sup>118</sup> Leslie Hook, *US Exempts China from Iran Oil Sanctions*, FIN. TIMES (June 29, 2012), <https://www.ft.com/content/8b8d6328-c1ac-11e1-8e7c-00144feabdc0>.

<sup>119</sup> Thirarath *supra* note 117.

<sup>120</sup> *Who Imports Iranian Oil?*, STATISTA (Apr 24, 2019), <https://www.statista.com/chart/17774/oil-imports-from-iran/>.

<sup>121</sup> Council Decision 2012/35, art. 1(2), 2012 O.J. (L 19) 22.

<sup>122</sup> *Under Sanctions, Iran's Crude Oil Exports Have Nearly Halved in Three Years*, U.S. ENERGY INFO. ADMIN. (June 24, 2015), <https://www.eia.gov/todayinenergy/detail.php?id=21792> [hereinafter 2015 EIA Report].

exporting significant amounts of oil from Iran. Greece, for instance, relied on Iran for approximately fourteen percent of its oil imports.<sup>123</sup> Spain and Italy were likewise dependent on Iran for approximately fifteen and thirteen percent of their oil imports respectively.<sup>124</sup> Europe's dependence on Iran's oil was crucial for the Iranian economy as Europe's oil purchases accounted for a quarter of Iran's total oil exports.<sup>125</sup> Similarly, the sanction on insurance companies was no trivial move by the European Union. Approximately ninety percent of the oil tanks in the world were insured by the International Group of Protection and Indemnity Clubs (IGP&I).<sup>126</sup> Because IGP&I was subject to European law, it became very difficult for most of the tanker fleets in the world to insure the transportation of Iranian oil.<sup>127</sup> This, in turn, had effects far beyond the European market. In June 2012, South Korea announced that due to the lack of insurance on Iranian oil tanks, it had no choice but to halt its Iranian oil imports temporarily.<sup>128</sup> Although some of Iran's biggest buyers, such as Japan and India, were able to resolve this problem by providing government-backed insurance to tanks carrying Iranian oil, insurance difficulties accounted for a significant drop in Asian exports of Iranian oil in 2012.<sup>129</sup> In this way, the European insurance sanction came to the aid of the U.S. secondary sanctions to cut Iran's oil exports to Asia.

By 2012, the joint effort by the United States and the European Union was successful in persuading every single one of Iran's major oil purchasers to substantially decrease their imports. In 2011, prior to the sanctions targeting Iran's oil sector, Iran was exporting 2.5 million barrels of oil per day. In 2012, Iran's oil exports plummeted to 1.5 million barrels per day,<sup>130</sup> and then again to 1.3 million barrels per day in 2013.<sup>131</sup> This precipitous drop in oil exports had a disastrous impact on Iran's total revenue. While the Iranian government was earning close to \$100 billion in oil revenue in 2011, the earnings had been

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<sup>123</sup> Rauri Patterson, *EU Sanctions on Iran: The European Political Complex*, 20 MIDDLE E. POL'Y COUNCIL 142 (2013).

<sup>124</sup> *Id.*

<sup>125</sup> Farnaz Fassihi & John M. Biers, *EU Bans Imports of Iran's Oil, Raising Pressure on Tehran*, WALL ST. J. (Jan. 24, 2012), <https://www.wsj.com/articles/SB10001424052970203718504577178231285985826>.

<sup>126</sup> *About the International Group*, INT'L GRP. OF P&I CLUBS, <https://www.igpandi.org/about> (last visited Feb. 2, 2022).

<sup>127</sup> Patterson, *supra* note 123.

<sup>128</sup> Meeyoung Cho, *South Korea To Halt Iran Oil Imports as EU Ban Bites*, REUTERS (June 25, 2012), <https://www.reuters.com/article/us-oil-korea-iran/south-korea-to-halt-iran-oil-imports-as-eu-ban-bites-idUSBRE85P00M20120626>.

<sup>129</sup> U.S. ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEF: IRAN 16–17 (2014), <https://www.iranwatch.org/sites/default/files/us-doe-irananalysisbrief072114.pdf>.

<sup>130</sup> 2015 EIA Report, *supra* note 122.

<sup>131</sup> *Id.*

slashed to \$35 billion by 2013.<sup>132</sup> The dramatic drop in the Iranian government's revenue was exacerbated by financial sanctions that prevented Iran from accessing the little revenue that it was earning.<sup>133</sup> By 2013, more than \$100 billion worth of Iranian oil revenue was frozen in foreign banks.<sup>134</sup>

In sum, as Iran continued to violate its international legal obligations, the United States was able to more easily justify its use of secondary sanctions and the rest of the world complied. In fact, Europe joined America's efforts by imposing its own unilateral sanctions on Iran.<sup>135</sup> By 2013, the decades-long effort to financially isolate Iran had finally become successful.

#### IV. OUTCASTING ON THE GROUND: THE DOMESTIC IMPACT OF THE PRE-JCPOA SANCTIONS REGIME

An outcasting regime is only successful if the outcast state is encouraged to cooperate in exchange for reintegration into the international community. As this Section will explain, the pre-JCPOA sanctions regime was successful because it was able to translate Iran's economic isolation into

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<sup>132</sup> REZAEI, *supra* note 40, at 203.

<sup>133</sup> Orde F. Kittrie, *Lawfare: Law as a Weapon of War* 131 (2015).

<sup>134</sup> SOLOMON, *supra* note 20, at 205.

<sup>135</sup> Along with the United States and the European Union, other nations imposed their own sanctions on Iran. For instance, in 2010, South Korea sanctioned 126 Iranian companies and individuals for their alleged involvement in Iran's nuclear program. Choe Sang-Hun, *South Korea Aims Sanctions at Iran*, N.Y. TIMES (Sept. 8, 2010), <https://www.nytimes.com/2010/09/09/world/asia/09korea.html>. Similarly, in 2011, Canada and the United Kingdom announced that they were unilaterally banning transactions with Iranian financial institutions including the CBI. Richard Solash, *U.S., U.K., Canada Hit Iran with New Economic Sanctions*, RADIO FREE EUR. RADIO LIBERTY (Nov. 21, 2011), [https://www.rferl.org/a/uk\\_cuts\\_all\\_financial\\_ties\\_with\\_iran\\_banks/24397756.html](https://www.rferl.org/a/uk_cuts_all_financial_ties_with_iran_banks/24397756.html). Other countries—including Australia, Canada, and Norway—soon followed with similar sanctions. CORDESMAN ET AL., *supra* note 116, at 46. None of these sanctions were particularly significant, however, because they were duplicative of the U.S. secondary sanctions. Notably, not all major trading partners imposed unilateral sanctions on Iran. China and Russia remained on the sidelines throughout the pre-JCPOA sanctions regime. While they enforced the sanctions required by the U.N. Security Council Resolutions, they refused to impose unilateral sanctions on Iran. See Conor Humphries, *Russia Warns U.S. Against Unilateral Iran Sanctions*, REUTERS (May 13, 2010), <https://www.reuters.com/article/idINIndia-48461720100513> (stating that Russian Foreign Minister Sergei Lavrov argued that “[c]ountries facing Security Council sanctions ‘cannot under any circumstances be the subject of one-sided sanctions imposed by one or other government bypassing the Security Council.’” The article further explained that “Russia is in talks with the United States and other U.N. Security Council members on a fourth round of sanctions” and that “China has joined Russia in opposing Washington’s plans to impose tough, wide-ranging sanctions”).

a change in Iran's foreign policy. To demonstrate this phenomenon, this Section will begin by examining how the phase-three sanctions led to economic hardship for everyday Iranians. It will then highlight how the United States incentivized Iran to cooperate by pairing the economic pressure with encouraging rhetoric that communicated to Iran that a path to reintegration was possible. Finally, this Section will end by examining how the joint effort—economic pressure and the promise of reintegration—led to a change in Iran's foreign policy.

*A. Economic Impact of the U.S. Secondary Sanctions Regime*

Despite the sanctions in phases one and two, Iran's overall economy continued to thrive.<sup>136</sup> Indeed, in 2012, Iran's GDP peaked at \$598.87 billion.<sup>137</sup> As the secondary sanctions entered the picture, however, Iran's economy began its downturn. By 2013, Iran's financial isolation and dwindling oil revenue crippled its economy, leading to an unprecedented drop in the value of Iran's currency (the rial), a significant blow to Iran's major industries, an increase in the unemployment rate, and shortages of food and medicine.<sup>138</sup>

One of the most significant economic consequences of the secondary sanctions was the sudden loss in value of the rial. Although the value of the rial had been dropping against the value of the dollar steadily over the preceding decade,<sup>139</sup> this trend was escalated in 2012, when the effects of secondary banking and financial sanctions were coupled with the significant drop in Iran's oil revenue. Consider that in September 2011, the rial traded at 13,000 to the dollar, but by October 2012, the value of the rial had plummeted to 37,000 rial to the dollar.<sup>140</sup> Secretary Cohen referred to this massive depreciation of the Iranian currency as “perhaps the most dramatic reflection of the . . . financial sanctions.”<sup>141</sup> This trend, combined with Iran's financial isolation, created a one-two punch that hit almost every sector of the Iranian economy. For instance, the sudden destabilization of the rial threw Iran's business sector into a panic.<sup>142</sup> Businesses were hesitant to buy or sell goods

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<sup>136</sup> See SHAYERAH ILIAS, CONG. RSCH. SERV., RL34525, IRAN'S ECONOMIC CONDITIONS: U.S. POLICY ISSUES 4 (2010).

<sup>137</sup> *Iran GDP*, TRADING ECON., <https://tradingeconomics.com/iran/gdp> (last visited Feb. 2, 2022).

<sup>138</sup> See *infra* note 139–172 and accompanying text.

<sup>139</sup> Rick Gladstone, *A New Sign of Distress as Iran's Currency Falls*, N.Y. TIMES (Oct. 1, 2012), <https://www.nytimes.com/2012/10/02/world/middleeast/irans-rial-plummets-against-the-dollar.html>.

<sup>140</sup> CORDESMAN ET AL., *supra* note 116, at 5.

<sup>141</sup> Cohen Remarks, *supra* note 68. Notably, severe mismanagement and corruption in Iran also contributed to the drop in the rial. Crisis Group Report, *supra* note 54, at 25.

<sup>142</sup> Crisis Group Report, *supra* note 54, at 25–26.

because the exchange rates were changing rapidly.<sup>143</sup> The consequences of these financial and trade sanctions were further amplified through the chilling effect, as foreign businesses feared conducting any transaction with Iran.<sup>144</sup> Unsurprisingly, this financial pressure had severe consequences on the output of many companies. In 2013, it was reported that Iran's automotive industry, Iran's largest manufacturing sector,<sup>145</sup> was forced to cut its output by approximately forty-three percent.<sup>146</sup>

Sanctions also hurt Iran's most significant site of foreign investment: fossil fuel extraction. Iran is home to the world's fourth largest oil reserves and the second largest natural gas reserves.<sup>147</sup> That said, developing these reserves requires massive investments.<sup>148</sup> In 2011, Iran's Oil Minister stated that Iran needed \$300 billion to address the declining rate of production in its oil fields.<sup>149</sup> Despite the attractive investment opportunities, foreign investors did not want to risk being sanctioned by the United States or the European Union and declined to invest.<sup>150</sup> The impact of these withdrawals was significant—estimates put Iran's losses of investments in the energy sector close to \$50 billion.<sup>151</sup>

The challenges faced by Iran's business sector trickled down to impact the lives of everyday Iranians, particularly the working class, as the financial constraints faced by Iranian businesses led to delayed payments, unemployment, and bankruptcies.<sup>152</sup> In 2012, it was estimated that bankruptcies had tripled in Iran, and forty percent of the working men in Iran's

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<sup>143</sup> *Id.* at 26.

<sup>144</sup> See e.g., Benoit Faucon, *In Iran, Private Sector Feels Squeeze of Sanctions*, WALL ST. J. (Aug. 2, 2012), <https://www.wsj.com/articles/SB10000872396390443687504577564991148939740> (providing anecdotes on the impact of sanctions on businesses in Iran); Gordon, *supra* note 93 (examining the impact of sanctions on Iran's financial, energy, and manufacturing sectors).

<sup>145</sup> Marcus George & Zahra Hosseinian, *Unemployment Mounts as Iran's Economy Falts*, REUTERS (Sept. 19, 2012), <https://www.reuters.com/article/us-iran-unemployment/unemployment-mounts-as-irans-economy-falts-idUSBRE88I0TA20120919>.

<sup>146</sup> CORDESMAN ET AL., *supra* note 116, at 5.

<sup>147</sup> Manovar Khalaj & Andrew Ward, *Western Oil Groups in No Rush to Return to Iran*, FIN. TIMES (Nov. 3, 2016), <https://www.ft.com/content/06acb822-95fe-11e6-a80e-bcd69f323a8b>.

<sup>148</sup> See CORDESMAN ET AL., *supra* note 116, at 96.

<sup>149</sup> *Id.* at 98.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Manufacturing, Blue Collar Workers, and the Urban Poor*, CTR. FOR HUM. RTS. (Apr. 29, 2013), <https://www.iranhumanrights.org/2013/04/manufacturing-blue-collar-workers-and-the-urban-poor>.

major cities had lost their jobs.<sup>153</sup> But the impact of the sanctions was not limited to the working class; it was also felt by Iran's elites. For instance, Iranians who could previously afford to send their children abroad for education were struggling to pay tuition as the rial plummeted.<sup>154</sup>

These multifaceted sanctions also led to an increase in the price of goods and shortages of food. With the depreciation of the rial and inflation reaching approximately twenty-nine percent, the price of food items (especially meat and dairy) escalated dramatically.<sup>155</sup> The cost of food was further amplified as financial and banking sanctions began making the financing of such transactions difficult.<sup>156</sup> This was true despite the fact that the sanctions allowed for exemptions for food.<sup>157</sup> Given the draconian financial consequences of violating the secondary sanctions, many international banks preferred to steer clear of dealing with Iran all together, even if it meant halting legal transactions.<sup>158</sup>

From May to June 2012, the Institute for Sustainable Development reported that there was a fifty-two percent increase in the price of meat and an eighty-one percent increase in the price of dairy.<sup>159</sup> Prices of everyday food items such as rice, beans, and sugar also increased.<sup>160</sup> Unlike the economic impacts on Iran's industrial sector, which mainly impacted the working class, the increase in the price of food hurt the middle class as well.<sup>161</sup> These price hikes had such significant impacts on the lives of everyday Iranians that many had no choice but to change their lifestyles—with many cutting meat from their diets entirely. In response to this phenomenon, one restaurant owner commented, “it was as though people had turned vegetarian overnight.”<sup>162</sup>

Similarly, Iran's health sector, despite also being exempt from sanctions,<sup>163</sup> suffered a major blow. Inflation led to massive increases in the price of medical treatment, and the fear of transacting with Iran led to

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<sup>153</sup> Gordon, *supra* note 93.

<sup>154</sup> Tara Bahrapour, *Sanctions Squeeze Iranian Students Abroad*, WASH. POST (Jan. 26, 2013), <https://www.washingtonpost.com/local/sanctions-squeeze-iranian-students-abroad>.

<sup>155</sup> Najmeh Bozorgmehr, *Iran Warned on Food Security*, FIN. TIMES (Apr. 3, 2013), <https://www.ft.com/content/809b63da-8fb9-11e2-9239-00144feabdc0>.

<sup>156</sup> Crisis Group Report, *supra* note 54, at 18.

<sup>157</sup> CORDESMAN ET AL., *supra* note 116, at 84.

<sup>158</sup> Crisis Group Report, *supra* note 54, at 34–35.

<sup>159</sup> CORDESMAN ET AL., *supra* note 116, at 84.

<sup>160</sup> *See id.*

<sup>161</sup> Gordon, *supra* note 93.

<sup>162</sup> *Id.*

<sup>163</sup> Julian Borger & Saeed Kamali Dehghan, *Iran Unable to Get Life-Saving Drugs Due to International Sanctions*, GUARDIAN (Jan. 13, 2013), <https://www.theguardian.com/world/2013/jan/13/iran-lifesaving-drugs-international-sanctions>.

shortages of medicine.<sup>164</sup> The chilling effect was particularly damaging to this sector. Nasar Naghdi, the director general of Darou Pakhsh, which supplied almost a third of Iran's pharmaceutical needs, told reporters at the time that it was as if the medical firms had imposed their own sanctions on Iran.<sup>165</sup> The fatal problem was that the potential consequence of being sanctioned was so dramatic that many big pharmaceutical companies and banks abandoned Iran altogether.<sup>166</sup> It was reported that by 2013 only one international bank in Turkey was willing to conduct transactions with the Iranian medical sector.<sup>167</sup> Unsurprisingly, the effect on the price and availability of medications was catastrophic—especially for medications that were traditionally imported. For instance, certain cancer medications became so rare that the lives of many cancer patients in Iran were in danger.<sup>168</sup> Iranians with other medical problems such as diabetes also suffered gravely.<sup>169</sup>

In sum, by early 2013, the pre-JCPOA sanctions regime had truly isolated Iran from the international community, and the people of Iran fully recognized that. In 2013, a survey conducted by Gallup concluded that Iran had the second highest “negative experience index score,”<sup>170</sup> essentially labeling Iran as the second “unhappiest” country in the world.<sup>171</sup>

### B. *Tempting a Path to Reintegration*

While the aggressive sanctions in phase three had completely financially isolated Iran, pure isolation was not enough to form a successful outcasting regime. In addition to sheer economic pain, the outcasting regime also needed to induce Iran's cooperation by enticing a path to reintegration. After all, an isolated state (even in the face of extreme economic hardship) has little incentive to cooperate if there is no path out of isolation.

The pre-JCPOA sanctions regime was successful in credibly promising this path for Iran through encouraging and consistent rhetoric, which made it clear that Iran would be better off as a result of cooperation.

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> Siamak Namazim, *Blocking Medicine to Iran*, N.Y. TIMES (Mar. 1, 2013), <https://www.nytimes.com/2013/03/02/opinion/blocking-medicine-to-iran.html>.

<sup>168</sup> Marcus George & Zahra Hosseinian, *Sanctions, Government Blamed for Iran's Drugs Shortage*, REUTERS (Dec. 5, 2012), <https://www.reuters.com/article/us-iran-medicine/sanctions-government-blamed-for-irans-drugs-shortage-idUSBRE8B40NM20121205>.

<sup>169</sup> Crisis Group Report, *supra* note 54, at 34.

<sup>170</sup> Jon Clifton, *Happiness in Short Supply in Iran*, GALLUP (June 3, 2014), <http://news.gallup.com/poll/170819/happiness-short-supply-iran.aspx>.

<sup>171</sup> Michele Richinick, *Iraq, Iran Top World's Unhappiest Countries List*, MSNBC (June 4, 2014), <http://www.msnbc.com/msnbc/iraq-the-worlds-most-unhappiest-country>.

For instance, at the height of the sanctions, Secretary Cohen described the United States' strategy as "dual-track"—one that coupled sanctions with a path for cooperation.<sup>172</sup> Specifically, Secretary Cohen conveyed America's commitment to the latter prong of this dual strategy by emphasizing that the United States offers "diplomatic engagement to Iran—providing Iran with a path to reclaim its place among the community of nations."<sup>173</sup> Moreover, in November 2013, President Obama—as if speaking directly to the Iranian people—declared that "[i]f Iran seizes this opportunity [for cooperation], the Iranian people will benefit from rejoining the international community."<sup>174</sup> So, while the sanctions were crippling Iran's economy, the United States was working to ensure that Iran and its people knew that there was a path for reintegration; and, as it turned out, this effort was successful in reaching the Iranian people. By 2015, the vast majority of Iranians believed that an agreement between Iran and the international community would alleviate the intensity and impact of the sanctions. In fact, in the lead-up to the Iran Deal, over eighty-five percent of Iranians believed that the United States would lift some of the sanctions if an agreement was reached.<sup>175</sup>

Thus, through its rhetoric, the United States was able to tempt a path to reintegration for Iran even though it was actively leading an aggressive economic sanctions regime. It was against the backdrop of this dual-track strategy that a drastic change in Iran's domestic politics started to take form.

### C. *Outcasting Alters Iran's Foreign Policy*

The true success of the pre-JCPOA sanctions regime laid in its ability to transform economic pressure into a change in Iran's foreign policy. Iranian leaders had for years maintained that sanctions had no effect on Iran's economy and would not impact its foreign policy.<sup>176</sup> But, as the phase-three sanctions began to take effect, it became clear that both claims were false. As the Iranian economy began to deteriorate, Iran's domestic politics began to

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<sup>172</sup> Cohen Remarks, *supra* note 68.

<sup>173</sup> *Id.*

<sup>174</sup> Press Release, The White House, Statement by the President on First Step Agreement on Iran's Nuclear Program (Nov. 23, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/11/23/statement-president-first-step-agreement-irans-nuclear-program>.

<sup>175</sup> NANCY GALLAGHER ET AL., CTR. FOR INT'L & Sec. STUD. AT MD., THE IRANIAN PUBLIC OPINION ON THE NUCLEAR NEGOTIATIONS: A PUBLIC OPINION STUDY 16 (2015), <https://cissm.umd.edu/sites/default/files/2019-07/UTCPOR-CISSM-PA%20final%20report%20062215.pdf>.

<sup>176</sup> For example, on September 10, 2012, Iran's Oil Minister, Rostam Qasemi, claimed that the sanctions had helped Iran become more self-reliant. CORDESMAN ET AL., *supra* note 116, at 7. Exactly one month later, Ayatollah Khamenei stated that the "[s]anctions are not an issue of yesterday or today. Sanctions have existed from the very beginning; they have intensified the sanctions . . . [but] these won't work . . ." *Id.* at 8.

change. The economic pressure led to infighting among the political elites, a recognition by Ayatollah Khamenei that a change in foreign policy was necessary, and finally, the rise of the Rouhani administration.

First, as the economic pressure generated by phase three was felt across Iran, there was a rise in intense infighting among the political elites.<sup>177</sup> International isolation and its effects on Iran's economy emboldened the opposition to the Ahmadinejad government.<sup>178</sup> In September 2011, Akbar Rafsanjani, a former president and a founding member of the Islamic regime, publicly warned Iran's Assembly of Experts to "not downplay the sanctions . . ." <sup>179</sup> In September 2012, members of the Iranian parliament openly accused Ahmadinejad of sabotaging the Iranian currency for political gains.<sup>180</sup> Over one hundred members of the parliament signed a letter demanding that Ahmadinejad be brought in for questioning.<sup>181</sup> As the infighting continued and the economic pressure mounted, influential political leaders recognized that it was time to rethink Iran's foreign policy and begin engaging with the international community. In the words of analyst Trita Parsi, "[t]he question was no longer *whether* there should be a relationship [with the great powers], but rather [what] the *nature* of that relationship [should be]."<sup>182</sup>

Beginning in 2012, while Ahmadinejad and the Ayatollah continued to deny that the sanctions were hindering Iran's economy,<sup>183</sup> behind the scenes, the regime was attempting to open a path through bilateral talks with the United States. While there are conflicting accounts as to whether Ahmadinejad was willing to seriously consider curbing Iran's nuclear program,<sup>184</sup> there is little dispute that the Ayatollah, the far more significant political figure in Iran, was.

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<sup>177</sup> Crisis Group Report, *supra* note 54, at 32.

<sup>178</sup> REZAEI, *supra* note 40, at 174.

<sup>179</sup> CORDESMAN ET AL., *supra* note 116, at 7.

<sup>180</sup> Crisis Group Report, *supra* note 54, at 32 n.191.

<sup>181</sup> Afshin Valinejad & Scott Peterson, *As Sanctions Crush Rial's Value, Iranians Point Fingers at Ahmadinejad*, CHRISTIAN SCI. MONITOR (Oct. 16, 2012), <https://www.csmonitor.com/World/Middle-East/2012/1016/As-sanctions-crush-rial-s-value-Iranians-point-fingers-at-Ahmadinejad>.

<sup>182</sup> Parsi 2, *supra* note 35, at 168.

<sup>183</sup> CORDESMAN ET AL., *supra* note 116, at 87.

<sup>184</sup> In 2016, the spokesman for the political group Combatant Clergy Association (*Jame-ye Rohaniat*) stated that during the last year of his presidency, Ahmadinejad approached Ayatollah Khamenei to request him to accept the terms of the U.N. Security Council Resolutions, but the Ayatollah rejected the offer. *Unveiling the Treacherous Proposal of the Head of the Former Government: What did Ahmadinejad's Leadership Say?*, KALAME (May 21, 2016), <http://www.kalame.com/-1395/02/21/klm-242764/?theme=fast>. That said, it has been reported that the bilateral talks between the United States and Iran circumvented Ahmadinejad, which suggests that perhaps his "firebrand" stance would have been counterproductive to the efforts. Parsi 2, *supra* note 35, at 168.

By March 2012, Ayatollah Khamenei had privately given his blessing for the Iranian delegation to begin bilateral negotiations with the Americans, and in July 2012, the first Iranian delegation traveled to Oman to meet secretly with the Americans.<sup>185</sup> This was a significant move by Iran. Although the Ayatollah warned his advisors that they should be “vigilant because [they cannot] trust the Americans,” his move to circumvent the extreme hardliners in order to engage in bilateral talks with the United States showed a drastic change in the Ayatollah’s foreign-policy approach.<sup>186</sup> And while no meaningful progress was made during the first bilateral meeting, it had become clear that Iran had the blessing of the most powerful man in Iran to begin a serious conversation regarding the downscaling of its nuclear program.<sup>187</sup>

As the political elites began recognizing that the pressure induced by the sanctions needed to be alleviated through direct negotiations with the international community, the Iranian people were becoming more and more outraged by the state of the economy. In late 2012, Iran witnessed one of its largest uprisings since the 2009 Green Movement.<sup>188</sup> In the first week of October 2012, the value of the rial dropped by almost forty percent,<sup>189</sup> prompting hundreds of citizens—including Tehran’s merchants (*Bazaaris*), members of one of Iran’s most powerful groups—to flood the streets in protest.<sup>190</sup> And while the demonstrations were suppressed, they foreshadowed what was to become one of the defining issues for the Iranian public in the lead-up to the 2013 presidential election: the economy.

With the economy deteriorating due to sanctions, it was only natural that the future of Iran’s nuclear program was going to take a life of its own during the 2013 presidential election. The public recognized that in order to alleviate their economic hardships, they needed a government that was serious about negotiating with the international community. In February 2013, a Gallup poll showed that fifty-six percent of the Iranian public believed that

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<sup>185</sup> Parsi 2, *supra* note 35, at 169.

<sup>186</sup> *See id.* at 168.

<sup>187</sup> *Secret Iran Talks with Jake Sullivan*, POD SAVE THE WORLD, at 24:02 (Feb. 1, 2017), <https://art19.com/shows/pod-save-the-world/episodes/720258b7-efd-4b42-98c6-fc62eda1e8bf>.

<sup>188</sup> The Green Movement was Iran’s largest uprising since the 1979 Revolution. It followed the controversial 2009 presidential election in which Ahmadinejad was declared the winner despite overwhelming evidence that Mir-Hossein Mousavi, a moderate, had won the race. *See generally* HAMID DABASHI, *THE GREEN MOVEMENT IN IRAN* (2011) (detailing the rise of the Green Movement).

<sup>189</sup> Thomas Erdbrink & Rick Gladstone, *Violence and Protest in Iran as Currency Drops in Value*, N.Y. TIMES (Oct. 3, 2012), <https://www.nytimes.com/2012/10/04/world/middleeast/clashes-reported-in-tehran-as-riot-police-target-money-changers.html>.

<sup>190</sup> *Id.*

the sanctions were hurting the lives of Iranians “a great deal.”<sup>191</sup> It was at this time that Hassan Rouhani, the Iranian moderate and former nuclear negotiator, emerged as a strong presidential contender.<sup>192</sup>

Rouhani recognized that the people of Iran were in desperate need of economic relief and that Iran had to alter its foreign policy to respond to the economic pain. From the start of his campaign, Rouhani not only publicly acknowledged the devastating impact of the sanctions, but he continued to stress the importance of alleviating the economic hardship.<sup>193</sup> While Rouhani did not directly promise a nuclear deal, his willingness to enter into a deal with the international community was apparent from his campaign promises.<sup>194</sup> Throughout the presidential campaign, Rouhani and his supporters continued to emphasize the need for “normalization” of Iran’s relationship with the rest of the world.<sup>195</sup> This coded language was used to highlight Rouhani’s commitment to rolling back Iran’s nuclear program, earning him and his supporters the nickname “Normalizers.”<sup>196</sup>

By contrast, Saeed Jalili—the most prominent conservative candidate and the one championed as Khamenei’s choice<sup>197</sup>—refused to acknowledge the impact of the sanctions on Iranians. Jalili went so far as to claim that the sanctions were beneficial for Iran because they allowed the

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<sup>191</sup> Mohamed Younis, *Iranians Feel Bite of Sanctions, Blame U.S., Not Own Leaders*, GALLUP (Feb. 7, 2013), <http://news.gallup.com/poll/160358/415ehran415s-feel-bite-sanctions-blame-not-own-leaders.aspx>.

<sup>192</sup> Kasra Najji, *Profile: Hassan Rouhani, President of Iran*, BBC NEWS (May 20, 2017), <http://www.bbc.com/news/world-middle-east-22886729> (highlighting the fact that Rouhani served as Iran’s chief nuclear negotiator from 2003 to 2005 but resigned his position after Ahmadinejad’s presidential victory).

<sup>193</sup> ROBERT EINHORN & RICHARD NEPHEW, FOREIGN POL’Y AT BROOKINGS, THE IRAN NUCLEAR DEAL: PRELUDE TO PROLIFERATION IN THE MIDDLE EAST 3 (2016), [https://www.brookings.edu/wp-content/uploads/2016/05/acnpi\\_20160531\\_iran\\_deal\\_regional\\_proliferation.pdf](https://www.brookings.edu/wp-content/uploads/2016/05/acnpi_20160531_iran_deal_regional_proliferation.pdf).

<sup>194</sup> *Id.*

<sup>195</sup> REZAEI, *supra* note 40, at 212.

<sup>196</sup> *Id.* at 213. Rouhani attempted to walk a fine line between recognizing the need for nuclear negotiations and maintaining that Iran would continue its nuclear program. In one of his most noted campaign statements, Rouhani said, “[i]t is good to have centrifuges running, provided people’s lives and livelihoods are also running.” Saeed Kamali Dehghan, *Iran Elections: Former Presidents Endorse Moderate Hassan Rouhani*, GUARDIAN (June 11, 2013), <https://www.theguardian.com/world/2013/jun/11/iran-elections-presidents-endorse-rouhani>.

<sup>197</sup> Thomas Erdbrink, *Anti-West Hard-Liner Gains in Iranian Race*, N.Y. TIMES (May 28, 2013) <https://www.nytimes.com/2013/05/29/world/middleeast/saeed-jalili-emerges-as-establishment-favorite-in-irans-presidential-race.html> (explaining that “Jalili, known as Iran’s unyielding nuclear negotiator and a protégé of the supreme leader, Ayatollah Ali Khamenei, is emerging as the presumed front-runner in Iran’s presidential election [and . . . is by far the most outspoken hard-liner”).

industrial sectors to thrive.<sup>198</sup> The conservative political faction's problems cut deeper than Jalili's denial of the economic realities; the conservatives failed to articulate a unified position on nuclear negotiations. For instance, the former Foreign Minister, Ali Akbar Velayati, accused fellow conservative Jalili of not doing enough to help relieve the pressure of the sanctions.<sup>199</sup> Criticizing Jalili's unreasonably hard stance toward negotiations, Velayati said: "When the other side is ready to take three steps and you want to take one step[,] it is obvious that you do not want to make progress."<sup>200</sup> Further amplifying the divide among conservatives, Mohammad Bagher Ghalibaf, another conservative presidential candidate, took a more moderate position by maintaining that "foreign policy does not change much with the change of [the] president."<sup>201</sup> This disjointed group of conservative candidates essentially split the conservative vote,<sup>202</sup> while the moderates united behind Rouhani, handing him an overwhelming victory.<sup>203</sup>

The people of Iran made it clear that they wanted a leader that could bring about real economic relief through a dramatic change in Iran's foreign policy.<sup>204</sup> After his win, Rouhani assured the public that he would "pursue a policy of reconciliation and peace."<sup>205</sup> As his new Foreign Minister, Rouhani selected Javad Zarif, a U.S.-educated Iranian diplomat viewed by the west as

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<sup>198</sup> REZAEI, *supra* note 40, at 212.

<sup>199</sup> Marcus George & Zahra Hosseinian, *Presidential Hopefuls Clash on Iranian Nuclear Policy*, REUTERS (June 7, 2013), <https://www.reuters.com/article/cnews-us-iran-election-debate-idCABRE9560UR20130607>.

<sup>200</sup> *Id.*

<sup>201</sup> Jason Rezaian, *Tehran Mayor Ghalibaf Seen as a Strong Contender in Iranian Presidential Race*, WASH. POST (June 5, 2013), [https://www.washingtonpost.com/world/middle\\_east/416tehran-mayor-ghalibaf-seen-as-a-strong-contender-in-iranian-presidential-race/2013/06/05/fe118584-cc5d-11e2-8573-3baeea6a2647\\_story.html?utm\\_term=.221788f25bf3](https://www.washingtonpost.com/world/middle_east/416tehran-mayor-ghalibaf-seen-as-a-strong-contender-in-iranian-presidential-race/2013/06/05/fe118584-cc5d-11e2-8573-3baeea6a2647_story.html?utm_term=.221788f25bf3).

<sup>202</sup> Jason Rezaian, *Iran's Conservatives Face Identity Crisis*, WASH. POST (June 29, 2013), [https://www.washingtonpost.com/world/middle\\_east/irans-conservatives-face-identity-crisis/2013/06/29/2604a960-e00c-11e2-8cf3-35c1113cfcc5\\_story.html?utm\\_term=.2dc3801a82b5](https://www.washingtonpost.com/world/middle_east/irans-conservatives-face-identity-crisis/2013/06/29/2604a960-e00c-11e2-8cf3-35c1113cfcc5_story.html?utm_term=.2dc3801a82b5).

<sup>203</sup> Clifton W. Sherrill, *Why Hassan Rouhani Won Iran's 2013 Presidential Election*, 21 MIDDLE E. POL'Y COUNCIL 64, 71 (2014). Rouhani received 50.7% of the popular vote, Ghalibaf received 16.6% of the popular vote, and Jalili received an embarrassing 11.4% of the popular vote. *Id.* at 75 n.15.

<sup>204</sup> Following Rouhani's victory, Iranians flooded the streets in celebration, publicly pleading with Rouhani to help reduce youth unemployment, improve foreign relations, and address the currency crisis. Al Jazeera English, *Hassan Rouhani Wins Iran Presidential Election*, YOUTUBE (June 15, 2013), <https://www.youtube.com/watch?v=2DukkKT717I> (audio translated by Author). *But see* Parsi 2, *supra* note 35, at 205–07 (arguing that there were many other factors that propelled Rouhani's victory such as the need for social change and endorsements from popular former presidents).

<sup>205</sup> SEYED HOSSEIN MOUSAVIAN & SHAHIR SHAHIDSALESS, *IRAN AND THE UNITED STATES: AN INSIDER'S VIEW ON THE FAILED PAST AND THE ROAD TO PEACE* 281 (2014).

a pragmatic moderate who had been sidelined after the 2009 election.<sup>206</sup> Selecting Zarif as the Foreign Minister was a signal that Iran was serious about negotiations.<sup>207</sup> Notably, this was one of the many choices that the Rouhani administration made to open a new chapter in Iran's foreign policy.<sup>208</sup>

In this way, the economic pressure of the pre-JCPOA sanctions regime was able to materially influence the domestic priorities of Iran, creating not only a dialogue among the political elites regarding a change in Iran's foreign policy, but also bringing a new brand of Iranian politicians and diplomats out of the shadows. With this achievement, it was time for the United States to reap the fruits of outcasting by negotiating an agreement that could bring Iran in compliance with international law and neutralize the threat of a nuclear-armed Iran.

#### IV. COOPERATION IN EXCHANGE FOR REINTEGRATION

By July 2012, Iran was willing to work with the international community to dramatically curb its nuclear program. This was an opportunity that the international community did not take for granted. In 2015, the P5+1 entered into the JCPOA with a newly cooperative Iran. In exchange for Iran's cooperation, the international community began the process of reintegration. This Section will provide a brief overview of the lead-up to the JCPOA, the substance of the Deal, and Iran's initial reintegration into the international community.

##### A. *The Lead-Up to the JCPOA*

In the lead-up to the summer of 2012, the United States was following a two-track effort: economic pressure and diplomacy.<sup>209</sup> By July 2012, the sanctions were beginning to truly cripple Iran's economy, while simultaneously, Iran's nuclear program was reaching a dangerous peak.<sup>210</sup> In light of these two important developments, the United States decided that it

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<sup>206</sup> DAVID S. OUALAALOU, *THE AMBIGUOUS FOREIGN POLICY OF THE UNITED STATES TOWARD THE MUSLIM WORLD: MORE THAN A HANDSHAKE* XXVIII (2016).

<sup>207</sup> *Id.*

<sup>208</sup> For a discussion of other relevant decisions made by the Rouhani administration see MOUSAVIAN & SHAHIDSALESS, *supra* note 205, at 281–291.

<sup>209</sup> Gerson Lehrman Group, *Jake Sullivan on Decisions in the West Wing: GLG Anatomy of a Decision*, YOUTUBE (Feb. 21, 2017), <https://www.youtube.com/watch?v=a7BkloQIlwM&t=193s>.

<sup>210</sup> Telephone interview with Jake Sullivan, former Dir. Of Policy Planning, U.S. Dep't of State (Mar. 15, 2018) (on file with author).

was time to emphasize the latter prong of its dual-track effort. It did so by initiating secret negotiations with Iran outside the official P5+1 channel.<sup>211</sup>

While the first meeting between the two sides was largely fruitless, the pace of the negotiations picked up with the U.S. concession to allow enrichment on Iranian soil,<sup>212</sup> and Rouhani's selection as Iran's new president in 2013.<sup>213</sup> After the U.S.-Iran negotiations made significant progress, the P5+1 were brought into the fold. Eventually, all the parties signed the "Joint Plan of Action" (JPOA) or the "Interim Deal" on November 24, 2013.<sup>214</sup> This agreement was vital as Iran was racing toward nuclear-weapon capabilities and the Interim Deal substantially slowed its progress.<sup>215</sup> After virtually freezing the advancement of Iran's nuclear program with the Interim Deal, the P5+1 spent the following year and a half working toward a more comprehensive agreement.

### B. *The JCPOA*

On July 14, 2015, after months of intense negotiations, the P5+1 and Iran signed the JCPOA. This agreement not only eliminated the threat of a nuclear-armed Iran, but it also brought Iran into compliance with its international legal obligations.<sup>216</sup> The JCPOA, while complicated, essentially addressed five major tasks: closing off the uranium-enrichment path, closing off the plutonium-enrichment path, gaining access to Iran's nuclear program, ensuring Iran's compliance with international law, and rolling back the sanctions.

First, the JCPOA closed off Iran's path to weaponized enriched uranium—its most likely path to a nuclear weapon—by putting severe restrictions on Iran's uranium-enrichment program. The JCPOA restricted Iran's enrichment level to 3.67% for fifteen years,<sup>217</sup> making it impossible for

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<sup>211</sup> *Id.*

<sup>212</sup> Parsi 2, *supra* note 35, at 190. The importance of this concession cannot be overstated. Experts claim that enrichment on Iranian soil was nonnegotiable for Iran. *See e.g.*, Telephone interview with Jake Sullivan, *supra* note 210.

<sup>213</sup> Telephone interview with Jake Sullivan, *supra* note 210.

<sup>214</sup> *Joint Plan of Action*, U.S. DEP'T OF TREASURY (Nov. 24, 2013), <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/iran-sanctions/joint-plan-of-action-jpoa-archive-and-joint-comprehensive-plan-of-action-jcpoa-archive>.

<sup>215</sup> The most significant mandates of the Interim Deal demanded that Iran halt the production of twenty-percent enriched uranium, the installment of new centrifuges, and the majority of its work at its Arak facility. Parsi 2, *supra* note 35, at 244.

<sup>216</sup> For a detailed discussion of the negotiations process and the setbacks see Parsi 2, *supra* note 35, at 244–317.

<sup>217</sup> JCPOA, *supra* note 2, ¶ 7.

Iran to build a nuclear weapon with enriched uranium.<sup>218</sup> The JCPOA also required Iran to eliminate ninety-seven percent of its enriched uranium, bringing it down from the original 10,000 kg to merely 300 kg—far below the amount needed for a single nuclear weapon.<sup>219</sup> Lastly, the Deal cut Iran's centrifuges from 19,900 to approximately 6,000 (only 5,000 of which could be used for enrichment).<sup>220</sup>

Second, the Deal closed off Iran's second path to a nuclear weapon (plutonium) by essentially disabling the Arak heavy-water research reactor.<sup>221</sup> By requiring an aggressive redesign of the Arak facility, the Deal ensured that Iran could not produce enough plutonium for a nuclear weapon.<sup>222</sup>

With the routes to a nuclear weapon closed, the biggest remaining concern was that Iran could not be trusted to adhere to the JCPOA. In fact, distrust was the premise of the Deal.<sup>223</sup> For this reason, the JCPOA imposed an extremely invasive and comprehensive monitoring regime to ensure Iran's compliance with its terms. Under the JCPOA, not only is Iran required to comply with its CSA obligations and Additional Protocols,<sup>224</sup> but it is also subject to JCPOA's unique monitoring protocols.<sup>225</sup> The JCPOA protocols include daily access to Iran's declared nuclear facilities and further access to any facility (including a military facility) that is suspected of engaging in illegal activities.<sup>226</sup> The combination of these monitoring protocols is so extensive that experts have gone so far as to say that it is virtually impossible for Iran to try to cheat without getting caught.<sup>227</sup> And if Iran does try to cheat, its breakout time is still over one year<sup>228</sup>—giving the international community enough time to prevent a nuclear attack. By contrast, prior to the Deal, Iran's

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<sup>218</sup> Wall Street Journal, *The Iran Nuclear Deal Explained*, YOUTUBE (Sept. 2, 2015), <https://www.youtube.com/watch?v=03JdbYggUTs&t=38s>. Uranium needs to be enriched up to at least ninety percent to be considered weapons-grade. *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> GARY SAMORE, BELFER CTR. FOR SCI. & INT'L AFFS, *THE IRAN NUCLEAR DEAL: A DEFINITIVE GUIDE* 23–24 (2015), <https://www.belfercenter.org/sites/default/files/files/publication/IranDealGuide2017.pdf> [hereinafter Samore 2].

<sup>221</sup> *Id.* at 18.

<sup>222</sup> *Id.* at 5 (detailing how the Deal effectively made it impossible for Iran to create a plutonium-based nuclear weapon for fifteen years following the Deal).

<sup>223</sup> *Secret Iran Talks with Jake Sullivan*, *supra* note 187, at 31:09.

<sup>224</sup> The Additional Protocols require Iran to notify the IAEA as soon as it decides to build a new nuclear facility. Samore 2, *supra* note 220, at 32–33.

<sup>225</sup> *Id.* at 33–34.

<sup>226</sup> *Id.* at 33, 35–36.

<sup>227</sup> *See, e.g.*, Parsi 2, *supra* note 35, at 290.

<sup>228</sup> Kelsey Davenport & Tyler Rodgers, *The P5+1 and Iran Nuclear Deal Alert, July 2017*, ARMS CONTROL ASS'N (July 11, 2017), <https://www.armscontrol.org/blog/2017-07-11/p51-iran-nuclear-deal-alert-july-2017>.

estimated breakout time stood at merely two months,<sup>229</sup> which might not have been enough for an effective military intervention.<sup>230</sup> In this light, the Deal was a monumental achievement in neutralizing the threat of a nuclear-armed Iran.

Fourth, the JCPOA also brought Iran into compliance with international law. By enforcing the monitoring requirements, the JCPOA ensured that Iran remains transparent about its nuclear program and continues to comply with its obligations under the CSA. Moreover, the JCPOA set the stage for the adoption of U.N. Security Council Resolution 2231,<sup>231</sup> which nullified previous limitations on Iran's uranium-enrichment program that had been put forth by Resolutions 1696 and 1737.<sup>232</sup> This was significant because under the Deal, Iran maintained the ability to continue its uranium-enrichment program.<sup>233</sup> In this way, the JCPOA ensured Iran's full compliance with its international legal obligations. And, the JCPOA set the stage for the removal of the pre-JCPOA sanctions regime.

### C. Reintegration

In return for Iran's compliance with international law, the JCPOA began to pave a way back into the international community for Iran. In early 2016, the JCPOA members attempted to follow through on the promise of reintegration by lifting the vast majority of the sanctions, including the U.S. secondary sanctions.<sup>234</sup>

After the sanctions were lifted, Iran's reintegration began almost immediately. In 2016, Iran's oil exports increased to 3.1 million barrels per day from 2.8 million barrels per day in 2015.<sup>235</sup> Mostly due to this increase in oil exports, Iran's overall economy grew by 12.5% in 2016.<sup>236</sup> And, some of the major investors that had fled Iran during the pre-JCPOA sanctions regime

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<sup>229</sup> Parsi 2, *supra* note 35, at 290.

<sup>230</sup> *Id.* at 181.

<sup>231</sup> S.C. Res. 2231 (July 20, 2015).

<sup>232</sup> JCPOA, *supra* note 2, ¶ 18.

<sup>233</sup> *Id.* ¶ 1.

<sup>234</sup> David Sanger, *Iran Complies with Nuclear Deal; Sanctions Are Lifted*, N.Y. TIMES (Jan. 16, 2016), <https://www.nytimes.com/2016/01/17/world/middleeast/iran-sanctions-lifted-nuclear-dea-l.html>.

<sup>235</sup> *Iran's Petroleum Production Expected to Increase as Sanctions Are Lifted*, U.S. ENERGY INFO. ADMIN. (Jan. 19, 2016), <https://www.eia.gov/todayinenergy/detail.php?id=24592>.

<sup>236</sup> *Iran's GDP Growth 12.5%*, FIN. TRIB. (June 18, 2017), <https://financialtribune.com/articles/domestic-economy/66731/iran-gdp-growth-125>.

planned to return to Iran as the sanctions were lifted.<sup>237</sup> But this growth was also met with major obstacles, one of which was a chilling effect that spread among foreign investors who feared that new sanctions might be around the corner.<sup>238</sup> As a consequence, the Iranian economy continued to struggle—the rial remained relatively weak, the price of food remained high, and unemployment stood at twelve percent.<sup>239</sup> In reality, the economic reintegration was much slower than expected, and one year after the sanctions were lifted, Iranians were feeling disappointed by the slow pace of the economic recovery.<sup>240</sup> Despite the economic struggles that continued after the JCPOA, the removal of the sanctions undoubtedly helped put the Iranian economy on the road to recovery.<sup>241</sup> In this way, outcasting through U.S. secondary sanctions had proved itself to be successful: Iran was continuing to abide by its international legal obligations in exchange for reintegration into the international community. This all changed, however, in May 2018, when the Trump administration withdrew from the JCPOA and re-imposed the U.S. secondary sanctions regime.<sup>242</sup>

#### V. THE IRAN RE-OUTCASTING REGIME

Despite the success of the JCPOA, the role of the United States in pioneering and committing to the agreement has always been polarizing back home.<sup>243</sup> The opposition to the agreement gained momentum when Donald Trump was elected president in November 2016, and eventually peaked in May 2018 when President Trump followed through with his promise to

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<sup>237</sup> See, e.g., Alanna Petroff, *Iran Signs \$2 Billion Gas Deal with France's Total*, CNN MONEY (July 3, 2017), <http://money.cnn.com/2017/07/03/news/iran-total-sign-2-billion-gas-deal/index.html?iid=EL>.

<sup>238</sup> Zahraa Alkhalisi, *Trump Keeps Scaring Investors Away from Iran*, CNN MONEY (Aug. 3, 2017), <http://money.cnn.com/2017/08/03/news/economy/iran-slow-investment/index.html>.

<sup>239</sup> Asa Fitch, *Behind Iran's Protests: A Struggling Economy Despite Sanctions Relief*, WALL ST. J. (Jan. 4, 2018), <https://www.wsj.com/articles/irans-economy-struggles-despite-sanctions-relief-fueling-unrest-1515007698>.

<sup>240</sup> Adam Taylor, *One Year After Iran Nuclear Deal, Poll Shows Growing Disappointment Among Iranians*, WASH. POST (July 13, 2016), <https://www.washingtonpost.com/news/worldviews/wp/2016/07/13/one-year-after-iran-nuclear-deal-poll-shows-growing-disappointment-among-iranians>.

<sup>241</sup> Haniyeh Sadat Jafariyeh, *Iranian Economy in a Nutshell: Key Points, Future Plans*, MOD. DIPL. (Apr. 2, 2018), <https://moderndiplomacy.eu/2018/04/02/iranian-economy-in-a-nutshell-key-points-future-plans>.

<sup>242</sup> See *infra* Part V.

<sup>243</sup> See, e.g., David A. Graham, *Undercutting Obama's Plans for Iran*, ATLANTIC (Mar. 9, 2015), <https://www.theatlantic.com/international/archive/2015/03/senate-republicans-pen-letter-to-iran-supreme-leader/387223/>.

withdraw the United States from the JCPOA.<sup>244</sup> Following this withdrawal, the United States re-imposed the U.S. secondary sanctions regime and, in effect, began “re-outcasting” Iran despite the fact that, at the time, Iran was adhering to its nuclear-related international legal obligations.<sup>245</sup> And while the economic threat of being sanctioned by the United States once again forced Iran’s trading partners to boycott Iran,<sup>246</sup> major world powers publicly condemned the re-outcasting regime as politically motivated and harmful.<sup>247</sup> Iran, in turn, began breaching some of its obligations under the Deal, thereby jeopardizing the Deal’s survival.<sup>248</sup>

The re-imposition of the U.S. secondary sanctions has created a counter-productive re-outcasting regime. While the United States did not violate international law by withdrawing from the JCPOA and re-imposing sanctions,<sup>249</sup> the fact that the re-outcasting regime was not imposed in response to international law violations by Iran makes the regime counter-productive in two ways. First, it weakens the economic power of U.S. secondary sanctions by encouraging resistance from sovereign states; and second, it weakens the diplomatic power of U.S. secondary sanctions by creating a long-lasting chilling effect that could undermine the path to

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<sup>244</sup> Landler, *supra* note 9.

<sup>245</sup> Kevin Breuninger, *Here Are the Sanctions that Will Snap Back into Place Now that Trump Has Pulled the US Out of the Iran Nuclear Deal*, CNBC (May 8, 2018), <https://www.cnbc.com/2018/05/08/here-are-iran-sanctions-returning-after-trump-leaves-nuclear-deal.html>; Salvador Rizzo & Meg Kelly, *Fact-checking President Trump’s reasons for leaving the Iran nuclear deal*, WASH. POST (May 9, 2018), <https://www.washingtonpost.com/news/fact-checker/wp/2018/05/09/fact-checking-president-trumps-reasons-for-leaving-the-iran-nuclear-deal/>.

<sup>246</sup> See e.g., Michael Selby-Green, *French Oil Giant Total Pulls Out of \$4.8 Billion Iran Deal Under US Pressure*, BUSINESS INSIDER (Aug. 21, 2018), <https://www.businessinsider.com/total-pulls-out-of-48-billion-iranian-oil-project-under-us-pressure-2018-8>.

<sup>247</sup> See, e.g., Jeremy B. White, *UK, France and Germany Issue Joint Statement Attacking Trump’s Withdrawal from Iran Nuclear Deal*, INDEPENDENT (May 8, 2018), <https://www.independent.co.uk/news/world-iran-nuclear-deal-latest-trump-macron-us-theresa-may-merkel-europe-rspo-nse-a8342126.html>.

<sup>248</sup> Arshad Mohammed and Humeyra Pamuk, *U.S. Says Window Open for Iran Nuclear Talks, But Not Forever*, REUTERS (Sept. 23, 2021), <https://www.reuters.com/world/middle-east/window-open-iran-nuclear-talks-wont-be-forever-us-2021-09-23/>.

<sup>249</sup> The JCPOA was a political agreement; so, adherence to its terms (including the commitment to refrain from re-imposing sanctions) was discretionary. Thus, President Trump’s decision to withdraw and re-impose sanctions was not a violation of international law. Moreover, the withdrawal did not violate domestic law. Because the JCPOA was an executive agreement, President Trump had the authority to unilaterally withdraw from the agreement without approval from Congress. For a detailed discussion of the legal authority to withdraw from the Deal see STEPHEN P. MULLIGAN, CONG. RSCH. SERV., R44761, WITHDRAWAL FROM INTERNATIONAL AGREEMENTS: LEGAL FRAMEWORK, THE PARIS AGREEMENT, AND THE IRAN NUCLEAR AGREEMENT 20–28 (2018).

reintegration. This Section will lay out the Iran re-outcasting regime and examine how this new regime functions as a form of counter-productive re-outcasting by weakening both the economic and the diplomatic force of U.S. secondary sanctions.

A. *U.S. Withdrawal from the JCPOA and the Re-Imposition of U.S. Secondary Sanctions*

On May 8, 2018, President Trump announced that the United States will withdraw from the JCPOA and re-impose the U.S. secondary sanctions regime.<sup>250</sup> To many who had followed the journey of the JCPOA, this withdrawal did not come as a surprise. The Republicans had generally opposed the Deal even prior to its inception.<sup>251</sup> In fact, the opposition was so strong that prominent members of the Republican party had made it clear that America's commitment to the JCPOA would be indefinitely vulnerable. In a now-infamous letter, forty-seven Republican Senators, led by Senator Tom Cotton, warned Ayatollah Khamenei and the rest of Iran's political leaders that "[t]he next president could revoke such an executive agreement with the stroke of a pen and future Congresses could modify the terms of the agreement at any time."<sup>252</sup> While at that time, this letter was seen mainly as an effort to sabotage the on-going negotiations with Iran,<sup>253</sup> its warnings proved to be meritorious when President Trump unilaterally withdrew the United States from the JCPOA in May 2018.<sup>254</sup>

Although the symbolic message and diplomatic impact of the withdrawal were significant, the most important consequence of the withdrawal was the re-imposition of the U.S. secondary sanctions. As illustrated earlier, U.S. secondary sanctions were by far the most powerful aspect of the pre-JCPOA outcasting regime.<sup>255</sup> As such, it was expected that the re-imposition of the U.S. secondary sanctions would begin a "re-outcasting" regime.

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<sup>250</sup> Brian Naylor & Ayesha Rascoe, *Trump: U.S. 'Will Withdraw' From Iran Nuclear Deal*, NPR (May 8, 2018), <https://www.npr.org/2018/05/08/609383603/trump-u-s-will-withdraw-from-iran-nuclear-deal>.

<sup>251</sup> Steve Inskeep, *How the Iran Vote Is Engineered To Pass*, NPR (Sept. 2, 2015), <https://www.npr.org/sections/itsallpolitics/2015/09/02/436647276/minority-rules-capitol-hill-vote-tactics-displayed-in-iran-deal>.

<sup>252</sup> Graham, *supra* note 243.

<sup>253</sup> Max Fisher, *The Uproar Over Sen. Tom Cotton's Letter to Iran, Explained*, VOX (Mar. 10, 2015), <https://www.vox.com/2015/3/10/8182063/tom-cottons-controversial-letter-to-iran-explained>.

<sup>254</sup> Landler, *supra* note 9.

<sup>255</sup> *See supra* Part III.

This re-outcasting regime, much like the pre-JCPOA outcasting regime, was undertaken primarily by OFAC and was split into two waves.<sup>256</sup> The first wave went into effect on August 6, 2018, following a 90-day wind-down period, and the second wave went into effect on November 4, 2018, following a 180-day wind-down period.<sup>257</sup> In practice, these two waves virtually re-imposed all nuclear-related U.S. secondary sanctions from the pre-JCPOA sanctions regime.<sup>258</sup>

By the time the re-outcasting regime was complete, it was virtually undisputed that Iran's economy had taken a toll. Not only did the sanctions halt the economic growth that was underway in Iran, but they also reversed much of the economic recovery that had followed the JCPOA.<sup>259</sup> As was the case during the pre-JCPOA sanctions regime, the re-imposition dramatically slashed Iran's oil exports, caused massive inflation, and increased unemployment rates.<sup>260</sup>

The sanctions also had a devastating impact on foreign investment in Iran. As the wind-down deadlines approached, international financial institutions that had taken the risk and revived commercial relations with Iran after the JCPOA slowly started to withdraw from Iran, and within months, major business deals and contracts were being nullified. In August 2018, for instance, the French oil company Total withdrew from a multi-billion dollar contract to invest in Iran's South Pars gas field (the largest known natural gas reserve in the world).<sup>261</sup> This announcement came despite efforts from the French and European authorities to obtain a waiver from the United States.<sup>262</sup> Other major European firms such as Maersk and Peugeot (automotive firm with a strong presence in Iran) faced the same fate.<sup>263</sup> In addition to European companies, Chinese firms (despite China's historical resistance toward U.S. secondary sanctions on Iran) also abandoned Iran. For example, CNPC, which had agreed to take over Total's investment in Iran's South Pars gas field, also suspended its investment in the project to avoid U.S. sanctions.<sup>264</sup> International financial institutions also steered clear of engaging in

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<sup>256</sup> Breuninger, *supra* note 245.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Six Charts that Show How Hard US Sanctions Have Hit Iran*, BBC (Dec. 9, 2019), <https://www.bbc.com/news/world-middle-east-48119109>.

<sup>260</sup> *Id.*

<sup>261</sup> Selby-Green, *supra* note 246.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> Tsvetana Paraskova, *China's CNPC Halts Iran Gas Investment Under U.S. Pressure*, OIL PRICE (Dec. 12, 2018), <https://oilprice.com/Latest-Energy-News/World-News/Chinas-CNPC-Halts-Iran-Gas-Investment-Under-US-Pressure.html>.

transactions with Iranian banks.<sup>265</sup> Although many major banks had been cautious when dealing with Iranian banks even before the re-outcasting regime, the re-imposition of U.S. secondary sanctions further pushed these financial institutions away from Iran.<sup>266</sup>

While economically, the re-outcasting regime unfolded in virtually the same manner as it had during the pre-JCPOA outcasting regime, the diplomatic posture of the re-outcasting regime was different. When the United States announced its withdrawal from the JCPOA, Iran had been complying with all of its nuclear-related international legal obligations.<sup>267</sup> For its part, the Trump administration did not dispute this fact when it withdrew from the Deal; instead, the administration put forth mainly policy justifications for the withdrawal and the re-imposition of sanctions. Specifically, the Trump administration justified the withdrawal by claiming that the JCPOA “gave the Iranian regime too much in exchange for too little” and “enriched the Iranian regime.”<sup>268</sup> It went on to claim that the withdrawal “will pressure the Iranian regime to alter its course of malign activities.”<sup>269</sup> In light of these purely policy justifications, the international community condemned the withdrawal as purely political while maintaining that Iran no longer posed a nuclear threat. At the center of this condemnation was the emphasis on Iran’s continued compliance with its international legal obligations.<sup>270</sup> Unlike the pre-JCPOA sanctions regime, the re-outcasting regime was imposed *despite* Iran’s compliance with international law. And the JCPOA members underscored this point as they expressed opposition to the U.S. withdrawal. In their joint statement, France, Germany, and the United Kingdom specifically noted that “[a]ccording to the IAEA, Iran continues to abide by the restrictions set out by the JCPOA, in line with its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons.”<sup>271</sup> Likewise, Russia and China emphasized Iran’s “full compliance with its commitments under the JCPOA”

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<sup>265</sup> Beatriz Rios, *EU Companies 'Most Likely to Leave' Iran After US Sanctions*, *Business Organizations Warn*, EURACTIV (Aug. 13, 2018), <https://www.euractiv.com/section/economy-job-s/news/eu-companies-most-likely-to-leave-iran-after-us-sanctions-business-organisations-warn/>.

<sup>266</sup> *Id.*

<sup>267</sup> Rizzo & Kelly, *supra* note 245.

<sup>268</sup> Press Release, The White House, Fact Sheets: President Donald J. Trump Is Ending United States Participation in an Unacceptable Iran Deal (May 8, 2018), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-ending-united-states-participation-unacceptable-iran-deal>.

<sup>269</sup> *Id.*

<sup>270</sup> *JCPOA—Joint Statement by France, the United Kingdom and Germany*, FR. DIPLOMATIC (May 8, 2018), <https://www.diplomatie.gouv.fr/en/french-foreign-policy/security-disarmament-and-non-proliferation/news/2018/article/jcpoa-joint-statement-by-france-the-united-kingdom-and-germany-08-05-18>.

<sup>271</sup> *Id.*

in a joint statement that they released prior to and in anticipation of the U.S. withdrawal.<sup>272</sup>

The JCPOA members also rejected the U.S. claim that the JCPOA was a threat to world security. France, Germany, and the United Kingdom emphasized that the “agreement remains important for [their] shared security,” and that the decision by the United States has caused “regret and concern.”<sup>273</sup> China and Russia also emphasized that “the JCPOA proved to be a significant contribution in strengthening global nuclear non-proliferation architecture as well as international security as a whole.”<sup>274</sup> World leaders also went further to unilaterally condemn the withdrawal as politically motivated. President Macron told reporters that the decision by President Trump was “for his own domestic reasons,” and “a campaign pledge [President Trump] made long ago.”<sup>275</sup> Moscow referred to the actions taken by the United States as “American aspirations to settle political scores with Iran.”<sup>276</sup> China’s Foreign Minister, Wang Yi, responded by stating that China openly “oppose[s] the wrong practices of unilateral sanctions and ‘long-arm jurisdiction’ in international relations.”<sup>277</sup> For its part, Iran responded to the U.S. withdrawal by violating some of its obligations under the Deal.<sup>278</sup> And while some JCPOA members pushed back against these breaches (the European members went so far as to trigger the Deal’s mechanism for dispute resolution), they continued to express their commitment to the Deal.<sup>279</sup>

So, while the economic reaction to the re-outcasting regime was similar to the one witnessed during the pre-JCPOA sanctions regime, the diplomatic response was more resistant. Without an international law

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<sup>272</sup> Preparatory Committee for the 2020 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, U.N. Doc. NPT/CONF.2020/PC.II/7/Rev.1 (May 3, 2018), <https://undocs.org/NPT/CONF.2020/PC.II/7/Rev.1> [hereinafter NPT 2020 Review Document].

<sup>273</sup> White, *supra* note 247.

<sup>274</sup> NPT 2020 Review Document, *supra* note 272.

<sup>275</sup> White, *supra* note 247.

<sup>276</sup> Daniel Boffey & Saeed Kamali Dehghan, *EU Foreign Policy Chief Calls on Firms To Defy Trump over Iran*, *GUARDIAN* (Aug. 7, 2018), <https://www.theguardian.com/world/2018/aug/07/eu-foreign-policy-chief-calls-on-firms-to-defy-trump-over-iran>.

<sup>277</sup> *Russia, China Say They Will Keep Their Commitment to Iran Nuclear Deal*, *PRESSTV* (Aug. 18, 2018), <https://www.presstv.ir/Detail/2018/08/18/571490/Russia-China-Iran-JCPOA-Trump-sanctions>.

<sup>278</sup> *Iran Still Expanding Enriched Uranium Stockpile, Says UN Watchdog*, *AL JAZEERA* (Sept. 4, 2020), <https://www.aljazeera.com/news/2020/09/iran-expanding-enriched-uranium-stockpile-watchdog-200904160435365.html>.

<sup>279</sup> Colin Dwyer, *‘Left with No Choice,’ European Allies Put Iran On Notice Over Nuclear Deal Breaches*, *NPR* (Jan. 14, 2020), <https://www.npr.org/2020/01/14/796199041/left-with-no-choice-european-allies-put-iran-on-notice-over-nuclear-deal-breache>.

violation to point to, the United States failed to justify the re-outcasting regime as either a valid diplomatic decision or necessary for world security. In sum, unlike the use of U.S. secondary sanctions in the pre-JCPOA outcasting regime—which was seen as an effort by the United States to coalesce the international community in response to Iran’s violations of international law—the re-imposition of the secondary sanctions during the re-outcasting regime was seen as an effort by the United States to strong-arm the international community in order to settle a political score. As the next Section will explain, re-outcasting a nation in the face of adherence to its international legal obligations is counter-productive.

### *B. The Iran Re-Outcasting Regime as Counter-Productive*

At its core, an outcasting/re-outcasting scheme is a “carrot-and-stick” regime. The sanctions work as the stick and the eventual economic reintegration serves as the carrot. For the U.S. secondary sanctions regime to function as an effective outcasting tool, both components of the carrot-and-stick regime need to be powerful. The counter-productive re-outcasting regime has weakened both components.

First, the re-outcasting regime may undermine the economic power of U.S. secondary sanctions by encouraging sovereign nations to defy U.S. sanctions; and second, by creating a long-lasting chilling effect around financial transactions with Iran, the re-outcasting regime may obscure the path to reintegration—thereby weakening the diplomatic power of U.S. secondary sanctions. In this way, the renewed sanctions regime has weakened both the carrot and the stick.

#### *i. U.S. Secondary Sanctions as Empty Threats*

There is virtually no dispute that U.S. secondary sanctions can inflict a lot of economic hardship on an outcast state. The immense power of a U.S. secondary sanctions regime lies in its ability to unilaterally isolate a nation. Sustaining a unilaterally led secondary sanctions regime, however, might be difficult in the face of international resistance. Given the fact that the U.S. economy relies on globalization, enforcing secondary sanctions could backfire by damaging the U.S. economy. While in the near future the threat of secondary sanctions may lead to compliance from sovereign states, in the long run, these same sovereigns might be willing to defy these sanctions if they see them as illegitimate. If this defiance from sovereign states materializes, some of the most powerful U.S. secondary sanctions may be exposed as empty threats due to America’s inability to enforce them.

As noted earlier, despite the economic compliance by the international community, the Iran re-outcasting regime faced diplomatic

opposition from its inception.<sup>280</sup> As the re-outcasting regime continued, however, the international community began to show economic defiance as well. One of the most prominent expressions of defiance came from the E3, which officially launched the “Instrument in Support of Trade Exchanges” (INSTEX) based in Paris in January 2019.<sup>281</sup> This “special-purpose vehicle” was created after the United States imposed the re-outcasting regime in order to facilitate European trade with Iran despite the U.S. sanctions.<sup>282</sup> This vehicle was created to serve as a catalyst between Iran and European companies<sup>283</sup>—substituting in for private international financial institutions that had previously facilitated trade between Iran and Europe. INSTEX is uniquely structured because it’s supported and governed by multiple sovereign nations rather than private individuals or entities. Initially, the governments of the E3 served as its sole shareholders,<sup>284</sup> and its board comprised of government officials from these three countries.<sup>285</sup> By November 2019, however, Belgium, Denmark, Finland, the Netherlands, Norway, and Sweden had also become INSTEX’s shareholders.<sup>286</sup>

While the success of the special-purpose vehicle is yet uncertain, it carries with it a great deal of significance. INSTEX was the first major effort by European powers to jointly circumvent U.S. secondary sanctions by allowing international companies to conduct trade with Iran without going through the international financial sector.<sup>287</sup> As this piece outlined earlier, the power of U.S. secondary sanctions is based on their threat to cut off international financial institutions from the U.S. financial sector and, by extension, the U.S. dollar.<sup>288</sup> So, at their core, U.S. secondary sanctions concentrate their leverage on banks and other financial institutions. But INSTEX may be able to shield itself from the consequences of U.S. sanctions because of its unique structure. Because INSTEX is directly backed by major

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<sup>280</sup> See *infra* note 272–281 and accompanying text.

<sup>281</sup> *INSTEX: Europe Sets Up Transactions Channel with Iran*, DEUTSCHE WELLE (Jan. 31, 2019), <https://www.dw.com/en/instex-europe-sets-up-transactions-channel-with-iran/a-47303580>.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> Esfandyar Batmanghelidj & Ellie Geranmayeh, *Trading with Iran Via the Special Purpose Vehicle: How it Can Work*, EUR. COUNCIL ON FOREIGN REL. (Feb. 7, 2019), [https://www.ecfr.eu/article/commentary\\_trading\\_with\\_iran\\_special\\_purpose\\_vehicle\\_how\\_it\\_can\\_work](https://www.ecfr.eu/article/commentary_trading_with_iran_special_purpose_vehicle_how_it_can_work).

<sup>285</sup> Christoph Schult, *German Banker Runs EU Payment system for Iran Trade*, SPIEGEL ABROAD (Jan. 31, 2019), <http://www.spiegel.de/politik/ausland/us-sanktionen-deutscher-banker-leitet-iran-zweckgesellschaft-a-1250864.html>.

<sup>286</sup> *Iranian Diplomat Says There Is Still Chance To Save Nuclear Deal*, TEHRANTIMES (July 13, 2020), <https://www.tehrantimes.com/news/449976/Iranian-diplomat-says-there-is-still-chance-to-save-nuclear-deal>.

<sup>287</sup> Batmanghelidj & Geranmayeh, *supra* note 284.

<sup>288</sup> See *infra* Section III.A.

European allies and its supervisory board is composed of government officials, sanctioning INSTEX would, in effect, be sanctioning European allies.<sup>289</sup> Such a move would be a far more aggressive step than those taken thus far. As such, it is far less likely that the United States would actually sanction INSTEX. This could give INSTEX a major leverage in bypassing U.S. sanctions because it could make sanctioning a costly endeavor for the United States.

As of now, though, INSTEX's significance is mostly symbolic. It's officially only authorized to trade commodities that are already exempt from U.S. secondary sanctions (such as food and medicine).<sup>290</sup> After months of planning, INSTEX finally processed its first transaction with Iran in March 2020: exporting medical supplies from Europe to Iran.<sup>291</sup> Although INSTEX's function is best described as modest in frequency and scope, its existence nevertheless possesses a threat to the economic power of U.S. secondary sanctions. Not only is it possible for this device to expand to non-exempt trades, but it can also expand to include other countries (European and non-European) in the future.<sup>292</sup> Although facilitating trade of non-exempt goods would increase INSTEX's exposure to U.S. sanctions, INSTEX could further shield itself from sanctions by including more countries into the scheme, thereby increasing the cost of sanctions for the United States.

The mere existence of INSTEX foreshadows a potentially significant setback created by counterproductive re-outcasting. As outlined earlier, the United States has thus far only imposed major secondary sanctions on private entities on a case-by-case basis.<sup>293</sup> In that posture, the United States has had a major advantage because it has been able to leverage its financial power against private entities one at a time. But the move by the United States to re-impose sanctions in this manner motivated Europe to take this unprecedented step toward counterbalancing the United States.<sup>294</sup> At bottom, the lack of legal legitimacy that accompanies counter-productive re-outcasting might incentivize and justify two efforts that can actually undermine the economic power of U.S. secondary sanctions: rebuke by sovereign states and unification

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<sup>289</sup> Henry Farrell, *Trump May Be About To Call Europe's Bluff on Iran. Europe Isn't Bluffing*, WASH. POST (Feb. 25, 2019), <https://www.washingtonpost.com/politics/2019/02/25/trump-may-be-about-call-europes-bluff-iran-europe-isnt-bluffing/>.

<sup>290</sup> See Batmanghelidj & Gernmayeh, *supra* note 284; see also Schult, *supra* note 285 (discussing that these goods were not being traded because of the chilling effect surrounding any transaction with Iran).

<sup>291</sup> Mauricio Escobar & Adria Perez, *Sanctions-Related Developments*, JDSUPRA (May 19, 2020), <https://www.jdsupra.com/legalnews/sanctions-related-developments-33900/>.

<sup>292</sup> *Id.*

<sup>293</sup> See Part II.A.

<sup>294</sup> See e.g., Escobar & Perez, *supra* note 291 (stating that INSTEX was "aimed at enabling trade with Iran and protecting participating companies from U.S. sanctions").

of economic forces. INSTEX is the result of both—not only does it leverage the combined economic weight of major European powers, but it also leverages their combined diplomatic pull. This, in effect, makes it a much more difficult target for the United States.

While INSTEX is unique in that it is a combined effort by sovereign states, in practice, many sovereign states could also unilaterally weaken the economic effect of U.S. secondary sanctions by simply refusing to comply with U.S. demands. A prime example of a sovereign nation that could unilaterally defy U.S. sanctions is China. At bottom, if China chooses to defy U.S. sanctions, the United States would probably be unable to enforce some of its most aggressive sanctions because doing so would greatly harm the U.S. economy.<sup>295</sup> This is especially true with regards to U.S. sanctions on Iran's oil sector. America's most effective tool for targeting Iran's oil sector, Section 1245 of the NDAA, is geared toward sovereigns rather than private entities.<sup>296</sup> Recall that through Section 1245, the United States threatens to boycott all financial institutions that are predominantly in a jurisdiction of a nation that refuses to substantially decrease its oil imports from Iran.<sup>297</sup> The economic gravity of following through with this sanction cannot be overstated. Given the powerful nature of Section 1245, the United States cannot enforce it aggressively without also harming the U.S. economy. Thus, experts have long expressed concern about these sanctions being exposed as empty threats. Jay Solomon, for instance, noted that even in 2011, many U.S. officials feared that if countries such as India and China refused to follow U.S. sanctions, the United States could be exposed as the "emperor with no clothes."<sup>298</sup>

But the United States avoided this outcome during the pre-JCPOA sanctions regime. While the sheer economic power of the United States was critical for this achievement, the diplomatic posture of the outcasting regime also made it very difficult for Iran's oil buyers to defect. The pre-JCPOA sanctions regime came at a time when the world was fully aware of Iran's dangerous nuclear progress and its various international law violations.<sup>299</sup> As a result, in addition to pressure from the United States, major world powers had independent reasons to outcast Iran during the pre-JCPOA outcasting regime.<sup>300</sup> So, by 2012, the world had recognized the threat of a nuclear Iran,

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<sup>295</sup> SOLOMON, *supra* note 20, at 194.

<sup>296</sup> Pub. L. No. 112-81, § 1245, *supra* note 80.

<sup>297</sup> *Id.*

<sup>298</sup> SOLOMON, *supra* note 20, at 194.

<sup>299</sup> For instance, U.N. members expressed their concern regarding Iran's growing nuclear program in 2010. S.C. Res. 1929, *supra* note 75.

<sup>300</sup> For instance, China contributed to the pre-JCPOA outcasting regime partly because it feared that a potential conflict in the Middle East would damage the Chinese economy. SOLOMON, *supra* note 20, at 196. The European Union contributed to the pre-JCPOA outcasting regime partly because of its commitment to implementing the directives of Resolution 1929. ADEBAHR, *supra* note 104, at 64.

and international law had authorized sanctions as a form of response to this threat. Thus, when the United States began gearing up its most aggressive secondary sanctions, those sanctions were seen as legitimate tools in response to a real threat from Iran.

These same aggressive U.S. secondary sanctions were imposed in a completely different context during the re-outcasting regime. These renewed sanctions regime were not legitimated by international law, nor was it imposed as an effort to combat a real threat from Iran. In this context, sovereign states may be more likely to defect, thereby exposing the United States as the emperor with no clothes.<sup>301</sup> Currently, there are signs of defection from sovereign states. Prior to the implementation of the re-outcasting regime, the Trump administration emphasized its commitments to a “maximum pressure” campaign against Iran.<sup>302</sup> At the center of this campaign was an effort to pressure every country to cut its oil imports from Iran entirely.<sup>303</sup> For instance, in September 2018, senior members of the Trump administration demanded that importers of Iranian oil cut their oil imports down to zero by November 2018.<sup>304</sup> The administration also maintained that it would not grant any waivers.<sup>305</sup> Yet, as the deadline approached, pressure from countries hoping to continue importing oil from Iran forced the administration to grant waivers to eight countries that imported approximately seventy-five percent of Iran’s total oil exports.<sup>306</sup> Even after the waivers expired, countries such as China and India continued to purchase oil from Iran.<sup>307</sup> Although the vast majority of Iran’s buyers eventually abandoned Iran in response to the re-imposition of sanctions, the defiance from countries such as China and India was powerful because it illustrated just how vulnerable the re-outcasting regime is.

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<sup>301</sup> SOLOMON, *supra* note 20, at 194.

<sup>302</sup> Josh Lederman et al., *The Trump Team’s Trade Sanctions Were Not What Iran Hawks Wanted*, CNBC NEWS (Nov. 2, 2018), <https://www.nbcnews.com/politics/national-security/trump-team-s-trade-sanctions-were-not-what-iran-hawks-n930561>.

<sup>303</sup> *Id.*

<sup>304</sup> Ian Talley, *U.S. Toughens Stance on Future Iran Oil Exports*, WALL ST. J. (June 26, 2018), <https://www.wsj.com/articles/u-s-signals-zero-tolerance-on-future-iran-oil-exports-1530028859>.

<sup>305</sup> *Id.*

<sup>306</sup> *Factbox: The Knowns and Unknowns of U.S. Iran Oil Sanction Waivers*, REUTERS (Nov. 7, 2018), <https://www.reuters.com/article/us-usa-iran-sanctions-factbox/factbox-the-knowns-and-unknowns-of-u-s-iran-oil-sanction-waivers-idUSKCN1NC100>. The eight countries that received waivers were China, India, South Korea, Japan, Italy, Greece, Taiwan and Turkey. *Id.*

<sup>307</sup> Anjali Singhvi et al., *Defying U.S. Sanctions, China and Others Take Oil From 12 Iranian Tankers*, N.Y. TIMES (Aug. 3, 2019), <https://www.nytimes.com/interactive/2019/08/03/world/middleeast/us-iran-sanctions-ships.html>.

Indeed, reports of a multibillion-dollar partnership between Iran and China have begun circulating. According to the reports, China is planning major long-term investments in Iran's banking, telecommunications, and railways sectors.<sup>308</sup> By late-2021, support from China and Russia—in the form of continued purchases of Iranian oil—was considered a major obstacle to effectively outcasting Iran.<sup>309</sup>

At bottom, although the United States has been successful in weakening Iran's economy through the use of secondary sanctions, the recent spark in resistance against the use of these sanctions could indicate the rise of powerful defectors. If this defiance grows, it could expose U.S. secondary sanctions as empty threats. Naturally, the impact of that exposure would go beyond the Iran re-outcasting regime and create long-lasting implications for the use of secondary sanctions in general. In short, by encouraging open defiance, the re-outcasting regime could weaken the stick in the “carrot-and-stick” sanctions scheme.

*ii. Long-Lasting Chilling Effect*

As explained earlier, to incentivize an outcast state to cooperate, the international community needs to provide a path for reintegration.<sup>310</sup> And while reintegration after the lifting of sanctions can normally be assumed, the Iran re-outcasting regime may have undermined that assumption. A counter-productive re-outcasting regime will, in all likelihood, intensify the chilling effect that lingers after U.S. secondary sanctions have been lifted. This is because re-imposing secondary sanctions, despite the outcast state's compliance with its international legal obligations, will confirm the fear that drives the chilling effect in the first place: secondary sanctions can be re-imposed at any time. And while sovereign states may stand united in defiance of U.S. secondary sanctions, private entities may not. So even if the economic power of U.S. secondary sanctions is weakened because of defiance by sovereign states, no meaningful reintegration can take place if the private international financial sector is out of reach due to the chilling effect. In this way, this chilling effect will obscure the path to reintegration, which could

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<sup>308</sup> Farnaz Fassihi & Steven Lee Myers, *China, With \$400 Billion Iran Deal, Could Deepen Influence in Mideast*, N.Y. TIMES (Mar. 29, 2021).

<sup>309</sup> Arshad Mohammed & John Irish, *U.S. Has Reached Out to China About Cutting Oil Imports from Iran, Officials Say*, REUTERS (Sept. 28, 2021), <https://www.reuters.com/business/exclusive-us-has-reached-out-china-about-cutting-oil-imports-iran-officials-say-2021-09-28>; Jonathan Tirone, *Boosted by China and Russia, Iran Digs in on Nuclear Talks*, BLOOMBERG (Sept. 3, 2021), <https://www.bloomberg.com/news/articles/2021-09-03/boosted-by-china-and-russia-iran-digs-in-on-nuclear-talks>.

<sup>310</sup> See *supra* Part IV.C.

discourage Iran and other similarly situated outcasts from engaging (or in Iran's case, re-engaging) in cooperation altogether.

iii. *Chilling Effect Following the JCPOA*

Even before the abrupt re-imposition of secondary sanctions in 2018, there was a major chilling effect around dealings with Iran. As noted earlier, when the secondary sanctions were initially imposed during the pre-JCPOA outcasting regime, major international financial institutions were dissuaded from engaging in even unsanctioned business with Iran—creating a chilling effect around doing any business with Iran.<sup>311</sup> And while this chilling effect might have initially helped incentivize Iran to participate in negotiations by adding to the economic pressure, it became problematic when the phenomenon remained after the sanctions were officially lifted in 2016.<sup>312</sup>

Despite improvements in the Iranian economy, many international banks continued to avoid doing business with Iran partly because the sanctions regime remained unpredictable.<sup>313</sup> As one expert noted following the JCPOA: “there is a growing reluctance [among] banks to get involved in any transactions that could become subject to changing interpretations of existing laws.”<sup>314</sup> This uncertainty—caused partly by the complexity of the reintegration regime—was further fueled by the divisive nature of U.S. politics.<sup>315</sup> Some foreign firms feared that U.S.-Iran relations might dramatically change under a future president.<sup>316</sup> While others, who saw Iran as the unreliable party, feared that Iran would eventually violate the JCPOA, causing the renewal of sanctions.<sup>317</sup>

In addition to the uncertainty surrounding the future of the JCPOA, the outdated nature of Iran's financial sector also dissuaded international

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<sup>311</sup> Crisis Group Report, *supra* note 54, at 34–35.

<sup>312</sup> Schult, *supra* note 285.

<sup>313</sup> Shora Azarnoush & Loveday Wright, *Post-Sanctions Iran Split Between Euphoria and Caution*, DEUTSCHE WELLE (Jan. 25, 2016), <https://www.dw.com/en/post-sanctions-iran-split-between-euphoria-and-caution/a-18998168>.

<sup>314</sup> Madison Marriage & Najmeh Bozorgmehr, *Iran Moves to Woo Foreign Investors; Relaxation of Trade Barriers after Nuclear Deal, but Sanctions Remain an Obstacle*, FIN. TIMES (October 17, 2016), <https://www.ft.com/content/3d139766-9205-11e6-a72e-b428cb934b78>.

<sup>315</sup> Azarnoush & Wright, *supra* note 313.

<sup>316</sup> Cameron Glenn, *A Year on, Iran's Nuclear Deal Is Helping its Economy, but Not as Some Hoped*, QUARTZ (July 13, 2016), <https://qz.com/729036/a-year-on-irans-nuclear-deal-is-helping-its-economy-but-not-as-much-as-some-hoped>.

<sup>317</sup> *Id.*

financial cooperation.<sup>318</sup> Years of sanctions had essentially left the Iranian financial sector behind international developments.<sup>319</sup> Following the removal of sanctions, a senior banker in Tehran observed this consequence by noting that “[the Iranian] banking system, like [the Iranian economy] has been isolated and has no idea what has happened in the world over the past decades.”<sup>320</sup> In this way, the sanctions themselves made the Iranian financial sector less attractive for investors even after their removal.

These concerns translated into practice as foreign investors exercised extreme caution when dealing with Iran following the JCPOA. While some believed that information and precaution would be enough to guard against potential future risks, others were deterred by the cost of the precaution itself.<sup>321</sup> For instance, small and medium-sized entities in Germany feared that the additional cost of precaution (such as the cost of expert advisors) would outweigh the potential financial gain of conducting business with Iranian entities.<sup>322</sup> Even for international entities that were interested in conducting business with Iran, it was difficult to find banks that were willing to enter into transactions with Iranian banks because many banks feared the potential re-imposition of sanctions and the massive fines that would accompany them.<sup>323</sup>

This chilling effect was so powerful that even ongoing reassurances from the source of the fear itself—the United States—achieved little success. A few months after the removal of phase-three sanctions, then-Secretary of State John Kerry spoke directly to multiple executives from major European banks in an attempt to assure them that transactions with many of the major Iranian banks and entities would no longer face punishment.<sup>324</sup> Other U.S. officials, such as officials from the Department of Treasury, encouraged foreign investors to hire attorneys in order to better navigate business with Iran.<sup>325</sup> But these on-going reassurances and guidance did little to dampen the uncertainty that had spread across international banks and other institutions.

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<sup>318</sup> Najmah Bozorgmehr, *Iran's 'Outdated' Banks Hamper Efforts To Rejoin Global Economy*, FINANCIAL TIMES (Jan. 19, 2016), <https://www.ft.com/content/39ebfc92-b4a0-11e5-b147-e5e5bba42e51>.

<sup>319</sup> Michael Schwartz *et al.*, *The Effects of the JCPOA on the Iranian Economy*, AIC (Apr. 17, 2017), <http://www.us-iran.org/news/2017/4/15/the-effects-of-the-jcpoa-on-the-iranian-economy>.

<sup>320</sup> *Id.*

<sup>321</sup> Marketa Hulpachova, *Untangling Iran's Web of Sanctions after the Nuclear Deal*, GUARDIAN (Apr. 13, 2016), <https://www.theguardian.com/world/iran-blog/2016/apr/13/untangling-irans-web-of-sanctions-after-the-nuclear-deal>.

<sup>322</sup> *Id.*

<sup>323</sup> For instance, in 2014, the United States hit France's BNP Paribas with a \$8.9 billion fine. *Id.*

<sup>324</sup> Kerry: *Euro Banks Free to Deal with Iran*, IRAN PRIMER (May 11, 2016), <https://iranprimer.usip.org/blog/2016/may/11/kerry-euro-banks-free-engage-iran>.

<sup>325</sup> Hulpachova, *supra* note 321.

iv. *Re-Outcasting Amplified the Chilling Effect*

The chilling effect that followed the JCPOA, although in itself problematic, was expected to alleviate over time.<sup>326</sup> Because uncertainty is dampened by stability, the chilling effect would have gradually faded if Iran had continued to comply with its obligations under the JCPOA and the United States had maintained a consistent policy toward the agreement. The rather abrupt and predominately political re-imposition of secondary sanctions, however, will probably intensify that chilling effect to a potentially destructive level. This is because by re-imposing secondary sanctions, the United States validated the fear that had sparked the chilling effect in the first place—uncertainty. The fact that the re-outcasting regime was perceived as political will likely only fuel the chilling effect surrounding U.S. secondary sanctions, and the reason for this is obvious: purely political decisions are by nature unpredictable.

In addition to the political nature of the re-imposition, the unilateral success of the re-outcasting regime in halting private business with Iran will further amplify the chilling effect, because it confirms that those companies that risked potential future sanctions by engaging in business dealings with Iran paid the price while those that remained cautious did not. A comparison between Airbus's and Boeing's paths illustrates this phenomenon. After the JCPOA, Airbus entered into a contract with IranAir for one hundred passenger aircrafts.<sup>327</sup> Boeing had likewise entered into an agreement with IranAir for eighty passenger aircrafts.<sup>328</sup> Following the re-imposition of sanctions in 2018, both Airbus and Boeing were compelled to freeze all dealings with Iran.<sup>329</sup> Although both companies had multi-billion dollar contracts with IranAir, Boeing was far more cautious in its dealings.<sup>330</sup> Boeing never began building the aircrafts nor did it factor their sales into its revenue calculation

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<sup>326</sup> *See id.* (describing the history of unpredictability surrounding US sanctions).

<sup>327</sup> Parisa Hafezi & Tim Hefher, *Iran Expects Word from Airbus on Plane Deal Soon: Fars*, REUTERS (May 11, 2018), <https://www.reuters.com/article/us-iran-nuclear-planes/iran-expects-word-from-airbus-on-plane-deal-soon-fars-idUSKBN1ICORY>.

<sup>328</sup> *Id.*

<sup>329</sup> Dominic Gates, *Boeing's \$9.5 Billion Iran Deals, Always Uncertain, Are Now Effectively Dead*, SEATTLE TIMES (May 8, 2018), <https://www.seattletimes.com/business/boeing-aerospace/boeings-8-billion-iran-deal-always-uncertain-is-now-effectively-dead/>. Even though Airbus is based in France, it is subject to the approval of OFAC because approximately ten percent of its components are made in the United States. Parisa Hafezi, *Iran Urges EU To Press Washington on Airbus Deliveries: ISNA*, REUTERS (Dec. 17, 2018), <https://www.reuters.com/article/us-iran-airbus/iran-urges-eu-to-press-washington-on-airbus-deliveries-isna-idUSKBN1OG19X>.

<sup>330</sup> Robert Wall & Nicolas Parasie, *Boeing, Airbus to Lose Billions in Orders from Trump's Iran Sanctions*, WALL ST. J. (May 9, 2018), <https://www.wsj.com/articles/boeing-airbus-to-lose-billions-in-orders-from-trumps-iran-sanctions-1525877490>.

because it feared that the future of the JCPOA was uncertain.<sup>331</sup> Airbus, on the other hand, not only officially booked its agreement with Iran, but it began building and delivering some of the aircrafts.<sup>332</sup> As such, Airbus made itself more vulnerable to financial damage by being more aggressive with its business dealings with Iran.<sup>333</sup>

The same pattern emerged in other sectors. The French carmaker Renault, for instance, lost approximately six percent of its revenue after the re-imposition of sanctions, which was partly due to losing a post-JCPOA agreement that was expected to increase its vehicle production by seventy-five percent.<sup>334</sup> But Total, a company that behaved more cautiously, was able to avoid significant losses after the re-outcasting regime was imposed; although Total lost a multi-billion dollar project in Iran's gas fields, it had not started the project by the time the sanctions were re-imposed, so it was able to avoid a major financial blow.<sup>335</sup>

Given this turn of events, it would seem likely that many international foreign institutions will be less inclined to enter into business dealings with Iran *even if* the re-outcasting regime is reversed. Naturally, this chilling effect would be greater than the one formed after the JCPOA since the purely policy/political justifications for the re-outcasting regime make any future agreement vulnerable to withdrawal. Thus, in an ironic twist, the unrivaled economic power of U.S. secondary sanctions might diminish their power as diplomatic tools—thereby weakening the carrot in the carrot-and-stick regime.

This predicted chilling effect will inevitably weaken the reward for, and by extension, the likelihood of cooperation. After all, why accede to international demands if the incentive for doing so is diminished? Thus, the chilling effect weakens the diplomatic power of U.S. secondary sanctions. As emphasized throughout this piece, the success of an outcasting regime is not measured solely by its ability to isolate a state; rather, a successful outcasting regime must induce cooperation—an option that becomes less attractive as the path to reintegration becomes less certain. As the former Secretary of Treasury

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<sup>331</sup> Jim Tankersley & Natalie Kitroeff, *Boeing C.E.O. Downplays Loss of \$20 Billion Contract with Iran*, N.Y. TIMES (May 9, 2018), <https://www.nytimes.com/2018/05/09/us/politics/boeing-ceo-iran.html>.

<sup>332</sup> Gates, *supra* note 329.

<sup>333</sup> *IranAir Gets Five More ATR Regional Planes Before Sanctions*, REUTERS (Aug. 5, 2018), <https://www.reuters.com/article/us-iran-nuclear-atr/iranair-gets-five-more-atr-regional-planes-before-sanctions-idUSKBN1KQ04B>.

<sup>334</sup> *Renault Reports First Revenue Decline Since Iran Exit*, PRESS TV (Oct. 24, 2018), <https://www.presstv.ir/Detail/2018/10/24/577941/Iran-automotive-Renault-Peugeot-France-sanctions>.

<sup>335</sup> *French Firms Big Losers in Trump's New Iranian Sanctions Game*, LOCAL FR., (Aug. 5, 2018), <https://www.thelocal.fr/20180805/french-firms-big-losers-in-trumps-new-iranian-sanctions-game>.

Jack Lew expressed in early 2016: “[T]o pressure bad actors to change their policy, we must be prepared to provide relief from sanctions when we succeed. If we fail to follow through, we undermine our own credibility and damage our ability to use sanctions to drive policy change.”<sup>336</sup>

Thus, a re-outcasting regime that is not responding to a state’s violation of international law is counter-productive because it weakens both the punishment and the reward for the outcast state. Because a counter-productive re-outcasting regime is imposed despite a state’s compliance with its international legal obligations, it is seen as a purely political move that is not responding a real threat. As such, such a regime will encourage sovereign states to defy U.S. secondary sanctions, while discouraging private financial institutions to resume dealing with the outcast state even after cooperation.

### C. *Moving Forward: The Future of the Iran Deal and Beyond*

The economic power of the United States is unparalleled; but, as the diplomatic and private-sector reactions to the re-imposition of the Iran sanctions regime illustrate,<sup>337</sup> brute economic force might not be enough to sustain successful outcasting regimes indefinitely. Without the legitimization that comes from international law, in the long-run, defiance by other nations and the chilling effect will diminish the power of U.S. secondary sanctions as tools of outcasting.

The current state of the Iran re-outcasting regime and the struggle around the renewed efforts by the Biden administration to return to the Iran Deal illustrates this phenomenon. Since taking office, the Biden administration has made meaningful efforts to return to the Iran Deal and bring Iran back into compliance with its JCPOA obligations. By September 2021, the United States, Iran, and representatives from other members of the JCPOA had participated in half a dozen meetings, but, unfortunately, with little progress to show for it.<sup>338</sup> The lack of any immediate progress is, at least in part, due to the diminished power of the U.S. secondary sanctions. For one, increasing sovereign defiance of U.S.-economic sanctions has weakened the “stick” in the Iran re-outcasting regime. Although Iran’s economy has undoubtedly suffered as a result of the re-imposition of sanctions, sovereign defiance has provided a lifeboat for Iran’s economy. This in turn, has made Iran less desperate for economic relief. In the midst of the renewed nuclear

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<sup>336</sup> Press Release, U.S. Dep’t of Treasury, Remarks of Secretary Lew on the Evolution of Sanctions and Lessons for the Future at the Carnegie Endowment for International Peace (Mar. 30, 2016), <https://www.treasury.gov/press-center/press-releases/pages/jl0398.aspx>.

<sup>337</sup> See *supra* note 270–309 and accompanying text.

<sup>338</sup> Kelsey Davenport, *Iran Suggests Harder Line in Nuclear Talks*, ARMS CONTROL ASS’N, (Sept. 2021), <https://www.armscontrol.org/act/2021-09/news/iran-suggests-harder-line-nuclear-talks>.

negotiations, it was reported that economic assistance from Russia and China made Iran more emboldened in the negotiations.<sup>339</sup> According to reports, Iran even considered expanding its demands of concessions from the United States because it saw U.S. sanctions as yielding “diminishing returns.”<sup>340</sup> At the same time, Iran also pointed to the abrupt 2018 withdrawal by the United States to emphasize that it was engaging in the negotiations with skepticism. In his first U.N. speech, Iran’s new President Ebrahim Raisi said: “We don’t trust the promises made by the U.S. government,”<sup>341</sup> thereby signaling that the economic relief—or “carrot” in the carrot-and-stick regime—had lost some of its attractiveness for Iran. This, of course, does not mean that the renewed talks are hopeless. Indeed, both Iran and the United States have signaled that they remain hopeful that a new agreement is feasible.<sup>342</sup> But the prolonged struggle illustrates the way in which counter-productive outcasting has diminished the effectiveness of the U.S. secondary sanctions as outcasting tools.

Any diminished effectiveness will likely follow U.S. secondary sanctions outside of the Iran sanctions regime. After all, if sovereign nations create mechanisms for circumventing U.S. secondary sanctions—such as INSTEX<sup>343</sup>—or, defy U.S. secondary sanctions without severe consequences—as China and Russia have<sup>344</sup>—they could do so in the face of any other U.S. secondary sanctions regime that they oppose. And if the United States cannot be trusted to bring back economic prosperity to a nation by lifting the sanctions for a sustained period, then, not just Iran, but any other outcast would be less enticed to yield to U.S. demands.

As the current crisis in Ukraine demonstrates, powerful U.S. secondary sanctions are more important than they have ever been in limiting armed conflict. Russia’s invasion of Ukraine is not only a violation of international law,<sup>345</sup> but also one of the biggest threats to international stability

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<sup>339</sup> Jonathan Tirone, *Boosted by China and Russia, Iran Digs In on Nuclear Talks*, BLOOMBERG (Sept. 3, 2021), <https://www.bloomberg.com/news/articles/2021-09-03/boosted-by-china-and-russia-iran-digs-in-on-nuclear-talks>.

<sup>340</sup> *Id.*

<sup>341</sup> Natasha Turak, *Iranian President Raisi Lambasts U.S. at First UN Speech, Biden Proposes Compliance to Nuclear Deal*, CNBC (Sept. 22, 2021), <https://www.cnbc.com/2021/09/22/irans-raisi-lambasts-us-at-un-biden-proposes-nuclear-deal-compliance.html>.

<sup>342</sup> Michelle Nichols & Arshad Mohammed, *Iran Says Nuclear Talks to Resume ‘Very Soon,’ Gives No Date*, REUTERS (Sept. 24, 2021), <https://www.reuters.com/world/middle-east/iran-says-talks-nuclear-deal-resume-very-soon-2021-09-24>.

<sup>343</sup> *INSTEX: Europe Sets Up Transactions Channel with Iran*, *supra* note 281.

<sup>344</sup> Tirone, *supra* note 309.

<sup>345</sup> Ingrid Wuerth, *International Law and the Russian Invasion of Ukraine*, LAWFARE (Feb. 25, 2022), <https://www.lawfareblog.com/international-law-and-russian-invasion-ukraine>

in modern times. Not surprisingly, in response to this unprecedented threat to international security, the United States has turned to secondary sanctions.<sup>346</sup> Although Russia is no stranger to U.S. sanctions,<sup>347</sup> these new sanctions are far more aggressive than their predecessors, targeting, for instance, the Russian financial sector through sanctions on SWIFT and the Central Bank of Russia.<sup>348</sup> The imposition of such sector-wide sanctions on a major economic and global player like Russia is unprecedented. But, despite the material impact of these sanctions on the global economy,<sup>349</sup> the international community is following the lead of the United States in outcasting Russia.<sup>350</sup> Even China, which has long voiced its opposition to U.S. secondary sanctions, has been hesitant to outright violate the Russian sanctions regime.<sup>351</sup> While it is too soon to tell whether the regime will be effective in limiting armed conflict, the lack of resistance toward aggressive U.S. secondary sanctions by the international community further illustrates just how powerful U.S. secondary sanctions can be in outcasting a state when they are legitimized as tools of enforcing international law.

To help sustain the power of U.S. secondary sanctions, moving forward, the United States should continue to strategically maintain and build on the legitimacy of U.S. secondary sanctions by using them only to enforce a nation's international legal obligations as it did during the pre-JCPOA sanctions regime and is currently doing in its imposition of the Russia sanctions regime.

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(explaining that Russia's invasion of Ukraine "violates Article 2(4) of the U.N. Charter, which prohibits the use of force against the territorial integrity of another state").

<sup>346</sup> Daniell McDowell, *The West Has Hit Russia With Tough Sanctions. They Could Be Tougher Still*, WASH. POST (Mar. 2, 2022), <https://www.washingtonpost.com/politics/2022/03/02/sanctions-russia-central-bank-ruble/>.

<sup>347</sup> CONG. RESEARCH SERV., RS45415, U.S. SANCTIONS ON RUSSIA 6–25 (2022) (explaining that since 2014, the United States has imposed a wide range of sanctions on Russia in response to Russia's annexation of Crimea, cyberattacks, interference with free and fair elections, and human-rights abuses).

<sup>348</sup> McDowell, *supra* note 346.

<sup>349</sup> Patricia Cohen, *Within Days, Russia's War on Ukraine Squeezes the Global Economy*, N.Y. TIMES (Mar. 1, 2022), <https://www.nytimes.com/2022/03/01/business/economy/russia-ukraine-sanctions-economy.html>.

<sup>350</sup> *Fact Sheet: United States, European Union, and G7 to Announce Further Economic Costs on Russia*, THE WHITE HOUSE (Mar. 11, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/11/fact-sheet-united-states-european-union-and-g7-to-announce-further-economic-costs-on-russia/>.

<sup>351</sup> *China Says It Wants to Avoid U.S. Sanctions Over Russia's War*, BLOOMBERG (Mar. 14, 2022), <https://www.bloomberg.com/news/articles/2022-03-15/china-says-it-wants-to-avoid-u-s-sanctions-over-russia-s-war>.

## VI. CONCLUSION

When the United States opted to sanction Iran instead of resorting to violence, it took a big risk. Not only was Iran an economically significant nation, but it was also a hostile one—a nation that seemed to be racing toward a nuclear weapon, unfazed by international condemnation.<sup>352</sup> Sanctions on Iran could have become futile if the international community was not properly incentivized to boycott Iran or if Iran was unpersuaded by the weight of the sanctions. Nevertheless, as this piece shows, the United States was able to overcome these potential shortcomings through the use of U.S. secondary sanctions during the pre-JCPOA sanctions regime.<sup>353</sup> As a result of the pre-JCPOA sanctions regime, U.S. secondary sanctions emerged as unprecedented tools in an effort to enforce international law. Because these sanctions were able to unilaterally compel third parties to join the sanctions regime, they proved to be uniquely powerful outcasting tools. But the pre-JCPOA U.S. secondary sanctions were propelled by more than mere brute force: they were also legitimated by Iran's increasingly threatening nuclear program and continuous violations of international law.

The re-outcasting regime, however, was not legitimated by any international law violation by Iran.<sup>354</sup> And the international reaction to the re-outcasting regime illustrates the importance of international law as a legitimizing force for the success of U.S. secondary sanctions.<sup>355</sup> Although the economic power of the United States is unparalleled, it is not absolute. As a result, this economic force needs legitimacy. As this piece proposes, international law can provide that legitimacy. Otherwise, these newly created outcasting tools might be viewed as empty threats that can be ignored and/or too unpredictable to trust.

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<sup>352</sup> See *supra* Part I.

<sup>353</sup> See *supra* Part II–III.

<sup>354</sup> See *supra* Part V.A.

<sup>355</sup> See *supra* Part V.A–B.