



Negotiating Nonproliferation: International Law and Delegation in the Iranian Nuclear Crisis

Aslı Ü. Bâli

ABSTRACT

The Iranian nuclear crisis reflects international worries about Iran's intentions in developing a nuclear energy program with potential military applications. This Article suggests that strengthening existing international institutions to more effectively provide ongoing verification of the civilian character of the Iranian program offers a diplomatic avenue of resolving this crisis. The nonproliferation regime includes safeguards to detect and deter the diversion of nuclear materials from civilian applications to weapons programs. The question of how to strengthen these safeguards to ensure that Iranian nuclear activities are verifiably proliferation resistant is at the heart of resolving the current crisis.

This Article shows that there is an identifiable compromise position that would address the concerns of the international community while enabling Iran to claim what it views as its right to nuclear energy. Yet despite this available avenue of compromise, missed negotiating opportunities have prolonged the crisis. Drawing on recent scholarship in the areas of negotiation theory and international delegations, this Article suggests an alternative approach to overcoming the conflict. By structuring negotiations around persuasive information, adopting an iterative and reciprocal negotiating structure, and strengthening the role of the International Atomic Energy Agency (the IAEA), the parties could address many of the challenges that undermined previous rounds of negotiations. Further, a delegation to the IAEA of greater authority over implementing safeguards in Iran will set an important precedent for strengthening the verification and monitoring capacities of the organization, enabling it to facilitate resolution in the instant case and to better address any future crises involving potential proliferators.

AUTHOR

Aslı Ü. Bâli is an Assistant Professor at UCLA School of Law, and holds a Ph.D. from Princeton University, a J.D. from Yale Law School, M.Phil., Cambridge University, and a B.A., Williams College. For helpful conversations and comments, I thank Antony Anghie, Laura Gómez, Allison Hoffman, David Kaye, Benedict Kingsbury, Russell Korobkin, Maximo Langer, Odette Lienau, Jennifer Mnookin, Aziz Rana, Kal Raustiala, Joanna Schwartz, Seana Shiffrin, Richard Steinberg, Ed Swaine, and Annecoos Wiersema, as well as participants at the American Society of International Law Mid-Year Research Forum, the Utah International Law Colloquium, and the Wharton-Colorado University International Law Workshop. This article benefited from excellent research assistance

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INTRODUCTION

Scarcely a day passes without one or two news articles appearing in the papers on attempts to halt advances in Iran's nuclear program.¹ These articles cover efforts to levy fresh sanctions against Iran;² they relay news of discussions among Iran's primary interlocutors on the nuclear question—the five permanent members of the United Nations Security Council (UNSC or the Council) plus Germany (collectively, the so-called P5+1)—about diplomatic overtures.³ Or the stories discuss the ebb and flow of new intelligence on Iran's program⁴ or the calls for airstrikes or other military action to delay and disrupt the progress of Iranian nuclear research.⁵ On occasion, the stories focus on negotiations between Iranian officials and the International Atomic Energy Agency (IAEA or the Agency) over a new protocol for conducting expansive inspections of the country's declared nuclear facilities and other locations of interest to the Agency.⁶ This high-profile media attention reflects many analysts' view that Iran's policies generally, and its nuclear program in particular, threaten the interests and security of the United States and Israel.⁷

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1. See, e.g., Michael R. Gordon, *Accord Reached With Iran to Halt Nuclear Program*, N.Y. TIMES, Nov. 23, 2013, <http://www.nytimes.com/2013/11/24/world/middleeast/talks-with-iran-on-nuclear-deal-hang-in-balance.html>; *Iran Nuclear Talks Halted Amid Row Over US Sanctions*, BBC (Dec. 13, 2013, 2:45 PM), <http://www.bbc.co.uk/news/world-middle-east-25370806>.
 2. See, e.g., Rick Gladstone, *United States Announces New Iran Sanctions*, N.Y. TIMES, Feb. 6, 2013, <http://www.nytimes.com/2013/02/07/world/middleeast/united-states-announces-new-iran-sanctions.html>; Michael Pearson, *New Sanctions Could 'Shatter Western Unity' on Iran*, *Senator Says*, CNN (Dec. 12, 2013, 2:32 PM), <http://www.cnn.com/2013/12/12/politics/iran-u-s-sanctions>.
 3. See, e.g., Adrian Croft, *Iran Nuclear Talks Show Progress, Western Diplomat Says*, REUTERS (Feb. 28, 2013, 6:05 PM), <http://www.reuters.com/article/2013/02/28/us-iran-nuclear-talks-idUSBRE91R1IO20130228>; Laura Rozen, *P5+1 Turns Focus to Implementing Iran Nuclear Deal*, BACK CHANNEL (Dec. 5, 2013), <http://backchannel.al-monitor.com/index.php/2013/12/7173/p51-turns-focus-to-implementing-iran-nuclear-deal>.
 4. See, e.g., Laura Rozen, *US Intelligence: Iran Decision on Nuclear Weapon Matter of 'Political Will'*, BACK CHANNEL (Mar. 12, 2013), <http://backchannel.al-monitor.com/index.php/2013/03/4708/us-iran-nuclear-weapons-decision-matter-of-political-will>.
 5. See, e.g., Isabel Kershner, *Israeli Official Hints Pentagon Plans May Make Lone Strike on Iran Unnecessary*, N.Y. TIMES, Jan. 26, 2013, <http://www.nytimes.com/2013/01/27/world/middleeast/defense-official-hints-that-israel-is-stepping-back-from-plans-to-unilaterally-attack-iran.html>.
 6. See Alan Cowell, *U.N. Nuclear Inspectors Invited to Iranian Facility*, N.Y. TIMES, Nov. 28, 2013, <http://www.nytimes.com/2013/11/29/world/middleeast/iran-nuclear-inspections.html>.
 7. See, e.g., Jodi Rudoren & David E. Sanger, *Report on Iran Nuclear Work Puts Israel in a Box*, N.Y. TIMES, Aug. 30, 2012, <http://www.nytimes.com/2012/08/31/world/middleeast/report-on-iran-nuclear-work-puts-israel-in-a-box.html>; Suzanne Kelly, *Iran a Threat to U.S. on Many Fronts*, CNN (Feb. 16, 2012, 1:35 PM), <http://security.blogs.cnn.com/2012/02/16/iran-a-threat-to-u-s-on-many-fronts>.

The willingness to consider military options to resolve the standoff reflects the seriousness of the perceived challenge to international security posed by an Iranian nuclear program.⁸ In one sense, the source of these concerns is obvious: Because major international actors fear that Iran wants to build an atomic bomb, they perceive its civilian nuclear energy program as a step toward achieving its alleged nuclear weapons goal. Becoming a nuclear power would strengthen Iran's claim to be a regional hegemon and counterweight to the current distribution of power in the Middle East. Some analysts believe that no amount of negotiations will deter Iran from its alleged pursuit of a nuclear weapon.⁹ As a result, they favor military attacks that might slow or halt the Iranian nuclear program with an immediacy that they fear diplomacy cannot deliver. The American intelligence community, however, has not yet concluded that the Iranian leadership is actively pursuing a nuclear weapon, and in any event, Iran is likely several years from attaining the technical capacity to produce such a weapon.¹⁰ There is therefore broad consensus that the international community—and the United States in particular—should take advantage of this window of opportunity by “persist[ing] in efforts to find a diplomatic or political solution as long as Iran does not decide to build a nuclear weapon.”¹¹ By early 2013, the lack of substantial progress had

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8. See, e.g., Matthew Kroenig, *Time to Attack Iran: Why a Strike Is the Least Bad Option*, FOREIGN AFF., Jan./Feb. 2012, at 76; *Obama Says 'All Options on the Table' for Iran's Nuclear Program*, CNN OUTFRONT BLOG (Mar. 14, 2013, 9:55 PM), <http://outfront.blogs.cnn.com/2013/03/14/obama-says-all-options-on-the-table-for-irans-nuclear-program>.
 9. See, e.g., Clifton W. Sherrill, *Why Iran Wants the Bomb and What It Means for US Policy*, NONPROLIFERATION REV., Mar. 2012, at 31, 44.
 10. The unclassified public summary of the 2007 National Intelligence Estimate on Iran reports that the intelligence community “assess[es] with moderate confidence Tehran had not restarted its nuclear weapons program as of mid-2007, but [it] do[es] not know whether it currently intends to develop nuclear weapons.” NAT'L INTELLIGENCE COUNCIL, IRAN: NUCLEAR INTENTIONS AND CAPABILITIES 5 (2007), *available at* http://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/20071203_release.pdf. The 2011 National Intelligence Estimate on Iran remains classified, but leaked reports indicate that although intelligence officials believe that Iran continues to pursue research with potential dual-use applications, “they stuck to their longstanding conclusion” that Iran “still has not decided to pursue a weapon.” James Risen, *U.S. Assessment of Iranian Risks Took Tricky Path*, N.Y. TIMES, Mar. 18, 2012, at A1. Further, IAEA inspections have revealed that Iran has halted progress on the program since the end of May, perhaps in preparation for renewed nuclear negotiations following the June 2013 presidential election. See Paul Richter, *Iran's Nuclear Program Has Slowed Almost to a Halt, IAEA Says*, L.A. TIMES, Nov. 14, 2013, <http://articles.latimes.com/2013/nov/14/world/la-fg-iran-sanctions-20131115>.
 11. IRAN PROJECT, STRATEGIC OPTIONS FOR IRAN: BALANCING PRESSURE WITH DIPLOMACY 10 (2013), *available at* <http://www.scribd.com/doc/136389836/Strategic-Options-for-Iran-Balancing-Pressure-with-Diplomacy> (listing signatories that endorse a call for the U.S. government to strengthen its diplomatic approach to the Iranian nuclear program, such as prominent current and former U.S. officials as General Michael Hayden, Senator Richard Lugar, Congressman Lee Hamilton, Congressman David Dreier, Ambassador Ryan Crocker, Ambassador Thomas Pickering, former State Department and National Security Council officials like Zbigniew Brzezinski, Anne-Marie

generated widespread cynicism regarding the efficacy of diplomacy, even when backed by coercive measures like sanctions and military threats.¹² The unexpected breakthrough in negotiations that occurred later in the year, following Iran's June 2013 presidential elections, was welcome evidence that the window of opportunity for negotiations remains open, though skepticism persists.¹³

A close analysis of the diplomatic record reveals that international negotiations have at times slowed—and even temporarily suspended—progress on Iran's nuclear program. These brief successes suggest that conciliation may be possible if world leaders can identify and correct past pitfalls. Most prominently, decades of deep-seated mistrust and hostility have convinced many hardliners on both sides that negotiations will fail because the other party lacks even a modicum of good faith.¹⁴ That is, Iran might be using the negotiations to buy time for their ultimate goal of acquiring a nuclear weapon, and the United States might be using nonproliferation concerns as a guise to justify sanctions with the ultimate goal of isolating Iran geopolitically in pursuit of regime change. Although many subscribe to these maximalist positions, moderates in both countries have emerged to promote their preference for a diplomatic solution. In this Article, I do not attempt to refute definitively skepticism about the

Slaughter and Gary Sick, and former Central Intelligence Agency officials like Paul Pillar, as well as prominent members of the American foreign policy establishment like Leslie Gelb, Joseph Nye and Paul Volcker).

12. The viability of a military option is the subject of some debate in the United States and in Israel. See, e.g., Leon E. Panetta, Sec'y of Def., Remarks at the Saban Center (Dec. 2, 2011) (transcript available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4937>) ("[T]he indication is that at best [a military strike] might postpone[,] . . . not destroy[,] their ability to produce an atomic weapon . . . [and might have unintended consequences that] could consume the Middle East in a confrontation and a conflict that we would regret."); Yossi Melman, *Former Mossad Chief: Israel Air Strike on Iran 'Stupidest Thing I Have Ever Heard'*, HAARETZ (May 7, 2011, 6:52 PM), <http://www.haaretz.com/news/diplomacy-defense/former-mossad-chief-israel-air-strike-on-iran-stupidest-thing-i-have-ever-heard-1.360367>; Josh Rogin, *Bush's CIA Director: We Determined Attacking Iran Was a Bad Idea*, CABLE (Jan. 19, 2012, 6:28 PM), http://thecable.foreignpolicy.com/posts/2012/01/19/bush_s_cia_director_we_determined_attacking_iran_was_a_bad_idea.
13. See Anne Gearan, *On Iran Deal, U.S. Lawmakers on Both Sides Criticize Administration, Hint at More Sanctions*, WASH. POST, Dec. 10, 2013, http://www.washingtonpost.com/world/national-security/on-iran-deal-us-lawmakers-on-both-sides-criticize-administration-hint-at-more-sanctions/2013/12/10/c4784994-61da-11e3-bf45-61f69f54fc5f_story.html; Yochi Dreazen, *Deal Reached to Halt Iran's Nuclear Program*, CABLE (Nov. 24, 2013, 3:05 PM), http://thecable.foreignpolicy.com/posts/2013/11/24/deal_reached_to_halt_irans_nuclear_program#sthash.Oo5sPN6z.dpbs.
14. See BIPARTISAN POLICY CTR., MEETING THE CHALLENGE: U.S. POLICY TOWARD IRANIAN NUCLEAR DEVELOPMENT at iv, 58 (2008); *US Insincere Toward Iran Over Nuclear Talks: Ray McGovern*, PRESSTV (Feb. 27, 2013, 10:17 AM), <http://www.presstv.com/detail/2013/02/27/291058/us-insincere-toward-iran-over-talks/>; John Irish, *France Says Iran "Two-Faced," Skeptical Talks Can Succeed*, REUTERS (Mar. 8, 2012, 6:29 AM), <http://www.reuters.com/article/2012/03/08/us-iran-nuclear-idUSTRE8250JB20120308>.

prospects for successful negotiations with Iran. Rather, I proceed on the assumption that to preserve the possibility of peaceful resolution, we must explore effective diplomatic options and ask whether persistent impasses might be attributable to the absence of trust between the parties or to ineffective negotiation strategies—rather than to bad faith. Only after exploring avenues for peaceful resolution can we assess whether skeptics are correct.

For negotiations to have even a prospect of success, two elements must be present. First, a bargaining zone—or a set of compromise positions that would meet the minimum requirements of both sides—must exist.¹⁵ Second, the structure of the negotiations must facilitate productive problem solving that allows the parties to reach an agreement within that bargaining zone. In what follows, I argue that these elements exist in the context of the Iranian nuclear negotiations, indicating a potential for peaceful, diplomatic resolution.

After briefly describing the Iranian nuclear program and applicable international law in Part I, this Article identifies three core terms that have repeatedly appeared in the compromise proposals of the past decade. These terms are (1) a limited Iranian uranium enrichment program subject to caps on size and level of enrichment, (2) an intrusive inspections regime under stringent IAEA supervision, and (3) sanctions relief.¹⁶ Such an agreement would meet Iran's stated minimum requirements, namely recognition of what they insist is their right to a civilian nuclear energy program and sanctions relief. The terms of the agreement would also meet the United States' stated minimum requirements by ensuring that Iran could not develop a breakout nuclear weapons capacity because of caps on its program enforced by a more stringent inspections regime. Further, these terms have the substantial collateral benefit of setting a precedent that substan-

15. Negotiations are understood as likely to occur *only if* the best alternative to a negotiated agreement (BATNA) is less attractive than a negotiated outcome. James Wallihan, *Negotiating to Avoid Agreement*, 14 NEGOTIATION J. 257, 261 (1998) (“[A] dominant party might still have a BATNA that exceeds any possible negotiating gain . . .”). For a detailed discussion of negotiations theory concepts such as BATNA and bargaining zone, see ALAN SCOTT RAU ET AL., NEGOTIATION 81–85 (3d ed. 2006).

16. These elements were present in proposals that were advanced by European powers negotiating with Iran on behalf of the international community as early as 2004. See *infra* Part I.B. Similar terms were also proposed by IAEA Director General Mohamed ElBaradei from 2004 onwards. See *infra* note 64 and accompanying text. Since the Obama administration took office in 2009, the U.S. position also appears to acknowledge that a compromise would include a limited enrichment program, capped and subject to stockpile limitations, coupled with intrusive inspections. For a discussion of the Obama administration's amenability to such a proposal, see *infra* note 71. Finally, the six-month interim deal announced on November 24, 2013 includes all three elements. Joby Warrick, *Nuclear Pact's Fine Print: A Temporary Halt in Advances*, WASH. POST, Nov. 23, 2013, http://www.washingtonpost.com/world/national-security/nuclear-pacts-fine-print-a-temporary-halt-in-advances/2013/11/23/0f71640a-54be-11e3-9e2c-e1d01116fd98_story.html.

tially enhances the inspections authority of the IAEA, strengthening the legal tools to detect and deter the diversion of nuclear materials from peaceful to military uses not only in the Iranian case but also for all potential future proliferators.

Part II then evaluates critical junctures at which negotiations between the IAEA, the Iranian government, and the P5+1 were thwarted.¹⁷ Examining the factors that contributed to these missed opportunities, Part III applies diagnostic tools drawn from negotiations theories to explain past failures and identify strategies to overcome foreseeable obstacles going forward. Relying on the core theory that parties can overcome an absence of trust by altering the structure of a negotiation, this Part proposes a customized approach that would adopt iterative processes to address principal-agent issues and domestic factors, utilizing a third-party arbiter to provide persuasive information and enhance the credibility of the parties' commitments. Finally, Part IV considers the effects of the Iranian nuclear crisis on the Nuclear Non-Proliferation Treaty (NPT) regime and suggests that the ultimate success of negotiations with Iran requires the strengthening of safeguards and verification mechanisms of the NPT. This Part also discusses and rebuts counterarguments regarding sovereignty concerns, arguing that enhancing the power of the nonproliferation regime more than offsets sovereignty costs associated with international delegations.

I. THE IRANIAN NUCLEAR PROGRAM

Iran first embarked on a robust nuclear energy program under the shah in the 1970s with the encouragement of the United States.¹⁸ The initial goals of

17. The P5, or permanent five members of the United Nations Security Council (UNSC or the Council), are the United States, UK, France, Russia and China. The P5+1—that is, the P5 plus Germany—is also sometimes referred to as the “EU3+3,” acknowledging that the UK, France, and Germany entered into negotiations with Iran over its nuclear program as the “EU3” before being joined by the United States, Russia, and China. Since the P5 have been involved in negotiations, some divisions have emerged among the Council powers on how to proceed. See Jay Solomon, *World News: China, Russia Resist Sanctions Against Iran*, WALL ST. J., Nov. 17, 2011, at A12; *Russia, China Block New Iran Nuclear Sanctions*, NBC NEWS (Sept. 23, 2008, 7:53 PM), http://www.nbcnews.com/id/26859796/ns/world_news-mideast_n_africa/t/russia-china-block-new-iran-nuclear-sanctions/#.Ucsm0WkS4_s.

18. The program dates back to 1957 when the United States and Iran signed a civil nuclear cooperation agreement as part of the Atoms for Peace program and the United States provided Iran with a five-megawatt nuclear reactor for research purposes, now known as the Tehran Research Reactor. DANIEL PONEMAN, *NUCLEAR POWER IN THE DEVELOPING WORLD* 84 (1982). Eventually, the shah developed a “plan to build 23 nuclear power reactors by the 1990s,” with support from the United States. SHARON SQUASSONI, CONG. RESEARCH SERV., *IRAN’S NUCLEAR PROGRAM: RECENT DEVELOPMENTS* 1 (2006); see also Ed Haas, *U.S. Endorsed Iranian Plans to Build Massive Nuclear Energy Industry*, GLOBAL RES. (Mar. 6, 2006), <http://www.globalresearch.ca/u-s-endorsed-iranian-plans-to-build-massive-nuclear-energy-industry/2067>.

the program were to meet domestic energy needs through nuclear energy, enabling Iran to develop its fossil fuel reserves for export.¹⁹ Iran became a party to the NPT as soon as the treaty was open for signature,²⁰ and entered into a Comprehensive Safeguards Agreement with the IAEA under which Iran was obliged to disclose the presence of any fissile material within its territory.²¹ After the fall of the shah, the Islamic Republic of Iran initially signaled that it would shelve its ambitious nuclear energy plans in favor of other budgetary priorities.²² International leaders were therefore surprised in 2002 when they discovered that Iran had been conducting clandestine nuclear activities for eighteen years.²³ Subsequent IAEA inspections established that Iran had an enrichment plant under construction at Natanz and had secretly conducted small-scale uranium enrichment tests.²⁴ In 2003, Iran also announced its intention to build a heavy water reactor project at Arak.²⁵ According to Iran, the goals of the current program remain to meet domestic energy needs while recouping the substantial investment made by the shah in developing a nuclear infrastructure. Iran's explanation for the clandestine nature of its activities is that U.S. and European policies had blocked the country from using open-market transactions to procure necessary equipment and technology for a civilian nuclear energy program.²⁶

19. Anthony H. Cordesman & Khalid R. Al-Rodhan, *Iranian Nuclear Weapons?: The Threat From Iran's WMD and Missile Programs* 58–59 (Feb. 21, 2006) (unpublished manuscript), available at http://csis.org/files/media/isis/pubs/060221_iran_wmd.pdf.
20. 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). Iran deposited its ratification instrument for the Nuclear Non-proliferation Treaty (NPT) in Washington, D.C. on February 2, 1970, immediately before the Treaty came into force on March 5, 1970 with the United States' ratification.
21. 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).
22. Abbas Milani, *The Shah's Atomic Dreams*, FOREIGN POLY, Dec. 29, 2010, http://www.foreignpolicy.com/articles/2010/12/29/the_shahs_atomic_dreams ("No sooner had Ayatollah Ruhollah Khomeini come to power than he ordered all work on Iran's nuclear program stopped, criticizing the shah for ever pursuing such a program.").
23. The National Council of Resistance of Iran (NCRI)—an Iranian political opposition group in exile with ties to the *Mujabideen e-Khalq* organization—made these revelations at a press conference on August 14, 2002. Alireza Jafarzadeh, Nat'l Council of Resistance of Iran, Remarks on New Information on Top Secret Projects of the Iranian Regime's Nuclear Program (Aug. 14, 2002) (transcript available at <http://www.iranwatch.org/privateviews/NCRI/perspec-ncri-topsecretprojects-081402.htm>). The first report of the IAEA's findings following the revelations was released in June 2003. See IAEA Board of Governors Resolution, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, IAEA Doc. GOV/2003/40 (June 6, 2003) [hereinafter IAEA Report, June 2003].
24. IAEA Report, June 2003, *supra* note 23, at 2.
25. Nazila Fathi, *Iran Says It Has Developed Ability to Fuel Nuclear Plants but Won't Seek Weapons*, N.Y. TIMES, Feb. 10, 2003, <http://www.nytimes.com/2003/02/10/international/mideast/10TEHR.html>.
26. For an example of an Iranian representative's explanation of the goals of the Iranian nuclear program, see Mohammad Javad Zarif, *Tackling the Iran-U.S. Crisis: The Need for a Paradigm Shift*, 60 COLUM.

These disclosures caused significant international concern that the Iranians might be building a nuclear program with the intention of pursuing military applications.²⁷ Because of these concerns, various diplomatic and coercive efforts have been undertaken in the subsequent decade to suspend the Iranian nuclear program and persuade the Iranian government to abandon its pursuit of an indigenous nuclear fuel cycle.²⁸

A. Understanding the Problem: International Law and Iran's Nuclear Record

The following Subparts survey the requirements of the NPT regime, the legal status of Iran's nuclear program, the documented record of Iran's nuclear activities, and the various proposals for resolution that have been tabled since 2003.

1. Iran's NPT and Safeguards Obligations

The NPT is the principal legal and institutional framework governing international nonproliferation policy. It obligates all non-nuclear weapons states (non-NWS) to abstain from developing nuclear weapons (Article II). In return, it recognizes the right of these states to use nuclear energy for peaceful purposes, specifying that the right must be exercised in conformity with nonproliferation obligations. Specifically, NPT parties must allow the IAEA to inspect their nuclear facilities to ensure that nuclear energy technology is not diverted to military

J. INT'L AFF. 73, 78–85 (2007), detailing the argument of the former Iranian ambassador to the United Nations that domestic energy needs will outstrip oil reserves and that a concerted diplomatic effort by the United States blocked Iranian access to nuclear energy markets, forcing the country to limit disclosure of its activities to avoid U.S. interference with its trade partners. *See also* Greg Bruno, *Iran's Nuclear Program*, COUNCIL ON FOREIGN REL. (Mar. 10 2010), <http://www.cfr.org/iran/irans-nuclear-program/p16811> ("Washington blocked nuclear deals between Iran and Argentina, China, and Russia... [This] left Tehran with little choice but to be discreet in its nuclear activities.").

27. ANTHONY H. CORDESMAN & KHALID R. AL-RODHAN, *IRAN'S WEAPONS OF MASS DESTRUCTION: THE REAL AND POTENTIAL THREAT* 125–28 (2006); MOHAMED ELBARADEI, *THE AGE OF DECEPTION: NUCLEAR DIPLOMACY IN TREACHEROUS TIMES* 112–26 (2011); Fathi, *supra* note 25.

28. For an overview containing a short history of official proposals on the Iranian nuclear issue from 2003 to Fall of 2013, see Kelsey Davenport, *History of Official Proposals on the Iranian Nuclear Issue*, ARMS CONTROL ASS'N, http://www.armscontrol.org/factsheets/Iran_Nuclear_Proposals (last updated Nov. 2013). The Arms Control Association has also published briefing book providing a broader chronology of the Iranian nuclear crisis from 2002 to 2013. ARMS CONTROL ASS'N, *SOLVING THE IRANIAN NUCLEAR PUZZLE* 39–42 (2013). Pressure on Iran to abandon fuel cycle activities on its own soil in exchange for fuel supply guarantees comes in the context of a broader shift in nonproliferation emphasis away from peaceful use of civilian nuclear energy towards international supply arrangements. DANIEL H. JOYNER, *INTERPRETING THE NUCLEAR NON-PROLIFERATION TREATY* 94–95 (2011).

uses (Article III and the Comprehensive Safeguards Agreement). Further, the NPT provides that the five recognized nuclear weapons states (NWS) will voluntarily reduce and eventually eliminate their own nuclear arsenals (Article VI).²⁹ In other words, the three pillars of the nonproliferation regime codified by the NPT are nuclear nonproliferation, peaceful nuclear cooperation, and nuclear disarmament.³⁰ As a non-NWS party to the NPT, the Iranian government is legally entitled to develop a civilian nuclear energy program subject to its nonproliferation obligations.

In light of this legal framework, the success of the global nonproliferation regime turns critically on the existence of an effective monitoring and verification system through the IAEA.³¹ While the IAEA does not have enforcement powers, the IAEA's Secretariat reports discrepancies revealed by its inspections to its

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29. The five acknowledged nuclear weapons states (NWS) at the time of the drafting of the NPT in 1968 were the permanent five members of the UNSC. Under the asymmetric structure of the NPT, all the remaining states in the international system entered into an agreement with those five states to forgo the pursuit of nuclear weapons in exchange for civilian energy inducements and the promise of future disarmament. The nonproliferation obligation of the non-nuclear weapon states (non-NWS) was not, however, absolute. Article X of the NPT recognizes that considerations of national security, deterrence, and reciprocity may give rise to legitimate withdrawal. The presence of Article X as part of the basic architecture of the regime reflects a recognition that the goal of nonproliferation was to be balanced with other values of the international security order, including the defensive rights of all states. For a discussion of the potential implications of Article X in the Iranian nuclear crisis, see DANIEL H. JOYNER, WHAT IF IRAN WITHDRAWS FROM THE NUCLEAR NONPROLIFERATION TREATY? PART I: CAN THEY DO THAT? (2013), *available at* <http://www.esil-sedi.eu/node/255>; DANIEL H. JOYNER, WHAT IF IRAN WITHDRAWS FROM THE NUCLEAR NONPROLIFERATION TREATY? PART II: WHAT WOULD THE LEGAL IMPLICATIONS BE? (2012), *available at* <http://www.esil-sedi.eu/node/260>.
 30. With the passage of time, two corollaries of the NPT regime have gained salience. First, ensuring the peaceful character of nuclear energy programs necessitated stringent IAEA inspections. One-hundred-seventy-one (of the 183) non-NWS parties to the NPT have brought into force a comprehensive Safeguards Agreement with the Agency. For a list of the twelve countries that do not have safeguards agreements in force, see *Factsheets and FAQs: NPT Comprehensive Safeguards Agreements*, INT'L ATOMIC ENERGY AGENCY, http://www.iaea.org/Publications/Factsheets/English/nptstatus_overview.html (last updated Sept. 24, 2013). Further agreements enhancing IAEA verification powers are discussed below. See *infra* notes 35, 36 and accompanying text on the Additional Protocol. Second, forgoing the option of pursuing a nuclear defense led non-NWS parties to demand negative security assurances from the NWS, who offered such negative security assurances through unilateral statements as part of the deal that resulted in the indefinite extension of the NPT in 1995. Such statements were subsequently noted in a UNSC resolution. S.C. Res. 984, ¶ 1, U.N. Doc. S/RES/984 (Apr. 11, 1995). In operative paragraph 1, the Council "[t]akes note with appreciation of the statements made by each of the nuclear-weapon States in which they give security assurances against the use of nuclear weapons to non-nuclear-weapon States that are Parties to the [NPT]." *Id.* (citations omitted). The negative security assurances are contingent only on the non-nuclear weapon states continuing to act in accordance with their NPT obligations. *Id.*
 31. Cristian DeFrancia, *Enforcing the Nuclear Nonproliferation Regime: The Legality of Preventive Measures*, 45 VAND. J. TRANSNAT'L L. 705, 722 (2012).

Board of Governors, the IAEA's thirty-five-member executive council.³² This political body, in turn, may decide to refer a case of noncompliance to the Council for consideration under the Council's Chapter VII enforcement powers.³³ The inspections system is thus designed to deter clandestine proliferation activities by raising the possibility of detection and subsequent enforcement measures through UNSC referral.³⁴

The inspections powers of the Agency were augmented with the drafting of a Model Additional Protocol in 1997.³⁵ Beyond the so-called safeguards authority vested in the IAEA under its Safeguards Agreement with Iran, Iran temporarily accorded the Agency greater access by signing, but not ratifying, an Additional Protocol Agreement. Though not legally obligated to do so prior to ratification, Iran voluntarily allowed the Agency to undertake the broader inspections activities permitted by the Protocol from 2003 to 2006.³⁶ Thereafter, Iran

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32. There are 159 member states of the IAEA, thirty-five of which are represented on the Board of Governors at any given time based on election by the annual meeting of the general conference of members. The election, in turn, is subject to rules to ensure representation of the eight regions of the world (defined by the IAEA Statute) and of the states with the most advanced nuclear energy technologies. By contrast, the IAEA Secretariat is a professional staff of international civil servant experts on the law, policy, and science of nuclear nonproliferation. The composition, rules, and procedures of the Board of Governors are available through the IAEA's portal on its governing bodies. See *IAEA Board of Governors*, INT'L ATOMIC ENERGY AGENCY, <http://www.iaea.org/About/Policy/Board/> (last visited Nov. 8, 2013).
 33. Under Article III.B.4 of the IAEA Statute, the Agency may report "when appropriate" to the UNSC in the event that questions arise "that are within the competence of the Security Council." Statute of the International Atomic Energy Agency art. III.B.4, *opened for signature* Oct. 26, 1956, 8 U.S.T. 1093, 276 U.N.T.S. 3 (ratified July 29, 1957).
 34. The Council's authority to regulate proliferation derives from its powers under the U.N. Charter to maintain international peace and security. The NPT and associated safeguards agreements set forth the requirements for compliance with nonproliferation obligations. But neither the U.N. Charter nor any subsequent nonproliferation treaties or agreements have specified the circumstances under which a violation must be referred to the Council nor what course of action the Council should take. Instead, the Council's authority under Chapter VII of the Charter enables it to take enforcement action as necessary to maintain international peace and security, thus granting the Council significant discretion to make such determinations on a case-by-case basis.
 35. Int'l Atomic Energy Agency, *Model Protocol Additional to the Agreement(s) Between State(s) and the International Atomic Energy Agency for the Application of Safeguards*, IAEA Doc. INFCIRC/540 (Sept. 1997). As of July 15, 2013, 121 NPT State parties had ratified the Additional Protocol as an addendum to their respective IAEA Safeguards Agreements. An additional twenty-one states, like Iran, had signed but not ratified the Additional Protocols. *Conclusion of Additional Protocols: Status as of 24 September 2013*, INT'L ATOMIC ENERGY AGENCY, http://www.iaea.org/OurWork/SV/Safeguards/documents/AP_status_list.pdf (last visited Nov. 4, 2013).
 36. As compared to the safeguards framework, the Additional Protocol provides the IAEA broader rights of access to sites, confers stronger inspections authority, and requires states to provide a more comprehensive declaration of their nuclear activities. John Carlson, IAEA Safeguards Additional Protocol 1 (Jan. 20, 2009) (research paper), *available at* icndd.org/Documents/IAEA_Additional_Protocol.doc (noting that the Additional Protocol is "complementary to the state's safeguards agreement with the IAEA, broadening the information to be reported to the IAEA and the access to

suspended such voluntary cooperation. The IAEA has since conducted ongoing inspections on Iranian territory under its more limited safeguards authority.

Iran's clandestine activities prior to 2002 involved multiple infractions of its reporting obligations under the Safeguards Agreement.³⁷ The IAEA has conducted continuous inspections in Iran over the ensuing decade, resulting in forty-one periodic reports detailing those infractions.³⁸ Some in the international community do not consider such reporting violations, however, to constitute an actual breach of Iran's NPT obligations.³⁹ That is, some consider only breaches with actual or potential proliferation significance to constitute an undisputed violation of the country's core Article II nonproliferation obligations.⁴⁰ Consequently, an international controversy exists as to whether Iran has violated its NPT obligations.⁴¹

be given to safeguards inspectors"). Iran agreed to comply with the terms of the Additional Protocol's expanded authority for the IAEA on a voluntary basis as a confidence-building measure during the period of its negotiations with the United Kingdom, France, and Germany—the so-called EU-3. Int'l Atomic Energy Agency, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, ¶ 23, IAEA Doc. GOV/2006/27 (Apr. 28, 2006) ("Since 5 February 2006, Iran has not been implementing the provisions of its Additional Protocol."); see also OLLI HEINONEN, DEVELOPMENTS IN THE IMPLEMENTATION OF THE NPT SAFEGUARDS AGREEMENT IN THE ISLAMIC REPUBLIC OF IRAN AND AGENCY VERIFICATION OF IRAN'S SUSPENSION OF ENRICHMENT-RELATED AND REPROCESSING ACTIVITIES 1 (2006) (noting as of January 2006 that "Iran has continued to . . . act as if the Additional Protocol is in force, including by providing in a timely manner the requisite declarations and access to locations"); Paul Kerr, *Iran Signs Additional Protocol With IAEA*, ARMS CONTROL ASS'N (Jan./Feb. 2004), http://www.armscontrol.org/act/2004_01-02/Iran. In addition to its voluntary implementation of the Additional Protocol, Iran also initially agreed to a 1991 safeguards provision known as "Code 3.1" of the Subsidiary Arrangements. For a discussion of the requirements of Code 3.1, see *infra* note 78 and accompanying text.

37. YA'EL RONEN, THE IRAN NUCLEAR ISSUE 16 (2010).

38. The IAEA maintains online access to all of its Board reports on Iran. For the full catalog of reports from 2003 to the present, see *IAEA Reports*, INT'L ATOMIC ENERGY AGENCY, http://www.iaea.org/newscenter/focus/iaecairan/iaea_reports.shtml (last visited Nov. 8, 2013).

39. RONEN, *supra* note 37, at 16.

40. See Richard Dalton et al., *Iran Is Not in Breach of International Law*, GUARDIAN, June 9, 2011, <http://www.theguardian.com/commentisfree/2011/jun/09/iran-nuclear-power-un-threat-peace> (cowritten by former ambassadors to Iran from the UK, Germany, Sweden, Belgium, France, and Italy); see also Int'l Atomic Energy Agency, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, ¶ 47, IAEA Doc. GOV/2003/75 (Nov. 10, 2003) [hereinafter IAEA Report, Nov. 2003] (detailing how the finding of noncompliance only involved failures to report); John Carlson, *Defining Noncompliance: NPT Safeguards Agreements*, ARMS CONTROL ASS'N (May 2009), http://www.armscontrol.org/act/2009_5/Carlson (noting that noncompliance with safeguards is distinct from an Article II violation and that "there remains no established definition of noncompliance" with safeguards).

41. A Congressional Research Service report on the subject of Iran's compliance with international obligations describes the controversy as follows: "Whether Iran has violated the NPT is unclear. . . . The U.N. Security Council has never declared Iran to be in violation of the NPT." PAUL K. KERR, CONG. RESEARCH SERV., R40094, IRAN'S NUCLEAR PROGRAM: TEHRAN'S COMPLIANCE WITH INTERNATIONAL OBLIGATIONS 10 (2013). The report goes on to note,

The Agency's reports reflect inspectors' concerns that the IAEA has not been able to fully verify all of Iran's past and current activities. Yet no IAEA report to date has identified evidence that Iran has violated its Article II obligation not to pursue or acquire nuclear weapon capacity.⁴² Absent evidence of such a violation, the IAEA does not have the legal authority to require Iran to suspend uranium enrichment other than as a voluntary and provisional confidence-building measure. Thus, so long as Iran conducts its current enrichment activities exclusively in declared sites and under IAEA safeguards, technically it is in compliance with the core international rules governing nuclear nonproliferation.⁴³

Notably, current claims that Iran has violated international law stem from additional legal requirements that the Council imposed on Iran, rather than from NPT obligations. In 2006, the Board of Governors referred Iran's file to the UNSC, which has binding authority over Iran under the Chapter VII of the U.N. Charter (Charter).⁴⁴ The Council, in turn, adopted Resolution 1696 in July 2006, which ordered Iran to cease all uranium enrichment activities.⁴⁵ Iran's subsequent refusal to suspend its enrichment program therefore violates Resolution 1696—not Article II's nonproliferation mandate.

Because of Iran's failure to suspend its enrichment program, the UNSC has acted on seven separate occasions to impose sanctions against Iran, with each ad-

however, that the U.S. Department of State considers Iran to have violated its Article II nonproliferation obligations. *Id.* at 10–11. By contrast, international lawyers are divided as to whether Iran's violations of the Safeguards Agreement impact its compliance with Article III of the NPT (obligation to enter into Safeguards Agreement), and few consider Iran to be in violation of Article II absent evidence of the diversion of nuclear materials to military purposes. See JACQUELINE SHIRE & DAVID ALBRIGHT, INST. FOR SCI. & INT'L SEC., *IRAN'S NPT VIOLATIONS—NUMEROUS AND POSSIBLY ON-GOING?* (2006); Scott Peterson, *NPT 101: Is Iran Violating the Nuclear Treaty?*, CHRISTIAN SCI. MONITOR (May 4, 2010), <http://www.csmonitor.com/World/Middle-East/2010/0504/NPT-101-Is-Iran-violating-the-nuclear-treaty>; Cyrus Safdari, *Iran Did NOT Violate the NPT*, IRAN AFF. (Jan. 22, 2008), http://www.iranaffairs.com/iran_affairs/2008/01/iran-did-not-vi.html; Shafaat Shahbandari, *Iran's Nuke Threat Is Overhyped: UN Official*, GULF NEWS (Mar. 6, 2013, 2:29 PM), <http://gulfnews.com/news/gulf/uae/environment/iran-s-nuke-threat-is-overhyped-un-official-1.1154727> (quoting Hans Blix, former Director General of the IAEA, and noting that “[s]o far Iran has not violated NPT and there is no evidence right now that suggests that Iran is producing nuclear weapons”).

42. See KERR, *supra* note 41, at 10 (“[T]he IAEA has never reported that Iran has attempted to develop nuclear weapons.”).

43. See *supra* note 40 and accompanying text.

44. U.N. Charter art. 24, para. 1 (conferring authority on the Council); *id.* art. 25 (requiring all members of the U.N. to carry out the decisions of the Council); *id.* arts. 39–42 (giving the Council power with respect to threats to the peace, breaches of the peace, and acts of aggression). For a more detailed discussion on the powers conferred on the Council under Chapter VII of the Charter and the concomitant obligation of all members of the United Nations to comply with Council actions, see Jochen Abr. Frowein & Nico Krisch, *Introduction to Chapter VII*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 701, 701–806 (Bruno Simma et al. eds., 2d ed. 2002).

45. S.C. Res. 1696, ¶ 2, U.N. Doc. S/RES/1696 (July 31, 2006).

ditional round of sanctions escalating in severity from symbolic to punitive.⁴⁶ Despite the severe toll on its economy, Iran has remained steadfast in insisting that it has a right under the NPT to develop a nuclear energy program through the enrichment of uranium. The resulting standoff between the UNSC and Iran has further complicated efforts to resolve concerns over the country's nuclear program.⁴⁷

2. The State of Iran's Nuclear Program

After over ten years of international diplomatic and coercive efforts, the international community has made little progress toward addressing concerns or reaching a compromise over Iran's activities. As of 2013, Iran has a fully functioning, industrial-sized enrichment facility at Natanz with approximately 10,000 installed first-generation centrifuges in operation.⁴⁸ Since 2007, this facility has produced over 10,000 kilograms of low-enriched (5 percent U-235) uranium (or LEU).⁴⁹ Since February 2010, Iran has also begun a program to enrich uranium to approximately 20 percent U-235, a level that is still below weapons-grade enrichment.⁵⁰ The significance of this development is that 20 percent U-235,

46. The Council first acted by issuing a nonbinding presidential statement in March 2006, calling on Iran to take steps outlined in the February 2006 IAEA Board of Governors' Resolution. Statement by the President of the Security Council, U.N. Doc. S/PRST/2006/15 (Mar. 29, 2006). Resolution 1696, which demanded that Iran suspend its uranium enrichment activities, came several months later and was the first binding action taken by the Council. S.C. Res. 1696, *supra* note 45, ¶ 2. This demand was reiterated in September 2008. *See* S.C. Res. 1835, ¶ 1, U.N. Doc. S/RES/1835 (Sept. 27, 2008). The Council has since adopted four additional resolutions imposing incremental sanctions on Iranian persons and entities believed to have been involved with the nuclear program. *See* S.C. Res. 1929, ¶ 3, U.N. Doc. S/RES/1929 (June 9, 2010); S.C. Res. 1803, ¶ 1, U.N. Doc. S/RES/1803 (Mar. 3, 2008); S.C. Res. 1747, ¶ 1, U.N. Doc. S/RES/1747 (Mar. 24, 2007); S.C. Res. 1737, ¶ 2, U.N. Doc. S/RES/1737 (Dec. 23, 2006). Two other actions by the Council have extended the mandate of the panel of experts supporting the U.N. Iran Sanctions Committee and otherwise reaffirmed prior resolutions. *See* S.C. Res. 2049, ¶ 1, U.N. Doc. S/RES/2049 (June 7, 2012); S.C. Res. 1984, ¶ 1, U.N. Doc. S/RES/1984 (June 9, 2011).

47. ELBARADEI, *supra* note 27, at 241–86.

48. Int'l Atomic Energy Agency, *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions in the Islamic Republic of Iran*, at 5, Annex II, IAEA Doc. GOV/2013/56 (Nov. 14, 2013) [hereinafter IAEA Report, Nov. 2013].

49. *Id.*

50. To date, Iran has produced approximately 410 kilograms of 19.75 percent enriched U-235 (often referred to by the shorthand "20 percent"), but only 196 kilograms remain in the stockpile. The remainder have been converted to uranium oxide fuel plates for the Tehran Research Reactor. *Id.* Such fuel plates reduce the capacity of Iran to further enrich the uranium fuel to weapons grade. Thus the relevant stockpile remains below the estimated 240–250 kilograms that analysts estimate would be required to be enriched to 90 percent to produce one nuclear weapon. Moreover, the number of centrifuges producing this higher level of enrichment remained stable throughout the five reporting periods prior to the most recent in November 2013. *Id.* at 6 & n.24; *see also* Kelsey

while not weapons-grade, can be more rapidly enriched to the level required for a nuclear weapon (over 90 percent U-235) than 5 percent U-235. As a result, a stockpile of 20 percent enriched uranium shortens the timeline for Iran to convert its existing low-enriched uranium to the higher enrichment level necessary for a weapon.⁵¹ The international community was further alarmed in 2011 when Iran announced its intention to move its production of this 20 percent enriched uranium to its Fordow facility, where production would be tripled.⁵²

As of the most recent IAEA report, Iran currently has roughly 2700 centrifuges installed at Fordow, one-third of which operate to enrich uranium to just under 20 percent.⁵³ Iran has also announced a plan of constructing up to ten new enrichment sites in coming years without providing additional information about locations or plans.⁵⁴ On the other hand, Iran has slowed the stockpiling of enriched uranium by increasingly converting it to reactor fuel, partially allaying

Davenport et al., *Cliff Notes on the May 2013 IAEA Report on Iran*, ARMS CONTROL NOW (May 22, 2013), <http://armscontrolnow.org/2013/05/22/cliff-notes-on-the-may-2013-iaea-report-on-iran> (noting that the number of centrifuges enriching uranium at Fordow had remained constant at 696); Kelsey Davenport et al., *The November IAEA Report on Iran's Nuclear Program: No Significant Advances*, ARMS CONTROL NOW (Nov. 14, 2013), <http://armscontrolnow.org/2013/11/14/the-november-iaea-report-on-irans-nuclear-program-no-significant-advances> [hereinafter Davenport et al., *No Significant Advances*].

51. Uranium enriched to the 20 percent level is still considered low-enriched uranium (LEU) and would need additional enrichment to become weapons-usable. INT'L ATOMIC ENERGY AGENCY, IAEA-TECDOC-1452, MANAGEMENT OF HIGH ENRICHED URANIUM FOR PEACEFUL PURPOSES: STATUS AND TRENDS 1 (2005).
52. David E. Sanger & William J. Broad, *Iran Says It Will Speed up Uranium Enrichment*, N.Y. TIMES, June 9, 2011, at A14. The Fordow facility was built in secret and has generated substantial controversy since its discovery in 2009 as to whether such concealment violated Iran's reporting obligations. Compare Daniel Joyner, *The Qom Enrichment Facility: Was Iran Legally Bound to Disclose?*, JURIST (Mar. 5, 2010), <http://jurist.org/forumy/2010/03/qom-enrichment-facility-was-iran.php> (arguing that Iran did not violate its reporting obligations in connection with Fordow), with James M. Acton, *Iran Violated International Obligations on Qom Facility*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Sept. 25, 2009), <http://carnegieendowment.org/2009/09/25/iran-violated-international-obligations-on-qom-facility/3cyt> ("There can be no doubt that since February 2003 Iran has been bound by the modified Code 3.1. It was therefore required to report on its new centrifuge . . .").
53. IAEA Report, Nov. 2013, *supra* note 48, at 6. The facility has faced several rounds of sabotage, including the severing of all electrical supply to the facility. Fredrik Dahl, *Iran Says Saboteurs Cut Power to Nuclear Plant*, REUTERS (Sept. 17, 2012, 4:24 PM), <http://www.reuters.com/article/2012/09/17/us-nuclear-iran-iaea-idUSBRE88G1AB20120917>. In addition, Iran claims that it has uncovered espionage equipment installed at the plant, which has given rise to accusations by Iranian officials that IAEA inspections are being used by third parties as a means of collecting intelligence. See, e.g., *Report: Iran Uncovered Spying Device Disguised as Rock at Fordow Nuclear Plant*, HAARETZ (Sept. 23, 2012, 9:02 AM), <http://www.haaretz.com/news/middle-east/report-iran-uncovered-spying-device-disguised-as-rock-at-fordow-nuclear-plant-1.466313>.
54. PAUL K. KERR, CONG. RESEARCH SERV., RL34544, IRAN'S NUCLEAR PROGRAM: STATUS 20 (2012).

international concerns about possible proliferation implications of its stockpile.⁵⁵ The country has also repeatedly reiterated its adherence to a religious decree prohibiting the acquisition of nuclear weapons.⁵⁶

At present, the U.S. government's position is that Iran's uranium enrichment program will eventually lead to Iran achieving the capacity to produce nuclear weapons but that the Iranian government has not yet decided to acquire a weapon.⁵⁷ Further, American intelligence predicts that producing the high-enriched uranium and metal core necessary to build a nuclear weapon would take an additional one to two years.⁵⁸ Finally, the nearly continuous presence of IAEA inspectors in Iran means that the production of weapons-grade fuel would be detected before a weapon could be completed.⁵⁹ A recently concluded deal

55. Alan Cowell, *Iran Is Said to Convert Enriched Uranium to Reactor Fuel*, N.Y. TIMES, Feb. 12, 2013, <http://www.nytimes.com/2013/02/13/world/middleeast/iran-converts-enriched-uranium-to-reactor-fuel-reports-say.html>. Indeed, since June 2013, Iran appears to have brought to a standstill the development of its nuclear infrastructure, adding no significant components to either its uranium enrichment facilities or the heavy water reactor under construction at Arak. Davenport et al., *No Significant Advances*, *supra* note 50.

56. *Iran: Religious Decree Against Nuclear Weapons Is Binding*, CBS NEWS (Jan. 15, 2013, 10:15 PM), http://www.cbsnews.com/8301-202_162-57564199/iran-religious-decree-against-nuclear-weapons-is-binding; see also Mike Shuster, *Iran's Nuclear Fatwa: A Policy or a Ploy?*, NAT'L PUB. RADIO (June 14, 2012, 5:05 AM), <http://www.npr.org/2012/06/14/154915222/irans-nuclear-fatwa-a-policy-or-a-ploy>.

57. *Hearing to Receive Testimony on the Current and Future Worldwide Threats to the National Security of the United States Before the S. Comm. on Armed Servs.*, 113th Cong. 12–13 (2013) (testimony of James Clapper, Dir. of National Intelligence) [hereinafter *Hearing*]. Under present conditions, it would be nearly impossible for Iran to undertake the production of high-enriched uranium (HEU) or the production of the uranium metal core necessary for a weapon without immediate detection by the IAEA inspectors currently monitoring the Natanz and Fordow facilities. See KENNETH KATZMAN, CONG. RESEARCH SERV., RL32048, IRAN: U.S. CONCERNS AND POLICY RESPONSES 26 (2013). "Iran could not divert safeguarded material and produce a weapon-worth of weapons grade uranium before this activity is discovered" due to the presence of IAEA inspectors at Iran's nuclear facilities. *Id.*

58. See *The Defense Secretary: Leon Panetta* (CBS television broadcast Jan. 29, 2012), available at http://www.cbsnews.com/8301-18560_162-57367997/the-defense-secretary-leon-panetta/?pageNum=2 ("The consensus is that, if they decided to do it, it would probably take them about a year to be able to produce a bomb and then possibly another one to two years in order to put it on a deliverable vehicle of some sort in order to deliver that weapon."). If Iran had a stockpile of 250 kilograms of 20 percent enriched uranium, which it does not at present, it would then have to feed that entire stockpile back into its centrifuges to enrich its fuel to the 90 percent level. Once Iran had a sufficient stock of HEU, it would require an additional three months to fashion this material into the cylindrical uranium metal that would form the core of a weapon. See DAVID ALBRIGHT & CHRISTINA WALROND, INST. FOR SCI. & INT'L SEC., IRAN'S CRITICAL CAPABILITY IN 2014: VERIFIABLY STOPPING IRAN FROM INCREASING THE NUMBER AND QUALITY OF ITS CENTRIFUGES 6 (2013) ("Iran would need more time, probably at least several months, to convert the weapon-grade uranium into a nuclear explosive . . .").

59. See *Hearing*, *supra* note 57, at 12.

between the IAEA and Iran further expands the Agency's current verification activities in the country.⁶⁰

This analysis has not offered much comfort to the international community, however, as Iran has increased its uranium stockpiles, enlarged its enrichment capacity, and built additional nuclear facilities—all of which demonstrate its intention to move forward with a comprehensive nuclear program.⁶¹ Further, although IAEA inspectors continue to monitor Iran's nuclear facilities, such safeguards authority remains more limited in scope than the intrusive inspections authority they exercised from 2003–2006—before the referral of Iran's nuclear file to the UNSC prompted Iran to suspend its voluntary cooperation with the Additional Protocol.⁶² The IAEA also still has outstanding questions concerning Iran's past activities.⁶³

Despite these valid concerns, the persistent framing of the Iranian nuclear program as an ongoing crisis tends to obscure several encouraging aspects of Iran's nuclear activities. First, Iran's slow progress has left open the window of opportunity to resolve the crisis for a longer period than many initially expected. Second, the continuous presence of IAEA inspectors has provided the international community with an important early warning mechanism should Iran begin to divert nuclear materials to military applications on a weapons scale. Third, and perhaps most striking, prolonged negotiations have identified the elements of a compromise that would satisfy Iran's stated goals while complying with international law's mandate that Iran's activities remain verifiably proliferation resistant. The next Subpart details those elements, setting the groundwork for my analysis of why negotiations to date have failed.

60. Press Release, Int'l Atomic Energy Agency, IAEA, Iran Sign Joint Statement on Framework for Cooperation (Nov. 11, 2013), *available at* <http://www.iaea.org/newscenter/pressreleases/2013/prn201321.html> [hereinafter IAEA Iran Joint Statement].

61. *See generally* DAVID ALBRIGHT ET AL., INST. FOR SCI. & INT'L SEC., *ISIS ANALYSIS OF IAEA IRAN SAFEGUARDS REPORT* (2013).

62. ELBARADEI, *supra* note 27, at 193. Some have argued that the termination of Iranian cooperation with the IAEA's expanded inspections authority under the Additional Protocol as a result of the transfer of the Iranian file from the IAEA to the Council reflects the relative failure of sanctions (coercive diplomacy) as compared to negotiations. *See, e.g.*, Daniel H. Joyner, 'Crowding' About Iran Sanctions Should Stop, *JURIST* (May 24, 2012), <http://jurist.org/forum/2012/05/daniel-joyner-iran-sanctions.php>. For a discussion on UNSC action since the referral, see *supra* note 46.

63. To address concerns about past activities, the inspectors require access to facilities that are beyond the scope of their safeguards-based inspection authority. As a result, they have sought to negotiate a side agreement (through a "structured approach") with Iran to access particular facilities on a one-off basis, but they were unable to secure the necessary access during Ahmadinejad's presidency. Jonathan Tirone, *IAEA Focus on Iran's Parchin Site May Undermine Monitors*, *BLOOMBERG* (Jan. 16, 2013, 3:57 AM), <http://www.bloomberg.com/news/2013-01-16/iaea-focus-on-iran-s-parchin-site-may-undermine-monitors.html>.

B. Elements of a Solution: Meeting Minimum International and Iranian Requirements

In 2004, the IAEA first proposed a compromise that satisfied both sides' positions: It granted Iran legal access to enrichment technology under the NPT but assuaged international concerns by limiting the scale of Iran's program and imposing stringent inspections requirements.⁶⁴ The principal terms of this solution—publicly proposed in 2005—have remained relatively stable, though the imposition of sanctions in the interim has now necessitated sanctions relief as an additional element.⁶⁵ Indeed, these terms form the basis for the Joint Plan of Action, an interim agreement reached between Iran and the P5+1 in November 2013, and constitute the framework for the final deal currently under negotiation.⁶⁶

The compromise package features three principal elements. First, Iran would retain a small-scale enrichment capacity on its own soil (with a cap on enrichment levels and on any stockpile of enriched fuel not converted into fuel rods), terminate the pursuit of an industrial-scale uranium enrichment program, and meet its fuel supply needs through international guarantees. Second, Iran would agree to submit to an inspections regime that would impose even more stringent requirements than those mandated under the Additional Protocol, thereby setting a precedent for stronger inspections in future nonproliferation cases. Third, and in exchange for the first two concessions, Iran would receive substantial sanctions relief, with a view to ultimately lifting all multilateral and bilateral sanctions. This compromise package would convey myriad benefits: It would reduce Iran's breakout nuclear capacity while potentially improving its economy, strengthening the IAEA inspections regime, defusing the threat of

64. See Elaine Sciolino, *Nuclear Accord Eludes Iran and Europeans*, N.Y. TIMES, Mar. 24, 2005, at A12; *Iran Offers "Objective Guarantees" on Nuclear Program, but No End to Uranium Enrichment*, GLOBAL SECURITY NEWswire (Mar. 17, 2005), <http://www.nti.org/gsn/article/iran-offers-objective-guarantees-on-nuclear-program-but-no-end-to-uranium-enrichment>.

65. Notably, developments over the past decade also suggest a shift in minimum compromise terms that would allow Iran wider latitude in conducting enrichment activities on its own soil. See, e.g., Scott Peterson, *World Powers Expect Iran to Be Ready for Progress at Next Nuclear Talks*, CHRISTIAN SCI. MONITOR (Apr. 4, 2013), <http://www.csmonitor.com/World/Middle-East/2013/0404/World-powers-expect-Iran-to-be-ready-for-progress-at-next-nuclear-talks> (noting that the P5+1 proposed partial sanctions relief in exchange for suspension of 19.75 percent enrichment, without requiring the cessation of lower enrichment activities); see also *infra* note 68.

66. *Iran Nuclear Deal: Joint Plan of Action—Full Document*, GUARDIAN, Nov. 24, 2013, <http://www.theguardian.com/world/interactive/2013/nov/24/iran-nuclear-deal-joint-plan-action> [hereinafter *Joint Plan of Action*] (reproducing the full text of the Joint Plan of Action); see also *infra* Part II.D.

military confrontation with Iran, and setting an important precedent for dealing with future proliferation issues.⁶⁷

1. Uranium Enrichment

Allowing Iran to retain a small-scale enrichment program,⁶⁸ subject to caps both on levels of enrichment and on retention of enriched fuel stockpiles, would, from Iran's perspective, vindicate Iran's right to enjoy peaceful nuclear technology under the NPT.⁶⁹ In exchange for forgoing industrial-scale enrichment, Iran would receive a guaranteed fuel supply for its civilian nuclear energy program. Such guarantees might be structured through Iranian participation in a multinational enrichment facility located outside of Iran or through enforceable fuel

67. Different analysts and officials have proposed versions of such a deal, touting precisely these benefits, particularly the strengthening of the IAEA's inspections authority. See, e.g., DAVID ALBRIGHT ET AL., INST. FOR SCI. & INT'L SEC., PREVENTING IRAN FROM GETTING NUCLEAR WEAPONS: CONSTRAINING ITS FUTURE NUCLEAR OPTIONS (2012) (arguing for the strengthening of IAEA inspections authority through a negotiated agreement with Iran); Michael A. Levi, *Drawing the Line on Iranian Enrichment*, 53 SURVIVAL: GLOBAL POL. & STRATEGY 169, 169–71 (2011) (arguing in favor of a cap on Iranian enrichment capacity together with more stringent IAEA verifications powers); Bruno Pellaud, *Testing Alternative Approaches*, in THE STRATEGIC IMPLICATIONS OF THE IRANIAN NUCLEAR PROGRAM 46, 53 (Joachim Krause & Charles King Mallory IV eds., 2010); Thomas Pickering, Co-Founder, The Iran Project, Remarks at the Brookings Institution Panel: Iran's Nuclear Program: Is a Peaceful Solution Possible? 7 (Feb. 19, 2013) (transcript available at http://www.brookings.edu/~media/events/2013/2/19%20iran/20130219_iran_nuclear_program_transcript.pdf) (arguing that the IAEA should be given the mandate to determine the extent of inspections authority it would need in a negotiated solution with Iran).

68. The consensus among well-placed American experts—recently vindicated by the terms of the November 2013 interim deal—has long been that the P5+1 must accept that Iran will retain some enrichment capacity in any negotiated resolution to the crisis. See MATTHEW BUNN, BEYOND ZERO ENRICHMENT: SUGGESTIONS FOR AN IRANIAN NUCLEAR DEAL 1 (2009) (“[T]here is virtually no chance that Iran will agree to zero enrichment in response to any set of sanctions and inducements the United States can plausibly put together. Insisting on zero will mean no agreement, leaving the world with the risks of acquiescence or military strikes.”); Thomas R. Pickering et al., *A Solution for the US-Iran Nuclear Standoff*, N.Y. REV. OF BOOKS, Mar. 20, 2008, <http://www.nybooks.com/articles/archives/2008/mar/20/a-solution-for-the-usiran-nuclear-standoff> (“[U.S.] insistence on zero enrichment of uranium on Iranian soil is not credible and grows less credible with every newly constructed Iranian centrifuge.”). The parties would still have to negotiate the size of Iran's local program. Over the last decade, the United States and its allies' position has shifted in light of technological advances in Iran's nuclear program from demanding zero enrichment, to considering a pilot-scale research enrichment capacity, to potentially accepting the more substantial enrichment capacity currently in place in Natanz. As a result, the present negotiations will likely shift focus away from rolling back the program at Natanz to suspending enrichment at the larger, underground Fordow facility. Scott Peterson, *Iran Hails 'Softer' and 'Smarter' Approach to Its Nuclear Program*, CHRISTIAN SCI. MONITOR (Feb. 28, 2013), <http://www.csmonitor.com/World/Middle-East/2013/0228/Iran-hails-softer-and-smarter-approach-to-its-nuclear-program> (noting that the P5+1 demanded that Iran suspend its 20 percent enrichment at Fordow).

69. Treaty on the Non-proliferation of Nuclear Weapons, *supra* note 20, art. IV.1; see also RONEN, *supra* note 37, at 8.

supply arrangements negotiated with the Vienna Group⁷⁰ and supplemented by a fuel stockpile held by the IAEA, or another country of Iran's choosing, as custodian.

The parties' positions during their negotiations in Geneva in November 2013 demonstrate that each side remains willing to accept a version of the limited enrichment model.⁷¹ For its part, Iran agreed for a six month period to limit its uranium enrichment levels at 5 percent, convert its existing stockpile of enriched uranium, freeze its current capacity at the Natanz and Fordow enrichment plants, and halt construction work at the Arak heavy water plant.⁷² The P5+1 did not explicitly acknowledge Iran's "right to enrich," but the preamble of the agreement states that a "comprehensive solution would involve a mutually defined enrichment programme with practical limits and transparency measures."⁷³ The P5+1's failure to demand the suspension of lower enrichment activities and the acknowledgment that a comprehensive agreement would likely include limited Iranian enrichment were apparently sufficient to satisfy Iranian negotiators.⁷⁴

American and European analysts, IAEA experts, and Iranian commentators have all shown broad support for the limited enrichment element to a diplomatic resolution. Several leading American security think tanks have issued reports arguing that the United States must accept that limited enrichment will be part of any negotiated solution.⁷⁵ Former IAEA officials like Bruno Pellaud

70. The Vienna Group comprises the United States, Russia, France, and the IAEA, with whom Iran was negotiating the terms of a fuel swap arrangement in Vienna in the fall of 2009. David E. Sanger & Nazila Fathi, *Iran Agrees to Allow Inspectors on Oct. 25*, N.Y. TIMES, Oct. 5, 2009, at A4 ("Ali Akbar Salehi, Iran's top nuclear official, said at a news conference that he would take part in a meeting on Oct. 19 with the United States, France and Russia to discuss the details of an agreement for Iran to get enriched uranium for a research reactor in Tehran."); *Iran: Ready for Nuclear Talks With Vienna Group*, VOICE AM. NEWS (July 29, 2010, 8:00 PM), <http://www.voanews.com/content/iran-ready-for-nuclear-talks-with-vienna-group-99622774/172199.html>.

71. Colin H. Kahl, *A Good Deal in Geneva*, FOREIGN POLY, Nov. 27, 2013, http://mideastafrica.foreignpolicy.com/posts/2013/11/25/a_good_deal_in_geneva#sthash.7aBuargR.dpbs (noting that under the deal "Iran has agreed to a number of important constraints on its uranium enrichment"); Rebecca Shimoni Stoil & Ricky Ben-David, *Obama: Iran Can Have Peaceful Nuclear Program, Modest Enrichment*, TIMES OF ISR. (Dec. 7, 2013, 8:38 PM), <http://www.timesofisrael.com/obama-my-goal-is-to-prevent-iran-from-getting-nuclear-weapon>.

72. Kahl, *supra* note 71. See generally *infra* Part II.D.

73. *Joint Plan of Action*, *supra* note 66.

74. See *Iran Enrichment Right Recognized in Deal: Zarif*, PRESS TV (Nov. 24, 2013, 7:14 AM), <http://www.presstv.ir/detail/2013/11/24/336364/iran-right-to-enrich-recognized-zarif> (quoting Iranian foreign minister and lead nuclear negotiator, Javad Zarif, describing the interim agreement as tantamount to an acknowledgment of Iran's right to enrichment).

75. See, e.g., ROBERT J. REARDON, RAND CORP., CONTAINING IRAN: STRATEGIES FOR ADDRESSING THE IRANIAN NUCLEAR CHALLENGE 144-48 (2012) (arguing that the United States must accept that limited enrichment will be part of any negotiated solution in exchange for an intrusive inspection regime); STRATEGIC STUDIES NETWORK, WHAT'S THE DEAL? CRAFTING

and Pierre Goldschmidt have also published articles voicing their support for a diplomatic solution involving a limited enrichment program in Iran coupled with intrusive inspections.⁷⁶ And the former Iranian nuclear negotiator, Hossein Mousavian, has written extensively in support of a diplomatic approach that recognizes Iran's right to enrich uranium while subjecting its enrichment program to substantial constraints beyond NPT requirements.⁷⁷

2. Additional Protocol Plus

A heightened inspections regime, beyond that required under Iran's Safeguards Agreement, is a crucial condition for Iran's retention of even a limited uranium enrichment program. Iran has signed but not ratified the Additional Protocol, which confers substantially enhanced inspections authority on the IAEA. Any negotiated agreement would require not only that Iran ratify the Additional Protocol but also that the country accept the additional provisions of Subsidiary Arrangement Code 3.1 (Code 3.1), which would permanently strengthen Iran's disclosure obligations to the IAEA.⁷⁸ Most analysts argue that

AN AGREEMENT ON IRAN'S NUCLEAR PROGRAM 4 (2013) (arguing for limited enrichment, greater IAEA oversight, and sanctions relief as key elements of a negotiated solution); ALI VAEZ & CHARLES D. FERGUSON, FED'N OF AM. SCIENTISTS, TOWARDS ENHANCED SAFEGUARDS FOR IRAN'S NUCLEAR PROGRAM 23–25 (2011) (recommending that Iran agree to intrusive IAEA oversight in exchange for the United States agreeing to accord the country a limited enrichment capacity); Thomas R. Pickering, *The Iranian Quagmire: How to Move Forward*, 66 BULL. ATOMIC SCIENTISTS 88, 91 (2010) (arguing for IAEA safeguards, limited enrichment, and sanctions relief as necessary elements of a diplomatic solution).

76. Pierre Goldschmidt, *The Iranian Nuclear Issue: Negotiating a Win-Win Solution After Baghdad*, CARNEGIE ENDOWMENT FOR INT'L PEACE (May 26, 2012), <http://carnegieendowment.org/2012/05/26/iranian-nuclear-issue-negotiating-win-win-solution-after-baghdad/b0lj#> (arguing for a limited enrichment capacity in Iran in exchange for increased IAEA oversight of the Iranian program); see also Pellaud, *supra* note 67, at 55–63 (endorsing a “constrained enrichment” approach to negotiations).

77. For instance, Mousavian has proposed that Iran would “agree[] to place limits on its enrichment program[,] . . . halt enrichment at 20% and cap its enrichment at 5% at a level that meets its domestic needs. . . . In addition, Iran can go even further and agree to the ‘Zero Stockpile Initiative,’ either exporting or converting its excess enriched uranium beyond its domestic needs.” Seyed Hossein Mousavian, *Closing Iran's Nuclear File*, AL-MONITOR (Jan. 3, 2013), <http://www.al-monitor.com/pulse/originals/2013/01/iran-nuclear-deal-us-deal.html>.

78. Under the original Subsidiary Arrangement Code 3.1 to the Safeguards Agreement (Code 3.1), Iran would be required to declare to the IAEA the existence of any nuclear facility no later than 180 days before introducing any nuclear materials into the facility. Under the modified Code 3.1, Iran would be required to notify the IAEA upon deciding to construct or to authorize the construction of a nuclear facility. Thus, the disclosure requirements concerning future facilities would be greatly strengthened. The implementation of modified Code 3.1 was suspended by Iran in 2007, though the Council and the IAEA have argued that the modified notice requirement remains legally binding under Council resolutions. See S.C. Res. 1803, *supra* note 46, at 1–2 (“Article 39 of Iran's Safeguards Agreement Code 3.1 cannot be modified nor suspended unilaterally and that the Agency's right to

Iran would also have to go further, undergoing even more intrusive inspections for an initial period to enable the IAEA to address persistent international concerns about possible past diversion of nuclear materials to military purposes, such as at Iran's Parchin military compound.⁷⁹ Such extensive inspections would serve to allay international fears that Iran might have additional undisclosed nuclear facilities.

In some ways, the enhancement of the IAEA's inspections authority is the most important feature of a potential compromise solution insofar as it strengthens and reinforces the nonproliferation and verification components of the NPT. It therefore transforms the Iranian file from a threat to a precedent for the imposition of a more stringent inspections regime. Such a precedent might then be invoked as authority for enhanced inspections in future cases involving non-NWS with programs that raise nonproliferation concerns. Strengthening the IAEA's authority might also restore the credibility of its inspections regime, which has been somewhat undermined because of the Iranian nuclear program.⁸⁰

Unsurprisingly, IAEA experts and the West strongly support enhanced inspections.⁸¹ But Iranian nuclear negotiators have also repeatedly emphasized

verify design information provided to it is a continuing right, which is not dependent on the stage of construction of, or the presence of nuclear material at, a facility.”).

79. Since Iran's suspension of its voluntary compliance with the Additional Protocol, the IAEA has negotiated with Iran to develop a working plan to complete investigation of the outstanding questions related to Iran's earlier record of noncompliance with its Safeguards Agreement. Mark Hibbs et al., *Can IAEA Solve Iran Nuclear Row?*, DIPLOMAT (June 8, 2012), <http://thediplomat.com/2012/06/08/can-iaea-solve-iran-nuclear-row>. Despite repeated efforts, no agreement for access to Parchin emerged from negotiations between the Agency and the Ahmadinejad government. Rick Gladstone, *Iran Said to Pave Over Site Linked to Nuclear Talks*, N.Y. TIMES, Aug. 22, 2013, <http://www.nytimes.com/2013/08/23/world/middleeast/iran-said-to-pave-over-site-linked-to-nuclear-talks.html> (“The agency's director general, Yukiya Amano, has publicly expressed frustration over Iran's unwillingness to grant access.”). There is debate amongst Western analysts about the significance of activities at Parchin. E.g., Diane Barnes, *Focus on Base Divides Iran Watchers*, GLOBAL SECURITY NEWSWIRE (Jan. 30, 2013), <http://www.nti.org/gsn/article/focus-iranian-base-divides-experts> (citing controversy among nuclear experts concerning IAEA requests to inspect Parchin); Robert E. Kelley, *The International Atomic Energy Agency and Parchin: Questions and Concerns*, STOCKHOLM INT'L PEACE RES. INST. (Jan. 18, 2013), http://www.sipri.org/media/expert-comments/18jan2013_IAEA_Kelley (“[R]ecent reports . . . suggest[] that the [IAEA's] case for visiting the Parchin site . . . is not as clear-cut or compelling as some experts and officials portray it.”). The Joint Plan of Action as well as the separate IAEA Iran agreement from November 2013 both provide for enhanced inspections and broader access to Iranian nuclear sites, though Parchin is not included. IAEA Iran Joint Statement, *supra* note 60; *Joint Plan of Action*, *supra* note 66. The elements of a comprehensive agreement described in the Joint Plan of Action provide that Iran will ratify and implement the Additional Protocol as well as providing additional enhanced transparency measures to clarify the remaining outstanding questions concerning past activities.

80. See *infra* Part IV.A.

81. See, e.g., VAEZ & FERGUSON, *supra* note 75, at 23–25 (recommending that Iran agree to intrusive IAEA oversight in exchange for retaining a limited enrichment capacity); Pickering, *supra* note 75, at

their willingness to embrace “maximum transparency,” which would include unrestricted cooperation with the IAEA, in exchange for the recognition of Iran’s right to enrichment under the NPT.⁸² This willingness was most recently reflected by the agreement that Iran entered into with the IAEA in November 2013 and the terms of the Joint Plan of Action, which impose a more intrusive monitoring regime on Iran’s nuclear program during the six-month period of the agreement.⁸³

3. Sanctions Relief

Multilateral sanctions, which the UNSC first adopted in December 2006, have had a crippling effect on the Iranian economy.⁸⁴ These sanctions enhanced the reach of bilateral sanctions that the United States has imposed against Iran for three decades.⁸⁵ The multilateral sanctions have further prompted many countries to adopt even more stringent sanctions than those imposed by the UNSC.⁸⁶ These non-U.N.-mandated sanctions have had a deleterious impact

91 (arguing that “the end result of the nuclear discussion will be a full and adequate international inspection of Iran based on an elaboration of the IAEA Additional Protocol”).

82. Every official Iranian proposal since 2005 has prominently featured the country’s willingness to broadly cooperate with the IAEA so long as its right to enrichment is recognized by the UNSC. Davenport, *supra* note 28. Going further than the official proposals, Mousavian has repeatedly argued that Iran would be willing to commit itself to the “maximum level of transparency that exists internationally” and even to “provide the IAEA access to facilities that are beyond the NPT and the additional protocol—a step no other NPR member state would be ready to accept.” Mousavian, *supra* note 77.

83. On the recent agreement between Iran and the IAEA, see *supra* note 60. In addition to that agreement, the Joint Plan of Action enhances IAEA inspections authorities by allowing daily (rather than weekly) inspections at Natanz and Fordow, providing IAEA monitoring of centrifuge production and assembly facilities, and requiring early declaration and information on all new facilities and the provision of detailed design information about Arak. *Joint Plan of Action*, *supra* note 66.

84. UNSC Resolution 1737 imposed the first round of sanctions, which banned the supply of nuclear-related materials and technology to Iran and froze the assets of individuals and companies that were alleged to be related to the nuclear program. S.C. Res. 1737, *supra* note 46. Subsequent resolutions imposed an arms embargo and expanded the asset freezes, S.C. Res. 1747, *supra* note 46; mandated that states monitor Iranian banking activity and inspect Iranian ships, aircraft, and individuals that might be connected to the nuclear program, S.C. Res. 1803, *supra* note 46; and blocked any Iranian banks or financial institutions from operating internationally if they could be linked in any way to the nuclear program, S.C. Res. 1929, *supra* note 46.

85. Patrick Clawson, *Iran Primer: U.S. Sanctions*, PBS FRONTLINE (Oct. 21, 2010, 10:26 PM), <http://www.pbs.org/wgbh/pages/frontline/tehranbureau/2010/10/iran-primer-us-sanctions.html>; Jason Starr, *Iran Primer: Timeline of U.S. Sanctions*, PBS FRONTLINE (Nov. 2, 2010, 6:29 PM), <http://www.pbs.org/wgbh/pages/frontline/tehranbureau/2010/11/iran-primer-timeline-of-us-sanctions.html>.

86. For background on the unilateral sanctions adopted by the EU, Canada, South Korea, Australia, and other erstwhile trading partners of Iran, see Sang-Hun Choe, *South Korea Aims Sanctions at Iran*, N.Y. TIMES, Sept. 8, 2010, <http://www.nytimes.com/2010/09/09/world/asia/09korea.html>; James Kanter & Thomas Erdbrink, *With New Sanctions, European Union Tightens Screws on Iran Over*

on Iran's oil industry, energy sector, banking services, and access to foreign reserves; they have even resulted in the European Union (EU) freezing the assets of Iran's central bank.⁸⁷ Because of EU sanctions Iran cannot access the London-based shipping-insurance market, causing it to increasingly encounter shipping and export difficulties.⁸⁸ For ordinary Iranians, the consequences of sanctions have ranged from difficulty purchasing pharmaceuticals and meeting medical needs to restrictions on access to information technology such as personal computers and tablets.⁸⁹ Sanctions relief has become one of the most important negotiation goals of the Iranian government because of the economic contraction that has occurred since multilateral sanctions first went into effect.

Nuclear Work, N.Y. TIMES, Oct. 16, 2012, at A4; Paul Vieira, *Canada Imposes a Total Ban on Trade in Goods With Iran*, WALL ST. J., May 29, 2013, <http://online.wsj.com/article/SB10001424127887324866904578513442435665794.html>; David Wroe, *Australia Toughening Iran Sanctions*, SYDNEY MORNING HERALD, Jan. 10, 2013, <http://www.smh.com.au/federal-politics/political-news/australia-toughening-iran-sanctions-20130110-2cicy.html>.

87. ANTHONY H. CORDESMAN ET AL., CTR. FOR STRATEGIC & INT'L STUDIES, U.S. AND IRANIAN STRATEGIC COMPETITION: SANCTIONS, ENERGY, ARMS CONTROL, AND REGIME CHANGE, at I–XIII, 57–61 (2013); Ewa Krukowska & Gregory Viscusi, *EU Hits Iran With Oil Ban, Asset Freeze Over Nuclear Effort*, BLOOMBERG (Jan. 23, 2012, 9:23 PM), <http://www.bloomberg.com/news/2012-01-23/eu-hits-iran-with-oil-ban-bank-asset-freeze-in-bid-to-halt-nuclear-plan.html>.
88. Javier Blas, *Sanctions Put Choker on Iran Oil Exports*, FIN. TIMES, Sept. 13, 2010, <http://www.ft.com/intl/cms/s/0/8efd517e-bf5d-11df-965a-00144feab49a.html>.
89. Michelle Nichols & Louis Charbonneau, *U.N. Chief Says Sanctions on Iran Affecting Its People*, REUTERS (Oct. 5, 2012, 12:46 PM), <http://www.reuters.com/article/2012/10/05/us-iran-sanctions-un-idUSBRE89412Z20121005>. For a discussion of the impact of sanctions on access to pharmaceutical supplies, see Julian Borger & Saeed Kamali Dehghan, *How Life-Saving Drugs Are Caught up in Iranian Sanctions*, GUARDIAN, Jan. 13, 2013, <http://www.theguardian.com/world/2013/jan/13/iran-sanctions-tehran-uranium-enrichment>, reporting that of the unintended consequences of sweeping new sanctions, “worst of all is the crisis they triggered in the Iranian pharmaceutical market, and the impact that it has had on millions of Iranians with chronic health problems.” On the effect of sanctions on access to personal computing technologies, see *Apple Store the Front Line of Iran Trade Sanctions*, SYDNEY MORNING HERALD (June 25, 2012), <http://www.smh.com.au/digital-life/digital-life-news/apple-store-the-front-line-of-iran-trade-sanctions-20120625-20x5q.html>, which reports that U.S. sanctions banning trade to Iran in technology products such as computers were circumvented through the smuggling of computer products through Dubai. See also Kari Huus, *Iran Trade Sanctions Get Personal in Apple Stores*, U.S. NEWS (June 22, 2012, 3:00 PM), http://usnews.nbcnews.com/_news/2012/06/22/12344611-iran-trade-sanctions-get-personal-in-apple-stores (“An Apple store employee refused to sell an iPad to an Iranian American customer, citing company policy that aims to comply with U.S. sanctions on trade with Iran . . .”). More recently, the United States decided to reverse course on banning personal computer sales to Iran in a bid to improve Iranian citizens’ access to social media in advance of the 2013 Iranian presidential elections. Terry Atlas, *U.S. Lifts Sanctions on Laptops, Mobile Phones*, BLOOMBERG (May 30, 2013, 1:09 PM), <http://www.bloomberg.com/news/2013-05-29/u-s-to-ease-iran-sanctions-on-laptops-mobile-phones.html> (“The change is intended to help Iranians communicate through social media, text messaging and mobile-phone videos in order to overcome some of the media and communications restrictions imposed by Iranian authorities.”).

Sanctions relief may be the most complex aspect of Iranian nuclear negotiations. Although the parties theoretically accept that any agreement would include sanctions relief, lifting unilateral and multilateral sanctions may prove more complicated than putting them in place. Initial relief would likely entail the suspension of some of the U.N.-mandated sanctions, perhaps beginning with financial sanctions and those related to the inspection of Iranian shipping.⁹⁰ Eventually, after verification of Iranian compliance with more stringent inspections and the limits on its enrichment program, the U.N.—and in time those nations that have imposed bilateral measures—would gradually lift all additional sanctions.⁹¹ The indexing of sanctions relief to particular benchmarks of Iranian compliance with IAEA inspections and the scaling back of enrichment activities would be among the important modalities to be negotiated in any agreement. The challenge of coordinating the numerous states that have imposed bilateral sanctions to lift those measures in tandem with international determinations, however, may be among the most logistically difficult elements of a proposed agreement. Some of this complexity was evident as the P5+1 offered limited sanctions relief to Iran under the Joint Plan of Action negotiated in November 2013.⁹²

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The most recent positions outlined by the parties during their negotiations in Geneva in November 2013 reflect an encouraging number of common princi-

90. Such sanctions relief was recommended, for instance, in a 2011 proposal put forth by Russian foreign minister Sergei Lavrov. Arshad Mohammed, *Russia Lays Out 'Step-by-Step' Approach on Iran*, REUTERS (July 13, 2011, 5:38 PM), <http://www.reuters.com/article/2011/07/13/iran-russia-usa-idAFN1E76C1XU20110713>.

91. Support for this element of the proposal is present in several of the official proposals that have been advanced both by Iran and by members of the P5+1. For instance, the Lavrov step-by-step proposal incorporates reciprocal steps by Iran and the P5+1 in which each confidence-building measure by Iran is met with a form of sanctions relief. Davenport, *supra* note 28, at 41. The most recent P5+1 proposal from February 2013 also incorporates relief from U.S. and EU sanctions on trade in gold and precious metals and on petrochemical sales in exchange for Iranian suspension of 20 percent enrichment and exportation of its existing 20 percent enriched uranium stockpile. Laura Rozen, *The P5+1 Nuclear Proposal to Iran in Almaty: Document*, BACK CHANNEL (June 9, 2013), <http://backchannel.al-monitor.com/index.php/2013/06/5444/p51-almaty-confidence-building-proposal-to-iran>.

92. The Joint Plan of Action provided that the P5+1 would hold off on additional U.S., EU, or UN sanctions for the six-month period of the agreement and offer modest relief from existing sanctions on oil sales while returning certain frozen assets. *Joint Plan of Action*, *supra* note 66. Yet, within weeks of the agreement, American lawmakers were putting pressure on the Obama administration to increase sanctions against Iran. Timothy Gardner, *U.S. Senators Prepare Legislation to Pressure Iran*, REUTERS (Dec. 9, 2013, 3:15 PM), <http://www.reuters.com/article/2013/12/09/us-iran-usa-legislation-idUSBRE9B812S20131209>.

ples. Prior to Geneva, Iran's last proposal had been offered in Moscow in June 2012. Its principal features were an offer to "transparently cooperate with the IAEA" in exchange for recognition of its right to enrichment and sanctions relief.⁹³ Though that proposal was not explicit as to whether the country would accept a cap on enrichment levels, it included an offer to cooperate on securing fuel supply, suggesting that Iran might not be producing the necessary 20 percent enriched fuel itself.⁹⁴ The P5+1 most recent proposal prior to Geneva was outlined in February 2013 talks. The proposal called for confidence-building measures whereby Iran would suspend 20 percent enrichment, ship its existing 20 percent enriched uranium stockpile out of the country, and suspend operations at the Fordow enrichment facility for six months without dismantling existing centrifuges.⁹⁵ In return, the United States and the EU would offer Iran some sanctions relief as well as assurances that no new sanctions would be imposed through the U.N. or the EU.⁹⁶ The terms of the deal reached in Geneva retained most of the features of these earlier proposals, but went further revealing additional priorities. The Joint Plan of Action caps Iranian enrichment at five percent, strictly limits its stockpile of enriched uranium, halts work on its heavy water facility at Arak and increases IAEA inspections. In return, the P5+1 offered limited initial sanctions relief and committed to avoid new sanctions during the six-month negotiating period established by the interim deal.⁹⁷ Importantly, the Geneva talks also set forth a shared conception of the elements of the comprehensive solution to be negotiated between the parties. Under the heading "elements of the final step of a comprehensive solution," Iran and the P5+1 agreed that a comprehensive agreement would ultimately result in a mutually defined

93. Similarly, the Russian step-by-step proposal focused on nuclear transparency in exchange for a tacit recognition of Iran's right to enrichment. Kaveh L. Afrasiabi, *US Stalls on Russia's Iran Plan*, ASIA TIMES (Aug. 10, 2011), http://www.atimes.com/atimes/Middle_East/MH10Ak03.html.

94. For the complete text of Iran's Moscow proposal, see *Full Text of Iran's Proposals to Six World Powers in Moscow Talks*, FARS NEWS AGENCY (July 7, 2012, 5:10 PM), <http://english2.farsnews.com/newstext.php?nn=9103085486>.

95. The dropping of an earlier requirement that enrichment equipment at Fordow be dismantled and that the facility be decommissioned was a significant concession. Further, the absence of a reference to suspension of *all* enrichment activities reinforced the widely held view that the United States had shifted its negotiating stance to accept a limited enrichment capacity in Iran, subject to substantial constraints. See, e.g., Steven Erlanger, *As Negotiators Ease Demands on Iran, More Nuclear Talks Are Set*, N.Y. TIMES, Feb. 28, 2013, at A6 ("[T]he six world powers . . . dropp[ed] the demand that [Iran] shut[] down its enrichment plant at Fordow . . . [and instead] insisted Tehran suspends uranium enrichment [there] . . ."); *West Offers Iran Deal, Drops Demand to Close Plant*, JERUSALEM POST (Feb. 28, 2013, 5:45 AM), <http://www.jpost.com/Iranian-Threat/News/West-offers-Iran-deal-drops-demand-to-close-plant>. The shift in the American position was confirmed during the November 2013 talks in Geneva.

96. Rozen, *supra* note 91.

97. *Joint Plan of Action*, *supra* note 66.

enrichment program (with agreed limitations on scope, enrichment level and stockpiles), the gradual lifting of all sanctions, and enhanced monitoring by the IAEA.⁹⁸ The interim measures put in place in Geneva and the common vision of a comprehensive solution articulated by the parties converge around the three elements—limited enrichment, enhanced inspections and sanctions relief—that have featured in the formal proposals separately offered by all of the major stakeholders for over a decade.⁹⁹

II. MISSED OPPORTUNITIES

The basic features of a diplomatic resolution to the Iranian nuclear crisis would ensure that Iran does not acquire a nuclear weapon while allowing the country to maintain a limited civilian nuclear energy program. Yet the referral of the Iranian program to the Council and the passage of numerous resolutions has failed to achieve such a solution. Many had hypothesized that this failure indicates that Iran is simply unwilling to forgo a nuclear weapon, and a negotiated solution is therefore impossible. The ability of the parties to achieve an interim agreement in November 2013 suggests that a comprehensive agreement may yet be possible, but it is too soon to determine whether this promising start will yield success. To enhance the prospects for successful diplomacy, this Article offers a review of the past decade of negotiations to identify the sources of past failure and determine whether they may be remediable. The following review of missed opportunities for a negotiated resolution from 2003 to the present offers a basis for proposals in the current negotiations to avoid the obstacles that produced earlier stalemates.

98. *Id.* The provisions relating to the IAEA provide not only that Iran will ratify and fully implement the Additional Protocol, but also that it will undertake additional “agreed transparency measures and enhanced monitoring.”

99. For a proposal featuring these three elements offered by IAEA Director General ElBaradei, see ELBARADEI, *supra* note 27, at 245–46. For a description of a proposal put forth by Russian Foreign Secretary Sergei Lavrov in 2011, see Peter Crail, *Iran Welcomes Russian Nuclear Proposal*, ARMS CONTROL ASS’N (Sept. 2011), <http://www.armscontrol.org/print/4995>. For examples over the last decade of discussion by British and American analysts of a solution featuring these three elements, see Rebecca Johnson, *Disarmament and Sustainable Non-proliferation*, ACRONYM INST. FOR DISARMAMENT DIPL. (Apr. 25, 2006), <http://www.acronym.org.uk/wmd/iranpres.htm>, and IRAN PROJECT, *supra* note 11. For the articulation of these three elements by a former Iranian nuclear negotiator in 2012, see Aslı Bâli, *Iran Will Require Assurances”: An Interview With Hossein Mousavizadeh*, MIDDLE E. REP. & INFO. PROJECT (May 16, 2012), <http://www.merip.org/mero/mero051612>.

A. 2003

When the purported reformist presidential candidate, Mohammad Khatami, was elected to the presidency of Iran in 1997, his administration's priorities seemed exceptionally promising. On the domestic front, Khatami ran on a platform of liberalization and reform, promoting greater freedom of expression, economic liberalization, and tolerance for civil society organizing and activism.¹⁰⁰ His administration's foreign policy agenda was to build constructive diplomatic relations with both the European Union and the United States.¹⁰¹ During Khatami's first term, the foreign relations committee of the Iranian National Security Council (NSC) met repeatedly to identify the terms for proposing a rapprochement with the United States to the Supreme Leader, Ali Khamenei.¹⁰² These meetings were necessary because any shifts in Iranian foreign policy must occur on two political levels: First, reformists must persuade internal hardliners to negotiate, and only then can Iran engage diplomatically with the United States.¹⁰³

When Khatami was reelected in 2001, much of the groundwork for diplomatic normalization had been laid, and Khamenei had reviewed the proposal for outreach to the United States.¹⁰⁴ But both the events of September 11 and the administration change in the United States altered the calculus. Following the September 11 attacks, Iran cooperated with the United States over Afghanistan through limited tactical accords, while discussions continued between the

100. TRITA PARSI, *TREACHEROUS ALLIANCE: THE SECRET DEALINGS OF ISRAEL, IRAN, AND THE U.S. 2002-05* (2007); Jahangir Amuzegar, *Khatami's First-Term Presidency: An Outsider's Assessment*, 22 SAIS REV. 1, 2-3, 6 (2002).

101. FLYNT LEVERETT & HILLARY MANN LEVERETT, *GOING TO TEHRAN: WHY THE UNITED STATES MUST COME TO TERMS WITH THE ISLAMIC REPUBLIC OF IRAN* 114 (2013) (claiming that Mohammad Khatami's signature foreign policy initiative sought to "improve relations with Western countries by 'highlighting the shared cultural and intellectual traditions'"); PARSI, *supra* note 100, at 202-05; Amuzegar, *supra* note 100, at 7-10.

102. Interview with Javad Zarif, Iranian Ambassador to the U.N. (Oct. 17, 2005) (on file with author). On the general reluctance of Ayatollah Khamenei to support the Khatami administration's overtures towards Iranian-U.S. rapprochement, see HOOMAN MAJD, *THE AYATOLLAHS' DEMOCRACY: AN IRANIAN CHALLENGE* 178-88 (2010), and SEYED HOSSEIN MOUSAVIAN, *THE IRANIAN NUCLEAR CRISIS: A MEMOIR* 439-41 (2012).

103. The challenge of a two-level game in which negotiators must first secure an agreement among domestic factions and then negotiate at the international level is discussed below, *infra* Part II.B. See also MOUSAVIAN, *supra* note 102, at 439 (explaining that Khatami's nuclear team was guided by Ayatollah Khamenei and operated only when he approved their actions).

104. See LEVERETT & LEVERETT, *supra* note 101, at 122-24 (stating that Khatami had to get permission from Ayatollah Khamenei prior to making concessionary steps to the IAEA and Western powers).

Khatami administration and Khamenei concerning a broader strategic initiative to engage with the United States.¹⁰⁵

In the end, Khamenei approved the broader strategic engagement and Khatami sent an ambassador to Paris to present Tim Guldemann, the Swiss diplomat who served as the go-between for U.S.-Iran relations, with a comprehensive offer for resolving outstanding issues between the United States and Iran. The Bush administration received the two-page document in the spring of 2003. The proposal offered broad dialogue, cooperation on the nuclear program including transparency measures, termination of support for militant groups in the Arab world, and normalization with Israel. In return, it sought resumption of ordinary relations with the United States, economic cooperation, and security guarantees.¹⁰⁶ This proposal marked the Iranian government's first attempt to negotiate an agreement with the United States directly.¹⁰⁷ The proposal's inclusion of the Iranian nuclear program as a subject for direct bilateral negotiation with the United States was particularly remarkable.

The Bush administration responded by dismissing the significance of the initiative and criticizing the Swiss ambassador for having relayed it.¹⁰⁸ Administration officials' views reportedly ranged from questioning the authenticity of the

105. PARSİ, *supra* note 100, at 230–32. The inclusion of Iran in President George W. Bush's famous "Axis of Evil" formulation contributed to the setback of efforts at rapprochement in this period. For the original inclusion of Iran under that designation, see George W. Bush, President of the U.S., State of the Union Address Before Congress (Jan. 29, 2002) (transcript available at <http://edition.cnn.com/2002/ALLPOLITICS/01/29/bush.speech.txt>). For Iranian Foreign Minister Kamal Kharrazi's response to the designation, see *Christiane Amanpour: Reaction to Bush's 'Axis of Evil' Warning* (CNN television broadcast Jan. 31, 2002), available at <http://edition.cnn.com/2002/US/01/30/amanpour.bush.otsc>, which notes that FM Kharrazi "reacted very harshly, vehemently rejecting those charges that were outlined in Mr. Bush's speech."

106. The proposal did not come to light in the United States until years later, at which point it received substantial media attention. *E.g.*, Glenn Kessler, *In 2003, U.S. Spurned Iran's Offer of Dialogue*, WASH. POST, June 18, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/17/AR2006061700727.html>. The full document itself was leaked to the press and is available online at http://www.armscontrol.org/pdf/2003_Spring_Iran_Proposal.pdf.

107. PARSİ, *supra* note 100, at 243; *see also* Davenport, *supra* note 28.

108. Reports at the time suggested that "the offer was never seriously considered at the highest levels of the Bush administration." BARBARA SLAVIN, BITTER FRIENDS, BOSOM ENEMIES: IRAN, THE U.S., AND THE TWISTED PATH TO CONFRONTATION 205 (2007); *see also* MOUSAVIAN, *supra* note 102, at 65; PARSİ, *supra* note 100, at 249. For a range of views on the 2003 offer and the Bush administration's response to it, see *The "Grand Bargain" Fax: A Missed Opportunity?*, PBS FRONTLINE (Oct. 23, 2007), http://www.pbs.org/wgbh/pages/frontline/showdown/themes/grand_bargain.html, which excerpts interviews with Flynt Leverett, Richard Armitage, John Bolton, Patrick Clawson, Vali Nasr, and Gary Sick.

offer,¹⁰⁹ to viewing the offer as evidence of Iranian weakness,¹¹⁰ to rejecting the offer because the Iranian regime was illegitimate.¹¹¹ In May of 2003, the United States broke off the tactical accord on Afghanistan with the Iranian regime and adopted a more confrontational posture, having successfully established an American presence in Iraq earlier that spring.¹¹² The first opportunity for a negotiated solution to the Iranian nuclear program had been definitively missed.

In June 2003, the IAEA first publicly announced that Iran had “failed to report certain nuclear materials and activities” and requested cooperation from the regime.¹¹³ At this point, the IAEA did not issue a finding that Iran was in noncompliance with its Safeguards Agreements, but it began a period of intensive inspections. In the meantime, the EU, through the United Kingdom, Germany, and France (the EU-3), initiated negotiations with Iran to procure Iranian agreement to disclose all of its nuclear activities and accept limitations on further development of its nuclear program.¹¹⁴ In October 2003, the IAEA reported that Iran had submitted a comprehensive declaration of its nuclear program.¹¹⁵ The following month, the IAEA reported that, despite breaches of the Safeguards Agreements, it had found no evidence that Iran had diverted nuclear materials toward military purposes.¹¹⁶

The IAEA’s findings coincided with the attainment of an initial agreement between the EU-3 and Iran.¹¹⁷ The terms of this agreement included temporary suspension of enrichment and heightened nuclear inspections (by virtue of Iran’s voluntary adherence to the Additional Protocol) in exchange for EU-3 recognition of Iran’s right to a civilian nuclear program, commitment not to refer the Ira-

109. MAJD, *supra* note 102, at 180 (noting that the White House regarded the Swiss delivery of the 2003 proposal as an “interference” in U.S. affairs and that some in the Bush administration even considered the letter a forgery).

110. ALI M. ANSARI, *CONFRONTING IRAN: THE FAILURE OF AMERICAN FOREIGN POLICY AND THE NEXT GREAT CONFLICT IN THE MIDDLE EAST* 193 (2006) (noting that some in the Bush administration took the view that “[i]f the Iranians were seeking to deal now, just think what they might offer following the triumph in Iraq”).

111. See IRAN PROJECT, *supra* note 11, at 69 (“Vice President Dick Cheney is said to have dismissed the initiative, reportedly asserting, ‘We don’t talk to evil.’”); Tom Regan, *Report: Cheney Rejected Iran’s Offer of Concessions in 2003*, CHRISTIAN SCI. MONITOR (Jan. 18 2007), <http://www.csmonitor.com/2007/0118/p99s01-duts.html>.

112. PARSI, *supra* note 100, at 226–34; see ALIREZA NADER & JOYA LAHA, RAND CORP., *IRAN’S BALANCING ACT IN AFGHANISTAN* 7–8 (2011).

113. IAEA Report, June 2003, *supra* note 23.

114. ELBARADEI, *supra* note 27, at 121; MOUSAVIAN, *supra* note 102, at 100–06.

115. Press Release, Int’l Atomic Energy Agency, Iran Provides Nuclear Declaration to the IAEA (Oct. 23, 2003), available at http://www.iaea.org/newscenter/mediaadvisory/iran/ma_iran_2310.html.

116. Int’l Atomic Energy Agency, *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions in the Islamic Republic of Iran*, IAEA Doc. GOV/2012/55 (Nov. 16, 2012).

117. ELBARADEI, *supra* note 27, at 121.

nian program to the UNSC, and various economic inducements.¹¹⁸ By the end of 2003, negotiations over the Iranian nuclear program involved Iran, the IAEA, and the EU-3, but the United States chose to remain aloof.

B. 2005

From 2003 to 2005, Iran concluded various agreements with the EU-3 and the IAEA. Iran's agreements with the EU-3 included the initial agreement of 2003 and the Paris Agreement of 2004 (Paris Agreement), which clarified the scope of "suspension" of enrichment activities under the initial agreement.¹¹⁹ Furthermore, Iran and the IAEA negotiated an agreement implementing the Additional Protocol and its Subsidiary Arrangements.¹²⁰ Pursuant to these last agreements, Iran suspended its enrichment program and allowed for wide-ranging IAEA inspections. Iran also continued negotiations with the EU-3 for a final agreement under which Iran would resume some elements of its civilian nuclear program and receive fuel-supply arrangements and negative security guarantees, but would submit to a permanent inspections regime and convey "objective guarantees" of the civilian nature of its program.¹²¹

By 2005, however, American nonparticipation began to undermine the negotiations.¹²² The absence of U.S. support left the EU-3 unable to provide two critical elements: international consensus as to the definition of "objective guarantees"¹²³ and credible security guarantees from the international community.¹²⁴

118. For the text of the Tehran Agreement, see *Statement by the Iranian Government and Visiting EU Foreign Ministers*, INT'L ATOMIC ENERGY AGENCY (Oct. 21, 2003), http://www.iaea.org/newscenter/focus/iaearan/statement_iran21102003.shtml.

119. For the text of the Paris Agreement, see *Iran-EU Agreement on Nuclear Programme*, INT'L ATOMIC ENERGY AGENCY (Nov. 14, 2004), http://www.iaea.org/newscenter/focus/iaearan/eu_iran14112004.shtml.

120. See *Iran Signs Additional Protocol on Nuclear Safeguards*, INT'L ATOMIC ENERGY AGENCY (Dec. 18, 2003), <http://www.iaea.org/newscenter/news/2003/iranap20031218.html#> (detailing events leading up to the signing of the Additional Protocol). Because Iran did not ratify the Additional Protocol, its implementation of the Additional Protocol's requirements remained voluntary.

121. *Iran-EU Agreement on Nuclear Programme*, *supra* note 119; see also MOUSAVIAN, *supra* note 102, at 107–12.

122. SLAVIN, *supra* note 108, at 212–14.

123. The negotiations had proceeded to this point on the expectation that with a sufficiently intrusive inspections regime and caps on both the level of permissible low-level enrichment and the stockpile of enriched fuel, a limited Iranian program could be certified as "proliferation-resistant." The EU-3 assumed that objective guarantees limiting Iranian nuclear fuel supply and ensuring nondiversion of nuclear materials to military applications would satisfy international concerns while also meeting Iran's insistence on its interpretation of its rights under the NPT. When the Bush administration insisted that nothing short of zero enrichment was acceptable, the solution of "objective guarantees" was rendered moot. On the U.S. zero-enrichment requirement, see *Iran in a War of Words With the Bush Administration*, PBS NEWSHOUR (Feb. 18, 2005), http://www.pbs.org/newshour/bb/middle_east/jan-june05/iran_2-18.html, quoting Secretary of State Condoleezza Rice in testimony to a Senate committee stating that "[t]he Iranians know what they need to do. They need to stop enriching uranium."

124. See MOUSAVIAN, *supra* note 102, at 161–63; Sciolino, *supra* note 64.

In the end, the EU-3 was unable to provide the key terms over which negotiations had been delayed until the summer of 2005—just weeks before Iranian elections.¹²⁵ Despite feverish efforts by Khatami administration negotiators to identify last-minute arrangements to salvage the negotiations,¹²⁶ the EU-3 opted to suspend negotiations until after the election. This decision was likely motivated by Britain's belief that Akbar Hashemi Rafsanjani would prevail in the election and would agree to more favorable terms on the issue of a pilot-scale program on Iranian soil.¹²⁷ This calculation was mistaken. Mahmoud Ahmedinejad won the election and replaced the Khamenei-Khatami negotiating team with a new team of hardliners.¹²⁸

In summary, the opportunity to secure the termination of commercial-scale enrichment in Iran was thwarted, first, by the EU-3's inability to gain U.S. support, and, second, by an erroneous assumption about the outcome of the 2005 Iranian elections.

The IAEA expressed deep frustration with the failure of the talks.¹²⁹ In the meantime, Secretary of State Condoleezza Rice publicly commented that IAEA's Director General Mohamed ElBaradei should "toughen his stance on Iran" if he wanted U.S. support for his reelection.¹³⁰ This politicization of the director general appointment process damaged the IAEA's credibility in the eyes of the non-NWS.¹³¹ Following the Iranian presidential elections, Iran resumed

125. ELBARADEI, *supra* note 27, at 143–44.

126. See Michael Hirsh & Maziar Bahari, *Blowup? America's Hidden War With Iran*, NEWSWEEK, Feb. 19, 2007, available at <http://warisacrime.org/node/18444>.

127. SLAVIN, *supra* note 108, at 215.

128. Initially, Ahmadinejad appointed Ali Larijani as chief nuclear negotiator. See *Larijani to Become Iran's Chief Nuclear Negotiator*, IRAN FOCUS (Aug. 7, 2005), http://www.iranfocus.com/en/?option=com_content&task=view&id=3224 (noting that Larijani is "a top confidant of Iran's Supreme Leader Ayatollah Ali Khamenei" and a member of the "ultra-conservative camp" of Iranian politics). When Larijani resigned in 2007, the even more conservative Saeed Jalili was appointed as Iran's leading nuclear negotiator. Anne Penketh, *Iran's New Hardline Nuclear Envoy Causes Jitters in West*, INDEPENDENT (Oct. 22, 2007), http://news.independent.co.uk/world/middle_east/article3084298.ece; see Robert Tait & Ian Black, *Iran's President Moves to Tighten Grip on Nuclear Policy*, GUARDIAN, Oct. 21, 2007, <http://www.theguardian.com/world/2007/oct/22/iran.international> ("Despite being staunchly opposed to abandoning the country's uranium enrichment programme . . . Mr. Larijani favoured diplomatic engagement to relieve international pressure, in contrast to the president's defiant approach.").

129. ELBARADEI, *supra* note 27, at 145.

130. *US Agrees to Back UN Nuclear Head*, BBC NEWS (June 9, 2005, 7:03 PM), <http://news.bbc.co.uk/2/hi/americas/4075496.stm>.

131. On the other hand, the comments enhanced ElBaradei's own credibility, in the eyes of some parties, as an independent actor capable of resisting U.S. pressure. Some even attributed the awarding of the 2005 Nobel Peace Prize to the IAEA as a strong message against the attempted politicization of the appointments process at the Agency. See, e.g., Maggie Farley & Alissa J. Rubin, *UN Nuclear Monitor Wins Nobel Peace Prize*, L.A. TIMES, Oct. 8, 2005, <http://articles.latimes.com/>

uranium enrichment to the 3.5 percent level, which it had suspended during negotiations with the EU-3.¹³² As of August 2005, the parties returned to the drawing board.

C. 2006

The failure to achieve a comprehensive negotiated agreement, coupled with the Iranian change of leadership, set the clock back on a diplomatic solution and cleared the way to a more confrontational approach. In September 2005, the IAEA Board of Governors voted on the proposition that the Iranian failures under the Safeguards Agreement, as documented in 2003, constituted “non-compliance.”¹³³ As discussed further below, this vote facilitated the referral of the Iranian file to the UNSC, which occurred in February 2006 over the objection of the IAEA secretariat.¹³⁴ The referral, in turn, prompted Iran to terminate voluntary compliance with intensive inspections under the Additional Protocol.¹³⁵

In June 2006, the EU-3 were joined by the remaining permanent members of the UNSC (the United States, China, and Russia) in presenting a new proposal to Iran, acting for the first time as the P5+1.¹³⁶ In July 2006, a war between Israel and Lebanon heightened regional security tensions, including those between Iran and the United States.¹³⁷ In the midst of the war, and before Iran had responded to the P5+1 proposal on the table, the UNSC passed its first

2005/oct/08/world/fg-peace8 (noting that the award was an expression of support for multilateralism after ElBaradei had publicly clashed with the Bush administration). The view of the appointments procedure for the director general position as politicized, however, would become an issue anew with the appointment of ElBaradei's successor. See *infra* Part IV.B.

132. ELBARADEI, *supra* note 27, at 145.

133. Int'l Atomic Energy Agency, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, at 2, IAEA Doc. GOV/2005/67 (Sept. 2, 2005) [hereinafter IAEA Report, Sept. 2005].

134. See Int'l Atomic Energy Agency, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, at 2, IAEA Doc. GOV/2006/15 (Feb. 27, 2006) [hereinafter IAEA Report, Feb. 2006]; ELBARADEI, *supra* note 27, at 145–47 (“[E]ventual referral to the UN Security Council [was] a certainty.”); MOUSAVIAN, *supra* note 102, at 210; Paul Kerr, *Agency Report Offers Mixed View on Iran*, ARMS CONTROL ASS'N (Oct. 2005), http://armscontrol.org/act/2005_10/OCT-AgencyIran (discussing a report submitted by ElBaradei on September 2 to the IAEA Board); Paul Kerr, *IAEA Cites Iran on Safeguards Failures*, ARMS CONTROL ASS'N (Oct. 2005), http://armscontrol.org/act/2005_10/OCT-IAEAIran.

135. MOUSAVIAN, *supra* note 102, at 230.

136. See ELEMENTS OF A PROPOSAL TO IRAN AS APPROVED ON 1 JUNE 2006 AT THE MEETING IN VIENNA OF CHINA, FRANCE, GERMANY, THE RUSSIAN FEDERATION, THE UNITED KINGDOM, THE UNITED STATES OF AMERICA AND THE EUROPEAN UNION 1 (2006), *available at* http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/reports/90569.pdf.

137. SLAVIN, *supra* note 108, at 224.

binding resolution.¹³⁸ The Council's action unilaterally altered the negotiating landscape and the legal parameters of the dispute over the Iranian nuclear program by requiring that Iran suspend its enrichment program as a *precondition* to negotiations. Prior to the resolution, Iran was reportedly willing to suspend its enrichment program, but only as an *outcome* of negotiations.¹³⁹ Following the resolution, Ali Larijani, Iran's chief nuclear negotiator at the time, gave a Tehran press conference declaring that Iran would never agree to permanently suspend its uranium enrichment activities.¹⁴⁰ By the time Iran responded to the P5+1 proposal, the proposal itself had been largely superseded by UNSC action.¹⁴¹

Oddly enough, just when the UNSC created a legal mandate that Iran suspend uranium enrichment, the United States finally retreated from its longstanding position that any negotiated agreement must permanently terminate enrichment on Iranian soil.¹⁴² Instead, the United States agreed to a compromise whereby Iran might eventually be allowed to retain a research-scale enrichment program in exchange for the cessation of the broader program.¹⁴³ Despite

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138. The adoption of the binding resolution was the first coercive measure taken by the Council in relation to Iran's nuclear program. UNSC Resolution 1696 calls for Iran to suspend all enrichment-related and reprocessing activities and further calls on all states to prevent the transfer of any materials to Iran that might contribute to that country's enrichment, reprocessing, or ballistic missile programs. S.C. Res. 1696, *supra* note 45, ¶¶ 2, 5. The Iranians responded defiantly, treating resort to coercive measures as inconsistent with good faith negotiations. See *Iran: Tehran Says UN Sanctions Could Spark Confrontation*, RADIO FREE EUR./RADIO LIBERTY (May 7, 2006), <http://www.rferl.org/content/article/1068226.html>.
139. ELBARADEI, *supra* note 27, at 198 ("As the Security Council began edging its way toward a resolution, Javad Va'edi, Larijani's deputy, came to see me. The gist of the conversation was that the Iranians were prepared to agree to suspension, but not as a precondition of the negotiations, only as an outcome.").
140. *Iran Will Never Halt Enrichment: Larijani*, DAILY TIMES (Pakistan) (Aug. 28, 2006), http://dailytimes.com.pk/default.asp?page=2006%5C08%5C28%5Cstory_28-8-2006_pg7_30.
141. Paul Kerr, *Iran Rejects Security Council Demand*, ARMS CONTROL ASS'N (Sept. 2006), http://www.armscontrol.org/act/2006_09/IranRejects. While the details of the Iranian response were not made public, a leaked version of Iran's August 2006 response was later published by the Institute for Science and International Security. INST. FOR SCI. & INT'L SEC., ISLAMIC REPUBLIC OF IRAN'S RESPONSE TO THE PACKAGE PRESENTED ON JUNE 6, 2006 (2006), <http://www.isis-online.org/publications/iran/iranresponse.pdf>.
142. Surprisingly, the Bush administration signaled that a temporary suspension of enrichment activities during the period of negotiations might be sufficient. Glenn Kessler & Dafna Linzer, *Brief Nuclear Halt May Lead to Talks With Iran*, WASH. POST, Sept. 12, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/11/AR2006091100766.html> ("Secretary of State Condoleezza Rice signaled yesterday that a temporary suspension of Iran's nuclear programs might be enough to pave the way for the first direct negotiations involving the United States and Iran in more than a quarter-century.").
143. While odd, these positions were not necessarily inconsistent. The United States remained adamant that Iran suspend enrichment until stringent IAEA inspections were completed, though it was now willing to entertain the idea that, after IAEA certification, Iran might resume an enrichment program limited to research purposes. MOUSAVIAN, *supra* note 102, at 244–45.

Council action earlier in the summer, this change created a new window of opportunity for negotiations to move forward. Larijani engaged in intensive talks with Javier Solana as the representative of the EU-3 and P5+1.¹⁴⁴ This time the possibility of a negotiated solution was undermined by the Iranian side when, at the last moment, Ahmadinejad and Khamenei apparently denied Larijani permission to go forward with the agreement.¹⁴⁵ The Iranian government's inability to arrive at a coherent position therefore caused another missed opportunity.¹⁴⁶

Following the breakdown of negotiations in the fall of 2006, the UNSC passed the first resolution imposing sanctions on Iran for continuing its enrichment program. UNSC Resolution 1737¹⁴⁷ was unanimously passed in December 2006 with the proviso that the sanctions might be suspended or lifted if Iran froze its enrichment program and resumed voluntary compliance with the Additional Protocol. In March 2007, UNSC Resolution 1747¹⁴⁸ tightened the existing sanctions package, and a third round of sanctions followed in March 2008 under UNSC Resolution 1803.¹⁴⁹ Finally, the UNSC imposed the fourth and most aggressive round of sanctions under UNSC Resolution 1929 in June 2010.¹⁵⁰ Various unilateral sanctions imposed first by the United States,¹⁵¹ and later by the EU, Japan, South Korea, Canada, and others¹⁵² further augmented these multilateral UNSC sanctions.

The introduction of sanctions established a new framework for negotiations going forward, with IAEA Director General ElBaradei proposing a "freeze-for-freeze" mechanism, whereby Iran would suspend its enrichment program in exchange for a pledge not to introduce new sanctions.¹⁵³ Under this arrangement, the reciprocal freeze would remain in place pending the conclusion of inspections and the negotiation of a permanent agreement concerning Iranian nuclear activi-

144. *Id.* at 245–47.

145. *Id.* at 247; Pellaud, *supra* note 67, at 52.

146. See Helene Cooper & Elaine Sciolino, *Two Tracks on Iran: Keep Talking, and Weigh Penalties*, N.Y. TIMES, Sept. 17, 2006, <http://www.nytimes.com/2006/09/17/world/17iran.html> (quoting Solana as stating, "A little bit more time was needed in order to reach a consensus in [Larijani's] own country among his own leadership" (internal quotation marks omitted)). Apparently, the Iranian side had not consolidated its position in response to the Council's shift to coercive action.

147. S.C. Res. 1737, *supra* note 46.

148. S.C. Res. 1747, *supra* note 46. The resolution imposed a ban on arms sales to Iran, expanded the asset freeze and travel ban put in place by Resolution 1737, and introduced a restriction on financial assistance to Iran by states and international financial institutions. See generally *id.*

149. S.C. Res. 1803, *supra* note 46.

150. S.C. Res. 1929, *supra* note 46.

151. Unilateral U.S. sanctions significantly predate U.N. sanctions. See KENNETH KATZMAN, CONG. RESEARCH SERV., RS20871, IRAN SANCTIONS 6 (2011).

152. See *id.* at 46.

153. ELBARADEI, *supra* note 27, at 204–05; MOUSAVIAN, *supra* note 102, at 253–55.

ties. The United States embraced this “freeze-for-freeze” approach in 2008, and it became the only official proposal on the table by the end of the Bush administration.¹⁵⁴

The pattern of multilateral and unilateral sanctions produced a tension in the international strategy between confrontation and negotiation. The IAEA under ElBaradei took the position that confrontation was counterproductive because it occasioned a reduction in the scope of inspections and undermined progress made during negotiations between Iran and the EU-3.¹⁵⁵ ElBaradei may have been correct in that the sanctions have diverted the attention of the P5+1 from possible negotiated solutions to the political conditions necessary for achieving consensus on adopting additional sanctions. Once in place, the sanctions have exerted an “irresistible appeal” to strengthen the P5+1 negotiating position by imposing increasing costs on the Iranian regime for its failure to comply with the Council’s demands concerning the suspension of enrichment.¹⁵⁶ Moreover, gaining support on the Council for further sanctions has required its own diplomatic investment in negotiations with Russia and China, displacing the priority of negotiations with the Iranians.¹⁵⁷ Without a clear diplomatic approach linked to sanctions, the sanctions themselves risk becoming the sole strategy without any demonstrable link to deterring the Iranian nuclear program.¹⁵⁸

154. The Bush administration sent a representative, Under Secretary of State for Political Affairs William J. Burns, to the P5+1 talks with Iran for the first time in July 2008. Elaine Sciolino, *Nuclear Talks With Iran End in a Deadlock*, N.Y. TIMES, July 20, 2008, at A1 (noting that the Bush administration decided “to reverse policy and send a senior American official to the table for the first time”). The agenda at the meeting was to pursue the proposal introduced with American support at an earlier meeting in June 2008 in which “the six-countries [sic] relayed an understanding that preliminary tasks could begin under a six-week ‘freeze-for-freeze’ period in which Iran would halt the expansion of its enrichment program while the six countries would agree not to pursue additional sanctions against Tehran.” Davenport, *supra* note 28.

155. ELBARADEI, *supra* note 27, at 241–42.

156. See INT’L CRISIS GRP., SPIDER WEB: THE MAKING AND UNMAKING OF IRAN SANCTIONS i–iii (2013), <http://www.crisisgroup.org/en/regions/middle-east-north-africa/iraq-iran-gulf/iran/138-spider-web-the-making-and-unmaking-of-iran-sanctions.aspx> (arguing for “greater prudence and judiciousness in imposing [sanctions]” and enabling sanctions relief where it might be diplomatically beneficial).

157. This dynamic was particularly evident in the case of the May 2010 Tehran Declaration, discussed *infra* note 176 and accompanying text.

158. In recent congressional testimony, for example, Alireza Nader of RAND has argued that “[t]he imposition of sanction after sanction without a clear diplomatic approach may convince the Iranian regime that Washington seeks regime implosion and overthrow, rather than a solution to the nuclear crisis. . . . Sanctions without diplomacy could lead a much weakened regime that is still close to a nuclear weapons capability.” Alireza Nader, *Roubani’s Election: Regime Retrenchment in the Face of Pressure, Testimony Before the Subcomm. on the Middle E. & N. Afr. of the H. Comm. on Foreign Aff.*, 113th Cong. 5–6 (2013); see also INT’L CRISIS GRP., *supra* note 156; IRAN PROJECT, WEIGHING BENEFITS AND COSTS OF INTERNATIONAL SANCTIONS AGAINST IRAN (2012); IRAN TASK FORCE, ATL. COUNCIL, TIME TO MOVE FROM TACTICS TO STRATEGY ON IRAN (2013); Jim

Placing the Iranian nuclear program under the authority of the UNSC has reinforced a tendency to think of the Iranian nuclear file in terms of coercive strategies. In addition to emphasizing the role of sanctions, this tendency also obscures the surprising degree of international support for Iran's civilian nuclear program. For instance, a majority of the members of the Non-Aligned Movement (NAM), a group of states largely from the Global South that eschew alignment with any particular world power bloc, have consistently supported Iran's program. In fact, in the September 2006 meeting of the NAM, all 118 member countries declared their support for the continuation of Iran's civilian nuclear program.¹⁵⁹ In other words, a clear majority of all member states of the United Nations (118 of 192) openly disagreed with the UNSC's characterization of the Iranian nuclear file. Support for the Iranian position by so many of the world's non-NWS suggests a disconnect between these states' interpretation of the NPT and the view taken by the UNSC, underscoring the potential costs to the nonproliferation regime of missed opportunities to find a diplomatic resolution to the conflict.

D. 2009–13

Between the imposition of multilateral sanctions by the UNSC in December 2006 and the end of the Bush administration, few opportunities for a breakthrough on the Iranian nuclear impasse emerged. The election of Barack Obama in November 2008, however, signaled a potential return to diplomatic initiatives.¹⁶⁰ The Obama administration took a dual track approach.¹⁶¹ On the one hand, the administration adopted a posture of engagement with Iran, seeking a negotiated halt to the nuclear program and comprehensive talks toward the

Lobe, *Iran: Sanctions' Effectiveness Widely Questioned*, INTER PRESS SERVICE (June 9, 2010), <http://www.ipsnews.net/2010/06/iran-sanctions-effectiveness-widely-questioned>.

159. See Non-Aligned Movement (NAM), Statement on the Islamic Republic of Iran's Nuclear Issue, NAM 2006/Doc.12/Rev. 1 (Sept. 16, 2006).

160. Within months of assuming office, President Obama recorded a video message to the Iranian people on the Iranian holiday of Nowruz. The message included an invitation to engagement: "My administration is now committed to diplomacy that addresses the full range of issues before us, and to pursuing constructive ties among the United States, Iran and the international community." Barack H. Obama, *The President's Message to the Iranian People*, WHITE HOUSE (Mar. 19, 2009), <http://www.whitehouse.gov/video/The-Presidents-Message-to-the-Iranian-People>.

161. Documents that emerged among the WikiLeaks cables detail the briefings U.S. officials were giving to their foreign counterparts concerning the purposes of their engagement strategy. These documents contain statements that the Obama administration was pursuing engagement as a means of bolstering international resolve for tightened sanctions, containment, and coercion. Tony Karon, *Preparing for New Iran Talks Under a Darkening Cloud*, TIME, Dec. 2, 2010, <http://content.time.com/time/world/article/0,8599,2034163,00.html>.

normalization of relations. On the other hand, the administration conveyed to its strategic partners that it expected engagement to fail, and that if engagement did not yield an agreement, the United States would expect multilateral support for strengthened sanctions.¹⁶² The disclosure of diplomatic cables detailing the U.S. administration's framing of engagement as a mechanism to test Iranian intentions and justify further sanctions undermined the dual-track approach.¹⁶³ Following the WikiLeaks disclosure, the Iranian side pointed to the cables as evidence that the administration's diplomatic overtures were insincere.¹⁶⁴

Nonetheless, the Obama administration's 2009 engagement strategy did achieve an important, if provisional, breakthrough. Months of overtures yielded the first high-level bilateral meeting between an Iranian official and an American official in thirty years. Under Secretary of State William Burns met with his Iranian counterpart, Saeed Jalili, acting as the personal representative of Iran's Supreme Leader, Ali Khamenei, at a meeting led by Javier Solana in Geneva, Switzerland.¹⁶⁵ Meetings continued throughout the month of October and then foundered as a result of an Iranian inability to commit to the provisional deal on offer.¹⁶⁶

162. "[T]he cables show how Mr. Obama's aides . . . roll[ed] out a plan to encircle Iran with economic sanctions and antimissile defenses. In essence, the administration expected its outreach to fail" David E. Sanger et al., *Around the World, Distress Over Iran*, N.Y. TIMES, Nov. 29, 2010, at A1.

163. Iran expert and former U.S. National Security Council member Gary Sick has argued that the pursuit of a pressure strategy from the outset undermined prospects for a negotiated solution in the first two years of the Obama administration. Gary Sick, *Iran, U.S. Need a Crisis Exit Ramp*, CNN (Jan. 12, 2012, 11:33 AM), <http://www.cnn.com/2012/01/12/opinion/sick-iran-us-relations/index.html>. More recently, a set of senior American officials and analysts have recommended that the "dual track" approach focus more clearly on diplomacy rather than pressure. IRAN PROJECT, *supra* note 11, at 15.

164. See Scott Peterson, *For Iran, WikiLeaks Cables Validate Its Skepticism of Obama's Sincerity*, CHRISTIAN SCI. MONITOR (Nov. 30, 2010), <http://www.csmonitor.com/World/Middle-East/2010/1130/For-Iran-WikiLeaks-cables-validate-its-skepticism-of-Obama-s-sincerity> (noting that leaked documents are being seen in Tehran as validation of Iranian skepticism about Obama's "high-profile public overtures to Iran").

165. "The talks were . . . led by the European Union's foreign policy chief, Javier Solana." Steven Erlanger & Mark Landler, *Iran Agrees to Send Enriched Uranium to Russia*, N.Y. TIMES, Oct. 2, 2009, at A1; see also Julian Borger, *Nuclear Talks Lead to Rare Meeting Between US and Iran*, GUARDIAN, Oct. 1, 2009, <http://www.theguardian.com/world/2009/oct/01/iran-nuclear-geneva-talks>. For Javier Solana's remarks about the meeting at the press conference following the meeting, see Introductory Remarks by Javier Solana, EU High Representative for the CFSP, at the Council of the European Union (Oct. 1, 2009) (transcript available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/discours/110393.pdf).

166. Seyed Hossein Mousavian has argued that the Iranian side was surprised that they had not been contacted through lower-level channels to prepare the background materials and establish a framework for discussions before the Burns-Jalili meeting. The failure to engage in adequate preparation for the talks was seen as one reason that another important opportunity was missed. See Bâli, *supra* note 99.

The Geneva talks coincided with a serendipitous development: The Tehran Research Reactor (TRR), a reactor for the production of medical isotopes, had run low on fuel. The TRR required fuel enriched to 20 percent U-235 (that is, a level above the 3.5 percent enrichment threshold that Iran had reached as of 2009). Due to this circumstance, and as a confidence-building measure, the IAEA responded to an Iranian request for fuel supply by proposing that Iran ship most of its known stockpile of low-enriched uranium (LEU) to Russia, where it would be further enriched to the 20 percent level and reprocessed into fuel rods in France and then returned as resupply for the TRR.¹⁶⁷ In other words, Iran would send most of its LEU stockpile outside of its territory and would receive a needed fuel supply—but one with protections against military diversion—in return.

Although the parties agreed to the deal in principle in Geneva, Ahmadinejad's negotiating team was unable to secure support in Tehran for two reasons. First, Iran considered the loss of the stockpile (an important bargaining chip) without a strategic exchange (for instance, acknowledgment of the right to continue enrichment) to be a poor tactical decision.¹⁶⁸ Second, Iran deemed the reprocessing of the fuel in France, a country that had previously reneged on international obligations toward Iran and had imposed tough bilateral sanctions, to be unacceptable.¹⁶⁹ As a result, Iran returned with a counterproposal for a simultaneous trade of Iranian LEU for French fuel rods, leaving the LEU stockpile on Iranian soil until the time of the swap.¹⁷⁰ The United States rejected this counterproposal, viewing the retention of the stockpile in Iran as unacceptable and Iranian efforts to renegotiate terms as a delay tactic.¹⁷¹ In the end, the parties

167. The benefit of transforming a portion of the 20 percent enriched stockpile to fuel rods is that it limits the ability to further enrich the fuel to weapons-grade. MOUSAVIAN, *supra* note 102, at 356–59; see Mark Fitzpatrick, *Iran: The Fragile Promise of the Fuel-Swap Plan*, 52 SURVIVAL 67, 78 (2010).

168. MOUSAVIAN, *supra* note 102, at 359–60. American officials publicly characterized the agreement as a means of significantly reducing Iran's current stockpile of low-enriched uranium and hence buying time by slowing Iranian progress. See, e.g., Tony Karon, *Iran's Geneva Offer on Nukes: Progress for All*, TIME, Oct. 2, 2009, <http://www.time.com/time/world/article/0,8599,1927537,00.html>. Ahmadinejad's domestic opponents seized on these characterizations to insist that the Iranian negotiators had given the P5+1 a major concession without attaining any progress on Iranian objectives, notably sanctions relief. Mark Fitzpatrick, *Containing the Iranian Nuclear Crisis: The Useful Precedent of a Fuel Swap*, 16 PERCEPTIONS 27, 32–33 (2011) (describing domestic opposition to the deal by Ahmadinejad's critics); Reza Marashi, *Dealing With Iran*, CAIRO REV. GLOBAL AFF., Nov. 2012, <http://www.aucegypt.edu/gapp/cairoreview/Pages/articleDetails.aspx?aid=258> (describing sources of domestic opposition to fuel swap deal).

169. Bâli, *supra* note 99.

170. IRAN PROJECT, *supra* note 11, at 70; MOUSAVIAN, *supra* note 102, at 361–62; TRITA PARSI, A SINGLE ROLL OF THE DICE: OBAMA'S DIPLOMACY WITH IRAN 135–36 (2012) [hereinafter PARSI, DICE].

171. ELBARADEI, *supra* note 27, at 310–12; IRAN PROJECT, *supra* note 11, at 71.

failed to reach an agreement in 2009, and by early 2010, Iran began further enriching its own LEU stockpile to the 20 percent level for the first time.¹⁷²

The fuel-swap agreement was never connected to a suspension of enrichment. While it would have initially removed 1200 kilograms of Iran's LEU stockpile, the terms of the deal in no way prevented the Iranian program from continuing to supplement its stockpile. Thus, the benefit of the fuel swap was not a permanent denial of Iranian capacity to enrich uranium, but rather a delay in the accumulation of LEU within Iran in order to buy time for negotiations and confidence building. As a result, despite the continuation of Iranian enrichment activities in 2010, the diplomatic channel opened by the fuel-swap proposal remained potentially fruitful.¹⁷³

In April 2010, the Obama administration lent its support to a Brazilian and Turkish initiative to revive the fuel swap agreement.¹⁷⁴ Some analysts have suggested that the administration expected the Iranians to balk again at the terms of the agreement, thereby proving the futility of the diplomatic track to the Brazilians and Turks.¹⁷⁵ Unexpectedly, however, the Brazilians and Turks succeeded in securing the terms negotiated in Geneva: Under the 2010 Tehran Agreement, Iran agreed to exchange 1200 kilograms of LEU in exchange for 120 kilograms of 20 percent enriched uranium to be supplied by the Vienna group.¹⁷⁶ This time, the Obama administration was caught flat-footed. American Ambassador to the U.N., Susan Rice, and Secretary of State Hillary Clinton had just secured

172. David E. Sanger, *Iran Said to Ignore Effort to Salvage Nuclear Deal*, N.Y. TIMES, Nov. 8, 2009, at A4; *Iran 'Starts Enriching Nuclear Fuel to 20%' at Natanz*, BBC NEWS (Feb. 9, 2010, 12:12 AM), <http://news.bbc.co.uk/2/hi/8505426.stm> (noting that this was the first time Iran announced it would engage in enrichment above the 3.5 percent level, citing the need for 20 percent enriched fuel for its research reactor).

173. PARSI, DICE, *supra* note 170, at 142–50; Marashi, *supra* note 168 (describing the Turkish and Brazilian foreign ministers' offer to "use cordial relations with Iran and the P5+1 to help inject trust into the diplomatic process"); *see also* Alexei Barrionuevo & Sebnem Arsu, *Brazil and Turkey Near Nuclear Deal With Iran*, N.Y. TIMES, May 17, 2010, at A10; Thomas Erdbrink, *Brazil and Turkey Seek Iranian Nuclear Deal*, WASH. POST, May 16, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/15/AR2010051503508.html>; Hashem Kalantari, *Iran Welcomes Turkish, Brazilian Nuclear Fuel Ideas*, REUTERS (May 8, 2010, 2:17 PM), <http://www.reuters.com/article/2010/05/08/us-iran-nuclear-swap-idUSTRE6470IW20100508>.

174. Marashi, *supra* note 168 (describing the terms of the detailed letter sent by President Obama to the presidents of Turkey and Brazil, offering terms of reference for a fuel swap deal).

175. PARSI, DICE, *supra* note 170, at 172–73; *see also* Sarah Diehl & Eduardo Fujii, *Brazil Challenges International Order by Backing Iran Fuel Swap*, NUCLEAR THREAT INITIATIVE (July 15, 2010), <http://www.nti.org/analysis/articles/brazil-backing-iran> (reporting that Brazilian Foreign Minister Celso Amorim "believe[d] the United States was not expecting that Iran would accept the terms of the agreement and was surprised with the outcome").

176. On the Vienna Group, *see supra* note 70. For the text of the 2010 Tehran Declaration, *see* JOINT DECLARATION BY IRAN, TURKEY AND BRAZIL (2010), *available at* http://www.politico.com/static/PPM143_100517_iran_agreement.html.

the support of Russia and China for a new round of sanctions against Iran when the deal struck between Iran, Turkey, and Brazil was announced; thus, the United States' dual-track policy proved to be the undoing of the 2010 Tehran Agreement.¹⁷⁷ Publicly the United States characterized the Agreement as a "stalling tactic" by Iran to avoid additional sanctions and dismissed the Agreement as insufficient.¹⁷⁸ Turkey and Brazil reacted to this diplomatic repudiation by voting against the sanctions package in the UNSC (where both held seats at the time).¹⁷⁹ Iran viewed the American dismissal as evidence of bad faith.¹⁸⁰ Once again, a tentative confidence-building measure turned into a missed opportunity, this time because of an American strategic decision.¹⁸¹

Despite a number of additional developments after 2010, no initiative advanced as far as the fuel swap proposal while President Ahmadinejad remained in office. The most substantial proposal to have been aired publicly was a Russian initiative to adopt a step-by-step approach to implementing the incentives package that the P5+1 first proposed in 2006 and updated in 2008 and 2009. Though the details of the Russian proposal are not publicly available, they were apparently circulated among the P5+1 in written form,¹⁸² and Iranian negotiators embraced the basic concept of a step-by-step sequence.¹⁸³

177. PARSI, DICE, *supra* note 170, at 194; see David E. Sanger & Mark Landler, *Major Powers Have Deal on Sanctions for Iran*, N.Y. TIMES, May 19, 2010, at A1.

178. PARSI, DICE, *supra* note 170, at 198–99. The agreement was formally rejected by the United States, Russia, and France in a letter to the IAEA on June 9, 2010, immediately prior to the passage of the new sanctions resolution through the Council. *Text: Powers Dismiss Iran Fuel Offer Before U.N. Vote*, REUTERS (June 9, 2010, 10:02 AM), <http://www.reuters.com/article/2010/06/09/us-nuclear-iran-response-text-idUSTRE6582W120100609>. While the letter lists several objections to the agreement, the principal obstacles appear to have been that 1200 kilograms was no longer a sufficient quantity of fuel to swap in light of the growth of Iran's LEU stockpile and that the Declaration did not require suspension of Iran's 20 percent enrichment. Neither of these additional conditions had been included in the detailed letters sent by President Obama to the Brazilians and the Turks.

179. Only twelve of the fifteen states on the Council supported the sanctions package, with Turkey and Brazil voting against and Lebanon abstaining. Glenn Kessler, *U.N. Vote on Iran Sanctions Not a Clear-Cut Win for Obama*, WASH. POST, June 9, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/09/AR2010060903742.html> (noting that Turkey and Brazil voted against the sanctions resolution).

180. Bâli, *supra* note 99.

181. PARSI, DICE, *supra* note 170, at 172–73; see also Howard LaFranchi, *US Pushes Iran Sanctions Over Brazilian-Turkish Uranium Swap*, CHRISTIAN SCI. MONITOR (May 28, 2010), <http://www.csmonitor.com/USA/Foreign-Policy/2010/0528/US-pushes-Iran-sanctions-over-Brazilian-Turkish-uranium-swap>.

182. The Arms Control Association has a detailed description of the proposal in its history of official proposals, based on a description provided by former Iranian nuclear negotiator Hossein Mousavian. See Davenport, *supra* note 28 ("Russian Step-by-Step Proposal").

183. MOUSAVIAN, *supra* note 102, at 407–10.

Substantive talks on a protocol for the implementation of a step-by-step approach took place in the spring and summer of 2012, beginning with meetings in Istanbul in April where negotiators on both sides agreed in principle to an incremental framework of reciprocal steps.¹⁸⁴ Substantial enthusiasm followed the April talks because the successful negotiation of the step-by-step framework represented the first real breakthrough since 2010.¹⁸⁵ The April meeting was followed by midlevel talks in Baghdad in May, then Moscow in June, and finally expert-level talks in Istanbul in July.¹⁸⁶ The process then stalled, likely because impending American presidential elections in November 2012 had a diversionary effect during the late summer and fall.¹⁸⁷ The impending Iranian presidential elections in June 2013 would subsequently cause further delays. Though talks did ultimately occur in late February and again in April,¹⁸⁸ substantive progress would have to wait until after the new Iranian president assumed office in August 2013.¹⁸⁹ The election of Hassan Rowhani—who had been a nuclear negotiator under the Khatami administration and was widely credited for having taken a more conciliatory approach from 2003 to 2005—as Iran’s new president was hailed as presenting a new window of opportunity for progress on the stalled negotiations.¹⁹⁰

184. See DAVID ALBRIGHT & OLLI HEINONEN, INST. FOR SCI. & INT’L SECURITY, OPENING THE DOOR TO A SOLUTION WITH IRAN (2012), <http://isis-online.org/isis-reports/detail/opening-the-door-to-a-solution-with-iran>.

185. For instance, a distinguished set of American nuclear policy analysts published a rather hopeful assessment of the developments that led up to the Istanbul meeting. Mark Hibbs et al., *How to Tell if the Iran Talks Are Working*, N.Y. TIMES, Apr. 12, 2012, <http://www.nytimes.com/2012/04/13/opinion/six-ways-to-measure-progress-in-the-iran-nuclear-talks.html>.

186. Accord Rick Gladstone, *Negotiators Meet in Bid to Revive Iran Talks*, N.Y. TIMES, Sept. 19, 2012, at A10.

187. See Kathy Lally & Joby Warrick, *Iran Nuclear Talks Fall Short*, WASH. POST, June 19, 2012, http://articles.washingtonpost.com/2012-06-19/world/35460011_1_jalili-possibility-of-further-negotiations-catherine-ashton.

188. Steven Erlanger, *As Negotiators Ease Demands on Iran, More Nuclear Talks Are Set*, N.Y. TIMES, Feb. 28, 2013, at A6 (reporting on the talks in late February 2013 between the P5+1 and Iran in Almaty, Kazakhstan where the discussion centered on agreeing to terms for further talks); David M. Herszenhorn, *Nuclear Talks With Iran End Without Accord or Plans for Another Round*, N.Y. TIMES, Apr. 7, 2013, at A14 (reporting on a second round of talks between the P5+1 and Iran in Almaty in April 2013 resulting in an apparent impasse).

189. See Scott Peterson, *New Hurdle for Nuclear Talks: Iran’s Presidential Politics*, CHRISTIAN SCI. MONITOR (Feb. 4, 2013), <http://www.csmonitor.com/World/Middle-East/2013/0204/New-hurdle-for-nuclear-talks-Iran-s-presidential-politics-video> (noting that “political sparring ahead of June presidential elections could stymie any dealmaking now”).

190. See David E. Sanger, *U.S. Officials Appear Eager to Press New Iranian Leader for Nuclear Talks*, N.Y. TIMES, June 17, 2013, at A6; Barbara Slavin, *Chances for Nuclear Deal Rise With Rouhani*, AL-MONITOR (June 15, 2013), <http://www.al-monitor.com/pulse/originals/2013/06/rouhani-revives-chances-for-progress-nuclear-negotiations.html> (“Khamenei’s bottom lines—recognition of Iran’s

Some analysts called for the P5+1 to seize the opportunity for new outreach and meaningful concessions.¹⁹¹

Once President Rowhani assumed office in the fall of 2013, it became apparent that the parameters for nuclear negotiations had shifted, opening a new phase of bilateral contact between the United States and Iran.¹⁹² When Secretary of State John Kerry attended meetings with Iran's new foreign minister, Javad Zarif, at the UN, it was the highest-level meeting between the two countries since the Iranian revolution.¹⁹³ As the annual UN General Assembly meeting of heads of state approached in September 2013, speculation grew that President Obama might actually meet directly with President Rowhani.¹⁹⁴ In the end, while the two heads of state did not meet in person, President Obama placed a telephone call to President Rowhani that reportedly lasted fifteen minutes and addressed the nuclear file among other topics.¹⁹⁵ That historic phone signaled a new phase of direct engagement between the United States and Iran. The result was two months of fast-paced meetings and consultations that

right to domestic enrichment and removal of sanctions—are unlikely to change. But Iran's approach to nuclear diplomacy will.”).

191. For instance, veteran CIA analyst Paul Pillar argued that the West should place “on the table a proposal that, in return for the desired restrictions on Iran's nuclear activities, incorporates significant relief from economic sanctions and at least tacit acceptance of a continued peaceful Iranian nuclear program, to include low-level enrichment of uranium.” Paul Pillar, *The Iranian People Challenge the West*, NAT'L INTEREST BLOG (June 16, 2013), <http://nationalinterest.org/blog/paul-pillar/the-iranian-people-challenge-the-west-8608>. For similar arguments in favor of renewed diplomatic initiative from the West in light of Rowhani's election, see Vali Nasr, *Regime Change Obama Can Believe in*, FOREIGN POL'Y, June 16, 2013, http://www.foreignpolicy.com/articles/2013/06/16/regime_change_iran_nuclear_weapons_deal, and Jonathan Steele, *Iran Has Changed Course. Now the US Must Do the Same*, GUARDIAN, June 16, 2013, <http://www.guardian.co.uk/commentisfree/2013/jun/16/iran-changed-course-us-must-do-same>. Israeli analysts predicted that Rowhani's election would delay coercive strategies towards the Iranian nuclear file. Amos Harel, *Rise of New Iran President Delays Israel's Military Option by at Least Another Year*, HAARETZ (June 18, 2013, 8:10 AM), <http://www.haaretz.com/news/middle-east/premium-1.530435>.
192. Seyed Hossein Mousavian argues that “the parameters of the negotiations have changed” as a result of the election of President Rowhani and the re-election of President Obama. SEYED HOSSEIN MOUSAVIAN, *SOLVING THE NUCLEAR CONFLICT WITH IRAN* (2013), available at http://www.koerber-stiftung.de/fileadmin/user_upload/internationale_politik/pdf/2013/Koerber_Policy_Brief_02_EN.pdf.
193. Julian Borger, *Iran Foreign Minister Expected to Meet Kerry in Diplomatic Breakthrough*, GUARDIAN, Sept. 23, 2013, <http://www.theguardian.com/world/2013/sep/23/iran-foreign-minister-kerry-nuclear-talks>; *Iran Talks: Kerry and Zarif Meet at UN in New York*, BBC (Sept. 26, 2013, 11:53 PM), <http://www.bbc.co.uk/news/world-us-canada-24292640>.
194. Mark Landler, *Obama and Iranian Leader Miss Each Other, Diplomatically*, N.Y. TIMES, Sept. 24, 2013, <http://www.nytimes.com/2013/09/25/world/middleeast/obama-and-iranian-leader-miss-each-other-diplomatically.html> (noting that “[i]t was the handshake that never happened”).
195. Dan Roberts & Julian Borger, *Obama Holds Historic Phone Call With Rouhani and Hints at End to Sanctions*, GUARDIAN, Sept. 27, 2013, <http://www.theguardian.com/world/2013/sep/27/obama-phone-call-iranian-president-rouhani>.

eventually yielded the basic parameters of an interim agreement that both countries could agree to, which was then presented formally at meetings between the P5+1 and Iran in Geneva in November 2013.¹⁹⁶ At the same time, Iran convened successful parallel meetings with the IAEA, resulting in the first breakthrough with the Agency in two years.¹⁹⁷ Finally, on November 24th, the initial terms agreed to between Iran and the United States became the basis for a Joint Plan of Action between the P5+1 and Iran, putting in place interim measures and initiating a six-month period—subject to extension by mutual agreement—to negotiate a comprehensive solution.¹⁹⁸ A new window of opportunity was opened, albeit one that might prove to be as vulnerable to reversals and stalemates as previous rounds.¹⁹⁹

Despite all the delays and missed opportunities, negotiations over Iran's nuclear program remain pertinent a decade after the discovery of Iran's nuclear activities. The crisis has not tipped into an armed confrontation in part because Iran has not pursued a maximalist strategy of nuclearization.²⁰⁰ Though it has

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196. Former Obama administration nuclear negotiator, Robert Einhorn, noted that when the interim agreement was first presented to the P5+1 as a group, there was some discomfort which might have reflected the concern of the French, for instance, "at not having been adequately consulted in the preparation of the draft, which had already been worked extensively with the Iranian delegation." That prior preparatory work had taken place between representatives of the United States, Iran and Catherine Ashton's office. Robert Einhorn, *Despite the Hiccup in Geneva, Iran Nuclear Talks Still on Track*, BROOKINGS (Nov. 14, 2013, 4:18 PM), <http://www.brookings.edu/blogs/iran-at-saban/posts/2013/11/14-einhorn-iran-nuclear-talks-on-track>.
 197. Alissa J. Rubin & Rick Gladstone, *U.N. Agency and Iran Cite Progress in Settling Questions on Nuclear Program*, N.Y. TIMES, Oct. 29, 2013, <http://www.nytimes.com/2013/10/30/world/middleeast/un-atomic-agency-and-iran-meeting.html>; IAEA Iran Joint Statement, *supra* note 60.
 198. *Joint Plan of Action*, *supra* note 66.
 199. Following the adoption of the Joint Plan of Action, differences between the parties' interpretations of key terms have repeatedly threatened to undermine progress in negotiations. On differences over whether the Joint Plan of Action recognizes Iran's right to enrich, see Scott Peterson, *All Sides Declare Victory in Historic Iran Nuclear Deal*, CHRISTIAN SCI. MONITOR (Nov. 24, 2013), <http://www.csmonitor.com/World/Security-Watch/2013/1124/All-sides-declare-victory-in-historic-Iran-nuclear-deal-video>, noting that Foreign Minister Zarif said "that the agreement explicitly recognized twice that Iran had a right to enrich uranium in any final deal" while Secretary Kerry "said that 'this first step does not say that Iran has a right to enrichment.'" On differences over whether the sanctions freeze would allow the U.S. to subject new individuals and entities to existing sanctions, see Frederik Dahl & Steve Gutterman, *U.S. Sanctions Move Angers Iran, Russia Sees Threat to Nuclear Deal*, REUTERS (Dec. 13, 2013, 6:59 PM), <http://www.reuters.com/article/2013/12/13/us-iran-nuclear-experts-idUSBRE9BC0MP20131213>.
 200. See, e.g., David E. Sanger & James Risen, *Iran's Slowing of Enrichment Efforts May Show It Wants a Deal, Analysts Say*, N.Y. TIMES, Dec. 27, 2012, <http://www.nytimes.com/2012/12/28/world/middleeast/irans-slowng-of-enrichment-efforts-may-show-it-wants-deal.html>; Sheera Frenkel, *Israel: Iran Slowing Nuclear Program, Won't Have Bomb Before 2015*, MCCLATCHY DC (Jan. 28, 2013), <http://www.mcclatchydc.com/2013/01/28/181276/israel-iran-slowng-nuclear-program.html> (reporting that Israeli intelligence officials believe that Iranian officials appeared to have "deliberately slowed" their progress on the nuclear program).

made substantial advances, Iran has pursued a gradualist approach rather than racing to develop a breakout capacity.²⁰¹ As a result, even the United States' and Israel's most recent estimates place Iran years rather than months away from developing a viable nuclear arsenal should it choose to pursue that capability.²⁰² In other words, the opportunity to reach mutually agreeable terms that meet the minimum requirements of Iran and the P5+1 remains available, as the November 2013 talks in Geneva attest. The most important question, then, is determining how the parties may capitalize on the current window of opportunity to finally resolve the Iranian nuclear crisis by avoiding the pitfalls that have resulted in so many missed opportunities in the past.

III. REACHING NEGOTIATED RESOLUTION: UNDERSTANDING PAST FAILURES AND OVERCOMING OBSTACLES

In light of the persistent possibility of a mutually beneficial compromise, this record of missed opportunities raises two questions. First, what explains the history of failed negotiations over the last decade? Second, is there an alternative mechanism for designing negotiations that might secure a compromise that would address international concerns about the Iranian nuclear program?

The remainder of this Article addresses both questions by drawing on negotiation theory for diagnostic and prescriptive purposes. The repetition of negotiation breakdowns suggests the presence of structural barriers to successful negotiations. Applying negotiation theory, this Part identifies principal-agent issues, domestic factors, and hard-bargaining strategies as chief structural barriers to successful resolution of the Iranian stand-off. This Part then suggests various prescriptive steps for overcoming these barriers, including the adoption of

201. See Ray Takeyh, *On Iran, There's Time*, L.A. TIMES, Feb. 14, 2013, <http://articles.latimes.com/2013/feb/14/opinion/la-oe-takeyh-iran-nukes-20130214> (“[G]iven Iran’s gradualist approach, it is still years from completing an efficient enrichment infrastructure . . .”).

202. In January 2012, U.S. Secretary of Defense Leon Panetta stated that “the consensus is that, if [the Iranians] decided to do it, it would probably take them about a year to be able to produce a bomb and then possibly another one to two years in order to put it on a deliverable vehicle of some sort in order to deliver that weapon.” Russell Berman, *Panetta: Iran Could Have Nuclear Weapons, Delivery Vehicles in 2-3 Years*, HILL (Jan. 30, 2012, 12:00 AM), <http://thehill.com/blogs/defcon-hill/policy-and-strategy/207275-panetta-iran-could-have-nuclear-weapons-delivery-vehicles-in-2-3-years> (internal quotation marks omitted). Days after his reelection, President Obama said in a press conference that the “window of time” to resolve concerns over Iran’s nuclear program diplomatically remained open. Barack H. Obama, President of the U.S., Remarks in a News Conference (Nov. 14, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2012/11/14/remarks-president-news-conference>). An Israeli intelligence estimate from January 2013 did not expect Iran to be capable of acquiring a nuclear arsenal “before 2015 or 2016.” Frenkel, *supra* note 200.

a step-by-step approach, bolstered by greater delegation of authority to the IAEA as a third-party arbiter.

A. Sources of Failure In Past Negotiations

As demonstrated in the previous Part, the source of the problem lies not in the absence of an acceptable compromise but in structural aspects of the negotiations that are amenable to correction. Of course, the Iranian nuclear conflict involves many additional layers of complexity not typically present in the domestic bargaining context, including the security concerns of multiple states, the competing priorities of international institutions, and geostrategic considerations. Nonetheless, the principles established in less complex contexts offer an important—if stylized—analytic lens for understanding the negotiating impasse described above.²⁰³ This Part therefore provides a brief, and necessarily abstract, description of various factors that may have impeded negotiations and then illustrates how these factors have arisen in the Iranian nuclear context.

1. Principal-Agent Problems

In distinct episodes on both sides of the negotiations, principal-agent problems have frustrated progress. The agency dilemma is commonly defined as the difficulty experienced by a principal party in motivating an agent to act in accordance with the principal's interests.²⁰⁴ In the Iranian case, this formulation does not quite capture the problem. Rather than the challenge of a so-called faithless agent—that is, one that serves his or her own interests rather than those

203. The analysis offered in Part III.A follows the conventional approach in the negotiation theory literature by making two initial assumptions. The first assumption is that each state may be treated as a unitary actor for the purposes of identifying the preferences expressed on behalf of the collective by representatives of the state at any particular moment. This assumption is relaxed, however, by the discussion in Part III.A.2 (and corresponding analysis in Part III.B.2), which specifically acknowledges the presence of domestic divisions within the state that may block a negotiated agreement. Second, the following analysis also assumes a so-called thin rationality model, namely, that once each actor has identified preferences (however formulated), the actor will seek to maximize the satisfaction of those preferences. For a discussion (and critique) of the thin rationality model, see Russell Korobkin & Thomas Ulen, *Law and Behavioral Science: Removing the Rationality Assumption From Law and Economics*, 88 CALIF. L. REV. 1051, 1067 (2000). Importantly, this assumption of thin rationality does not require any assumption about the composition or ordering of preferences nor does it exclude the possibility that, in seeking to maximize their utility, the parties might miscalculate.

204. See BARRIERS TO CONFLICT RESOLUTION 20–22 (Kenneth Arrow et al. eds., 1995); RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 295 (2002); Darren G. Hawkins et al., *Delegation Under Anarchy: States, International Organizations, and Principal-Agent Theory*, in *DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS* 3 (Darren G. Hawkins et al. eds., 2006).

of the principal—the difficulty has been the propensity of principals on both sides to shift the goalposts during the negotiations, providing agents with inadequate authority to conclude agreements and leaving agents without a clear sense of the principal's minimum requirements. The issue is not the shifting goalposts but the absence of authority to adapt to such changes during negotiations, forcing meetings to break off while agents return to their capitals for consultations and ultimately introducing delays that have frequently given opponents of a deal the necessary time to scuttle progress. Thus, the core of the Iranian conflict's principal-agent problems has been related to insufficient authority and miscommunication of the terms of reference.

The first clear manifestation of such principal-agent issues occurred during the 2003–05 negotiations when the EU-3 countries entered into talks with their Iranian counterparts as intermediaries of the international community. The EU-3 knew that securing U.S. backing was essential to the EU-3's ability to negotiate on behalf of the international community. Securing U.S. backing, however, would require a complete suspension of all uranium enrichment activities—a requirement that exceeded the legal requirements by which Iran was bound. Thus, by asserting the United States' demands in the negotiating process, the EU-3 effectively entered into a principal-agent relationship in which the United States served as the *de facto* principal, imposing terms of negotiation though it was not formally a party to the talks. Ultimately, however, the EU-3 did not have the authority to bind the United States to the minimum terms necessary to facilitate a compromise.²⁰⁵ A similar principal-agent dilemma might explain the failure of the 2010 Tehran Declaration—when Brazil and Turkey sought to negotiate a fuel swap agreement with Iran based on an apparent American green light that faded to red once the agreement was reached.²⁰⁶

On the Iranian side, principal-agent problems have also interfered with negotiations. For instance, talks foundered in 2006 because the Iranian negotiating team apparently lacked the necessary authority to finalize the agreement they had

205. See *supra* notes 122–124 and accompanying text.

206. See Peter Crail, *Brazil, Turkey Broker Fuel Swap With Iran*, ARMS CONTROL ASS'N (June 2010), http://www.armscontrol.org/act/2010_06/FuelSwap (“The United States and its allies responded coolly to the May 17 declaration, citing advances in Iran’s nuclear program since last fall and additional concerns about Iran’s nuclear program the deal does not address.”). On the apparent miscommunication between the Obama administration and the governments of Brazil and Turkey, see Roger Cohen, *Ruthless Iran: Can a Deal Be Made?*, N.Y. REV. BOOKS, June 6, 2013, <http://www.nybooks.com/articles/archives/2013/jun/06/ruthless-iran-can-deal-be-made>, stating that “Obama sent nearly identical letters to his Turkish and Brazilian counterparts” offering terms of reference in response to their offer to mediate an agreement with Iran on a fuel swap and explaining that, once the agreement was negotiated, it was “immediately rejected” by the administration “to the fury of Brazil and Turkey, whose leaders felt used.”

negotiated.²⁰⁷ In that case, the nuclear negotiating team had signaled a willingness to accept terms negotiated with Javier Solana, on behalf of the P5+1, to which the government in Tehran—under Khamenei and Ahmadinejad—would not agree.²⁰⁸ As the Iranian government was apparently internally united in its opposition to the terms of the Solana-Larijani agreement, the issues there involved a lack of authority and miscommunication between the agents and their principals.²⁰⁹ In each of these examples, the failure of negotiations was related to principal-agent problems that arose because of two factors: first, the failure of each side to clearly define the bargaining zone for a compromise *ex ante* for their own agents²¹⁰ and, second, the inadequate authority accorded to the negotiators to conclude a deal once talks were underway.

2. Domestic Factors: Negotiating a Two-Level Game and Managing Veto Players

Divisive domestic factors, including the election cycle and opposition from hardliners, can forestall successful international negotiation. International negotiations necessarily raise the level of complexity associated with negotiating strategy well beyond the challenges that may arise in a domestic setting. Although states are treated as unitary actors when representing their interests at the international level, the executive branch of the state must also contend with multiple actors, including the other branches of government, vying to define the national interest at the domestic level.²¹¹ This “two-level game” dimension to interna-

207. See *supra* notes 144–146 and accompanying text.

208. See *supra* notes 144–146 and accompanying text.

209. As discussed above in Part II.C, after an apparently successful negotiating round between P5+1 representative Javier Solana and Iran’s nuclear negotiator, Ali Larijani, the Iranian regime appeared to backtrack. Some analysts have suggested that President Ahmadinejad and Supreme Leader Khamenei acted jointly to block Larijani’s attendance of a scheduled negotiating session by scheduling the September 2006 annual General Assembly heads of state meeting to coincide with negotiations, thereby scuttling the progress that had been made. MOUSAVIAN, *supra* note 102, at 275–79; see also ASPEN EUROPEAN STRATEGY FORUM, THE STRATEGIC IMPLICATIONS OF THE IRANIAN NUCLEAR PROGRAM 11, 16–17 (2010) (“Larijani accepted [Solana’s] offer and took it home to Iran only to have it rejected by Iranian president Mahomoud Ahmadinejad and Supreme Leader Ali Hoseyni Khamene’i.”); Cooper & Sciolino, *supra* note 146.

210. This is a term defined in the negotiations theory literature that refers to the set of theoretical deals that would leave both sides better off than if they were to pursue their BATNA. In other words, it is the range between each party’s minimum requirements in which the spectrum of their rationally acceptable terms overlap. See ROY J. LEWICKI ET AL., NEGOTIATION: READINGS, EXERCISES, AND CASES 73–74 (1999); Russell B. Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1791–94 (2000).

211. For a study of the impact of domestic factors on nuclear negotiations, see Etel Solingen, *The Domestic Sources of Regional Regimes: The Evolution of Nuclear Ambiguity in the Middle East*, 38 INT’L STUD. Q. 305 (1994). Solingen has also published a study of the impact of domestic conditions on choices by

tional negotiations gives rise to multiple challenges.²¹² The first of these challenges is the cyclical character of elections. While the election cycle itself is independent of the negotiations process, elections will have a predictable impact on negotiations as they heighten the potential domestic costs of appearing to make concessions and distract national decisionmakers. Negotiators face a second challenge in the form of competing domestic actors who object to the specific terms of the negotiations at issue or prefer a confrontation to negotiation.

Domestic electoral considerations are a form of external barrier to negotiations. Although domestic elections are not a subject of the negotiations (and are outside of the control of negotiators) they may materially alter the range of available bargains to which negotiators are able to agree. In the context of Iranian nuclear negotiations, cyclical domestic political processes have engendered such external barriers on multiple occasions.²¹³

For example, in 2005, impending Iranian presidential elections delayed negotiations with the EU-3, and the unexpected election of Ahmadinejad then brought them to a halt.²¹⁴ In 2012, the P5+1 and Iran made significant progress on a protocol for a step-by-step agreement involving incremental and contemporaneous actions by each side. Yet U.S. presidential elections slowed such momentum by July and led to a complete suspension of negotiations throughout the fall.²¹⁵ Once the American presidential elections concluded, the United States aggressively sought to reinstate talks in early 2013. By that time, however, the Iranian presidential elections exerted parallel pressures on the Iranian negotiators. The stalling of negotiations for over a year was a consequence not of substantive considerations, or even negotiations-related tactical planning, but of the constraints imposed by domestic electoral cycles on both sides.²¹⁶

states pursuing nuclear-weapons capabilities. ETEL SOLINGEN, *NUCLEAR LOGICS: CONTRASTING PATHS IN EAST ASIA AND THE MIDDLE EAST* (2007).

212. For the canonical treatment of the logic of two-level games and domestic constraints affecting a state's ability to conclude international agreements or sustain cooperation, see Robert Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988).

213. The issue arising from domestic elections relates neither to minority voting blocs that might seek to block the approval of an agreement nor to hardliners who will reject any negotiated solution. Rather, the issue is that the domestic political election cycles cause turnover in leadership to which both sides are subject *independent* of the negotiations. In this sense, presidential election cycles in both the United States and Iran serve as significant constraints on the course of negotiations that are external to the talks themselves.

214. See *supra* notes 125–128 and accompanying text.

215. See *supra* note 187 and accompanying text.

216. Of course, both the American and Iranian negotiators may use these external constraints to try to gain a strategic advantage. For instance, the P5+1 may attempt to leverage the timing of impending Iranian presidential elections to pressure Iran to resume negotiations in advance of those elections. Nonetheless, the constraint of the elections and the elevated domestic audience costs faced by either

Internal divisions over the terms of an agreement represent a second kind of domestic challenge to negotiations.²¹⁷ Formulating a unitary position that seemingly reflects the collective interest of the nation is the role of foreign ministries, diplomats, and ultimately the chief executive in each state.²¹⁸ Yet an agreement cannot be ultimately finalized without the support of additional domestic constituencies. In both the United States and Iran, any agreement would require at least the de facto support of the legislative branch.²¹⁹ Gaining such support may present a substantial challenge for both states. For instance, some analysts argue that Iran is unable to come to an agreement because each domestic faction is too invested in portraying its opponents as weak in the course of the negotiations.²²⁰ Similarly, some have argued that Congress is too intransigent to leave the Obama administration sufficient room to maneuver.²²¹

Recent evidence on both sides supports these concerns. For instance, the presidential candidate debates in the lead up to the June 2013 Iranian elections revealed substantial internal divisions over the negotiating positions adopted at various junctures. Three of the presidential candidates had held significant positions as either chief nuclear negotiator or foreign minister over the course of the last decade.²²² During one presidential debate, conservative candidate Saeed Jalili came under attack for having shown inflexibility during the course of the negoti-

party during a period of domestic electoral politics is a variable not influenced by or dependent upon the framing or structure of the negotiations.

217. The discussion of domestic veto players as a strategic barrier in complex international negotiations draws on Russell Korobkin & Jonathan Zasloff, *Roadblocks to the Road Map: A Negotiation Theory Perspective on the Israeli-Palestinian Conflict After Yasser Arafat*, 30 YALE J. INT'L L. 1, 27 (2005).
218. Indeed, for the stylized purposes of negotiations theory analysis the executive branch is taken to be the principal in negotiations on behalf of each state. And if there is a lead state determining bargaining positions in a negotiating coalition—for instance, the United States in the P5+1—then the chief executive of that state stands as the principal for the coalition.
219. The executive in both countries may technically be endowed with the authority to conclude an agreement concerning the nuclear crisis as a sole-executive agreement, not requiring formal domestic ratification. This is typically the case with international agreements to resolve a crisis involving national or international security. But even absent the domestic hurdle of ratification, both Iran and the United States would face a substantial political challenge in concluding an agreement opposed by the legislative branch.
220. See Patrick Clawson, *Iran Can't Agree to a Damn Thing*, FOREIGN POLY, Feb. 20, 2013, http://www.foreignpolicy.com/articles/2013/02/20/iran_can_t_agree_to_a_damn_thing (arguing that Iranian leaders are too internally divided to come to a coherent position).
221. See Lee Hamilton et al., *Don't Mess up U.S.-Iran Sanctions*, BLOOMBERG (Dec. 16, 2012), www.bloomberg.com/news/print/2012-12-16/don-t-mess-up-u-s-iran-sanctions.html (arguing that Congress's aggressive pursuit of additional unilateral sanctions may unduly restrict President Obama's options in negotiations).
222. Saeed Jalili, the top nuclear negotiator during President Ahmadinejad's second term, Hassan Rowhani, the chief nuclear negotiator in President Khatami's second term, and Ali Akbar Velayati, former foreign minister and a close confidante of Ayatollah Khamenei, were all participants in the presidential debates.

ations, leading to additional sanctions.²²³ Earlier reformist candidate Hassan Rowhani was criticized by the deputy secretary of Iran's National Security Council for compromising Iranian interests by making too many concessions in negotiations under the Khatami regime.²²⁴

On the U.S. side, Congress has also demonstrated substantial opposition to diplomatic concessions made in the course of nuclear negotiations with Iran.²²⁵ Congress has expressed this opposition in a number of ways, including by repeated questioning of administration officials involved in the negotiations,²²⁶ by the passage of additional unilateral sanctions against Iran that may complicate the negotiating track,²²⁷ and through measures calling for military readiness to undertake strikes against Iranian nuclear facilities.²²⁸ Some hardliners in Congress

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223. "Velayati further admonished Jalili . . . Diplomacy . . . does not mean to just 'give a sermon to other countries' . . . Velayati said Jalili had missed important opportunities, including most recently at . . . Almaty." Scott Peterson, *Stalled Nuclear Talks Fuel Sharp Exchange at Iran's Final Presidential Debate*, CHRISTIAN SCI. MONITOR (June 8, 2013), <http://www.csmonitor.com/World/Middle-East/2013/0608/Stalled-nuclear-talks-fuel-sharp-exchange-at-Iran-s-final-presidential-debate>.
 224. *Id.* (noting that Rowhani was "a moderate candidate and former top nuclear negotiator who has come under criticism from hardliners . . . for making a compromise with European diplomats to suspend enrichment from 2003 to 2005").
 225. See Gearan, *supra* note 13. Similar to Iran, domestic divisions were also acutely illustrated during the 2012 American presidential debates. See, e.g., Scott Wilson & David Nakamura, *At News Conference, Obama Criticizes GOP Candidates for Talk of War With Iran*, WASH. POST, Mar. 6, 2012, http://www.washingtonpost.com/politics/obama-blasts-gop-hopefuls-over-comments-on-war-with-iran/2012/03/06/gIQAYiL7uR_story.html (noting that President Obama chastised Republicans for pushing for war with Iran without taking into account the costs involved in war).
 226. A recent example is the testimony requested of the lead U.S. negotiator, Wendy Sherman. See *U.S. Policy Regarding Iran: Hearing Before the S. Foreign Relations Comm.*, 113th Cong. (2013) (statement of Wendy Sherman, Under Sec'y of State for Political Affairs). Sherman took great pains throughout the testimony to satisfy senators that the Obama administration was taking a very tough stance on Iran despite participating in negotiations by adopting a "dual-track policy." *Id.*
 227. Unlike sanctions passed by executive order, congressional sanctions cannot be repealed by the administration unilaterally, meaning that relief from congressional sanctions cannot be readily offered as an incentive to the Iranians during the negotiations. If a negotiated solution were attained, the Obama administration would face the second-order task of negotiating the repeal of congressional sanctions with the leadership of both chambers. In the lead up to the June 2013 Iranian presidential elections, both chambers of Congress introduced measures to impose additional sanctions against Iran. See Emily Cadei, *Chambers Prepare for Another Round of Iran Sanctions*, ROLL CALL (May 13, 2013, 3:55 PM), http://www.rollcall.com/news/chambers_prepare_for_another_round_of_iran_sanctions-224763-1.html. Perhaps to head off the harsher steps being contemplated by Congress, the Obama administration imposed additional sanctions on Iran on June 3, 2013. See Josh Lederman, *Obama Orders New Economic Sanctions on Iran*, ASSOCIATED PRESS (June 3, 2013, 7:35 PM), <http://bigstory.ap.org/article/obama-orders-new-economic-sanctions-iran>.
 228. Senator Lindsay Graham has been a leading voice in Congress calling for a tougher stance on Iran, offering an explicit pledge of support should Israel decide to pursue military strikes against Iranian facilities. See Jennifer Rubin, *Graham Previews His Iran Resolutions, Including Force Authorization*, WASH. POST RIGHT TURN BLOG (Mar. 4, 2013, 3:54 PM), <http://www.washingtonpost.com/blogs/right-turn/wp/2013/03/04/graham-previews-his-iran-resolutions-including-force-authorization>.

even believe that negotiations and sanctions are insufficient to prevent Iran from obtaining nuclear weapons capacity and that “the logical outcome if sanctions fail would be a pre-emptive strike.”²²⁹ The preference for tough sanctions backed by the threat of military force is also viewed as an expression of support for Israeli national security preferences, an important priority for some in Congress.²³⁰ Domestic divisions in both Iran and the United States may translate into a substantial obstacle to a negotiated agreement if veto players in the legislative branch reject any bargain that is deemed to include too many concessions to the counterparty.

3. Hard Bargaining

Hard bargaining is the most challenging obstacle to resolving the Iranian nuclear crisis, since the absence of trust between the parties makes this a dominant strategy, despite its counterproductive effects.²³¹ The strategy of hard bargaining is one of the results of the imperfect information ordinarily attendant to negotiations.²³² Since neither side of a negotiation can know their counterparty's

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229. See Steven T. Dennis, *Congress Unlikely to Impede Iran Strike*, ROLL CALL (Oct. 9, 2012, 12:00 AM), http://www.rollcall.com/issues/58_27/Congress-Unlikely-To-Impede-Iran-Strike-218061-1.html (paraphrasing Senator Lindsey Graham's stance on stringent sanctions and a military solution to Iran's pursuit of nuclear weapons).
230. For instance, hardline positions on Iran include explicit reference to support for an Israeli attack on Iran. See, e.g., S. Res. 65, 113th Cong. (2013) (supporting Israel's right to self-defense and reaffirming the close relationship between the United States and Israel); Press Release, U.S. Senate Comm. on Foreign Relations, Resolution Introduced by Graham, Menendez Condemning Iran's Pursuit of Nuclear Capability Passes Senate (May 22, 2013), available at <http://www.foreign.senate.gov/press/chair/release/resolution-introduced-by-graham-menendez-condemning-irans-pursuit-of-nuclear-capability-passes-senate>; Haviv Rettig Gur, *Senate Backs Israel in Event of Strike on Iran Nuclear Weapon Program*, TIMES ISR. (May 23, 2013, 5:53 AM), <http://www.timesofisrael.com/senate-votes-to-back-possible-strike-on-iran-nuclear-weapon-program>. Support from pro-Israel groups within the United States for a harder line on Iran has been widely reported. See, e.g., Eric Lichtblau & Mark Landler, *Hawks Steering Debate on How to Take on Iran*, N.Y. TIMES, Mar. 19, 2012, at A1 (“[P]ro-Israel groups on all sides have mobilized to make their views known to the Obama administration and to Congress.”).
231. See Korobkin, *supra* note 210; Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).
232. Some negotiations theorists refer to this as the problem of “strategic barriers.” Robert H. Mnookin, *Strategic Barriers to Dispute Resolution: A Comparison of Bilateral and Multilateral Negotiations*, 8 HARV. NEGOT. L. REV. 1, 1–2 (2003) (noting that strategic barriers “arise from the efforts of ‘rational’ bargainers to maximize individual returns [and] . . . can cause rational, self-interested disputants to act in a manner that proves to be both individually and collectively disadvantageous”); see also Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 238–42 (1993) [hereinafter Mnookin, *Why Negotiations Fail*] (describing how information asymmetries contribute to strategic behavior in negotiating over the distribution of benefits in ways that lead to inefficient outcomes).

reservation point with any certainty, each side has an incentive to convince the other that it must make substantially greater concessions than is actually necessary to reach a deal.²³³ Indeed, a logical corollary of this inherent uncertainty is that, even though a bargaining zone exists, the parties may fail to identify it and therefore reach impasse even when both parties would be better off by reaching an agreement. Even within the bargaining zone, each side has an incentive to seek an agreement that provides its own side with the largest possible share of the gains within that bargaining zone (and the counterparty with the least gain necessary to secure agreement). The fact that neither side can know the size of the bargaining zone with certainty may cause each side to hold out for a more advantageous agreement and thereby prevent any agreement at all.

The inherent uncertainty of any negotiations process produces numerous barriers, three of which are particularly salient in the Iranian nuclear context: first, the tendency to undervalue agreements deemed attainable;²³⁴ second, each side's belief that patience will improve that side's bargaining position and result in a better deal;²³⁵ and third, attempts to lower the reservation point of the counterparty through unilateral actions that undermine the counterparty's position. Each of these barriers might explain some of the missed opportunities canvassed above.

a. Devaluation of Attainable Terms

The tendency to devalue an agreement once it becomes attainable has long been a subject of interest to cognitive psychologists and behavioral economists.²³⁶

233. The "reservation point" is defined as the minimum deal terms on the basis of which a party will accept a deal. This is sometimes referred to as "reservation price" or "reservation value." These phrases capture the same idea, but when a negotiation is not over material terms denominated by monetary values, "reservation point" is the more accurate descriptor. The distance between the reservation points of two parties defines the extent of the bargaining zone. For a detailed discussion of the concepts of bargaining zone and reservations points, see RAU ET AL., *supra* note 15, at 81–85.

234. See, e.g., Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in BARRIERS TO CONFLICT RESOLUTION, *supra* note 204, at 26, 35.

235. The benefits of demonstrating patience in a bargaining context is an insight drawn from game theory. See, e.g., Jonathan Levin, *Bargaining and Repeated Games* (Feb. 2002) (unpublished manuscript), available at www.stanford.edu/~jdlevin/Econ%20203/RepeatedGames.pdf (discussing the benefits of patience in game theoretic models).

236. See, e.g., HENNER GIMPEL, PREFERENCES IN NEGOTIATIONS: THE ATTACHMENT EFFECT (2007); Jared R. Curhan et al., *Dynamic Valuation: Preference Changes in the Context of Face-to-Face Negotiation*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 142 (2004); Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 7 NEGOTIATION J. 389 (1991). Devaluation is one among multiple cognitive barriers leading negotiators to act against their rational self-interest. See, e.g., LEWICKI ET AL., *supra* note 210, at 141–74; RAU ET AL., *supra* note 15, at 157–78; Mnookin, *Why Negotiations Fail*, *supra* note 232, at 246.

Negotiation theorists have applied insights from psychology regarding the effects of bounded rationality and loss and risk aversion²³⁷ on peoples' evaluations of costs and benefits to explain the negotiation psychology of both individual and state actors.²³⁸ In the case of nuclear negotiations, these factors distort perceptions of the benefits of a compromise agreement by magnifying perceptions of loss and risk on both sides. At the same time, these factors discount the value of future benefits gained from cooperation when compared to the immediate costs of any perceived concession.

The cost-benefit calculation that led the United States to prefer passing a new set of sanctions against Iran in June 2010 to capitalizing on an agreement to ship enriched uranium out of Iran may illustrate the tendency to devalue an agreement once it is deemed attainable.²³⁹ There are several plausible explanations for the United States' decision, including that the United States may never have intended to accept a fuel swap as an initial confidence-building measure,²⁴⁰ or that the objective value of the deal depreciated between the time that the United States authorized Brazil and Turkey to serve as mediators and the time the deal was secured.²⁴¹ Like many other instances of missed opportunities, the

237. Bounded rationality refers to the fact that rationality in decisionmaking is limited by imperfect information, cognitive limitations, and time constraints. For a recent overview of models of bounded rationality in behavioral economics, see *BOUNDED RATIONALITY: THE ADAPTIVE TOOLBOX* (Gerd Gigerenzer & Reinhard Selten eds., 2002). Loss aversion refers to the tendency of individuals to inflate the value of avoiding loss as compared to their valuation of the benefit of a gain of equal magnitude. This tendency leads to a discounting of potential gains in cases involving uncertainty, which is described as risk aversion. For a discussion of the application of these insights to negotiations theory, see KOROBKIN, *supra* note 204, at 67–68, 76–86.

238. See, e.g., Jack S. Levy, *Loss Aversion, Framing, and Bargaining: The Implications of Prospect Theory for International Conflict*, 17 INT'L POL. SCI. REV. 179 (1996); Barry O'Neill, *Risk Aversion in International Relations Theory*, 45 INT'L STUD. Q. 617 (2001). Of course, the analysis proceeds on a weak assumption that states may be treated as unitary actors. Even so, psychological factors cannot be directly imputed to states as if they were characterized by a collective psyche. Still, insights concerning bounded rationality and particular cognitive barriers do have some purchase in examining policies that are formulated by individual (or, more accurately, groups of individual) policymakers and negotiators even when proposed on behalf of a state.

239. See *supra* note 171 and accompanying text.

240. Which then raises the principal-agent issues described in Part III.A.1 above, since it would mean that the Brazilians and Turks were deputized to negotiate an agreement whereas the principal knew in advance that it would not accept a deal based on the terms of reference it provided to its agents.

241. For instance, a breakthrough substantially impacting probabilistic expectations of support for sanctions may have occurred behind closed doors after April shifting the United States' assessment of the value of a fuel swap deal. But that possibility seems unlikely given that contemporaneous public reporting indicates that China and Russia had expressed their support prior to April. See, e.g., Julian Borger & Ewen MacAskill, *China Supports Barack Obama's Call for New Iran Sanctions*, GUARDIAN, Mar. 31, 2010, <http://www.theguardian.com/world/2010/mar/31/china-supports-obama-iran-sanctions>; *Russia May Support Iran Nuclear Sanctions*, REUTERS (Mar. 25, 2010, 10:28 AM), <http://www.reuters.com/article/2010/03/25/us-nuclear-russia-iran-idUSTRE62O1V520100325>.

failure to reach an agreement may be overdetermined. That the United States rejected the 2010 Tehran Agreement because its perception of the value of the fuel swap deal decreased once the deal was attained is, however, a credible explanation.

This devaluation might have seemed perfectly rational in the short-run. The U.S. government used substantial diplomatic capital to persuade the Russian and Chinese governments to support a tough new sanctions package backed by the Council in the spring of 2010.²⁴² The sunk cost of these diplomatic efforts to gain Russian and Chinese support for a source of leverage against Iran may have increased the perceived value of the sanctions package from the American perspective.²⁴³ In the context of adversarial bargaining, in which negotiations appear to have a zero-sum character, the development of a new source of leverage represents an immediate nonreciprocal gain.²⁴⁴ At the same time, the United States may have heavily discounted the benefits of securing a fuel swap deal through the Turkish-Brazilian channel²⁴⁵ because of pessimism about the likelihood of an agreement and the view that Iran's sole motivation for moving forward on the stalled proposal was to avoid additional sanctions.²⁴⁶ Iranian negotiators perceived this reaction as a signal that Iran would be penalized whether or not they

242. Russian support was elicited in a high-profile meeting between President Medvedev and President Obama timed to coincide with Russian frustration over the stalemating of the Russian's own 2009 fuel swap initiative with Iran. See Michael D. Shear & Glenn Kessler, *Russia Supports Iran Sanctions, but With Limits*, WASH. POST, Apr. 9, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/08/AR2010040803866.html>. The United States also spent considerable capital on forging ties between China and Saudi Arabia, going so far as to persuade the Saudis to offer the Chinese fuel supply guarantees. See, e.g., Sanger et al., *supra* note 162 (reporting on a leaked cable, which "noted simply 'Saudi Arabia has told the Chinese that it is willing to effectively trade a guaranteed oil supply in return for Chinese pressure on Iran'").

243. The term "sunk costs" refers to past costs that have already been incurred and cannot be recovered. Classic economics models posit that such costs should not influence investment decisions, which depend on prospective costs. Behavioral economics have shown that real-world behavior is marked by loss aversion and framing effects that are shaped by sunk costs. The ongoing influence such costs exert on prospective judgments is considered an example of bounded rationality. See Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1553 (1998).

244. In this conception of adversarial negotiation strategy, the purpose of negotiations is to capture gains at the expense of the counterparty. This is the least productive approach to negotiations since it casts gains as necessarily non-reciprocal. Menkel-Meadow argues that even in the context of adversarial negotiations, a problemsolving approach yields a framing that allows the bargained-for agreement to be devised as a means of ensuring that both parties are better off. The possibility of a so-called win-win solution to the Iranian nuclear file is thus likelier if gains are framed in terms of reciprocity. Menkel-Meadow, *supra* note 231, at 754.

245. See *supra* note 178 and accompanying text.

246. PARSI, DICE, *supra* note 170, at 196; David E. Sanger & Michael Slackman, *U.S. Is Skeptical on Iranian Deal for Nuclear Fuel*, N.Y. TIMES, May 18, 2010, at A1; Matthew Lee, *Clinton: Iran Fuel Swap Offer Is Ploy*, NBC NEWS (May 25, 2010, 3:11 PM), http://www.nbcnews.com/id/37339404/ns/world_news-mideast_n_africa/t/clinton-iran-fuel-swap-offer-ploy/#.UdNdx2kS4_s.

made concessions, enhancing their own risk aversion in the next round of talks.²⁴⁷ While devaluation of the Tehran Agreement may have been reasonable in the short run, the privileging of sanctions over an agreement may reflect a means-ends reversal in the international strategy on reaching a diplomatic solution to the Iranian nuclear crisis.²⁴⁸

b. Demonstrating Patience

Uncertainty regarding a counterparty's reservation point may induce a party to hold out—or demonstrate patience—in hopes of inciting concessions from the counterparty.²⁴⁹ If each side believes that they are better able to withstand delays in agreement, however, such hard bargaining may yield indefinite impasse. At various junctures, representatives of both the P5+1 and Iran have made statements suggesting that each believes time favors their side.²⁵⁰ On the other

247. PARSI, DICE, *supra* note 170, at 199 (“To the Iranians, the West was out to deprive Iran of its independence, rights, and potential, whether it pursued diplomacy or confrontation.”).

248. A recent example of this concern is implicit in a report endorsed by a group of thirty-eight “interested former officials of the United States government and professionals in the field of U.S. national security.” THE IRAN PROJECT, WEIGHING BENEFITS AND COSTS OF INTERNATIONAL SANCTIONS AGAINST IRAN (2012), available at <http://www.scribd.com/doc/115678817/IranReport2-120312-2>. The authors note that “[s]anctions alone are not a policy. . . . [S]anctions strategies . . . should be assessed in terms of their effectiveness.” *Id.* at 28. The authors contrast this with the concern that “the combination of strenuous U.S.-led sanctions, expressed U.S. support for opposition groups, and ongoing covert operations against Iran could be interpreted by Iran’s leaders as de facto pursuit of regime change.” *Id.* Their recommendations reflect the view that sanctions policy should not become the driver of U.S. strategic objectives, displacing the possibility of a negotiated solution. See Hamilton et al., *supra* note 221 (“The time is ripe for a deal and wrong for more sanctions.”).

249. For a discussion of the problem of “demonstrating patience” in negotiations theory, see KOROBKIN, *supra* note 204, at 171–78, and HOWARD RAIFFA ET AL., NEGOTIATION ANALYSIS 149–64 (2002).

250. U.S. officials, including President Obama himself, have stated that economic sanctions put increasing pressure on the Iranians to make a deal as soon as possible. See, e.g., *Obama’s Remarks on Iraq and Afghanistan*, N.Y. TIMES, July 15, 2008, <http://www.nytimes.com/2008/07/15/us/politics/15text-obama.html> (“[W]e will ratchet up the pressure, with stronger unilateral sanctions; stronger multilateral sanctions in the Security Council, and sustained action outside the UN to isolate the Iranian regime. . . . [T]he Iranians should negotiate now . . .”); *Interview: U.S. Nuclear Official Samore Discusses Iran Nuclear Talks*, RADIO FREE EUR./RADIO LIBERTY (Apr. 17, 2012), http://www.rferl.org/content/interview_us_nuclear_official_samore_iran_nuclear_talks/24551477.html (quoting Gary Samore, special assistant to President Obama and White House coordinator for arms control and weapons of mass destruction, proliferation, and terrorism as stating: “[T]ime works on our side. . . . To the extent that the Iranian concern about sanctions is driving them to seek an agreement, the closer we get to the summer, the stronger our position becomes”). Iranian officials insist that the sanctions will not work and that as time passes Iranian resolve increases. See, e.g., *Iran P5+1 Stance Stronger After NAM Summit: Iran Deputy FM*, PRESS TV (Sept. 15, 2012), <http://www.presstv.com/detail/2012/09/15/261752/iran-stronger-after-nam-summit> (quoting Iranian Deputy Foreign Minister Abbas Araqchi as declaring: “The passage of time is on our

hand, P5+1 representatives have also often repeated that they will not negotiate with the Iranians indefinitely.²⁵¹ This repeated statement likely reflects frustration on the P5+1 side with an Iranian negotiating style that relies heavily on demonstrating patience; it is also likely meant as a signal to convince Iran that time in fact favors the P5+1.

Examples of demonstrating patience abound on both sides. For instance, the unwillingness of the EU-3 to respond to the Iranian proposal to conclude negotiations in April 2005 was explicitly keyed to the Iranian presidential elections.²⁵² On the Iranian side, repeated delays in responding to P5+1 offers appear to exhibit a similar logic. For instance, the Iranian government's reticence in resolving logistical details concerning the location and timing of the next round of nuclear negotiations in January 2013 led to a delay of over one month before the representatives of the two sides were able to meet.²⁵³ One explanation for the delay might be that the Iranian negotiating team had already concluded that no significant progress would be possible prior to the Iranian presidential elections in June 2013 and sought to slow the pace of meetings.

Unfortunately, to the extent that each party believes that patience will serve its interests, progress at any given round of negotiation will be limited by the view that the subsequent round will yield more favorable deal terms. In the meantime, as both parties also take unilateral steps intended to strengthen their own positions or weaken that of their counterparty, a deal that might have satisfied both parties' minimum conditions and been attainable at time N may fall outside of the bargaining zone by time N+1.

side. . . . [T]herefore they [the P5+1 member states] can wait as long as they want. We are in no hurry"); Nasser Karimi, *Iran Dismisses U.N. Report on Uranium*, FOX NEWS (Nov. 16, 2006), http://www.foxnews.com/printer_friendly_wires/2006Nov16/0,4675,IranNuclear,00.html (quoting Iranian President Mahmoud Ahmadinejad as stating: "While the West tries to thwart the progress of our nation, time is on our side").

251. Hillary Clinton and Wendy Sherman, the State Department officials most involved with the Iranian nuclear negotiations, are among prominent members of the Obama administration to repeat this point in public statements. See *U.S. Policy Regarding Iran: Hearing Before the S. Foreign Relations Comm.*, *supra* note 226 (statement of Wendy Sherman, Under Sec'y of State for Political Affairs) ("There is still time for [Iran] to change course, but that time is not indefinite."); Damien Pearse, *Time Running out for Diplomacy With Iran, Warns Hillary Clinton*, GUARDIAN, Mar. 31, 2012, <http://www.guardian.co.uk/world/2012/mar/31/iran-nuclear-programme-hillary-clinton>.

252. See *supra* Part II.B.

253. *Iran Accused of Dragging Feet on Meeting Again With 6 Global Powers for Nuclear Talks*, FOX NEWS (Jan. 25, 2013), <http://www.foxnews.com/world/2013/01/25/date-location-still-not-set-for-nuclear-talks-between-iran-6-global-powers>.

c. Unilateral Actions to Shift Negotiations

Perhaps the most troubling hard bargaining tactics on which both sides have relied have been efforts to degrade the counterparty's position unilaterally. The clearest examples of this dynamic have been the Stuxnet computer virus cyberattack, the attempted physical sabotage of Iran's enrichment facilities, and the assassination of civilian nuclear officials and physicists, all of which have significantly set back the Iranian program since 2009.²⁵⁴ Some analysts have concluded, however, that the backlash these efforts generated in Iran offset the time gained through imposing these unilateral costs on the Iranian program.²⁵⁵ Specifically, the Iranian leadership and the public have responded to the attacks by calling for withdrawal from negotiations, demanding withdrawal from the NPT, redoubling investment in the nuclear program, and changing the minimum requirements they will accept for any negotiated agreement.²⁵⁶ The attacks also adversely affected the timing of negotiations as the Iranian negotiating team at times delayed meetings in order to avoid appearing weak by making concessions in the aftermath of an attack.

At the same time, Iran has also taken unilateral measures to degrade the P5+1's negotiating position in the form of expansions of the country's nuclear

254. See, e.g., KERR, *supra* note 54, at 26; MOUSAVIAN, *supra* note 102, at 23–30.

255. This backlash is linked not only to the material deterioration of the Iranian position as a consequence of unilateral attacks but also encompasses the keen sense felt by the Iranian leadership and the Iranian public that they have been treated with disrespect by their counterparties. This Iranian sense of grievance has two components. First, many in Iran subscribe to the view that the country is subject to a double standard in that the IAEA and UNSC seek to apply a higher NPT standard to Iran than to other countries with more advanced uranium enrichment programs. See, e.g., Ladane Nasser, *Iranians Decry Double Standard Before Nuclear Talks*, BLOOMBERG (Apr. 12, 2012, 1:01 PM), <http://www.bloomberg.com/news/2012-04-12/iranians-decry-double-standard-before-nuclear-talks.html>. Second, Iranians feel a lingering sense of grievance that dates back at least to the use of chemical weapons against Iranians during the Iran-Iraq War. The failure of the international community to intervene to prevent or condemn Iraqi use of chemical weapons through the Council is seen as evidence that Iran does not benefit from international law protections, even though the country is punished for alleged transgressions. See, e.g., *US, Israel Main Violators of Chemical Weapons Convention: Vahidi*, PRESS TV (June 27, 2012), <http://www.presstv.com/detail/2012/06/27/248228/iran-raps-us-israel-breach-of-cwc>; Robert Tilford, *U.S. Blatantly Violates the Chemical Weapons Convention, Says Iran*, EXAMINER (June 28, 2012), <http://www.examiner.com/article/u-s-blatantly-violates-the-chemical-weapons-convention-says-iran>.

256. For an argument that unilateral actions produce a backlash among “Iranian hard-liners” and prompts Iran to “redouble its nuclear efforts,” see MOUSAVIAN, *supra* note 102, at 28–29; for the argument that a “confrontationalist” group in Iran favors withdrawal from the NPT in response to coercive actions against the country, see *id.* at 80–81. See also Ali Akbar Dareini, *Lawmaker: Iran Could Quit Nuclear Treaty*, YAHOO! NEWS (Apr. 8, 2013, 10:34 AM), <http://news.yahoo.com/lawmaker-iran-could-quit-nuclear-treaty-143329882.html>; Andrea Shalal-Esa, *Iran Strengthened Cyber Capabilities After Stuxnet—U.S. General*, SWISS INFO (Jan. 18, 2013, 5:04 AM), http://www.swissinfo.ch/eng/news/international/Iran_strengthened_cyber_capabilities_after_Stuxnet_-_U.S._general.html?cid=34760066.

program. The construction of the underground Fordow facility to expand capacity for assembling uranium centrifuges and fortify protections against attack were clearly designed to persuade Iran's counterparties that there would be no credible military alternative to a negotiated agreement.

If each side habitually resorts to unilateral measures to gain an advantage during negotiations, the counterparty will seek to restore parity by resorting to parallel reciprocal measures.²⁵⁷ The ensuing vicious cycle of reprisals would undermine positive momentum toward a negotiated solution. Indeed, the mixed messaging that occurs when negotiations and unilateral actions are undertaken simultaneously has been a problem repeatedly raised by the Iranian side,²⁵⁸ but one of which both sides have been guilty. For example, by calling for direct bilateral negotiations during the same week that it imposed additional unilateral sanctions, the United States undermined Iranian confidence in its sincerity in pursuing a negotiated rather than coerced solution.²⁵⁹ Similarly, signaling by

257. Further, though unilateral actions may be intended to persuade the counterparty to accept a negotiated deal rather than risk further deterioration of their position, such actions might in fact have the converse effect by undermining confidence in the negotiating process. For example, some evidence suggests that the Stuxnet attack may have caused Iran to demand additional concessions to compensate for the imposition of further costs. David E. Sanger, *Iran's Leader Rejects Direct Talks With U.S.*, N.Y. TIMES, Feb. 8, 2013, at A10 (quoting Ayatollah Khamenei, "The Iranian nation will not negotiate under pressure The U.S. is pointing a gun at Iran and wants us to talk to them. The Iranian nation will not be intimidated by these actions").

258. See, e.g., Mohammad Khazaei, Permanent Representative of the Islamic Republic of Iran to the U.N., Remarks at the Asia Society New York (Feb. 20, 2013) (transcript available at <http://asiasociety.org/new-york/complete-transcript-ambassador-mohammad-khazaei-asia-society-new-york>) ("[T]he logic of the two-track policy of diplomacy and pressure is incomprehensible, as it constitutes a conflict in term. Regrettably, for some in the US, pressure has become an end in itself. . . . They naïvely believe that pressure and diplomacy complement each other."); *US Invitation to Talks Inconsistent With Threats: Iran*, PRESS TV (Feb. 3, 2013, 12:21 PM), <http://www.presstv.com/detail/2013/02/03/287089/threats-invitation-to-talks-inconsistent> (quoting Iranian Foreign Minister Ali Akbar Salehi, who stated: "You cannot use a threatening tone and say all options are on the table, on the one hand, while talking about negotiations, on the other hand, [because] this is an apparent contradiction. . . . Exerting pressure and [invitation to] talks are not compatible. If you have honest intentions we can place serious negotiations on the agenda" (alterations in original)).

259. For instance, Vice President Biden suggested at the 2013 Munich Security Conference that the United States would be open to direct bilateral talks with Iranian officials to discuss the range of disputed issues between the two countries. Press Release, Joe Biden, Vice President of the U.S., Remarks at the Munich Security Conference (Feb. 2, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/02/02/remarks-vice-president-joe-biden-munich-security-conference-hotel-bayeri> ("We have made it clear at the outset that we would not—we would be prepared to meet bilaterally with the Iranian leadership."). In the same week, the United States imposed a new round of sanctions on Iran. *Iranians Brace for Hard Times as US Imposes New Round of Sanctions*, GUARDIAN, Feb. 8, 2013, <http://www.guardian.co.uk/world/2013/feb/08/iranians-braced-hard-times-sanctions>. In response, Ayatollah Khamenei stated that Iran would not accept coercion as an inducement to negotiation. See Reza Sayah & Shirzad Bozorgmehr, *Supreme Leader: U.S. Pressuring Iran on Talks*, CNN (Feb. 7, 2013, 7:15 AM), <http://www.cnn.com/2013/02/07/world/meast/iran->

some Iranian negotiators that significant progress was attained in a round of negotiations is undercut when other Iranian officials simultaneously minimize such claims and express pessimism instead.²⁶⁰

B. Structuring Negotiations for Success

Despite the presence of a clearly identifiable range of viable compromise options, recurring factors have undermined progress in negotiations over the Iranian nuclear file. Negotiation theory explains this impasse by recognizing that the existence of a potentially acceptable compromise solution does not alone ensure that the parties will reach an agreement. In fact, two elements are necessary for successful negotiations: the existence a bargaining zone and a structure that enables the parties to engage in productive negotiations. The first of these elements, a bargaining zone, exists if at least one set of terms is more beneficial than a party's best alternative to a negotiated agreement, making a compromise theoretically possible. The scope of the zone is defined by each side's "reservation point"—that is, the minimum requirements of each side to be better off accepting a negotiated resolution than pursuing the next best unilateral alternative.²⁶¹ The existence of a substantial bargaining zone in the case of the Iranian nuclear file was identified as early as 2003 by the IAEA inspections.²⁶² Despite changes in leadership in both countries—as well as the gradual development of Iran's program and the imposition of sanctions through the U.N.—this zone of agreement has remained relatively stable because of the underlying continuity in both countries' interests.²⁶³

khamenei-dismiss. For an American analyst's critique of the U.S. dual-track approach, see Loren White, *Why the 'Dual Track' Strategy Derailed*, HUFFINGTON POST (Mar. 23, 2012, 7:12 PM), http://www.huffingtonpost.com/loren-white/obama-iran_b_1376479.html, stating that "[there is] something fundamentally contradictory about trying to engage in diplomacy with the same people that you are simultaneously putting the screws to."

260. Initial analyses of the talks between the P5+1 and Iran at Almaty, Kazakhstan in late February 2013 were positive. See, e.g., Joby Warrick & Jason Rezaian, *Iran Nuclear Talks End on Upbeat Note*, WASH. POST, Feb. 27, 2013, http://articles.washingtonpost.com/2013-02-27/world/37320165_1_nuclear-program-nuclear-impasse-nuclear-facilities. Yet by the next week, Ayatollah Khamenei was downplaying progress at Almaty. See Arash Karami, *Khamenei: West Did Not Offer Any Concessions at P5+1*, AL-MONITOR (Mar. 8, 2013), <http://iranpulse.al-monitor.com/index.php/2013/03/1501/khamenei-west-did-not-offer-any-concessions-at-p51>.

261. In Part III.B.3 and in Part IV, *infra*, I argue that the zone of negotiation that lies between the reservation points of Iran and the P5+1 might be expanded through the delegation of greater authority to the IAEA. There is evidence that the Agency's technical services and mediation efforts broadened the parties' reservation points in precisely this way between 2003 and 2005, though U.S. abstention from those talks ultimately impeded success.

262. See *supra* Part I.B.

263. See *supra* notes 64–66 and accompanying text.

What has been missing, however, has been the second element necessary for reaching an accommodation within this bargaining zone: an appropriate structure that enables the parties to engage with one another in productive negotiations. In this Subpart, I draw on the analysis of past missed opportunities to suggest a modified negotiating framework that might enhance the prospects for reaching a bargained-for agreement going forward. I propose adjustments to negotiating strategies and the adoption of a step-by-step approach to address the counterproductive principal-agent dynamics and proactively anticipate and defuse the impact of domestic factors on continuing talks at the international level. The term “step-by-step” refers to an approach in which incremental confidence-building measures are taken simultaneously by each side on a quid-pro-quo basis. Thus, for instance, in exchange for Iran halting the planned production and installation of a new set of advanced uranium enrichment centrifuges at Fordow, the UNSC would suspend some elements of its sanctions.²⁶⁴ After both sides complete and verify this step, Iran might adopt additional transparency and inspections measures in exchange for further sanctions relief, and so forth. The end-point of the “step-by-step” proposal would be the ultimate resolution of all outstanding questions on Iran’s nuclear file and the establishment of a proliferation-resistant limited enrichment program under stringent IAEA inspections, on the one hand, in exchange for the lifting of all sanctions and the undertaking of economic and security cooperation yielding security assurances for Iran, on the other. The primary benefit of the step-by-step approach would be confidence building in the early stages that would then create momentum toward a long-term solution, but as described below, there are other important benefits as well.

1. Adjusting the Principal-Agent Dynamic Step By Step: Defining the Goalposts and Providing Requisite Authority

As previously discussed, principal-agent difficulties at issue in the Iranian conflict have arisen primarily out of the failure of the principals on either side to articulate their minimum requirements to their agents and to accord the requisite authority to their agents to negotiate an agreement consistent with those requirements. In order for negotiations to be successful, negotiators must understand the alternatives to a negotiated settlement and the opportunity costs of pursuing a negotiated agreement.²⁶⁵ This requires research into the negotiator’s

264. This is described as “Step 1” of the Russian proposal laid out by Lavrov. Davenport, *supra* note 28; see also MOUSAVIAN, *supra* note 102, at 408; Bâli, *supra* note 99.

265. Korobkin, *supra* note 210, at 1794.

own positions, goals, purposes, and alternatives, as well as those of the negotiator's opponent(s). Such prenegotiation research allows negotiators to estimate their own minimum requirements (or reservation point) accurately and to consider ways to shift their opponent's reservation point by opening up new alternatives and opportunities.²⁶⁶ This process requires substantial expert-level talks between the sides to glean information about the parties' respective positions as well as to structure the basis for negotiations before higher-level reciprocal talks begin.²⁶⁷

In both the final phase of the discussions between the EU-3 and Iran in 2005 and in the breakdown of talks between Larijani and Solana in 2006, positive sum bargaining²⁶⁸ to engage in issue-linkage²⁶⁹ and enlarge the potential zone of compromise gave way to zero-sum bargaining. This occurred both because the parties failed to express their minimum requirements with sufficient specificity and because the requirements changed in the course of the negotiations. The EU-3 were clearly well aware of the minimum Iranian requirements of security assurances and a recognition of NPT rights, but their expectation that the U.S. position would enable compromise on these issues was mistaken.²⁷⁰ Similarly, Larijani knew the Solana agreement would require freezing the broader enrichment program in exchange for recognition of rights and a pilot-scale program at Natanz and yet had not secured authorization from Tehran to commit to the terms of the agreement once it had been negotiated. Sufficient advance preparation, together with low-level expert discussions prior to any round of high-profile negotiations, may have revealed the gulf between the parties' positions and enabled more creative approaches to identifying bridging proposals.²⁷¹

Iterated step-by-step negotiations have the benefit of generating greater information exchange through indirect mechanisms such as the submission of initial and subsequent proposals offering insights into subtle shifts in issue priority

266. See *id.* at 1797–99.

267. See Ronald J. Fisher, *Pre-negotiation Problem-Solving Discussions: Enhancing the Potential for Successful Negotiation*, 44 INT'L J. 442 (1989); Janice Gross Stein, *Getting to the Table: The Triggers, Stages, Functions, and Consequences of Pre-negotiation*, 44 INT'L J. 475 (1989).

268. On positive-sum bargaining, see I. William Zartman, *Common Elements in the Analysis of the Negotiation Process*, 4 NEGOTIATION J. 31, 37 (1988), which reviews the literature on “integrative analysis” of negotiations with a focus on generating “positive-sum outcomes” through iterative processes.

269. For the classic statement on the value of issue linkage to secure collective benefits in international interaction, see Ernst B. Haas, *Why Collaborate? Issue-Linkage and International Regimes*, 32 WORLD POL. 357 (1980).

270. See *supra* notes 122–124 and accompanying text.

271. MOUSAVIAN, *supra* note 102, at 247.

or potential compromises on both sides.²⁷² Further, iterated negotiations reduce the problem of agency slack by offering multiple opportunities for negotiators to check in with their principals over a sequence of talks.²⁷³ In many respects, the Joint Plan of Action agreed to in Geneva in November 2013 appears to internalize the benefits of an iterated approach. That agreement puts in place interim arrangements limiting and capping the Iranian program during negotiations, specifies a defined timeline for negotiations, and articulates a shared vision of the principal elements of the comprehensive deal to be negotiated.²⁷⁴ The details of how negotiations are to be structured during the six-month period of the agreement have not been made public, but the initial aftermath of the deal has witnessed continuous low-level technical meetings in Vienna as well as intermittent higher-level meetings in Geneva.²⁷⁵

Similarly, more frequent meetings and interactions between lower-level negotiators authorized to address strictly technical issues would enable the parties to continue making progress around specified steps while immunizing some elements of talks from the intense public scrutiny generated by higher-level meetings.²⁷⁶ The experts meetings of 2013 represent a helpful example to build on. During the first half of the year, while major advances in nuclear talks were unlikely because of impending Iranian presidential elections, lower-level expert meetings in Almaty and Istanbul produced some technical proposals on limiting an Iranian breakout capacity. While final policy decisions required higher-level participation, identifying areas of potential compromise through technical talks provided a clearer picture of potential areas for subsequent progress.²⁷⁷ This

272. A review of the history of official proposals in the Iranian nuclear negotiations illustrates this potential benefit. The progressive identification of concrete steps to address the concerns of the parties is evident in the record from 2003 to 2012. Davenport, *supra* note 28.

273. Agency slack is the potential problem of “unwanted independent action by an agent,” here a nuclear negotiator, “divert[ing] policy away from principals’ preferences toward [the agent’s] own.” Christopher S. Marcoux, *Autonomous Actors or Faithful Agents?*, 9 INT’L STUD. REV. 262, 262 (2007) (reviewing DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS, *supra* note 204).

274. *Joint Plan of Action*, *supra* note 66.

275. *EU Says “Technical Issues” Delaying Iran Nuclear Talks; Iran Says U.S. “Sanctions” Prompted Walk-out*, REUTERS (Dec. 13, 2013, 10:42 AM), <http://www.cbsnews.com/news/iran-nuke-talks-hit-technical-hurdle> (describing brief suspension in ongoing talks); *Iran Committed to Continuing Nuclear Talks: Foreign Minister*, REUTERS (Dec. 15, 2013, 6:07 AM), <http://www.reuters.com/article/2013/12/15/us-iran-nuclear-idUSBRE9BE04620131215> (noting disruption to, then continuation of, technical talks in Vienna).

276. On the importance of quieter, lower-profile meetings to resolve technical questions and protect the diplomatic process from attacks by domestic opponents, see Marashi, *supra* note 168, noting that “discretion is the better part of valor” in negotiations and that successful diplomacy is almost never conducted in the “public eye.”

277. See, e.g., Marashi, *supra* note 168 (“If there was a silver lining from the Moscow talks, it was the agreement to continue diplomacy at the technical level (rather than at the political level) through the

background work likely contributed to the rapid breakthrough between the parties that became possible once President Rowhani was in office.

As minimum requirements on most technical issues have grown clearer and have stabilized over recent years, new rounds of negotiations should begin from a set of briefs exchanged by both sides through meetings between each side's lower-level deputies. Such briefs should include the deputies' understanding of the ground that has been covered in past discussions and the starting point and framework for the next round. The parties should clarify issue priorities and the minimum requirements of each side prior to negotiating through preparatory expert exchanges. In addition to this level of clarity, negotiators should leave the agenda for each negotiation session relatively fluid. That is, negotiators should retain the flexibility to adapt the scope of negotiations by adding or subtracting issues as needed. At the highest-level negotiations, the negotiators should also have direct lines of communication to the principals with the authority to authorize binding agreements.

During the 2012 talks, for instance, Iran's Supreme Leader, Ayatollah Khamenei, was apparently personally supervising the negotiations with Saeed Jalili serving as his representative.²⁷⁸ The negotiations under President Rowhani have been conducted under the supervision of Foreign Minister Zarif, who now leads the Iranian negotiating team and enjoys a direct channel to both Rowhani and Khamenei.²⁷⁹ On the P5+1 side, Secretary Kerry has repeatedly attended negotiations, at times breaking off other diplomatic commitments to ensure a high-level American presence to bolster the position and authority of Catherine Ashton, the EU foreign policy chief serving as the representative of the P5+1, at critical junctures.²⁸⁰

2. Addressing Domestic Factors by Structuring Step-By-Step Negotiations and Managing Veto Players

To maximize the likely success of negotiations, the structure of negotiations should account for domestic institutional factors. Negotiators should sequence

end of 2012. Additional rounds of negotiations can help both sides continue to reacquaint themselves with one another after three decades of estrangement.”).

278. See Steven Erlanger, *At Nuclear Talks, Hopes That a New Iranian Attitude Will Reduce Tensions*, N.Y. TIMES, Apr. 13, 2012, at A6.

279. See Rick Gladstone, *Iran Hints Nuclear Talks Could Include New Official*, N.Y. TIMES, Aug. 21, 2013, at A4.

280. *Iran Nuclear Crisis Sees Deal Emerging in Geneva*, BBC NEWS (Nov. 8, 2013, 6:39 AM), <http://www.bbc.co.uk/news/world-middle-east-24862743> (noting that Secretary Kerry made a “dramatic decision to change his travel plans” to “help narrow differences in negotiations” between Iran and the P5+1”).

and time different phases of the negotiations ex ante to avoid disruption to progress occasioned by predictable, cyclical domestic constraints that lie outside of the control of negotiators and beyond the substance of negotiations.²⁸¹ The most recent proposals tabled by the parties for the resumption of negotiations have focused on a step-by-step iterative model that would define a timeline for reciprocal steps in advance. The step-by-step negotiations model captures one of negotiations theory's key insights: the advantage of a structure that incentivizes parties to engage in productive negotiating strategies by identifying where immediate progress is attainable and building confidence and momentum toward additional steps.²⁸² The step-by-step structure would allow parties to build into the sequencing and timing of the steps anticipated cyclical domestic factors—such as presidential and legislative election cycles. Both sides might then be motivated to secure an agreement in advance of any elections that might pose a barrier to agreement, ensuring a more productive timeline in which neither party would lose a relative advantage. More generally, iterative processes may help keep the parties from falling into zero-sum negotiating strategies by focusing attention on mechanisms for expanding the potential benefits achievable from negotiations.²⁸³ The fact that each agreed step would have a reciprocal component, would allow each side to manage domestic expectations by pointing to the benefit gained from continued negotiation. The incremental benefits would also facilitate a problem-solving, rather than confrontational, approach to ongoing talks.²⁸⁴ Finally, the additional benefit of a step-by-step approach is that as a more cooperative dynamic takes hold, the position of domestic actors in favor of a negotiated solution will improve with concrete evidence that talks are yielding progress. Strengthening the position of those who favor a negotiated solution will also provide a stronger basis for managing domestic veto players.

281. The international law and international relations literature on the rational design of international agreements has recently given considerable attention to agreement design that accounts for domestic factors. See, e.g., Barbara Koremenos, *Institutionalism and International Law*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART* 59, 68–70 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013).

282. See Reinhard John & Matthias G. Raith, *Strategic Step-by-Step Negotiation*, 70 J. ECON. 127 (1999) (discussing how negotiations processes that proceed in stages may improve players' expected payoffs if such processes reduce the difference between their equilibrium offers).

283. For a classic discussion of positive sum negotiations in asymmetrical situations of negotiations in North-South contexts and the benefits of pragmatic iterated bargaining, see *POSITIVE SUM: IMPROVING NORTH-SOUTH NEGOTIATIONS* (I. William Zartman ed., 1987).

284. A step-by-step approach is another way of describing what Gabi Blum has identified as "islands of agreement," in which rivals are able to identify particular issues on which they have convergent interests or that are divisible from their broader conflict to enter into a stepwise process of negotiations beginning with the most easily addressed issues. GABRIELLA BLUM, *ISLANDS OF AGREEMENT: MANAGING ENDURING ARMED RIVALRIES* 28–48 (2007).

Despite the advantages of a step-by-step approach, the challenge of garnering support from a wide array of domestic factions remains daunting. While there may not be any way to convince all the potential veto players to support a negotiated agreement, some important constituencies' concerns might be addressed through careful planning. The key is to highlight the benefits that would accrue from elements within an agreement while minimizing the significance of apparent concessions.

In addition to the challenge posed by cyclical domestic events, negotiators also face a challenge in that they must simultaneously elicit cooperation from two sides with dichotomous interests: domestic veto holders and their negotiating counterparty. In order to solicit support from opposing domestic forces, each side's negotiators frame the course of negotiations as very positive for their own domestic constituencies. These messages reach well beyond domestic audiences, however, thus potentially inspiring a backlash from the negotiating counterparty's domestic constituencies or the international community at large. In other words, while State A's statements are designed to appeal to State A's hardliners, both State B's domestic hardliners and its general public may perceive such statements as indicators that State B's negotiating tactics have been too conciliatory. State B may then react negatively, undermining the process of negotiations. Because of this negative feedback loop—or boomerang effect—current messaging strategies often yield counterproductive and perhaps unintended consequences in the negotiating context.

For example, repeated statements by American officials emphasizing the coercive dimension of the U.S. “dual track” strategy fuel negative Iranian perceptions of the negotiations.²⁸⁵ Similarly, each time the Iranian government holds a domestic press conference to celebrate a new “advance” in its nuclear program negotiations are likely undermined.²⁸⁶ Even if Iran's claims turn out to be overblown or are subsequently debunked, such public statements reinforce the Amer-

285. Iranian press accounts routinely emphasize what they perceive as American bad faith in negotiating while simultaneously gloating over Iranian economic distress. See, e.g., *Senior Clergy Slams US Dual-Track Policy Towards Iran*, FARS NEWS AGENCY (Feb. 11, 2013), <http://www.thefreelibrary.com/Senior+Clergy+Slams+US+Dual-Track+Policy+towards+Iran.-a0318258600> (quoting Ayatollah Khamenei: “[Y]ou should know that pressure and negotiation are not compatible and the (Iranian) nation will not be intimidated by these things”).

286. Such announcements are likely intended to placate Iranian hardliners by offering assurances that progress on the nuclear program remains steady. On several occasions, Ahmadinejad's claims of “advances” were not verifiable by the IAEA. ELBARADEI, *supra* note 27, at 282; Thomas Erdbrink & Mary Beth Sheridan, *Ahmadinejad Claims Progress in Iranian Nuclear Program*, WASH. POST, Apr. 10, 2009, http://articles.washingtonpost.com/2009-04-10/world/36806029_1_centrifuges-gholam-reza-aghazadeh-national-nuclear-technology-day; Rick Gladstone, *Iran Leader Is Expected to Announce Atomic Steps*, N.Y. TIMES, Feb. 15, 2012, at A8.

ican perception that Iran's program poses a security threat and predictably generate a negative feedback loop. In an age of globalized media, managing domestic veto players by adopting a more hawkish public stance at home than the position actually taken in negotiations will likely backfire. Thus, a commitment by all parties to limit their use of such skewed, domestic media representations would increase the likelihood of successful negotiations.

If domestic messaging intended to appease likely veto players is not the best strategy, what alternatives may be available? In both the United States and Iran the most significant veto players are legislators opposed to negotiations and the domestic factions or lobbies that support them. In Iran, whichever group holds the presidency will face domestic opponents that characterize the current president's handling of the nuclear file as either incompetent—generating unnecessary sanctions—or unduly soft for making concessions.²⁸⁷ In the United States, congressional opposition to negotiations has often taken the form of relatively bipartisan support for a more coercive and militarized approach.²⁸⁸ In both Iran and the United States, the executive branch appears committed to pursuing negotiations—but only as long as the legislative majority necessary to ratify the ultimate agreement is willing to support such negotiations.²⁸⁹ To manage this constraint,

287. For instance, in the 2013 Iranian presidential debates, the conservative candidate, Saeed Jalili, attacked his opponent from the reformist camp by “blasting” the allegedly “soft” negotiating stance of the Khatami administration. Zahra Hosseinian & Marcus George, *Presidential Hopefuls Clash on Iranian Nuclear Policy*, REUTERS (June 7, 2013, 4:07 PM), <http://www.reuters.com/article/2013/06/07/us-iran-election-debate-idUSBRE9560UR20130607>. But Jalili himself came under attack for missing opportunities and serving as an ineffective nuclear negotiator by virtue of taking too hard a line. Peterson, *supra* note 223.

288. For instance, a bipartisan resolution supporting Israel should it strike Iran garnered overwhelming support in the U.S. Senate in the spring of 2013. See Cecily Hilleary, *Senate Committee Resolution Supports Israeli Action on Iran*, VOICE AM. NEWS (Apr. 17, 2013), <http://www.voanews.com/content/senate-committee-passes-resolution-to-support-any-israeli-strike-on-iran/1643266.html>.

289. In a recent example of this dynamic, after the signing of the Joint Plan of Action, lawmakers in the United States threatened to impose new sanctions on Iran in violation of the terms of the deal. After negotiating with Congress, the White House eventually expanded the list of individuals and entities affected by existing sanctions to avoid the imposition of new sanctions, though Iran objected that this, too, violated the terms of the deal. Oren Dorell, *Kerry Urges Lawmakers to Reject New Iran Sanctions*, USA TODAY, Dec. 10, 2013, <http://www.usatoday.com/story/news/world/2013/12/10/kerry-briefs-lawmakers-on-iran/3950703/> (noting that Secretary Kerry urged members of Congress to honor the terms of the Joint Plan of Action by refraining from imposing new sanctions on Iran during the six-month period of the agreement); David E. Sanger & Michael R. Gordon, *White House Punishes More Firms Over Iran Sanctions*, N.Y. TIMES, Dec. 12, 2013, <http://www.nytimes.com/2013/12/13/world/middleeast/white-house-sanctions-iran.html> (noting that the White House responded to pressure from Congress on new sanctions by adding additional individuals and entities to those punished under existing sanctions to forestall the imposition of new sanctions legislation); Fredrik Dahl & Adrian Croft, *Iran Angry Over U.S. Sanctions, Nuclear Talks Interrupted*, REUTERS (Dec. 13, 2013, 8:24 AM), <http://www.reuters.com/article/2013/12/13/us-iran-nuclear-sanctions-idUSBRE9BC0CY20131213>.

each side has two basic options: offering inducements to gain the support of potential veto players or limiting the ability of opponents to block an agreement.

On the Iranian side, negotiators might induce the support of veto players by structuring sanctions relief in a way that materially benefits constituencies most likely to oppose a deal otherwise. In the longer run, the promise of normalization of international relations and the lifting of sanctions may produce significant additional opportunities to provide side payments. On the American side, a side agreement under which Israel assented to the U.S.-Iranian agreement and received additional defensive (and perhaps offensive) benefits to address its national security concerns might placate congressional opponents.²⁹⁰ Despite some rhetoric to the contrary, an emerging consensus has formed among both the Israeli national security establishment and American military officials that there may be no military solution to the Iranian nuclear crisis.²⁹¹ Thus, Israel may have the necessary incentives to accept a negotiated agreement with additional assurances from the United States.²⁹² In short, side agreements offer a po-

290. Congressional hardliners invoke Israeli security interests as a significant source of their opposition to a negotiated agreement that does not entirely eliminate the Iranian nuclear power program. See Mark Landler, *Israel's Backers Pressure Obama on Iran Position*, N.Y. TIMES, Mar. 4, 2012, at A1.

291. Following the announcement of the Joint Plan of Action, for instance, Israeli Prime Minister Benjamin Netanyahu became the most prominent international critic of the interim nuclear deal. Netanyahu described the agreement as a "historic mistake" and warned that Israel might still consider military strikes against Iran. Karl Vick, *Israel Renews Warning of Military Action After Iran Nuclear Deal*, TIME, Nov. 24, 2013, <http://world.time.com/2013/11/24/israel-renews-warnings-of-military-action-after-iran-nuclear-deal>; David Simpson & Josh Levs, *Israeli PM Netanyahu: Iran Nuclear Deal 'Historic Mistake'*, CNN (Nov. 25, 2013, 10:59 AM), <http://www.cnn.com/2013/11/24/world/meast/iran-israel>. However, despite the harsh rhetoric from the Israeli prime minister, an Israeli military intelligence report signaled that the nuclear deal might benefit Israel and stabilize the region. Joshua Mitnick, *Israeli Military Goes Off Message on Iran Nuclear Talks*, CHRISTIAN SCI. MONITOR (Nov. 21, 2013), <http://www.csmonitor.com/World/Security-Watch/2013/1121/Israeli-military-goes-off-message-on-iran-nuclear-talks-video>. The Obama administration also offered Israel additional security assurances following the deal, including the promise of large-scale military exercises signaling to Iran the continuing American commitment to Israeli national security. Yaakov Lappin, *Israel, US to Stage Large-Scale Military Drill When Iran Nuclear Deal Expires*, JERUSALEM POST (Nov. 28, 2013, 7:05 AM), <http://www.jpost.com/Iranian-Threat/News/Israel-US-to-stage-large-scale-drill-when-iran-nuclear-deal-expires-333302> (noting that "planned exercise signals to Iran that West is keeping military option alive"). Meanwhile, domestic opponents of the interim deal offered only muted criticism. Paul Richter, *Iran Nuclear Deal Foes Rein in Criticism*, L.A. TIMES, Nov. 27, 2013, <http://articles.latimes.com/2013/nov/27/world/la-fg-iran-deal-20131128>.

292. See Panetta, *supra* note 12 ("[T]he indication is that at best [a military strike] might postpone[,] . . . not destroy their ability to produce an atomic weapon . . . [with] the unintended consequences . . . [of] a confrontation and a conflict that we would regret."); Yaakov Katz, *Defense: Don't Attack Iran Now, Warns Ex-intel Chief*, JERUSALEM POST (Aug. 3, 2012, 3:18 AM), <http://www.jpost.com/Features/Front-Lines/Defense-Dont-attack-Iran-now-warns-ex-intel-chief> (quoting former head of Israeli Military Intelligence advising that Israel hold off on a military attack against Iran, since "even if it is successful, it will ruin the legitimacy that is needed" to sustain diplomatic support and ensure the Iranians are not allowed to rebuild their nuclear facilities);

tentially powerful tool to garner legislative support, thus greatly degrading the power of any remaining rejectionists to block a negotiated solution. In order for such side agreements to be feasible, however, the American and Israeli publics must move closer to the consensus of their respective military establishments on the absence of a military solution. Changing the tone of domestic outreach efforts may be one way to accomplish this goal.²⁹³

3. Persuasive Information at Each Step: Enhancing the Role of the IAEA

Negotiation theory counsels that failure to conclude a negotiated agreement is likely a consequence of many factors and highly overdetermined. Nevertheless, the absence of trust between the parties likely poses the paramount challenge to successful negotiations. This mistrust drives behaviors—such as hard bargaining strategies—that inhibit effective negotiation and foment even greater uncertainty. Mistrust results partly from the fact that the parties do not know their counterparty's reservation point and are incentivized to misrepresent their own. These information asymmetries predictably lead the parties to devalue attainable deal terms, hold out for more advantageous terms even at the expense of undermining the likelihood of an agreement, and take unilateral measures to undermine the counterparty's position. In other words, informational asymmetries distort the parties' valuations of the range of available compromise positions. Thus, one of the most important factors for structuring a successful negotiation is reducing these informational asymmetries that breed mistrust.²⁹⁴

Given the mistrust that results from imperfect information, hard bargaining strategies are structurally inevitable unless a third party—who is trusted by all negotiating parties—furnishes an external source of accurate information. Only if the parties are persuaded of the accuracy of the information they use to establish

Melman, *supra* note 12 (quoting a former Mossad chief saying the possibility of a future Israeli Air Force attack on an Iranian nuclear facility was “the stupidest thing I have ever heard”).

293. For statements opposing an attack on Iran by U.S. and Israeli military officials, see *supra* notes 11–12 and accompanying text. Collections of statements by U.S. and Israeli security officials warning against military strikes on Iran are also available online. See, e.g., *U.S., Israeli Security Officials Warn Against Attacking Iran*, FRIENDS COMMITTEE ON NAT'L LEGIS., http://fcn.org/issues/iran/us_israeli_security_officials_warn_against_war_with_iran (last visited Nov. 10, 2013) (citing former U.S. Secretaries of Defense Panetta and Gates and former Israeli Prime Minister Ehud Olmert, among others). For an Obama administration initiative to warn U.S. and Israeli audiences of the negative consequences of an attack on Iran, see Mark Landler, *Obama Says Option to Strike Iran Not a 'Bluff,' but Cites Repercussions*, N.Y. TIMES, Mar. 3, 2012, at A4.

294. See, e.g., LEWICKI ET AL., *supra* note 210, at 108–10; Leigh L. Thompson, *Information Exchange in Negotiation*, 27 J. EXPERIMENTAL SOC. PSYCHOL. 161, 175–76 (1991).

their respective reservation points will those requirements remain stable over the course of negotiations. Further, the parties must have confidence that they can accurately ascertain that their counterparty is actually performing on the obligations undertaken during negotiations. International law scholarship on negotiations has sought to overcome obstacles related to mistrust through verification mechanisms that would produce reliable information of each side's intentions and performance.²⁹⁵ Indeed, the existence of the NPT regime and the IAEA is largely a consequence of the widespread international recognition of common interests in the existence of a multilateral verification mechanism to ensure that parties do not defect from their nonproliferation commitments.²⁹⁶ Perhaps the greatest advantage of a step-by-step approach lies in the internalization of verification mechanisms at each step in negotiations. This is because that structure creates opportunities for the IAEA to verify that the parties have met their obligations at the conclusion of each step, offering all parties confidence that progress is being made. As a consequence, an agreed protocol for the IAEA's inspection, monitoring, and verification activities is not only a necessary element of a negotiated solution to the Iranian nuclear crisis but also a necessary structural feature of the negotiations themselves.

Unsurprisingly, the talks in 2012 on a step-by-step protocol focused on addressing issues of nuclear transparency in exchange for reciprocal action toward sanctions relief and enhanced IAEA inspections were ultimately a key element of the November 2013 Joint Plan of Action. On the Iranian side, confidence building requires a reversal of strategies premised on withholding information. But leaks of sensitive information to parties outside of the negotiations apparently emanating from the IAEA have complicated the organization's relationship with Iran. Iran is understandably hesitant to grant the IAEA access to its nuclear sites without better guarantees of confidentiality, thus hindering transparency

295. See, e.g., Kenneth W. Abbott, "Trust but Verify": *The Production of Information in Arms Control Treaties and Other International Agreements*, 26 CORNELL INT'L L.J. 1, 16–17 (1993) (arguing that the fears of defection in an atmosphere of suspicion or unfamiliarity—particularly concerning the development of technological advancements, such as the breakout of advanced weapons systems—typically are best addressed through verification strategies).

296. For the classic account of the design of regimes to resolve "dilemmas of common interests" and the relationship of these insights specifically to the arms control context, see Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, 36 INT'L ORG. 299, 311–13 (1982), which argues that arms-control agreements represent a dilemma of common interests where the equilibrium outcome (proliferation) is suboptimal for all but the fear of defection requires the establishment of a regime providing objective verification to provide persuasive information to all parties of the credibility, implementation and enforceability of their counterparties' commitments.

efforts.²⁹⁷ An important mechanism to overcome these issues would be to offer clear assurances that any information gleaned from IAEA activities will be held in confidence and that all parties agree to the terms for data collection and analysis by the technical secretariat of the IAEA, insulated from the political pressures of its Board of Governors.²⁹⁸

Formalizing the role of the IAEA as a third-party mediator could further improve the structure of negotiations.²⁹⁹ For instance, during the initial talks between Iran and the EU-3, the IAEA secretariat offered advice concerning potentially proliferation-resistant controls that would meet the requirements of the nonproliferation regime while forging common ground between the parties, taking proliferation concerns and so-called nuclear energy rights into account. These efforts resulted in a framework for negotiations between the parties in consultation with Director General ElBaradei.³⁰⁰ The IAEA provided both reliable and verified information concerning the scope of the Iranian program and proposals aimed at facilitating compromise during the EU-3 phase of the talks.³⁰¹ There were also later instances in which ElBaradei served as a go-

297. For an example of these leaks, see *Iran Criticizes IAEA for Revealing Confidential Information*, IRAN-UN.ORG (Feb. 12, 2013), <http://iran-un.org/en/2013/02/13/iran-criticizes-iaea-for-revealing-confidential-information>.

298. For example, the November 2013 framework of cooperation between Iran and the IAEA includes a statement that “[t]he IAEA agreed to continue to take into account Iran’s security concerns including through the use of managed access and the protection of confidential information.” IAEA Iran Joint Statement, *supra* note 60. As discussed above, negotiations between the IAEA and Iran over a “structured approach” to giving inspectors expanded access ultimately resulted in expanding the Agency’s inspections authority in November 2013, though sensitive military sites like Parchin remained outside of the scope of those agreements. See *supra* notes 60, 63, 66, 79 and accompanying text. Within the framework of the broader reset in negotiations, Iranian concerns may yet be allayed with confidence-building measures incorporated in the process, including assurances from the P5+1 that inspections will be insulated from political pressure.

299. LEWICKI ET AL., *supra* note 210, at 454–67. The IAEA has technically been a party to the talks throughout as the agency vested with monitoring compliance with core NPT obligations, but it can also serve as a third party in the sense that its sole commitment is to the international law framework, taken as the starting point for talks by all parties. Beyond its NPT-related mandate, the IAEA is not an interested party in the same way as the states involved in the negotiations and can furnish services as an international institution capable of technical monitoring and verification as well as mediation.

300. As director general, ElBaradei developed proposals for a negotiated solution, including an argument for multinational control over Iran’s fuel cycle, an idea that would reconcile Iran’s assertion of a right to develop a civilian nuclear energy program with international concerns that any such program be proliferation resistant. This and other proposals forwarded by ElBaradei shaped the initial framework for international negotiations with Iran. ELBARADEI, *supra* note 27, at 123.

301. For an early example of ElBaradei’s advocacy for equitable multinational controls over civilian nuclear fuel cycles, see Mohamed ElBaradei, *Towards a Safer World*, INT’L ATOMIC ENERGY AGENCY (Oct. 16, 2003), <http://www.iaea.org/newscenter/statements/2003/ebte20031016.html>. The proposal to place all civilian nuclear fuel cycle activities under multinational controls—that is, removing fuel cycle activities from any given country’s sole domestic control—was designed to avoid Iran’s concerns that it was being singled out for scrutiny when comparable civilian uranium

between on several iterations of the fuel swap deal and was recognized as a credible mediator by both sides.³⁰² In keeping with the lessons learned from El-Baradei's mediation efforts, the IAEA is uniquely situated to mediate and facilitate negotiations. The IAEA could serve as a precommitment device by offering credible monitoring to ensure that the parties meet their obligations once they agree to a particular step-by-step process.³⁰³ Further, the IAEA can verify that the parties have undertaken the reciprocal measures to which they have agreed.

Under conditions in which verification requires intrusive measures subject to sovereign consent, as with the Iranian nuclear program, the use of a trusted third-party arbiter is especially critical.³⁰⁴ The ability to iterate confidence-building measures at different stages of negotiations and ensure their full implementation through IAEA verification may serve to alleviate some of the chronic trust issues that have hampered negotiations. Yet, for the IAEA to provide sufficiently robust verification to offer a credible deterrent to an Iranian breakout capacity should Tehran decide to repurpose its enriched uranium for military purposes, the IAEA will require a greater delegation of authority than it currently enjoys.³⁰⁵ This will mean not only expanding its inspections powers but also reassuring the Iranians that the IAEA—not the P5+1 or other political bodies—will determine how best to interpret IAEA findings; it will further require the IAEA to maintain the confidentiality of the information it gathers and to apply a legal, rather than political, standard in assessing whether Iran has complied with relevant obligations.³⁰⁶

enrichment programs in forty other states were not subjected to equivalent scrutiny. In general, IAEA involvement in negotiations has the benefit of setting precedents that would be applicable to other states, addressing complaints of inconsistent treatment.

302. For ElBaradei's own account of his role in trying to advance a fuel swap agreement, see ELBARADEI, *supra* note 27, at 293–313, which describes how the United States and Russia brought a fuel swap proposal to the IAEA and expressions of confidence in the role of the IAEA expressed directly by President Obama and by the head of Iran's Atomic Energy Organization, Ali Salehi.
303. The IAEA is poised to play precisely such a role under the terms of the November 2013 Joint Plan of Action, which tasks the Agency with monitoring Iran's compliance with the terms of the interim deal by giving inspectors daily rather than weekly access to the Natanz and Fordow facilities as well as expanding their access to additional nuclear sites. *Joint Plan of Action*, *supra* note 66.
304. For instance, Abbott explicitly discusses the need for a third party for inspections and data collection in the arms-control context. Abbott, *supra* note 295, at 35. In the case of the Iranian nuclear crisis, such an arbiter is readily available in the form of the IAEA as will be discussed in Part IV below.
305. See Part IV below for a discussion of the benefits of greater delegation to the IAEA both to the course of the Iranian nuclear negotiations and as a collateral benefit in strengthening the NPT regime as a whole against future would-be proliferators.
306. Such a delegation is not without precedent. When the UNSC imposed sanctions on Iraq in relation to disarmament obligations, the IAEA was given the authority to determine, as a technical matter, whether Iraq was in compliance with the requirements of the UNSC resolution. The UNSC's

The advantages of delegating greater authority to the IAEA as a technical secretariat would inure to the benefit of both sides of the negotiations. Greater delegation would have three salutary effects: It would expand the IAEA's authority to provide persuasive information and analysis, accord the IAEA a role in furnishing mediation services (including as a commitment device to ensure that the parties undertake the steps to which they have agreed), and elevate the IAEA as a source of binding legal advice with respect to NPT and safeguards obligations.³⁰⁷

The Iranian case amply illustrates the benefits that might accrue from such an enhanced delegation of authority to the IAEA. Past efforts to interpose third-party states as potential mediators have failed, posing substantial principal-agent problems as intermediaries were not delegated the requisite authority by the relevant principals.³⁰⁸ On the other hand, a delegation of authority to the IAEA would substantially improve the negotiating framework, enhancing the information available to the parties on their respective positions. For the P5+1 countries, the broader inspections mandate would mean more persuasive information concerning the extent of past and current Iranian nuclear activities and a more reliable and verifiable mechanism for ensuring a proliferation-resistant program going forward. For Iran, the depoliticization of compliance assessments and the return of the Iranian nuclear file to the authority of the IAEA would mean a more reliable relationship between Iranian cooperation and the suspension of punitive measures.³⁰⁹

enforcement decisions were dependent upon, and therefore constrained by, this compliance determination. For a discussion of the constraints on UNSC members' enforcement choices based on delegation of authority to the IAEA, see Michael J. Tierney, *Delegation Success and Policy Failure: Collective Delegation and the Search for Iraqi Weapons of Mass Destruction*, 71 LAW & CONTEMP. PROBS. 283, 305–06 (2008).

307. W. M. Reisman, *The Enforcement of International Judgments*, 63 AM. J. INT'L L. 1, 9 (1969) (describing the benefits of authoritative international organizations and agencies as "enforcers" which can "direct" and legitimize state action even if the organization or agency does not itself have coercive power over the "target state" against whom enforcement is required).
308. See *supra* notes 122–124 and accompanying text on the EU-3 role and *supra* notes 174–181 and accompanying text on the role of Brazil and Turkey.
309. This benefit would presumably depend, from the Iranian perspective, on a parallel depoliticization of the appointments process for senior IAEA officials. One difficulty that would need to be addressed is that a delegation of greater authority to the IAEA will trigger demands for greater accountability on the part of powerful states such as the P5+1. Because such states view a politicized appointments process as a lever of accountability, their demands would cut in favor of a politicization that would diminish Iranian (and probably, more broadly, non-NWS) confidence in the Agency's autonomy.

IV. CAPTURING THE BENEFITS OF DELEGATION

The Iranian nuclear crisis represents a serious challenge to the viability of the NPT regime. One of the most attractive features of structuring negotiations around an enhanced role for the IAEA is that it would turn this challenge into an opportunity to set a precedent that strengthens the capabilities and authority of the IAEA. Crucially, setting such a precedent would generate long-term benefits with implications well beyond the Iranian case. In this Part, I turn to the collateral benefits that greater delegation to the IAEA would confer to the nuclear nonproliferation regime as a whole.

The stakes of the Iranian nuclear crisis go well beyond the proliferation risks posed by Iran itself. Over the past decade, the prolonged standoff over the Iranian nuclear program has eroded the credibility of the IAEA and of the NPT regime's enforcement mechanisms. Greater delegation of authority to the IAEA, coupled with measures to correct for the real or perceived politicization of the IAEA's work, would go a long way toward addressing these harms. Of course, international delegations are themselves a source of anxieties, particularly concerning accountability and agency costs.³¹⁰ In the remainder of this Article, I address these concerns and argue that they are mitigated by the presence of numerous accountability measures in international organizations, like the IAEA. Further, they are offset by the significant gains in international cooperation that might result from the proposed delegation. With respect to this latter benefit, it is notable that strengthening the IAEA will enhance the benefits of an NPT regime that already internalizes an asymmetric distribution of rights and benefits disproportionately favoring the P5. The reinforcing benefits of this asymmetry should therefore outweigh some of the conventional accountability concerns expressed by powerful states.³¹¹

310. David A. Lake & Matthew D. McCubbins, *The Logic of Delegation to International Organizations*, in DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS, *supra* note 204, at 341, 347–48.

311. Less powerful states have even greater reason to be concerned about delegations as they do not enjoy many of the levers of control and accountability available to great powers. Nevertheless, the non-aligned movement (NAM) countries have repeatedly expressed their confidence in the IAEA and supported arguments to shift the Iranian nuclear file back to the Agency from the Council. This may be in part because the Agency's Board of Governors is a more representative political body than the Council. It may also be because the technical determinations of the Agency in its noncompliance findings are more consistent and predictable than enforcement action by the Council. Since the P5 on the Council are the five acknowledge nuclear weapons states, NAM countries—which are all non-nuclear weapons states—may also prefer keeping nonproliferation determinations out of the exclusive control of the world's nuclear oligopolists. See Non-Aligned Movement, *supra* note 159; Tanya Ogilvie-White, *International Responses to Iranian Nuclear Defiance: The Non-aligned Movement and the Issue of Non-compliance*, 18 EUR. J. INT'L L. 453, 462 (2007).

Using international law and international institutions to provide clear criteria for determinations of noncompliance would lend greater credibility to the nonproliferation regime and render enforcement decisions more consistent and thus more legitimate.³¹² One advantage of international institutions is their capacity to facilitate a mutually beneficial bargain by reducing the political costs of cooperation.³¹³ In circumstances like the Iranian case in which a negotiated solution is identifiable yet the political costs of arriving at an agreed-upon bargain remain an obstacle, the delegation of authority to an international institution may offer the most effective mechanism for insulating monitoring and verification of Iranian nonproliferation obligations from political pressures.³¹⁴

Extending the shadow of the law over the political negotiations process offers all sides cover to refer both domestic audiences and strategic allies to existing institutional and legal structures that represent binding precommitments.³¹⁵ Of course, because states have time-inconsistent preferences, such delegations will produce some sovereignty costs—after the delegation, states will not be able to pursue their preferred policy approach independent of the agreed framework.³¹⁶ But this limitation is a benefit of delegation, rather than a cost, if the goal is to structure negotiations to prioritize nonproliferation above other competing policy goals.³¹⁷ Indeed, the purpose of delegation is to limit the propensity of states to defect from an agreed framework in pursuit of short-term gains at the expense of the longer-term goals of the negotiations.

The strengthening of the nonproliferation regime also requires the restriction of powerful actors' propensities to shield their allies from consequences for noncompliance or to pursue punitive enforcement against adversaries. The long-term goal of a viable nonproliferation regime is, after all, one that secures an asymmetric benefit to those same powerful actors, based in a treaty structure that recognizes the lawfulness of their nuclear arsenals while ensuring that all other

312. See Pierre Goldschmidt, *Exposing Nuclear Non-compliance*, 51 SURVIVAL 143, 144 (2011).

313. See Robert O. Keohane, *The Demand for International Regimes*, 36 INT'L.ORG. 325, 333–34 (1982).

314. For an account depicting these depoliticization benefits in the context of the UNSC's delegation of authority to international bodies tasked with weapons inspections, see Tierney, *supra* note 306, at 311.

315. See, e.g., Sepehr Shahshahani, *Politics Under the Cover of Law: Can International Law Help Resolve the Iran Nuclear Crisis?*, 25 B.U. INT'L L.J. 369 (2007).

316. Oona Hathaway makes this point when she notes that time-inconsistent preferences are a built-in feature of international delegations, which are precisely intended as precommitment devices. Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 LAW & CONTEMP. PROBS. 115, 127–29 (2008).

317. Indeed, the benefits of international institutions more generally are that they lower the transaction costs of cooperation, increase transparency of information, and reduce uncertainty by framing commitments and yielding greater predictability in state behavior. Keohane, *supra* note 313.

states in the system forgo pursuit of the same.³¹⁸ Constraining short-term policy preferences in favor of this long-term goal is therefore in the rational self-interest of the NWS.

Understanding this dynamic helps explain why the United States might be willing to accept a proposal that returns authority over the Iranian nuclear file to the IAEA and away from the Council. Greater delegation to the IAEA would enhance the prospects for a diplomatic resolution in the Iranian case while reinforcing the NPT regime itself. To secure these benefits, the United States would have to privilege its long-term interests in the durability of the NPT and the credibility of the IAEA above its short-term interest in securing greater direct control (and concomitantly reducing the likelihood of diplomatic resolution) over the Iranian nuclear file through the Council. In the next Subparts, I explain the benefits that greater delegation would have on the institutional design of the NPT regime, argue in favor of shielding the IAEA from politicization, and identify the long-term, collateral benefits that may accrue to the NPT system if the Iranian nuclear negotiations are seized on as an opportunity to strengthen the IAEA. Ultimately, the long-term stakes of resolving the Iranian nuclear crisis are maintaining and, hopefully, enhancing the viability of a nonproliferation regime that has contributed to a relatively stable international security order for more than half a century after the advent of nuclear weapons.

A. Lending Credibility

The IAEA's record remains the most reliable intelligence concerning the Iranian nuclear program to date. Under its ordinary safeguards powers, the IAEA has consistently proven itself competent to monitor developments and verify the veracity of statements and documentation provided by all sides (such as

318. The value of the NPT to the recognized, lawful nuclear weapons states is that it legitimizes their sole monopoly on the world's most powerful weapon. Moreover, the bargain struck by the treaty regime may have contributed to deterring other states from the illicit pursuit of nuclear weapons. At the time the NPT was opened for signatures, most analysts believed that in a few decades the world would have dozens of nuclear weapons states. Indeed, over forty countries today have domestic nuclear fuel cycle activities furnishing civilian energy programs that provide them with a latent capability to develop a weapons option. And yet the number of nuclear weapons states remains very limited, with only four additional states known to have nuclear arsenals. Of those, three—India, Pakistan and Israel—remained pointedly outside of the NPT framework, while the fourth, North Korea, formally withdrew from the NPT citing national security concerns. On the DPRK withdrawal, see *North Korea Withdraws From Nuclear Treaty*, GUARDIAN, Jan. 10, 2003, <http://www.theguardian.com/world/2003/jan/10/northkorea1>. On efforts to engage the three de facto nuclear weapons states that remain outside of the NPT, see Marvin Miller & Lawrence Scheinman, *Israel, India, and Pakistan: Engaging the Non-NPT States in the Nonproliferation Regime*, ARMS CONTROL ASS'N (Dec. 2003), www.armscontrol.org/print/1431.

incomplete declarations by the Iranians or allegations of militarization offered by the United States).³¹⁹ One of the few promising outcomes of the Iranian nuclear impasse has been the confirmation of the IAEA's technical capacities and institutional judgment, even in the face of substantial political pressure.³²⁰ Maintaining this positive record is imperative for the credibility of inspections as a mechanism for monitoring compliance with the NPT. While reliable access to Iranian nuclear sites is an important objective in itself, the IAEA's relationship to the Iranian nuclear file may also impact its ability to manage future proliferation challenges. A positive precedent in Iran will serve to strengthen the IAEA just as a negative precedent may weaken the capacity of inspections to produce reliable information when dealing with potential future proliferators.

The effectiveness of the IAEA's inspections authority depends on states' confidence that the IAEA serves as an impartial arbiter of compliance with safeguards obligations. The autonomy of IAEA inspectors is in large measure the guarantee given to states for affording international bureaucrats access to sensitive sites on their territory. The credibility of the IAEA's findings, in turn, depends on the perception that compliance findings will be based on the technical secretariat's professional expertise, insulated from extraneous considerations. Yet the compliance determination is ultimately a political decisionmaking process driven by the Board of Governors. On the one hand, the credibility of the IAEA depends on states' views that its inspections will conform to a consistent standard for safeguards compliance. On the other hand, the compliance findings

319. See, e.g., ELBARADEI, *supra* note 27, at 116 (detailing how IAEA testing was able to rebut Iranian claims that nuclear material had never been introduced at the Kalaye Electric Company); IAEA Report, Sept. 2005, *supra* note 133, ¶¶ 39–41 (explaining that IAEA environmental samples taken at Parchin and Lavizan-Shian were unable to substantiate Western intelligence reports that those two military sites were used for Iran's nuclear program); Int'l Atomic Energy Agency, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, ¶¶ 81, 84, IAEA Doc. GOV/2004/83 (Nov. 15, 2004) [hereinafter IAEA Report, Nov. 2004] (detailing how the IAEA was able to dismiss claims that Iran had successfully acquired beryllium); *id.* ¶ 76 (noting how IAEA pressure forced Iran to correct its earlier incomplete declaration about the quantities of plutonium used for reprocessing experiments); IAEA Report, Nov. 2003, *supra* note 40 (detailing the IAEA's initial finds concerning Iran's P-1 enrichment activities); IAEA Report, June 2003, *supra* note 23, ¶¶ 16–18 (detailing how an IAEA investigation proved that Iran had failed to disclose aspects of its enrichment program).

320. Nonproliferation experts consistently underscore the utility of the IAEA's inspections authority as the most significant source of verifiable information about the Iranian nuclear program. See, e.g., KELSEY DAVENPORT ET AL., ARMS CONTROL ASS'N, THE NOVEMBER 2012 IAEA REPORT ON IRAN AND ITS IMPLICATIONS (2012) (stating that the IAEA regularly monitors Iran's uranium enrichment facilities and uranium stockpiles and suggesting that Iran would need to expel IAEA inspectors prior to developing a nuclear weapon); TREVOR FINDLAY, CTR. FOR INT'L GOVERNANCE INNOVATION, UNLEASHING THE NUCLEAR WATCHDOG: STRENGTHENING AND REFORM OF THE IAEA 1 (2012) ("IAEA has attributes and roles that cannot be matched by other organizations, groups of states or individual states, no matter how powerful or influential.").

ultimately depend on political decisions made by delegates on the IAEA's governing body. The tension between technical accuracy concerning the empirical record of compliance and a political decisionmaking process in producing the final determination introduces a tension that may produce inconsistency. The IAEA could resolve such tension by requiring its political body to conform its referral decisions to the technical judgments of the secretariat as to whether a non-compliance referral is warranted. According to the IAEA the power to determine when instances of noncompliance cross the threshold that triggers UNSC scrutiny—rather than allowing this determination to be made on an ad hoc, political basis—would further incentivize states to cooperate with the IAEA.

An important study in the political economy literature on institutional design focuses on the benefits of delegating more binding authority to an international secretariat facing constraints similar to those of the IAEA.³²¹ The study found inconsistency in the International Monetary Fund's (IMF) lending in post-Communist countries that resulted from the introduction of political considerations into loan decisions by the executive board of the organization—comprising twenty-four board members drawn from member countries, and including permanent seats for the largest economies, like the United States and China. Because powerful state members heavily influenced the international body governing enforcement decisions, the strategic importance of borrowers to those states influenced lending determinations.

The conclusion of the study was that the IMF would engage in discriminatory enforcement of its formal lending requirements based on the strategic weight attached to particular countries. As a result, the IMF's lending behavior was at variance with the conditions for the promotion of monetary stability developed by its own secretariat. The outcome—monetary instability among IMF borrowers—diminished the benefits of international monetary cooperation through the IMF for both the borrowers and their powerful patrons.³²² One implication of the study was that greater ex ante delegation of authority over lending decisions to the technical secretariat would ensure that the IMF's lending

321. The study in question examined the effectiveness of the International Monetary Fund (IMF). RANDALL W. STONE, *LENDING CREDIBILITY: THE INTERNATIONAL MONETARY FUND AND THE POST-COMMUNIST TRANSITION* (2002).

322. *See id.* at xx (“[A]s a result, international influence became a strategic liability rather than an asset . . . The U.S. government’s continual efforts to shield Russia from the rigor of IMF conditions . . . compromised Russia’s efforts at market reform . . . [T]he long-term cost of this policy was disastrous.”).

conditions were consistently implemented, which would bolster the IMF's credibility and improve compliance among borrowers.³²³

The IMF study offers important lessons that translate well to the nonproliferation context. The argument for delegating greater authority to the technical secretariat of the IAEA would yield similar benefits, including greater consistency in safeguards implementation and greater credibility for the IAEA in its daily monitoring and verification work. Currently, the mechanism for reporting non-compliance when inspectors make such a determination runs through a political body comprising member-state delegates, which incidentally functions much like the IMF's Executive Board. Specifically, IAEA inspectors report findings of noncompliance to the deputy director general for safeguards who, in turn, communicates the inspectors' report to the director general. The director general next transmits the report to the IAEA Board of Governors (the Board). The Board is endowed with the discretionary authority to make a formal finding of noncompliance and to call on the state in question to remedy the situation. Should it make such a formal finding, the Board is expected to make a report to all members of the IAEA and to the UNSC and General Assembly.³²⁴

In the four recent occasions when IAEA inspections have led to findings of noncompliance, the Board has taken inconsistent approaches to the relevant states.³²⁵ Safeguards breaches by South Korea and Egypt were not reported as noncompliance to the Council and breaches by Libya were reported "for information purposes only," together with a statement commending Libyan corrective actions.³²⁶ Only in the Iranian case was a finding of safeguards breach reported to the Council as an instance of noncompliance and referred for possible enforcement action.³²⁷ The decision not to refer the other cases was based on the view that it would trivialize the concept of noncompliance to engage in referrals

323. *Id.* ("Consequently, my most important piece of policy advice is this: As is true of central banks, international financial institutions can only be effective to the extent that they are independent of political authorities.").

324. Goldschmidt, *supra* note 312, at 145.

325. The four states in question are Iran, Libya, South Korea and Egypt. *Id.*

326. Press Release, Sec. Council, Security Council Welcomes Libya's Decision to Abandon Weapons of Mass Destruction Programmes, U.N. Press Release SC/8069 (Apr. 22, 2004).

327. The absence of an agreed-upon set of enforcement measures in the event of noncompliance with the nonproliferation norm aggravates the inconsistencies in the enforcement of the norm. See Goldschmidt, *supra* note 312, at 143. For arguments that the IAEA Board of Governors should adopt a consistent standard for UNSC referrals and that the Council should develop a standing resolution setting for standards and rules in the event of a finding of noncompliance by the IAEA, see Jack I. Garvey, *A New Architecture for the Non-proliferation of Nuclear Weapons*, 12 J. CONFLICT & SECURITY L. 339 (2007), and Michael Spies, *Iran and the Limits of the Nuclear Non-proliferation Regime*, 22 AM. U. INT'L L. REV. 401 (2007).

when there are no clearly established implications for peace and security.³²⁸ Because the Board's decision is contingent upon member-state voting, rather than an automatic trigger based on the secretariat's evaluation, referral may turn in part on political, rather than technical, considerations.³²⁹

The Board is not obliged to make a formal finding of noncompliance if such a finding is deemed unwarranted in light of the circumstances.³³⁰ Indeed, even in the Iranian case, the finding of past noncompliance in 2003 did not yield a report to the Council until 2006, when the breakdown in the EU-3 negotiating track and the attendant reduction in Iranian cooperation with inspections led to pressure on the Board by the American and European delegates in favor of Council referral.³³¹ The appearance of politicized decisionmaking concerning the referral of the Iranian nuclear file to the Council has been one reason that non-aligned-movement countries have supported the Iranian position in negotiations. Iran has stated that it views the referral as lacking a legal basis and therefore finds it inconsistent with IAEA practice.³³² Iranian officials rely on this

328. INT'L ATOMIC ENERGY AGENCY, SAFEGUARDS STATEMENT FOR 2007, at 9 (2007), <http://www.iaea.org/safeguards/documents/es2007.pdf> (stating that the IAEA Secretariat determined that the Agency did not need to refer South Korea to the Council because it "clarif[ied] all issues relating to past undeclared activities" in its Safeguards Agreement); cf. ELBARADEI, *supra* note 27, at 216; Steven Kim, *ROK's Nuclear Experiments: A Successful Case of Alliance Management*, INT'L J. KOREAN STUD., Fall/Winter 2005, at 127, 129 (explaining that South Korea engaged in an intense diplomatic campaign with the United States and the IAEA to assure the IAEA that South Korea's nuclear experiments did not pose a threat to peace and security).

329. See Goldschmidt, *supra* note 312, at 145 (noting that the IAEA Secretariat reported specific cases of noncompliance with safeguard agreements by Iran, Libya, South Korea and Egypt and the "actions taken by the board in each case were inconsistent and, if they go uncorrected, will create unfortunate precedents"). The complication is particularly associated with perceptions of double standards under which certain countries are subjected to referrals and others are not despite similar records with respect to noncompliance. Such arguments have repeatedly bolstered Iranian defiance and support among non-Nuclear Weapon States for the Iranian position. On the record of Non-Aligned Movement support for the Iranian nuclear position, see Ogilvie-White, *supra* note 311.

330. Goldschmidt, *supra* note 312, at 149.

331. There are allegations that the Board's decision to refer the Iranian file to the Council were a consequence of vote buying on the Board by the United States. Former Assistant Secretary of State for Nonproliferation and International Security, Stephen G. Rademaker, made comments after he left office suggesting that the Bush administration tied the Indian vote on UNSC referral of the Iranian nuclear file to future U.S.-Indian nuclear cooperation. Rademaker was quoted as stating during a speech in New Delhi that "the two votes India cast against Iran at the IAEA" were connected to nuclear inducements for India, a non-NPT member. "I am the first person to admit that the votes were coerced." Siddharth Varadarajan, *India's Anti-Iran Votes Were Coerced, Says Former U.S. Official*, GLOBAL RES. (Feb. 19, 2007), <http://www.globalresearch.ca/india-s-anti-iran-votes-were-coerced-says-former-u-s-official/4851>.

332. Int'l Atomic Energy Agency, *Communication Dated 2 February 2006 Received From the Permanent Mission of the Islamic Republic of Iran to the Agency*, ¶ 3, INFCIRC/666 (Feb. 3, 2006), available at <http://www.iaea.org/Publications/Documents/Infircs/2006/infirc666.pdf>.

interpretation to justify their rejection of UNSC resolutions concerning the suspension of uranium enrichment activities.³³³

The Board's inconsistent reporting pattern has complicated the work of the IAEA's general secretariat in other ways as well. First, following the reporting of its file to the Council, Iran ceased its voluntary compliance with the enhanced inspections authority of the Additional Protocol and its modified Subsidiary Arrangements.³³⁴ Second, as former Director General ElBaradei has attested, concerns about potential enforcement actions by the Council have influenced the secretariat's reporting on the Iranian file.³³⁵ Finally, the inconsistent treatment of the secretariat's legal and technical findings of noncompliance has introduced a degree of uncertainty in the IAEA's own understanding of its legal mandate.

One solution proposed by former IAEA officials is that the Board should automatically adopt as findings of noncompliance all reports by the secretariat that specifically find technical noncompliance with safeguards implementation obligations.³³⁶ Such an equitable standard with respect to noncompliance findings would mean that safeguards violations by allies of powerful states, like South Korea and Egypt, would be treated no differently than violations by a more isolated country like Iran. The strengthening of the nonproliferation regime by such a consistent standard would flow from two factors. First, states would have advanced notice that safeguards violations would predictably result in findings of noncompliance, presumably deterring some violations that currently occur with the expectation of a political exemption from such findings for countries with strategic weight. Second, such a reporting rule would also deprive countries like Iran of an argument that their compliance record was subjected to inconsistent punitive treatment.

Another way of stating the argument in favor of enabling the IAEA's technical findings to serve as the standard for noncompliance determination is that

333. The November 2013 Joint Plan of Action allows Iran to continue enriching uranium subject to caps on enrichment and strict limitations on the stockpiling of enriched fuel. *Joint Plan of Action*, *supra* note 66. This agreement was signed by the P5, which are the same states that imposed the Security Council resolutions mandating Iran to suspend its enrichment activities. The inconsistency between the Joint Plan of Action and the Council's resolutions lends further weight to the view that by overreaching in its original demands, the Council risked undermining its own authority. Not only has Iran continued to enrich uranium in defiance of the resolutions, but the P5 themselves have now entered into an agreement that authorizes Iran to continue enrichment during a six-month negotiating period despite the continued applicability of the Council resolutions.

334. See *supra* note 135 and accompanying text.

335. See Jack Shenker, *Cautious Reports on Tehran Nuclear Programme 'Were Framed to Avoid War'*, GUARDIAN, Mar. 31, 2010, <http://www.guardian.co.uk/world/2010/mar/31/iran-nuclear-programme-cautious-language> (reporting that ElBaradei "acknowledged he believed he had a duty to frame agency reports in a way that could not be exploited by those seeking war").

336. Goldschmidt, *supra* note 312, at 156–57.

the IAEA should be delegated greater authority, based on their monitoring and verification work, to shape enforcement outcomes. This argument has the same intuitive appeal as the conclusions of the IMF study, but goes one step further by offering an objective framework for providing persuasive information and a verifiable commitment device for negotiations in cases like the Iranian nuclear file. In the next Subparts, I consider the IAEA's performance to date as a credible arbiter in light of insights from current literature on international delegations to evaluate the benefits and potential costs of such an enhanced delegation of authority to the IAEA.

B. Harm to IAEA Credibility Related to the Iranian Crisis

Over the course of the Iranian nuclear negotiations, the growing detachment of enforcement decisions from the IAEA's monitoring and inspections functions has significantly harmed the IAEA's credibility. Once the Iranian file moved to the Security Council in 2006, the IAEA was no longer in an authoritative position to assure Iran that cooperation with stringent inspections would yield a normalization of its nuclear file or a diminution of sanctions. Further, suggestions that the appointments procedures for the IAEA may have been politicized in order to influence its approach to the Iranian file harmed the IAEA's reputation for autonomy.³³⁷ Finally, claims that the IAEA's inspections have been infiltrated for intelligence-gathering purposes may undermine not only Iranian—but also other non-nuclear weapons states'—incentives to allow inspectors access to sensitive sites.³³⁸ The reversal of these harms is critical to maintaining the viability of the nonproliferation regime, which depends on the IAEA's monitoring and verification activities to ensure compliance with the NPT. Fortunately, several earlier junctures in the Iranian nuclear negotiations illustrated the benefits of the IAEA's involvement, demonstrating that proposals to en-

337. For an interview with ElBaradei on the perception of politicization, see Shenker, *supra* note 335. The selection of ElBaradei's successor, Yukiya Amano, required six rounds of voting on the board of governors, due to fears he would be biased in favor of the West. *IAEA Chief Amano Wins Second Term*, ALMANAR NEWS (Mar. 6, 2013, 6:29 PM), <http://www.almanar.com.lb/english/adetails.php?fromval=1&cid=56&cfid=56&eid=84689>.

338. See Saeed Kamali Dehghan, *UN Agency 'Infiltrated by Terrorists and Saboteurs,' Says Iranian Nuclear Chief*, GUARDIAN, Sept. 17, 2012, <http://www.guardian.co.uk/world/2012/sep/17/un-terrorists-saboteurs-iran-nuclear-chief>; see also *UN Atomic Agency Mustn't Let Itself Be Used Over Iran, Blix Says*, LUXEMBOURG F. (Sept. 12, 2012), <http://luxembourgforum.org/eng/events/news/detail.php?ID=7552> (citing former IAEA Director General Hans Blix publicly voicing concern that Agency "nuclear inspectors probing Iran must resist being used by special interests intent on spinning facts to fit their theories").

hance the authority of the IAEA while shielding it from politicization may go a long way to reversing more recent harmful developments.

The IAEA played a crucial role in facilitating talks between the EU-3 and Iran in 2003, despite considerable American skepticism.³³⁹ By assuring the international community that thorough inspections would yield credible information on Iranian nuclear activities, the IAEA generated international confidence that Iran's claims would be subject to verification, requiring the country to fully disclose its past and present activities. Simultaneously, the IAEA provided a critical timeframe for talks by framing negotiations around the absence of credible evidence of diversion of nuclear materials to military applications.³⁴⁰ Beyond providing this framework, the IAEA also developed specific proposals for negotiation. For instance, the director general argued in favor of a "freeze-for-freeze" proposal built around reciprocal steps by Iran and the P5+1 to improve confidence among the parties.³⁴¹ Because of the IAEA's expertise, it could also advise the parties on technical matters, such as whether allowing Iran to continue particular activities would be verifiably proliferation-resistant.

The credibility of the IAEA in the eyes of all parties to the negotiation as an impartial institution offering professional expertise and coming to technically accurate legal conclusions about compliance was critical to the course of early negotiations. Some tangible results of that initial period included Iranian cooperation with extensive inspections under the Additional Protocol, verified suspension of Iranian enrichment activities, and a contraction of the terms of the negotiations toward a compromise position. The three years during which the Iranian nuclear file remained under the exclusive authority of the IAEA witnessed more progress than the subsequent seven years of coercive enforcement measures by the Council insofar as Iran suspended its enrichment activities, provided enhanced access to inspections, and did not expand its enrichment facilities during that initial period.

Recent international law scholarship on delegations helps explain why the IAEA's capacity to play a constructive role in negotiations declined after the referral of the Iranian nuclear file to the Council. An international delegation refers to a grant of legally binding authority by two or more states to an international body to make decisions or take actions.³⁴² In the case of the IAEA,

339. ELBARADEI, *supra* note 27, at 112–47.

340. This timeline was maintained despite pressure from U.S. Under Secretary of State for Arms Control and International Security, John Bolton, who preferred immediate coercive enforcement action against Iran through the Council. *Id.* at 122–23.

341. *Id.* at 204.

342. Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, 71 LAW & CONTEMP. PROBS. 1, 3 (2008).

the secretariat enjoys delegated authority over monitoring and implementation of the safeguards obligations of member states. Members of the IAEA secretariat also have a degree of “informal agenda-setting power” because “the information that they [choose] to report (or withhold)” has a substantial influence on the substantive agenda of governing body of the IAEA.³⁴³ In addition, the IAEA has a degree of informal dispute resolution authority because its conclusions about whether a state is diverting nuclear materials to prohibited uses are often outcome determinative in ongoing disputes about proliferation concerns.³⁴⁴

States engage in international delegations in order to enhance the credibility of their commitments,³⁴⁵ generate positive network externalities—such as safety—through nuclear nonproliferation,³⁴⁶ and solve collective action problems they cannot address individually—such as nonproliferation inspections—by pooling their respective authorities.³⁴⁷ Particularly in situations in which the organization offers specialized technical expertise and presides over a large membership, states have incentives to relinquish individual control over decisionmaking to capture the efficiency gains of cooperation.³⁴⁸ The ability to capture these benefits, in turn, requires affording a degree of autonomy to the international organization.

Since the referral of the Iranian nuclear file to the Council, the capacity of the IAEA to exert a constructive role in shaping negotiations has diminished. This observation correlates with the expectations developed in the international delegations scholarship. The Iranian file was moved beyond the adjudicative authority of the IAEA and became subject to the enforcement authority of a political body that acted independently of the IAEA’s determinations. In the words of the Russian foreign minister, Iranian compliance with its safeguards obligations went from being a legal question to a political one.³⁴⁹ The decline in the

343. Tierney, *supra* note 306, at 306.

344. On international delegations to produce “arbitrating agents,” see Hawkins et al., *supra* note 204, at 17–18.

345. *Id.* at 18–20.

346. See David Epstein & Sharyn O’Halloran, *Sovereignty and Delegation in International Organizations*, 71 LAW & CONTEMP. PROBS. 77, 78 (2008).

347. Bradley & Kelley, *supra* note 342, at 7.

348. Keohane, *supra* note 313. Barbara Koremenos underscores that delegation is most likely in areas of complex cooperation problems involving large numbers of states, as is the case with the IAEA. See generally Barbara Koremenos, *When, What and Why Do States Choose to Delegate?*, 71 LAW & CONTEMP. PROBS. 151 (2008).

349. The issue that the world powers have with Iran is a *political* one, not a *legal* one. “The IAEA will be there and will supervise this,” Lavrov said, “but I’d like to repeat that this is a legal aspect of the matter, while the political aspect is that we, along with the other Security Council members, have called on Iran to freeze enrichment operations during the negotiations.”

IAEA's capacity to shape enforcement outcomes has correspondingly reduced Iranian incentives to cooperate with the IAEA.³⁵⁰

Further, claims that the appointment of the current Director General, Yukiya Amano, was politicized, that Western intelligence services infiltrated IAEA inspections during the Iraq War, and that confidential information in the IAEA's possession was leaked have collectively called the IAEA's autonomy into question.³⁵¹ Each of these allegations has the potential to damage the IAEA's reputation substantially, with repercussions beyond the Iranian nuclear file. The perception that the IAEA is subject to political capture by powerful states undermines the very credibility that generates positive externalities from

Yousaf Butt, *How Close Is Iran to Nuclear Weapons?*, REUTERS (Feb. 22, 2013), <http://blogs.reuters.com/great-debate/2013/02/22/how-close-is-iran-to-nuclear-weapons>.

350. See *IAEA Demands Iran Nuclear Access to Parchin Site*, BBC NEWS (Mar. 4, 2013, 6:32 AM), <http://www.bbc.co.uk/news/world-middle-east-21654575>; see also UN, *Iran Nuclear Talks 'Going Around in Circles'—UN Official*, UN NEWS CENTRE (June 3, 2013), <http://www.un.org/apps/news/story.asp?NewsID=45068&Cr=nuclear&Cr1=iran#UleUR2SY7vw> (quoting Director General Amano as stating that “[t]o be frank, for some time now, we have been going around in circles. This is not the right way to address issues of such great importance to the international community, including Iran” (internal quotation marks omitted)).
351. Hans Blix, a former director general of the IAEA, has publicly addressed worries that Western intelligence services have infiltrated the Agency: “The IAEA must not be the prolonged arm of intelligence agencies . . . I don’t think you can possibly have a decent relationship with the country you inspect if they see that the inspectors contain people that come from intelligence or maybe even collect information about suitable targets.” Jonathan Tirone, *Iran Spy Data Need Checks as Amano Prepares for New Term*, BLOOMBERG (Mar. 7, 2013, 3:09 AM), <http://www.bloomberg.com/news/2013-03-07/iran-spy-data-need-checks-as-amano-prepares-for-new-term.html> (internal quotation marks omitted). Equally worrisome, nuclear analysts have voiced concerns that the IAEA’s approach towards Iran has become “intelligence-driven” rather than “information-driven,” meaning that its safeguards reports focus on unsubstantiated allegations based on intelligence shared by third-party governments rather than verified information based on their own inspections. See Mark Hibbs, *Intel Inside: Has the IAEA’s Information Become Politicized?*, FOREIGN POLY, Dec. 10, 2012, http://www.foreignpolicy.com/articles/2012/12/10/intel_inside. These claims coincide with the view that the appointments process for the director general was politicized, fueled by disclosures in American diplomatic cables made available by WikiLeaks. The cables have led to a widespread perception that Director General Yukiya Amano is in the “American court.” See, e.g., Scott Peterson, *WikiLeaks Cable Portrays IAEA Chief as ‘in US Court’ on Iran Nuclear Program*, CHRISTIAN SCI. MONITOR (Dec. 2, 2010), <http://www.csmonitor.com/World/Middle-East/2010/1202/WikiLeaks-cable-portrays-IAEA-chief-as-in-US-court-on-Iran-nuclear-program>. This view further exacerbates the apparent politicization of the earlier process for the renewal of ElBaradei’s directorship, when it was revealed that the United States had been engaging in surveillance to generate a case against his reappointment. See Dafna Linzer, *IAEA Leader’s Phone Tapped: U.S. Pores Over Transcripts to Try to Oust Nuclear Chief*, WASH. POST, Dec. 12, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A57928-2004Dec11.html>. On the claims that the Agency has leaked confidential information, see Frederik Dahl, *IAEA Rejects Iran Accusation Over Scientist’s Killing*, REUTERS (Jan. 20, 2012, 1:27 PM), <http://www.reuters.com/article/2012/01/20/us-nuclear-iran-iaea-idUSTRE80J13H20120120>.

delegation. That perception may also undermine other non-nuclear weapons states' willingness to subject themselves to intrusive inspections.

The politicization of weapons inspections generally makes it more difficult for the international community to gain access to countries' programs for verification and monitoring purposes.³⁵² For instance, the way in which the Council presided over the twelve-year-long inspections in Iraq dealt a substantial blow to the credibility and legitimacy of weapons inspections. In the Iraqi case, UNSC sanctions were technically keyed to disarmament, yet sanctions were never modified in response to evidence of Iraqi compliance.³⁵³ The perception that weapons inspections were a pretext for regime change was the first blow to the credibility of the inspectors' work.³⁵⁴ The second issue related to Iraqi claims that the inspections teams were being used to collect intelligence about Iraq's security defenses. These claims eventually led Iraq to expel the inspectors, ending international efforts to verify Iraqi disarmament. Following the 2003 Iraq War, comprehensive inspections across the country verified that Iraq no longer possessed weapons of mass destruction stockpiles.³⁵⁵ Subsequent to the war, further allegations emerged supporting Iraqi claims that the inspection teams were infiltrated by Western intelligence agencies.³⁵⁶

352. For a discussion of access issues for weapons inspectors suspected of bias or infiltration by intelligence agencies, see Tierney, *supra* note 306, at 301–02.

353. Then-U.S. Secretary of State Madeleine Albright stated in 1997 that compliance with WMD requirements would not result in the lifting of sanctions and suggested that regime change might be the only means of normalizing Iraq's status. Madeleine Albright, Sec'y of State, Policy Speech on Iraq (Mar. 26, 1997) (transcript available at <http://www.fas.org/news/iraq/1997/03/bmd970327b.htm>) ("We do not agree with the nations who argue that if Iraq complies with its obligations concerning weapons of mass destruction, sanctions should be lifted. . . . Clearly, a change in Iraq's government could lead to a change in U.S. policy. Should that occur, we would stand ready, in coordination with our allies and friends, to enter rapidly into a dialogue with the successor regime.").

354. The contemporaneous memoirs of the head of UNSCOM, Richard Butler—which detail Butler's conviction that the Iraqi regime was acting irrationally, cheating on its disarmament obligations, and addicted to weapons of mass destruction—makes for sober reading. See generally RICHARD BUTLER, *THE GREATEST THREAT: IRAQ, WEAPONS OF MASS DESTRUCTION, AND THE GROWING CRISIS OF GLOBAL SECURITY* (2000). The overestimate of the Iraqi weapons of mass destruction (WMD) threat undermined confidence that submission to an intrusive inspections regime would be sufficient to allay international proliferation concerns. On the overestimate, see Kenneth M. Pollack, *Spies, Lies, and Weapons: What Went Wrong*, ATLANTIC, Jan. 1, 2004, <http://www.theatlantic.com/magazine/archive/2004/01/spies-lies-and-weapons-what-went-wrong/302878> (explaining why Iraqi WMD capacities were overestimated by analyzing the work of U.N. inspectors and American national intelligence officials).

355. See Frank Ronald Cleminson, *What Happened to Saddam's Weapons of Mass Destruction?*, ARMS CONTROL ASS'N (Sept. 2003), http://www.armscontrol.org/act/2003_09/Cleminson_09.

356. SCOTT RITTER, *IRAQ CONFIDENTIAL: THE UNTOLD STORY OF THE INTELLIGENCE CONSPIRACY TO UNDERMINE THE UN AND OVERTHROW SADDAM HUSSEIN* (2005).

The IAEA must avoid the stigma now associated with the Iraq weapons inspections to preserve access to Iranian nuclear sites. This is particularly true in light of the covert operations that have been undertaken against Iran in the form of cyberattacks, assassinations of nuclear scientists, and sabotage of facilities.³⁵⁷ At least one former Iranian nuclear negotiator has argued that “[t]here is a consensus within Iran that more access [with the IAEA], more cooperation, [means] more assassinations, more sabotage . . . [w]hich means there is a great, great mistrust from the Iranian point of view to the real intention of the IAEA.”³⁵⁸ Despite this mistrust, Iran has accorded the Agency expanded inspections authority in the context of the most recent negotiations in November 2013.³⁵⁹ Going forward, ensuring that such access does not coincide with additional covert attacks on Iranian infrastructure will likely be critical to building on the progress in relations between Iran and the Agency.

Protecting the IAEA’s reputation for autonomy from further politicization is essential to its capacity to offer a framework for constructive negotiations without the appearance of working covertly to advance the interests of any party.³⁶⁰ Fortunately, it is not too late to rehabilitate perceptions of the IAEA in the Iranian case, particularly as Iran has renewed cooperation with the IAEA to resolve outstanding transparency issues.³⁶¹ Because the Iranian nuclear file has become a bellwether of the IAEA’s credibility, the new window of opportunity for a reset of the IAEA’s relationship with Iran under Rowhani is particularly welcome.

C. Balancing IAEA Authority and Accountability

Drawing on negotiation theory insights, this Article has argued that according a role to the IAEA to furnish persuasive information and credible veri-

357. See *supra* note 254 and accompanying text.

358. Scott Peterson, *Iran Nuclear Talks: Why the Trust Gap Is So Great*, CHRISTIAN SCI. MONITOR (Apr. 12, 2012), <http://www.csmonitor.com/World/Middle-East/2012/0412/Iran-nuclear-talks-Why-the-trust-gap-is-so-great> (quoting former Iranian nuclear negotiator Seyed Hossein Mousavian). Mousavian elaborated: “They are really concerned that the IAEA has been used as an instrument for espionage, sabotage, covert action and preparing the ground for a military strike.” *Id.* The article goes on to note that in making these claims, Iranian officials explicitly point to the UNSCOM Iraq weapons inspections precedent.

359. On renewed cooperation between Iran and the IAEA, see *supra* note 60, 66 and accompanying text.

360. Iran relayed messages to U.S. officials through then-Director General ElBaradei, treating him as an “honest broker” between the United States and Iran. Robert McMahon, *Tehran Wants to Talk*, COUNCIL ON FOREIGN REL. (May 25, 2006), <http://www.cfr.org/iran/tehran-wants-talk/p10774> (noting that ElBaradei carried a message from Larijani to high-level meetings in Washington).

361. See Ladane Nasser, *Rohani Pledges to Make Iran Nuclear Program More Transparent*, BLOOMBERG (June 18, 2013, 12:15 AM), <http://www.bloomberg.com/news/2013-06-17/rohani-pledges-to-make-iran-s-nuclear-program-more-transparent.html>.

fication mechanisms in a step-by-step negotiating process will enhance the prospects for a negotiated resolution to the Iranian nuclear crisis. True, the IAEA has suffered substantial reputational harm over the past decade. But restoring the IAEA's authority over the Iranian nuclear file, enhancing its inspections authority, and taking measures to insulate its secretariat from politicization would not only benefit the Iran negotiations but would also strengthen the NPT regime as a whole by starting to repair the damage done to the IAEA's reputation.

The delegation of authority to an international secretariat bound by a legal mandate and formal decision rules restricts each individual state's ability to suspend or defect from those rules when its policy preferences so dictate. For instance, despite pressure from the United States, the IAEA's secretariat was unwilling to issue a legal conclusion that Iran had violated its NPT obligations in its first report on the country's infractions in November 2003. As a result, the United States faced constraints in pursuing a more confrontational course with Iran.³⁶² Such constraints produced a temptation to move the file to the Council where it would be under the direct political control of the P5 without the constraining effects of IAEA rules and technical judgments. Yet as we have seen, this political control may have contributed to undermining a diplomatic resolution of the Iranian crisis. Restoring the IAEA's authority over the Iranian nuclear file may yield substantial benefits both for the Iranian negotiations and for reinforcing the NPT regime more broadly.

Of course, the sovereignty costs associated with such a delegation to the IAEA vary dramatically among states. Iran's sovereignty has been constrained to a far greater degree by intrusive inspections than that of any other country with a stake in the Iranian nuclear crisis. Still, so long as the IAEA exercises control over the Iranian nuclear file, all states, including the P5, must conform their policy preferences to the IAEA's compliance findings. Thus, the Council's permanent members had a clear incentive to shift authority over the Iranian file to the Council, a forum in which each had veto power, in order to pursue their own policy preferences.³⁶³ Although this shift enabled the P5 to issue a binding resolution demanding suspension of the Iranian enrichment, it was ineffective in securing the result sought by the P5. Whereas Iran did suspend enrichment during talks with the EU-3 under IAEA auspices, it has refused to do so since the Council issued its demand. Indeed, in the most recent negotiations in No-

362. ELBARADEI, *supra* note 27, at 122.

363. On differential delegation and the maintenance of a veto over authoritative decisions of a collective body, see Tierney, *supra* note 306, at 298.

vember 2013, it was the P5 who agreed to terms that would allow Iran to continue its enrichment activities, subject to a cap on enrichment and strict limits on stockpiling enriched fuel, during a six-month negotiating period. Far from succeeding in coercing Iran to suspend its program, the P5 have presided over an expansion of the Iranian nuclear program and, eventually, acquiesced to negotiating terms that are inconsistent with the Council's resolutions.³⁶⁴ Thus, although counterintuitive at first blush, greater delegation to the IAEA was ultimately more effective in securing the goal of suspending Iranian enrichment activities than shifting control of the file to the Council has proven to be.

How can concerns about IAEA autonomy—that is, the desire to limit that autonomy on the part of powerful states—be addressed without undermining the benefits of delegation associated with the reputation and perceived impartiality of the IAEA? In international law scholarship, conventional concerns about international delegation focus on agency costs and democratic accountability.³⁶⁵ The underlying intuition is that international delegations always create greater agency costs than their domestic equivalents because of the absence of direct oversight mechanisms that ensure that international institutions will act within the bounds of their delegated authority. Such a sentiment is rational, given that international institutions are not directly elected representative bodies and therefore not accountable to the publics of the states that create such institutions. As a result, international delegations exacerbate the democratic deficit issues associated with domestic delegations. These concerns have been expressed frequently in American scholarship on international delegations suggesting that even powerful states may harbor serious concerns about binding delegations.³⁶⁶

But international institutions are actually relatively accountable to their powerful member states. Even when delegating power to international institutions, the United States and other powerful countries have extensive *ex ante* institutional design powers and *ex post* appropriations powers that enable them to impose the kinds of accountability mechanisms that are common in domestic delegations. These accountability measures include the power to influence the

364. See *supra* note 333.

365. For analysis of issues of accountability in delegation to international organizations, see generally Daniel Bodanksy, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596 (1999), Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 405 (2006), and Joseph S. Nye, Jr., *Globalization's Democratic Deficit: How to Make International Institutions More Accountable*, FOREIGN AFF., July/Aug. 2001, at 2.

366. See, e.g., Bradley & Kelley, *supra* note 342; Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems With Old Solutions*, 85 MINN. L. REV. 71 (2000); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492 (2004).

drafting of the constitutive documents of international organizations,³⁶⁷ to retain asymmetric voting rights,³⁶⁸ to withhold budgets, and to use side payments and lobbying to influence executive bodies within international institutions.³⁶⁹ Elements of each of these accountability levers are present in the United States' relationship with the IAEA.³⁷⁰

Powerful states' participation in international organizations is also frequently sovereignty enhancing, enabling them to exercise disproportionate influence relative to other members while benefiting from the collective pooling of sovereignty to generate greater authority than they could wield individually.³⁷¹ In light of extant accountability mechanisms and the sovereignty-enhancing quality of delegations, powerful states should forgo the temptation to unduly influence the appointment of top officials at international institutions in ways that undermine the perceived autonomy of the organization. Rather than constituting an additional accountability mechanism, the politicization of the appointments processes compromises the benefits of delegated authority guided by formal mandates.³⁷²

The effectiveness of international delegations depends heavily on the perception of institutions as implementing rules fairly and effectively from the per-

367. The role of the United States and the Soviet Union in drafting the U.N. Charter illustrates this strategy. See Office of the Historian, Bureau of Pub. Affairs, *The United States and the Founding of the United Nations, August 1941–October 1945*, U.S. DEPT ST., <http://2001-2009.state.gov/t/pa/ho/pubs/fs/55407.htm> (last visited Nov. 10, 2013) (describing the Soviet-American bilateral negotiations in Moscow that determined the ultimate structure of authority on the Council).

368. The veto power of the permanent members of the Council provides an example of such asymmetric voting rights.

369. One influential article on accountability in the context of international delegations lists three kinds of accountability that states continue to exert on international organizations following delegations: supervisory accountability (the ability to remove heads of organization for malfeasance), fiscal accountability (the capacity to cut the budget of an organization), and public reputational accountability (the ability to deprive the organization of legitimacy as an agent). See Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29 (2005).

370. For instance, the United States contributes over 30 percent of the IAEA's annual budget (together with an additional \$27.2 million in technical support). U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO-06-93, NUCLEAR NONPROLIFERATION: IAEA HAS STRENGTHENED ITS SAFEGUARDS AND NUCLEAR SECURITY PROGRAMS, BUT WEAKNESSES NEED TO BE ADDRESSED 5 (2005). The appointment of Director General Amano was to some extent influenced by American preferences. See *supra* note 351 and accompanying text. There is also evidence that the United States has been able to effectively use lobbying and side payments to influence votes on the IAEA Board of Governors. See *supra* note 331 and accompanying text.

371. For arguments that delegations may be sovereignty-enhancing, see Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT'L ECON. L. 841 (2003), which explores various theories that institutions such as the WTO strengthen rather than threaten sovereignty. See also Epstein & O'Halloran, *supra* note 346; Hathaway, *supra* note 316.

372. See, e.g., *supra* note 351 and accompanying text (discussing controversies around the appointment of Yukiya Amano as the Director General of the IAEA).

spective of weaker states that are likely to experience real sovereignty costs from such delegations. This is because coercive enforcement by the international organization is both unlikely to occur or to be effective.³⁷³ Rather, the credibility of the adjudicatory authority of an international organization rests on the willingness of member states to comply with its decisions. Moreover, weaker actors do not enjoy a differential capacity to influence constitutive documents or impose ex post fiscal accountability. They are also far likelier to face compulsory compliance demands with whatever standards are implemented through delegation.³⁷⁴ Consequently, weak states are more sensitive to the legitimacy considerations that arise when rules are enforced inconsistently or in a politicized manner.

On the other hand, though delegation to the IAEA imposes some constraints on powerful states' abilities to pursue their preferred policies of punishing adversaries or shielding allies, such states do not face direct sovereignty constraints. They do, however, enjoy substantial benefits from such delegation in the case of nonproliferation: The strengthening of the safeguards arrangements of the NPT is disproportionately beneficial to the nuclear weapons states (that is, five of the six P5+1 countries) because it verifiably locks in a bargain through which international law recognizes the five recognized nuclear weapons states' exclusive and asymmetric entitlement to maintain their nuclear arsenals. Therefore, such states have a presumptive interest in protecting the IAEA's autonomy to secure broad compliance in an international regime that protects their asymmetric stake in nonproliferation.

The benefits of greater delegation to the IAEA—both in terms of enhancing the organization's monitoring and verification powers as well as entrusting it with the sole technical and legal authority to certify findings of noncompliance—extend beyond the Iranian nuclear file. The real value of delegation lies in the precedent that will constrain future would-be proliferators. By reinforcing the IAEA's inspections mandate, safeguarding its autonomy, and returning the emphasis to core nonproliferation obligations, a reframing of the Iranian nuclear file would go some distance toward repairing the credibility of the nonproliferation regime as a reliable basis for detecting and deterring nuclear proliferation.

373. Even in the case of Council-mandated WMD inspections in Iraq, once the Iraqis withdrew their cooperation, the Security Council was unable to resume inspections through sheer military force. Tierney, *supra* note 306, at 302.

374. This is especially the case where enforcement is tied to the UNSC and its veto-wielding permanent members who, by definition, are able to block any enforcement action directly impacting their own sovereignty or national security.

CONCLUSION

The nonproliferation regime has sustained significant damage because of the prolonged crisis over the Iranian nuclear program. The Iranian argument for the “right to enrichment” has repeatedly received strong political support among non-nuclear weapon states.³⁷⁵ The IAEA’s position as the institutional setting for resolving nonproliferation issues as well as its reputation as a neutral arbiter have therefore been called into question.³⁷⁶ Further, as enforcement actions in response to noncompliance with the NPT Safeguards have failed to accomplish their stated purpose of securing the cessation of the Iranian uranium enrichment program, the NPT, the IAEA, and the UNSC appear increasingly ineffective.

As a result, it is imperative that the negotiations of the Iranian nuclear file be brought to a successful close before stalemate does further damage to the enforceability of the underlying nonproliferation norm. In order to achieve such a compromise agreement, I have argued that applying insights drawn from negotiation theory and adopting a step-by-step structure would strengthen the bargaining framework to avoid past pitfalls.³⁷⁷ In particular, iterated negotiations with an agreed sequence create opportunities for agents to check in with principals, avoiding issues of miscommunication. Such a step-by-step framework also enables negotiators to build domestic electoral cycles into the timeline for negotiations in advance. Further, because iterated negotiations are conducive to positive-sum bargaining, such a structure generates tangible results at each step that would increase the support of domestic factions and thereby reinforce momentum in favor of negotiations. Finally, and most critically, iterated negotiations that internalize verification mechanisms at each step address issues of mistrust and uncertainty that produce strategies of hard bargaining. Such verification depends crucially on the credibility of the IAEA. Thus, the adoption of a more central, autonomous, and nonpoliticized role for the IAEA would enhance the value of any negotiated agreement.³⁷⁸

The strengthening of the NPT system requires greater delegation of authority to the IAEA secretariat. Making enforcement decisions contingent on technical—as opposed to political—criteria will increase the consistency of enforcement and thereby aid the IAEA’s credibility. A detailed analysis of the Iranian case is particularly instructive because it has been one of the most sustained and well-documented engagements of the IAEA in a problem that represents a

375. See *supra* note 159 and accompanying text.

376. See *supra* Part IV.B.

377. See *supra* Part III.B.

378. See *supra* Part IV.C.

growing risk to the international system: how best to manage the increased access to nuclear energy programs in a world that risks being destabilized by the emergence of new (even if virtual) nuclear weapons states. Drawing the right lessons from the Iranian experience is essential both for resolving the ongoing international crisis over Iran's nuclear program and for formulating a long-term strategy to strengthen the nonproliferation regime.

Almost everything that is known about the Iranian nuclear program is a consequence of the continuous inspections work of the IAEA. In this sense, the record of international monitoring of the Iranian nuclear program since 2003 does not represent a breakdown in the nonproliferation regime but rather a vindication of its detection mechanisms and their capacity to slow or halt progress in nuclear developments involving a proliferation risk. The Iranian case does, however, demonstrate a need to reinforce the authorities available to the IAEA.

We now live in a world in which nuclear technology is becoming increasingly available despite attempts to limit access. The NPT and its inspections regime remain the best hope for restraining proliferation through objective verification that countries are implementing their nonproliferation obligations. In order to ensure the durability of the system, the Iranian nuclear file should be treated as an opportunity to strengthen the IAEA. The diplomatic breakthrough accomplished by Iran and the P5+1 in November 2013 represents a new window of opportunity to finally resolve the Iranian nuclear crisis. This Article has advocated for an approach to the negotiations that internalizes the lessons of past missed opportunities to avoid the pitfalls that have led to repeated stalemates over the last decade. The most critical element of the approach presented herein is the strengthening of the role accorded to the IAEA. Negotiation theory suggests that delegating greater authority to the IAEA as a credible verification mechanism during the course of the step-by-step negotiations in the Iranian case will enhance the prospects of success. The collateral benefits of such delegation include setting a precedent that strengthens the inspections authority of the IAEA, ensuring that the monitoring and verification mechanisms of the NPT regime are sufficient to detect and deter potential proliferation risks. Going forward, these benefits may be equally or more valuable than any resolution of the Iranian case.