DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW

2012

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Editor

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Table of Contents

Introduction xv

Note from the Editor xvii

Chapter 1 1
Nationality, Citizenship, and Immigration 1
A. NATIONALITY AND CITIZENSHIP 1
1. Immigration and Nationality Act 1
2. Nationality of Women and Children 3
B. PASSPORTS 3
1. Western Hemisphere Travel Initiative Implementation 3
2. Authority to Determine Content of Passports to Implement Foreign Policy 3
C. IMMIGRATION AND VISAS 4
1. Change in visa fees 4
2. Increase in validity period of visas for Colombians traveling to the United States 4
3. Addition of Taiwan to the Visa Waiver Program 4
4. Litigation over flawed diversity visa lottery 5
5. Entry into Force of U.S.-Russia Visa Agreement 6
6. U.S.-Canada Visa and Immigration Information-Sharing Agreement 7
D. ASYLUM AND REFUGEE STATUS AND RELATED ISSUES 8
1. Syria 8
2. El Salvador 11
3. Somalia 11
4. Haiti 14
Cross References 14

Chapter 2 15
Consular and Judicial Assistance and Related Issues 15
A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE 15
1. Uniform Law Commission 15
2. *Avena* Implementation and Related Issues 16
a. Legislation 16
b. State court actions to comply with Avena 16
B. CHILDREN 18
1. Adoption 18
a. Russia 18
b. Report on Intercountry Adoption 18
c. Intercountry Adoption Universal Accreditation Act ("UAA") 19
2. Abduction 19
a. 2012 Hague Abduction Convention Compliance Report 19
b. Entry into force of Hague Convention with additional U.S. partners 20
c. Hague Abduction Convention Litigation 20
Cross References 20

Chapter 3 21
International Criminal Law 21
A. EXTRADITION AND MUTUAL LEGAL ASSISTANCE 21
1. U.S.-Bermuda Mutual Legal Assistance Treaty 21
2. Extraditions pursuant to the U.S. extradition treaty with the United Kingdom 21
3. Asset Sharing Agreement with the Dominican Republic 22
4. Extradition of Fugitive Alleging Fear of Torture: Trinidad y Garcia 22
5. Challenge to Extradition Prior to Secretary's Determination: Meza 26
7. Agreements on Preventing and Combating Serious Crime 30
B. INTERNATIONAL CRIMES 30
1. Terrorism 30
a. Country reports on terrorism 30
b. UN General Assembly 31
c. U.S. actions against support for terrorists 32
(1) U.S. targeted sanctions implementing UN Security Council resolutions 32
(2) Foreign terrorist organizations 32
(i) New designations 32
(ii) Reviews of FTO designations and the delisting of MEK 32
d. Global Counterterrorism Forum 35
2. Narcotics 37
a. Majors List process 37
(1) International Narcotics Control Strategy Report 37
(2) Major drug transit or illicit drug producing countries 37
b. Interdiction assistance 38
3. Trafficking in Persons 38
a. Executive Order 13627 protecting against trafficking in persons in federal contracts 38
b. Trafficking in Persons report 39
c. Presidential determination 40
4. Illicit Cross-Border Trafficking in Arms, Drugs, Weapons, and Other Items 40
5. Money Laundering 43
a. JSC CredexBank (Belarus) 43
b. Withdrawal of Finding: Myanmar Mayflower Bank and Asia Wealth Bank 45
6. Organized Crime 46
7. Corruption 47
8. Piracy 48
a. Overview 48
b. International support for efforts to bring suspected pirates to justice 53
(1) UN Security Council 53
(2) Contact Group on Piracy off the Coast of Somalia 55
(3) Foreign prosecutions 58
c. U.S. prosecutions 58
C. INTERNATIONAL, HYBRID, AND OTHER TRIBUNALS 61
1. Overview 61
2. International Criminal Court 72
a. Overview 72

b. Kenya 78
c. Democratic Republic of Congo ("DRC") 78
d. Libya 79
e. Darfur 81
3. International Criminal Tribunals for the Former Yugoslavia and Rwanda 84
a. Overview 84
b. International Criminal Tribunal for the Former Yugoslavia 86
(1) Developments in the case of Radovan Karadzic 86
(2) Other developments 86
c. International Criminal Tribunal for Rwanda 86
d. Mechanism for International Criminal Tribunals 87
4. Special Court for Sierra Leone 89
5. Khmer Rouge Tribunal ("ECCC") 89
Cross References 90

Chapter 4 91
Treaty Affairs 91
A. CONCLUSION, ENTRY INTO FORCE, RESERVATIONS, APPLICATION, AND TERMINATION 91
1. Treaties and Agreements as part of Twenty-first Century International Lawmaking 91
2. The Anti-Counterfeiting Trade Agreement 95
3. U.S. Objection to Bolivia's Reservation to the 1961 Narcotics Convention 96
B. LITIGATION INVOLVING TREATY LAW ISSUES 97
1. Constitutionality of U.S. Statute Implementing the Chemical Weapons Convention 97
2. Constitutionality of Statue Implementing Berne (Copyright) Convention: *Golan v. Holder* 100
3. Rights of U.S. Citizens in Puerto Rico Under International Treaty: *Igartua v. United States* 100
4. Constitutionality of MARPOL Amendment Procedure: Alaska v. Clinton 104
5. APA Challenge Alleging Conflict with International Agreement 112
6. Constitutional Challenge to Tax Treaties 115
Cross References 121

Chapter 5 122
Foreign Relations 122
A. CONSTITUTIONALITY OF STATE LAWS CONCERNING IMMIGRATION 122
1. Arizona 122
2. Alabama 124
3. South Carolina 124
4. Utah 125
B. ALIEN TORT CLAIMS ACT AND TORTURE VICTIM PROTECTION ACT 125
1. Overview 125
2. *Mohamad v. Palestinian Authority* 126
3. *Kiobel v. Royal Dutch Petroleum* 127
C. ACT OF STATE AND POLITICAL QUESTION DOCTRINES 128
1. *McKesson v. Iran* 128

2. Zivotofsky 130
Cross References 130

Chapter 6 131
Human Rights 131
A. GENERAL 131
1. Country Reports on Human Rights Practices 131
2. UN General Assembly Resolutions 131
3. Human Rights Council 132
a. Overview 132
b. Guiding Principles on Business and Human Rights 135
c. Actions regarding Syria 136
(1) Actions at the 19th session 136
(2) Special Session on Syria 138
(3) Actions at the 20th session 138
(4) Actions at the 21st session 139
d. Sri Lanka 140
e. Belarus 141
f. Eritrea 142
g. Mali 142
4. Strengthening the Human Rights Treaty Body System 143
B. DISCRIMINATION 147
1. Race 147
a. Overview 147
b. Human Rights Council 147
c. Statement on U.S. efforts to eliminate racial discrimination at home and abroad 148
d. OAS Resolution on the Draft Inter-American Convention Against Racism 150
e. Ad Hoc Committee on the Elaboration of Complementary Standards 151
2. Gender 152
a. Women, Peace, and Security 152
(1) The United States National Action Plan on Women, Peace, and Security 152
(2) United Nations actions on women, peace, and security 152
(3) G8 work on women, peace, and security 155
b. Female Genital Cutting 156
d. Opposition to resolution on "traditional values" 157
e. UN Commission on the Status of Women 159
3. Sexual Orientation 160
a. U.S. opposition to removing references to sexual orientation in UNGA resolution on extrajudicial, summary, and arbitrary executions 160
b. Follow-up to resolution adopted on LGBT rights at HRC 17 161
c. Presidential proclamation of Lesbian, Gay, Bisexual, and Transgender Pride Month, 2012 162
d. Organization of American States 163
4. Age 164
a. UN Working Group 164
b. Third Committee proposal for legal instrument to protect older persons 166

c. Human Rights Council ... 167
5. Persons with Disabilities ... 168
a. Submission of Disabilities Convention for U.S. Senate Ratification ... 168
b. Human Rights Council ... 181
C. CHILDREN ... 183
1. Optional Protocols to the Convention on the Rights of the Child ... 183
2. Children and Armed Conflict ... 183
a. Security Council ... 183
b. Human Rights Council ... 184
c. Child Soldiers Prevention Act ... 186
3. Resolutions on Rights of the Child ... 186
a. Human Rights Council ... 186
b. General Assembly ... 187
D. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS ... 189
1. Health and Education ... 189
2. Food ... 190
a. UN Convention on Food Assistance ... 190
b. Human Rights Council resolution ... 190
3. Water and Sanitation ... 192
a. Human Rights Council resolution ... 192
b. Secretary Clinton's remarks on World Water Day ... 193
4. Housing ... 195
E. OTHER ECONOMIC, SOCIAL, AND CULTURAL ISSUES ... 196
1. Hazardous waste ... 196
2. Development ... 197
a. Human Rights Council ... 197
b. General Assembly ... 198
F. INDIGENOUS ISSUES ... 199
1. UN Permanent Forum on Indigenous Issues ("PFII") ... 199
2. UN World Conference on Indigenous Peoples ... 200
3. U.S. Statements on Indigenous Peoples at HRC 21 ... 202
4. Response to report of Special Rapporteur Anaya ... 204
G. PROTECTION OF INTERNALLY DISPLACED PERSONS ... 205
H. TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT ... 206
I. JUDICIAL PROCEDURE, PENALTIES, AND RELATED ISSUES ... 206
1. Death Penalty ... 206
2. Extrajudicial, Summary or Arbitrary Executions ... 207
3. Arbitrary Detentions ... 208
J. PROMOTION OF TRUTH, JUSTICE, REPARATION ... 209
K. RULE OF LAW AND DEMOCRACY PROMOTION ... 210
1. U.S. Pledges at UN General Assembly High-Level Event on Rule of Law ... 210
2. Transparency and Accountability ... 211
3. Open Government Partnership ... 213
4. Civil Society ... 213

L. FREEDOM OF EXPRESSION 215
1. Media Freedom 215
2. Internet Freedom 217
3. Religion 219
a. Freedom of religion 219
(1) Designations under the International Religious Freedom Act 219
(2) Annual Report on International Religious Freedom 219
(3) U.S. Statement at the Human Rights Council 219
b. Combating discrimination based on religion 220
4. Expressions of Racism 222
a. U.S. submission to the Committee for the Elimination of Racial Discrimination 222
b. Third Committee resolution 225
M. PROMOTION OF HUMAN RIGHTS IN THE CONTEXT OF PRIVATE MILITARY AND SECURITY COMPANIES ("PMSCs") 226
1. U.S. Submissions to the Working Group on the Use of Mercenaries 227
a. Legal status and accountability of PSCs 227
b. National laws and regulations relating to PMCs and PSCs 228
2. Second Session of the Working Group on PMSCs 230
N. FREEDOM OF ASSEMBLY AND ASSOCIATION 237
O. U.S. CONCERNS OVER PUTATIVE RIGHT TO PEACE 238
Cross References 242

Chapter 7 244
International Organizations 244
A. UNITED NATIONS 244
1. UN Reform 244
a. Security Council 244
b. Overall reform 244
2. Accountability of UN Experts on Missions 248
3. Charter Committee 249
4. UN Women 251
5. WIPO Assistance to Countries Subject to UN Sanctions 252
6. UN's Relationship with Regional Organizations (African Union) 255
B. PALESTINIAN MEMBERSHIP EFFORTS IN THE UN SYSTEM 258
C. INTERNATIONAL COURT OF JUSTICE 260
D. INTERNATIONAL LAW COMMISSION 261
E. OTHER ORGANIZATIONS 264
1. OAS 264
a. General Assembly Resolution on the ICC 264
b. U.S. Comments on Efforts to Reform the Inter-American Commission on Human Rights 264
2. U.S. Observer Status at SICA 267
3. U.S. Membership in the Multilateral Organization Performance Assessment Network ("MOPAN") 268
Cross References. 268

Chapter 8 269
International Claims and State Responsibility 269
A. INTERNATIONAL LAW COMMISSION 269
B. IRAN-U.S. CLAIMS TRIBUNAL 269
1. Case B/1 269
2. Case A/15(IV) 269
C. LIBYA CLAIMS PROGRAM 269
1. Nationality 270
2. Hostage taking and unlawful detention 273
D. IRAQ CLAIMS PROGRAM 279
Cross References 280

Chapter 9 281
Diplomatic Relations, Succession, Continuity of States, and Other Statehood Issues 281
A. DIPLOMATIC RELATIONS 281
B. STATUS ISSUES 281
1. Syria 281
2. Kosovo and Serbia 283
C. EXECUTIVE BRANCH AUTHORITY OVER FOREIGN STATE RECOGNITION AND PASSPORT ISSUANCE 283
Cross References 286

Chapter 10 287
Privileges and Immunities 287
A. FOREIGN SOVEREIGN IMMUNITIES ACT 287
1. Exceptions to immunity 287
a. Commercial activity 287
(1) Requirement of establishing jurisdiction under the FSIA prior to ordering asset discovery 287
(2) McKesson v. Iran*: whether the commercial activity exception creates a cause of action* 290
b. Acts of terrorism 293
2. Execution of judgments and other post-judgment actions 295
a. Attachment under the Terrorism Risk Insurance Act 295
(1) Rubin v. Iran 295
(2) Hausler 299
b. Attachment under the FSIA of blocked assets 302
(1) Calderon-Cardona v. Bank of New York *et al.* 302
(2) Heiser v. Iran 305
c. Discovery orders to aid in execution under the FSIA 305
(1) Walters v. People's Republic of China 305
(2) Rubin v. Iran 307
d. Assets of foreign central banks 310
e. Injunctive relief under the FSIA: NML Capital v. Argentina 315
3. Availability of contempt sanctions 319

B. IMMUNITY OF FOREIGN OFFICIALS 323
1. Overview 323
2. Samantar 324
3. *Ahmed v. Magan* 326
4. *Giraldo v. Drummond*: Immunity from providing testimony 326
5. Mumbai attacks 331
C. HEAD OF STATE IMMUNITY 333
1. President Kagame of Rwanda 333
2. President Rajapaksa of Sri Lanka 336
a. Proceedings in U.S. district court in the District of Columbia 336
b. Proceedings on appeal to the District of Columbia Circuit 339
c. Proceedings in the U.S. district court for the Southern District of New York 342
3. Sheikh Al-Sabah, the Emir of Kuwait 345
4. Former President Ernesto Zedillo of Mexico 345
5. President Biya of Cameroon 346
6. President Saleh of Yemen: immunity from deposition in military commission case 347
D. DIPLOMATIC AND CONSULAR PRIVILEGES AND IMMUNITIES 348
E. INTERNATIONAL ORGANIZATIONS 349
Cross References 350

Chapter 11 351
Trade, Commercial Relations, Investment, and Transportation 351
A. TRANSPORTATION BY AIR 351
1. Bilateral Open Skies and Air Transport Agreements 351
2. European Union's Emissions Trading Scheme 352
B. INVESTMENT DISPUTE SETTLEMENT UNDER FREE TRADE AGREEMENTS 356
1. Investment Dispute Settlement under Chapter 11 of the North American Free Trade Agreement 356
a. Apotex, Inc. v. United States of America 356
b. Apotex Holdings, Inc. and Apotex, Inc. v. United States of America 356
2. Investment Dispute Settlement under the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR") 360
a. U.S. Submission in Railroad Development Corp. v. Guatemala 361
b. U.S. Submission in Teco Guatemala Holdings, LLC v. Guatemala 362
3. Arbitration under U.S.-Ecuador Bilateral Investment Treaty 364
a. U.S. Statement of Defense 365
b. U.S. Memorial on Jurisdiction 366
C. WORLD TRADE ORGANIZATION 376
1. Dispute Settlement 376
a. Disputes brought by the United States 376
(1) Disputes brought by the United States against China 376
(i) China—Measures Relating to the Exportation of Various Raw Materials (DS394) 376
(ii) China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States (DS414) 377

(iii) China – Certain Measures Affecting Electronic Payment Services (DS413).. 378
(2) Dispute brought by the United States against the European Union: Measures Affecting Trade in Large Civil Aircraft (DS316)..... 378
b. Disputes brought against the United States..... 378
(1) United States—Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products (DS381) 378
(2) United States – Certain Country of Origin Labeling (COOL) Requirements (Canada) (DS384) and (Mexico) (DS386) 379
(3) United States – Measures Affecting Trade in Large Civil Aircraft; Recourse to Article 21.5 of the DSU (DS353) 380
(4) United States—Clove Cigarettes (DS 406)..... 381
(5) Zeroing..... 381
2. Russia: WTO Accession and Extending Normal Trade Relations 382
3. Other WTO Developments 383
D. INVESTMENT TREATIES AND AGREEMENTS 384
1. Revised 2012 Model Bilateral Investment Treaty 384
2. Termination of the BIT with Bolivia 384
3. U.S.-EU Statement on Shared Principles for International Investment..... 385
E. TRADE AGREEMENTS AND TRADE-RELATED ISSUES..... 385
1. Trade Legislation and Trade Preferences 385
a. Generalized System of Preferences..... 385
b. African Growth and Opportunity Act 386
2. Arbitration and Related Actions Arising from the Softwood Lumber Agreement..... 386
3. Free Trade Agreements..... 392
a. Free trade agreement with Korea..... 392
b. Free trade agreement with Colombia..... 392
c. Free trade agreement with Panama 393
d. Trans-Pacific Partnership 393
F. COMMUNICATIONS 394
1. U.S.—Mexico Telecommunications Agreements 394
2. World Radiocommunication Conference 395
3. World Conference on International Telecommunications..... 395
G. OTHER ISSUES 397
1. Committee on Foreign Investment in the United States 397
2. Intellectual Property:..... 407
a. Beijing Treaty on Audiovisual Performances..... 407
b. Special 301 Report..... 407
3. Food Assistance Convention..... 408
4. Voluntary Principles on Security and Human Rights..... 409
5. SEC Final Rules Implementing the Dodd-Frank Act 410
a. Rule requiring disclosure of use of conflict minerals..... 410
b. Rule requiring disclosure of payments by resource extraction issuers 411
6. Tax Treaties 412
a. Bilateral Tax Treaties 412
b. Protocol Amending the Convention on Mutual Administrative Assistance in Tax Matters 412

c. Foreign Account Tax Compliance Act (FATCA) Agreements 413
7. Antitrust 413
Cross References 414

Chapter 12 415
Territorial Regimes and Related Issues 415
A. LAW OF THE SEA AND RELATED BOUNDARY ISSUES 415
1. UN Convention on the Law of the Sea 415
2. Other Boundary or Territorial Issues: South China Sea 418
3. Piracy 419
4. Freedoms of Navigation and Overflight 419
a. Airspace warning area—Mexico 419
b. Freedom of Navigation—Pakistan 420
c. Archipelagic States 421
5. Maritime Security and Law Enforcement 422
a. Agreement with Samoa 422
b. Agreement with Canada 423
6. United States-Mexico Transboundary Hydrocarbons Agreement 423
B. OUTER SPACE 424
1. International Code of Conduct for Outer Space Activities 424
2. UN Group of Government Experts on Outer Space 425
Cross References 425

Chapter 13 426
Environment and Other Transnational Scientific Issues 426
A. LAND AND AIR POLLUTION AND RELATED ISSUES 426
1. Climate Change 426
a. Climate and Clean Air Coalition ("CCAC") 426
b. UN Framework Convention on Climate Change ("UNFCCC") 430
(1) Statement on negotiations under the Durban Platform 430
(2) Conference of the Parties 433
2. Ozone Depletion 434
B. PROTECTION OF MARINE ENVIRONMENT AND MARINE CONSERVATION 435
1. Marine Pollution from Ships 435
a. U.S. Ratification of the 2001 Anti-Fouling Convention 435
b. U.S. Implementation of Amendments to MARPOL Annex I 435
c. Alaska v. Clinton: *case challenging creation of ECA pursuant to MARPOL* 436
d. Pacific Merchant Shipping Association v. Goldstene: *case challenging California vessel fuel emission standards* 437
2. Antarctic Marine Protection Proposal 441
3. Fish and marine mammals 441
a. Illegal, unreported, and unregulated fishing: the Pacific Maritime Surveillance Partnership 441
b. Sea turtle conservation and shrimp imports 442

C. OTHER CONSERVATION ISSUES 444
Cross References 445

Chapter 14 446
Educational and Cultural Issues 446
A. CULTURAL PROPERTY: IMPORT RESTRICTIONS 446
1. Peru 446
2. Cyprus 447
3. Mali 447
4. Guatemala 448
5. *Ancient Coin Collectors Guild v. U.S. Department of State* 448
6. Renewal of the Charter of the Cultural Property Advisory Committee 454
B. PRESERVATION OF AMERICA'S HERITAGE ABROAD 455
Cross References 455

Chapter 15 456
Private International Law 456
A. COMMERCIAL LAW: UNCITRAL 456
B. SECURITIES LAW 457
C. FAMILY LAW 459
1. Chafin: appeal from order returning a child to country of habitual residence 459
2. Lozano: equitable discretion and Article 12 defense 467
D. INTERNATIONAL CIVIL LITIGATION 474
1. Cross-border Insolvency 474
2. Arbitration 479
a. Argentina v. BG Group*: arbitrability* 479
b. ESAB Group, Inc. v. Zurich Insurance PLC*: relation of McCarran-Ferguson Act to the New York Convention and Federal Arbitration Act* 483
c. Application of Consorcio Ecuatoriano*: judicial assistance in obtaining evidence for foreign private arbitral proceedings* 489
Cross References 492

Chapter 16 493
Sanctions, Export Controls, and Certain Other Restrictions 493
A. IMPOSITION, IMPLEMENTATION, AND MODIFICATION OF SANCTIONS AND CERTAIN OTHER RESTRICTIONS 493
1. Syria 493
a. Meetings of Friends of the Syrian People 493
b. U.S. sanctions and other controls 494
(1) Sanctions imposed under executive orders issued prior to 2012 494
(2) New executive order aimed at malign use of information technology in Iran and Syria 496
(3) New executive order aimed at curtailing evasion of sanctions relating to Iran and Syria 497
(4) Syria-related designations under other executive orders 498
2. Iran 498

a. Implementation of UN Security Council Resolutions 499
(1) Statements in the Security Council 501
(2) Communication to the Committee established pursuant to Resolution 1737 503
b. U.S. sanctions and other controls 504
(1) Executive Order 13599 504
(2) Further actions implementing the NDAA of 2012 506
(3) Executive Order 13622 507
(4) Iran Sanctions Act, as amended by the TRA 509
(i) Energy-related sanctions 511
(ii) Financial sanctions 513
(iii) Human rights sanctions 513
(5) Executive Order 13628 514
(6) Sanctions under Executive Order 13382 515
(7) Executive Order 13224 designations 519
3. Nonproliferation 519
a. Democratic People's Republic of Korea 519
(1) Committee established pursuant to Resolution 1718 519
b. Iran 522
c. Executive Order 13382 522
d. Resolution 1540 Sanctions 522
4. Terrorism 523
a. Security Council counter-terrorism committees 523
b. U.S. targeted financial sanctions implementing Security Council resolutions on terrorism 525
(1) Overview 525
(2) Department of State 525
(3) OFAC 527
(i) OFAC designations 527
(ii) OFAC de-listings 528
c. Countries not cooperating fully with antiterrorism efforts 528
d. Foreign terrorist organizations 529
5. Armed Conflict: Restoration of Peace and Security 529
a. Democratic Republic of the Congo 529
b. Iraq 530
c. Darfur 530
d. Yemen 530
e. Somalia 531
(1) Security Council 531
(2) Executive Order 13620 532
(3) Executive Order 13536 533
6. Threats to Democratic Processes 533
a. Libya 533
b. Mali 534
c. Côte d'Ivoire 534
d. Modification of Sanctions and Related Actions 535

(1) Cuba 535
(2) Burma 535
7. Transnational Crime 541
B. LITIGATION RELATING TO SANCTIONS 541
1. Opposition to certiorari in case challenging application of Cuba Assets Control Regulations 541
2. U.S. filing in Hausler regarding why Cuba was designated a state sponsor of terrorism 547
3. Designation of Foreign Terrorist Organizations and related issues 548
C. EXPORT CONTROLS 548
1. Commerce Department Entity List 548
2. Nonproliferation-related Changes 548
a. Australia Group 548
b. Wassenaar Arrangement 549
Cross References 549

Chapter 17 550
International Conflict Resolution and Avoidance 550
A. MIDDLE EAST PEACE PROCESS 550
B. PEACEKEEPING AND CONFLICT RESOLUTION 551
1. Syria 551
2. Somalia 560
3. Sierra Leone 564
4. Sudan 565
5. Mali 567
6. Nagorno-Karabakh 568
7. Timor-Leste 569
C. CONFLICT AVOIDANCE 570
1. United States Atrocities Prevention Board 570
2. Responsibility to Protect 570
3. Implementation of the National Action Plan on Women, Peace, and Security 573
Cross References 574

Chapter 18 575
Use of Force, Arms Control and Disarmament, and Nonproliferation 575
A. USE OF FORCE 575
1. General 575
a. Use of force issues related to U.S. counterterrorism efforts 575
(1) Legal basis for activities directed at al-Qaida and "associated forces" 575
(2) Trying suspected terrorists who can be captured and use of legal force to target others 577
(3) Use of remotely piloted aircraft, or drones 584
(4) Issues associated with the end of the conflict against al-Qaida 590
b. Bilateral agreements and arrangements 592
(1) Afghanistan 592
(2) Iraq 593

c. International humanitarian law 593
(1) Applicability of international law to hostilities in cyberspace 593
(2) Private military security companies, military contractors, and their accountability 602
2. Convention on Certain Conventional Weapons 602
3. Detainees 603
a. General 603
(1) Presidential Policy Directive on Military Custody 603
(2) Detention policies guided by rule of law: Copenhagen Process 605
b. Transfers 607
c. U.S. court decisions and proceedings 608
(1) Detainees at Guantanamo: Habeas litigation 608
(i) Overview 608
(ii) *Obaydullah v. Obama*: propriety of government withholding intelligence sources in discovery 608
(2) Former detainees 611
(i) *Gul v. Obama*: attempt to continue habeas litigation post-transfer 611
(ii) *Lebron v. Rumsfeld*: civil claims against government and military personnel 614
(iii) *Al-Shimari v. CACI*: claims against military contractors 619
d. Criminal prosecutions and other proceedings 629
(1) Overview 629
(2) Military commission proceedings 629
(i) Hamdan II 629
(ii) Khalid Sheik Mohammed and others responsible for the 9/11 attacks 635
(iii) New charges against Ahmed Mohammed Ahmed Haza al Darbi 636
(iv) Plea agreement with Khan, tied to cooperation in future trials 637
B. NONPROLIFERATION, ARMS CONTROL, AND DISARMAMENT 638
1. General 638
2. Nuclear Nonproliferation 638
a. Non-Proliferation Treaty ("NPT") 638
(1) P5 Conference on Implementing the NPT 638
(2) U.S. statement on the NPT at the UNGA First Committee 640
(3) Nuclear-weapon-free status 643
b. Comprehensive Nuclear Test Ban Treaty 643
c. Fissile Material Cut-off Treaty 645
d. Nuclear Security and Safety 646
e. Country-specific issues 649
(1) Democratic People's Republic of Korea ("DPRK" or "North Korea") 649
(2) Iran 651
(3) Russia 651
(i) Executive Order blocking property related to disposition of Russian HEU 651
(ii) Russia's accession to the NEA 652
3. G8 Global Partnership 652
4. Implementation of UN Security Council Resolution 1540 653

5. Proliferation Security Initiative 657
6. Chemical and Biological Weapons 657
a. Chemical weapons 657
(1) Annual compliance report to Congress 657
(2) Chemical Weapons Convention 657
b. Biological weapons 660
7. Ballistic Missile Defense 670
8. New START Treaty 670
9. Treaty on Conventional Armed Forces in Europe 673
10. Treaty on Open Skies 674
11. Arms Trade Treaty 674
12. Arms Embargoes 679
Cross References 679

Introduction

I am delighted to introduce the annual edition of the *Digest of United States Practice in International Law* for 2012. This volume provides a historical record of developments occurring during calendar year 2012, the last full year of Hillary Rodham Clinton's service as Secretary of State and Harold Hongju Koh's service as Legal Adviser. The State Department is once again publishing the official version of the *Digest* exclusively on-line. By publishing the *Digest* on-line, we seek to make U.S. views on international law more readily accessible to our counterparts in other governments, to international organizations, and to scholars, students, and other users, both within the United States and around the world.

Included in this volume of the Digest are excerpts from several noteworthy speeches delivered by Legal Adviser Harold Koh in 2012, including: his remarks on Syria at the annual meeting of the American Society of International Law in March; his address on international law in cyberspace in September at the USCYBERCOM legal conference; his talk at Georgetown in October on treaties and international lawmaking; and remarks he delivered in November in both New York and The Hague on international criminal justice. The Digest also discusses other key speeches on U.S. counterterrorism efforts by Obama administration officials.

Significant legal issues arose in 2012 relating to ongoing United States efforts to address the crisis in Syria. The Digest discusses the U.S. designation of Syria for temporary protected status, actions at the Human Rights Council on Syria, U.S. and international acceptance of the National Coalition of Syrian Revolution and Opposition Forces as the legitimate representative of the Syrian people, U.S. sanctions relating to Syria, and UN General Assembly and Security Council actions on Syria.

In 2012, the United States remained engaged in the development of international law by negotiating and concluding treaties. The administration worked to support ratification of the Disabilities Convention, which the Senate considered in 2012 but declined to give its advice and consent to by a vote of 61-38. Secretary Clinton testified before the Senate in support of U.S. ratification of the UN Convention on the Law of the Sea ("UNCLOS"). The United States signed the Beijing Treaty on Audiovisual Performances and the UN Food Assistance Convention. The United States also became a party to the International Convention on the Control of Harmful Anti-Fouling Systems on Ships and transmitted to the Senate for advice and consent to ratification the Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary. In addition, the United States participated actively in the negotiation of the new UN Arms Trade Treaty.

U.S. government involvement in litigation and arbitration also contributed to the development of international law in 2012. In U.S. courts, the United States filed *amicus* briefs in two Hague Abduction Convention cases; opposed petitions for certiorari in two extradition cases; participated in litigation challenging the constitutionality of statutes implementing treaty obligations; and filed statements of interest and suggestions of immunity in several cases involving foreign sovereigns and heads of state. State and federal courts issued important decisions with international law implications, including: the Nevada Supreme Court's remand of the death penalty case of Carlos Gutierrez due to the lack of consular assistance; the Fourth Circuit's opinion that the definition of piracy under the law of nations is the definition contained in Article 15 of UNCLOS; and U.S. Supreme Court decisions that most of Arizona's state

immigration law provisions are preempted by federal law, and that only individuals—not corporations—can be liable under the Torture Victim Protection Act. The United States also made submissions to arbitral bodies, including a voluminous submission to the Iran-U.S. Claims Tribunal in Case B/1, several submissions to NAFTA and CAFTA tribunals, and submissions in arbitral proceedings initiated by the Republic of Ecuador against the United States which resulted in dismissal of Ecuador's claims for lack of jurisdiction.

This edition of the *Digest* also discusses activities in the UN and other multilateral organizations, domestic legislative and regulatory efforts with respect to international relations, and the conclusion of bilateral agreements. Among other things, the United States supported UN General Assembly resolutions condemning human rights abuses in Iran, North Korea, and Syria, and supported UN Security Council resolutions to address emerging and ongoing threats to international peace and security in a number of states around the world. The United States was instrumental in the launch of the Climate and Clean Air Coalition in 2012. Domestically, the Uniform Law Commission began work on a uniform state law on consular notification requirements, Congress passed the Intercountry Adoption Universal Accreditation Act of 2012, and the Securities and Exchange Commission implemented provisions of the Dodd-Frank Act regarding disclosures of conflict minerals and payments to governments by extractive industries. The United States also concluded several important bilateral agreements in 2012, including, among others, a Strategic Partnership Agreement with Afghanistan, an immigration information sharing agreement with Canada, and a bilateral maritime law enforcement agreement with Samoa. Finally, the U.S. government also exhibited leadership in the world in initiatives with international scope. For example, the Obama administration launched the Atrocities Prevention Board and began implementation of the National Action Plan on Women, Peace, and Security.

Many attorneys in the Office of the Legal Adviser collaborate in the annual effort to compile the *Digest*. For the 2012 volume, attorney advisers whose voluntary contributions to the *Digest* were particularly significant include Kevin Baumert, Violanda Botet, Tess Bridgeman, Michael Coffee, Paul Dean, Jonas Lerman, Keith Loken, Kathy Milton, Holly Moore, Lorie Nierenberg, Judith Osborne, Phillip Riblett, and Tim Schnabel. I express very special thanks to Joan Sherer, the Department's Senior Reference Librarian, Legal, and to Jerry Drake, our bureau's records manager, for their technical assistance in transforming drafts into the final published version of the *Digest*. Finally, I thank CarrieLyn Guymon for her continuing, outstanding work as editor of the *Digest*.

Mary E. McLeod
Acting Legal Adviser
Department of State

Note from the Editor

Once again this year, the official version of the *Digest of United States Practice in International Law* for calendar year 2012 is being published exclusively on-line on the State Department's website. I would like to thank my colleagues in the Office of the Legal Adviser and those in other offices and departments in the U.S. government who make this cooperative venture possible and aided in the timely release of this year's *Digest*.

The 2012 volume follows the general organization and approach adopted in 2000. We rely on the texts of relevant original source documents introduced by relatively brief explanatory commentary to provide context. Some of the litigation related entries do not include excerpts from the court opinions because most U.S. federal courts now post their opinions on their websites. In excerpted material, four asterisks are used to indicate deleted paragraphs, and ellipses are used to indicate deleted text within paragraphs.

Entries in each annual *Digest* pertain to material from the relevant year, although some updates (through the end of May 2013) are provided in footnotes. For example, we note the release of U.S. Supreme Court and other court decisions, as well as other noteworthy developments occurring during the first several months of 2013 where they relate to the discussion of developments in 2012.

Updates on most other 2012 developments, such as the release of annual reports and sanctions-related designations of individuals or entities under U.S. executive orders are not provided, and as a general matter readers are advised to check for updates. This volume also continues the practice of providing cross references to related entries within the volume and to prior volumes of the *Digest*.

As in previous volumes, our goal is to ensure that the full texts of documents excerpted in this volume are available to the reader to the extent possible. For many documents we have provided a specific internet cite in the text. We realize that internet citations are subject to change, but we have provided the best address available at the time of publication. Where documents are not readily accessible elsewhere, we have placed them on the State Department website, at *www.state.gov/s/l/c8183.htm*.

Other documents are available from multiple public sources, both in hard copy and from various online services. The United Nations Official Document System makes UN documents available to the public without charge at *http://documents.un.org*. For UN-related information generally, the UN's home page at *www.un.org* also remains a valuable source. Resolutions of the UN Human Rights Council can be retrieved most readily by using the search function on the Human Rights Council's website, at *www2.ohchr.org/english/bodies/hrcouncil*. Legal texts of the World Trade Organization ("WTO") may be accessed through the WTO's website, at *www.wto.org/english/docs_e/legal_e/legal_e.htm*.

The U.S. Government Printing Office ("GPO") provides electronic access to government publications, including the Federal Register and Code of Federal Regulations; the Congressional Record and other congressional documents and reports; the U.S. Code, Public and Private Laws, and Statutes at Large; Public Papers of the President; and the Daily Compilation of Presidential Documents. The Federal Digital System, available at *www.gpo.gov/fdsys*, is GPO's online site for U.S. government materials.

On treaty issues, this site offers Senate Treaty Documents (for the President's transmittal of treaties to the Senate for advice and consent, with related materials), available at *www.gpo.gov/fdsys/browse/collection.action?collectionCode=CDOC*, and Senate Executive Reports (for the reports on treaties prepared by the Senate Committee on Foreign Relations), available at *www.gpo.gov/fdsys/browse/collection.action?collectionCode=CRPT*. In addition, the Office of the Legal Adviser provides a wide range of current treaty information at *www.state.gov/s/l/treaty*, and the Library of Congress provides extensive treaty and other legislative resources at *http://thomas.loc.gov*.

The U.S. government's official web portal is *www.usa.gov*, with links to government agencies and other sites; the State Department's home page is *www.state.gov*.

While court opinions are most readily available through commercial online services and bound volumes, individual federal courts of appeals and many federal district courts now post opinions on their websites. The following list provides the website addresses where federal courts of appeals post opinions and unpublished dispositions or both:

U.S. Court of Appeals for the District of Columbia Circuit:
www.cadc.uscourts.gov/bin/opinions/allopinions.asp;

U.S. Court of Appeals for the First Circuit:
www.ca1.uscourts.gov/opinions;

U.S. Court of Appeals for the Second Circuit:
www.ca2.uscourts.gov/opinions.htm;

U.S. Court of Appeals for the Third Circuit:
www.ca3.uscourts.gov/indexsearch/archives.asp;

U.S. Court of Appeals for the Fourth Circuit:
http://pacer.ca4.uscourts.gov/opinions/opinion.htm;

U.S. Court of Appeals for the Fifth Circuit:
www.ca5.uscourts.gov/Opinions.aspx;

U.S. Court of Appeals for the Sixth Circuit:
www.ca6.uscourts.gov/opinions/opinion.php;

U.S. Court of Appeals for the Seventh Circuit:
www.ca7.uscourts.gov/opinions.html;

U.S. Court of Appeals for the Eighth Circuit:
www.ca8.uscourts.gov/all-opinions;

U.S. Court of Appeals for the Ninth Circuit:
www.ca9.uscourts.gov/opinions/ (opinions) and
www.ca9.uscourts.gov/memoranda/ (memoranda and orders—unpublished dispositions);

U.S. Court of Appeals for the Tenth Circuit:
www.ca10.uscourts.gov/clerk/opinions.php;

U.S. Court of Appeals for the Eleventh Circuit:
www.ca11.uscourts.gov/opinions/index.php;

U.S. Court of Appeals for the Federal Circuit:
www.cafc.uscourts.gov/opinions-orders/search/report.html.

The official U.S. Supreme Court website is maintained at *www.supremecourtus.gov*. The Office of the Solicitor General in the Department of Justice makes its briefs filed in the Supreme Court available at *www.justice.gov/osg*.

Many federal district courts also post their opinions on their websites, and users can access these opinions by subscribing to the Public Access to Electronic Records ("PACER") service.

Some district courts post all of their opinions or certain notable opinions without requiring users to register for PACER first. For example, the U.S. District Court for the District of Columbia posts its opinions on its website at *www.dcd.uscourts.gov/dcd*.
Other links to individual federal court websites are available at *www.uscourts.gov/links.html*.

Selections of material in this volume were made based on judgments as to the significance of the issues, their possible relevance for future situations, and their likely interest to government lawyers, especially our foreign counterparts; scholars and other academics; and private practitioners.

As always, we welcome suggestions from those who use the *Digest*.

CarrieLyn D. Guymon

Chapter 1

Nationality, Citizenship, and Immigration

A. NATIONALITY AND CITIZENSHIP

1. Immigration and Nationality Act

On October 20, 2012, the U.S. District Court for the District of Columbia decided a case involving an attempt by a federal prisoner to compel the U.S. Department of State or the U.S. Citizenship and Immigration Services ("USCIS") to recognize his purported renunciation of U.S. citizenship by issuing a Certificate of Loss of Nationality ("CLN"). *Sluss v. USCIS*, No. 12-0417 (D.D.C. 2012). The court's opinion dismissing the case is excerpted below with footnotes and citations to the record omitted.

* * * *

I. LEGAL FRAMEWORK

United States law provides that a U.S. national "shall lose his nationality by voluntarily performing" any of a number of expatriating acts "with the intention of relinquishing United States nationality." 8 U.S.C. § 1481(a). When a U.S. national performs an expatriating act, he is "presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily." *Weber v. U.S. Dep't of State*, Civ. No. 12-0532, ___ F. Supp. 2d ___,___, 2012 WL 3024751, at *3 (D.D.C. July 25, 2012) (quoting 8 U.S.C. § 1481(b)) (citing *Lozada Colon v. U.S. Dep't of State*, 2 F. Supp. 2d 43, 45 (D.D.C. 1998) ("expatriation depends not only on the performance of an expatriating act, but also upon a finding that the individual performed such act 'voluntarily' and 'with the intention of relinquishing United States nationality'").

In addition, "[w]henever a . . . consular officer of the United States has reason to believe that a person while in a foreign state has lost his United States nationality," that officer "shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations prescribed by the Secretary of State," and "if the report of the . . . consular officer is approved by the Secretary of State," then a CLN shall be issued. 8 U.S.C. § 1501. "The State Department has issued regulations to implement 8 U.S.C. §§ 1481 and 1501 that (1) prescribe the 'form' of formal renunciations of nationality before consular officers and (2) prescribe regulations under which consular officers certify the facts that form the basis for the belief that a person abroad has lost his U.S. nationality." *Weber*, 2012 WL 3024751, at *3.

Although plaintiff states in his affidavit accompanying his renunciation request that he performed the expatriating act of declaring his allegiance to Canada, see 8 U.S.C. § 1481(a)(2), he seeks from the instant complaint an order to compel defendants to act on his alleged renunciation of citizenship under § 1481(a)(6) of the INA which states:

> A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by . . . making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense . . . .

8 U.S.C. § 1481(a)(6). Defendants argue first that plaintiff's mandamus claim fails because the act he seeks to compel from the State Department—issuing a CLN—is discretionary and next that plaintiff's claim is moot since the USCIS has responded to his request for renunciation under subsection (a)(6). They are correct on both points.

II. MANDAMUS

* * * *

This Court recently denied mandamus relief to an applicant seeking a CLN after finding that the Secretary's decision to issue a CLN is a discretionary act. *Weber*, 2012 WL 3024751, at * 4. Nothing in this case compels a different result. Furthermore, since the USCIS has performed the only ministerial duty owed plaintiff by responding to his request to renounce his citizenship, a fact plaintiff concedes, the Court has no further function to perform and, therefore, will dismiss the mandamus claim as moot. See accord *Schnitzler v. U.S.*, Civ. No. 11-1318, ___ F. Supp. 2d ___, ___, 2012 WL 1893582, at *2 (D.D.C. May 25, 2012) ("To the extent that defendant Homeland Security had a ministerial duty to act on the plaintiff's application to renounce his citizenship, which is also the relief the plaintiff seeks from the complaint, it has done so.") (citations omitted).

III. ADMINISTRATIVE PROCEDURE ACT

The provisions of the APA relevant to plaintiff's claim are those that direct the reviewing court to "compel agency action unlawfully withheld," 5 U.S.C. § 706(1), and "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Plaintiff argues that the USCIS' letter "is clearly in violation of the agency discretion that it may enjoy as afforded…by the statute, and therefore the response is arbitrary, capricious, or otherwise in violation of the law." Plaintiff contends correctly that "[t]he plain language of the statute does not encumber a person to visit a USCIS office . . . and does not [require a citizen] to be interviewed by the USCIS." But the statute requires the agency to assess the voluntariness of an applicant's renouncement without stating how such an assessment should occur. "[W]hen an agency is compelled by law to act, but the manner of its action is left to the agency's discretion, the 'court can compel the agency to act, [although it] has no power to specify what th[at] action must be.' " *Kaufman v. Mukasey*, 524 F.3d 1334, 1338 (D.C. Cir. 2008) (quoting *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 65 (2004)) (alterations in original).

While "APA cases are typically decided via summary judgment," on a factually developed administrative record, *Weber*, 2012 WL 3024751, at *5, the USCIS' reasonable explanation based on plaintiff's incarceration, provides a sufficient record for the Court to find that no APA violation resulted from the USCIS' action. See *Schnitzler*, 2012 WL 1893582, at *2 (agreeing with the USCIS that no prejudice arises from holding a prisoner's renunciation "application in abeyance until he is able to comply with § 1481(a)(6)") (citing, *inter alia*, *Koos v. Holm*, 204 F. Supp. 2d 1099, 1108 (W.D.Tenn. 2002) ("Lawful incarceration brings about the

necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system," quoting *Hewitt v. Helms*, 459 U.S. 460, 467 (1983)).

While it appears from the instant record that the State Department still has not addressed plaintiff's request for a CLN, the Court will not prolong the inevitable dismissal of this case by compelling the State Department to perform what surely would be a futile gesture. The INA provides that:

> Except as provided in paragraphs (6) and (7) of section 1481(a) of this title, no national of the United States can lose United States nationality under this chapter while within the United States . . ., but loss of nationality shall result from the performance within the United States or any of its outlying possessions of any of the acts or the fulfillment of any of the conditions specified in this part if and when the national thereafter takes up a residence outside the United States and its outlying possessions.

8 U.S.C. § 1483(a). As long as plaintiff is incarcerated in the United States, he cannot lose his nationality and, thus, does not qualify for a CLN. Hence, not only does plaintiff fail to state a claim but he lacks standing to pursue the claim because any alleged injury is not "redressable by judicial relief." *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 518 (D.C. Cir. 2009) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)) (other citation omitted); see also *Schnitzler*, 2012 WL 1893582, at *2 (prisoner lacked standing to challenge the constitutionality of § 1481(a)(5), (6), since no prejudice would arise from holding his application in abeyance until he is able to comply with the statute).

* * * *

2. Nationality of Women and Children

See Chapter 6.B.2.c. for a discussion of the U.S.-led resolution at the Human Rights Council on women's and children's right to nationality.

B. PASSPORTS

1. Western Hemisphere Travel Initiative Implementation

The Department of Homeland Security ("DHS") issued a notice that, effective January 31, 2012, the Native American Tribal Card issued by the Kootenai Tribe is an acceptable document for identity and citizenship for purposes of entering the United States under the Western Hemisphere Travel Initiative ("WHTI"). 77 Fed. Reg. 4822 (January 31, 2012). For further information on the WHTI, see *Digest 2007* at 8-16.

2. Authority to Determine Content of Passports to Implement Foreign Policy

See Chapter 9.C., discussing developments in the *Zivotofsky* case in 2012.

C. IMMIGRATION AND VISAS

1. Change in visa fees

Effective April 13, 2012, the Department of State changed the schedule of fees for consular services, affecting a variety of types of U.S. visas. 77 Fed. Reg. 18,907 (March 29, 2012). As stated in the Federal Register notice, adjusting the visa fees was necessary "to ensure that sufficient resources are available to meet the costs of providing consular services in light of the recent fee review's findings that the U.S. government is not fully covering its costs for the processing of these visas under the current fee structure." *Id.* Although many fees for nonimmigrant visas increased, notably fees for several petition-based nonimmigrant visas and all immigrant visas actually decreased. *Id.*

2. Increase in validity period of visas for Colombians traveling to the United States

On April 15, 2012, the State Department announced that visas granted to visitors from Colombia would be valid for ten years, instead of five. The State Department fact sheet describing the change is available at *www.state.gov/r/pa/prs/ps/2012/04/187927.htm*. The fact sheet explains the reasons for the change:

> This extension of visa validity is supporting of the expanding partnership between the United States and Colombia on a broad array of issues, which has resulted in increased exchanges for tourism and business. The extension is also consistent with the passage of the U.S.-Colombia Trade Promotion Agreement, which can increase investment between our two countries. A growing Colombian economy will lead to a growth in travel for education and training, tourism, and economic activities.

3. Addition of Taiwan to the Visa Waiver Program

On October 2, 2012, the Secretary of Homeland Security, in consultation with the Secretary of State and with reference to the Taiwan Relations Act of 1979, designated Taiwan for participation in the Visa Waiver Program ("VWP"). The Department of Homeland Security ("DHS") issued the final rule adding Taiwan to the list of countries designated for participation in the VWP in the Federal Register on October 22, 2012. 77 Fed. Reg. 64,409 (Oct. 22, 2012). In general, travelers from designated VWP participants may apply for admission to the United States at U.S. ports of entry as nonimmigrant aliens for a period of ninety days or less for business or pleasure without first obtaining a nonimmigrant visa, provided that they are otherwise eligible for admission under applicable statutory and regulatory requirements. The Secretary of Homeland Security determined, after consulting with the Secretary of State, that Taiwan meets all requirements for participation in the VWP under section 217 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1187, including: (1) meeting the statutory rate of nonimmigrant visitor visa refusals for nationals of the

country; (2) a government certification that it issues machine-readable passports that comply with internationally accepted standards; (3) a U.S. government determination that the country's designation would not negatively affect U.S. law enforcement and security interests; (4) an agreement to report, or make available through other designated means, to the U.S. government information about the theft or loss of passports; (5) the government acceptance for repatriation any citizen, former citizen, or national not later than three weeks after the issuance of a final order of removal; and (6) an agreement with the United States to share information regarding whether citizens or nationals of the country represent a threat to the security or welfare of the United States or its citizens.

4. Litigation over flawed diversity visa lottery

On July 3, 2012, the Court of Appeals for the District of Columbia Circuit affirmed a district court's dismissal of a class action complaint relating to the State Department's diversity visa ("DV") lottery. *Smirnov v. Clinton*, 487 Fed.App. 582, 2012 WL 2579312 (D.C. Cir. 2012). The DV lottery conducted for fiscal year 2012 did not comport with the requirement in the INA that the lottery be conducted in a random manner. After results of the flawed lottery had been posted on-line, the Department cancelled the first lottery and conducted a new one. A group of those selected in the flawed lottery brought suit. Excerpts from the opinion of the Court of Appeals follow (with footnotes omitted).

_____

* * * *

The diversity visa program is designed to encourage and facilitate immigration to the United States from historically underrepresented countries. Each year, 50,000 diversity visas are distributed "to eligible qualified immigrants strictly in a random order established by the Secretary of State." 8 U.S.C. § 1153(e)(2). The State Department promulgated regulations pursuant to this statute establishing an annual drawing known as the diversity visa lottery, which selects 100,000 winners who then have the opportunity to apply for one of the 50,000 visas.

The regulations require that the lottery be conducted in three steps. First, as petitions are received online during a thirty-day submission period they are "assigned a number in a separate numerical sequence for each regional area" specified by the statute. 22 C.F.R. § 42.33(c). The initial numbers largely reflect the order in which petitions are received. Second, "all numbers assigned for each region will be separately rank-ordered at random by a computer using standard computer software for that purpose." *Id*. Third, the Department selects the appropriate quantity of petitions from the random "rank orders determined by the computer program." *Id*. The "winners" selected are considered for visas in the regional rank-order established by this process. *Id*. § 42.33(e). The program is extremely competitive: for the 2012 lottery, the Department received almost 15 million petitions.

The results of the first 2012 diversity visa lottery were posted online on May 1, 2011. But on May 5, the Department cut off access to its website in response to complaints that almost all of the winners had submitted their applications on October 5 or 6, 2010, the first two days of the submission period. Approximately 22,000 winners had already viewed the results. On May 13,

the Department announced that the lottery results were invalid because they were not random as required by law, explaining that over 90% of the winners had been selected from the first two days of the registration period because of a "computer programming error." It had previously guaranteed all applicants from each region an equal chance regardless of the day they submitted their petition. See 75 Fed.Reg. 60,846–02, 60,851 (Oct. 1, 2010). The Department announced it would conduct a second lottery and release the results on July 15, 2011.

On June 16, 2011, Ilya Smirnov filed suit on behalf of a putative class of the 22,000 winners who viewed the results before May 5. He sought an order to force the Department to honor the results of the first lottery and enjoin it from conducting another. The district court dismissed the action on July 14, 2011, finding the Department's actions were not arbitrary and capricious or contrary to law. *Smirnov v. Clinton*, 806 F.Supp.2d 1 (D.D.C.2011). The next day, the Department announced the results of the redrawn lottery, and most of the plaintiffs were not "winners" the second time around. Smirnov appealed.

We affirm the district court's conclusion that the Department acted reasonably in voiding the results of the first lottery and conducting a second. The first lottery was unlawful because it failed the regulation's requirement that the petitions be "rank-ordered at random" after the initial numbering is complete. See 22 C.F.R. § 42.33(c).

* * * *

Smirnov also argues that the Department should be equitably estopped from voiding the results of the first lottery, relying primarily on an October 25, 2011 report from the Office of the Inspector General of the Department of State detailing the process that led to the computer error. The report found that the Department did not follow several internal regulations regarding information technology testing and development when implementing the new randomizer program, and that some employees developing the software did not fully understand the diversity visa process. Because the report was released after the district court dismissed the case, Smirnov filed a Rule 60(b) motion for relief from judgment, which the district court rejected. He appealed that ruling and also asked us directly to take judicial notice of the report.

The equitable estoppel argument fails for at least two reasons. First, the State Department's software development practices were at most negligent—far short of the "affirmative misconduct" required to apply equitable estoppel against the government. See *Morris Commc'ns, Inc. v. FCC*, 566 F.3d 184, 191 (D.C.Cir.2009). Second, equitable estoppel requires a weighing of the equities, and were we to reallocate visa numbers back to the winners of the first lottery, the unfairness to the winners of the second lottery would be at least as grave as that to the first set of winners. Because the equitable estoppel claim lacks merit, we conclude that the district court did not abuse its discretion in denying the Rule 60(b) motion and that we need not decide whether it would be appropriate to take judicial notice of the report.

* * * *

5. Entry into Force of U.S.-Russia Visa Agreement

On September 9, 2012, the agreement between the United States and Russia regarding the issuance of visas entered into force. See *Digest 2011* at 2-3 for background on the agreement. The State Department issued a fact sheet on the agreement on September 7,

2012, available at *www.state.gov/r/pa/prs/ps/2012/09/197476.htm*. Excerpts from the fact sheet follow.

* * * *

Among other benefits, the agreement provides for longer visa validity which allows for expanded contacts and promotes greater mutual understanding between our societies.

U.S. Secretary of State Clinton and Russian Foreign Minister Lavrov first announced this agreement in July 2011, which was ratified by the Russia Duma and signed by President Putin in July 2012.

The agreement includes these key provisions:

- Three-year, multiple-entry visas will be issued as the standard "default" visa for U.S. citizens visiting Russia and Russian citizens visiting the United States;
- Diplomatic and official visa holders on temporary assignments will receive one-year, multiple-entry visas;
- The agreement streamlines the visa issuance process by reducing the documentation required. For example, the Russian government will no longer require U.S. citizens to provide formal, "registered" invitation letters when applying for Russian business visas or visas for private visits, although applicants seeking Russian tourist visas must continue to hold advance lodging reservations and arrangements with a tour operator;
- Both sides have committed to keeping standard visa processing times under 15 days, although the circumstances of individual cases may require additional processing; and
- The $100 issuance—or reciprocity—fee for Russians issued U.S. visas for business or tourism (visa types B1/B2) will decrease to $20.

* * * *

6. U.S.-Canada Visa and Immigration Information-Sharing Agreement

On December 13, 2012, the United States and Canada signed an agreement to enable the two countries to share information from nationals of other countries who apply for a visa or permit to travel to either the United States or Canada. The agreement is described in a December 14, 2012 media note, which is excerpted below and available in full at *www.state.gov/r/pa/prs/ps/2012/12/202065.htm*.

* * * *

This will better protect the safety and security of Americans and Canadians and facilitate legitimate travel and business. Increased information sharing will support better decision-making by both countries to confirm applicants' identities, and identify risks and inadmissible persons at the earliest opportunity. It will increase safety and security, as both countries work to identify terrorists, violent criminals, and others who pose a risk before they reach our borders. All

officers working on immigration and refugee protection will be equipped with more information to make decisions. This will better protect the safety and security of Americans and Canadians alike and further facilitate legitimate travel.

The agreement authorizes development of arrangements under which the United States may send an automated request for data to Canada, such as when a third country national applies to the United States for a visa or claims asylum. Such a request would contain limited information, such as name and date of birth in the case of biographic sharing, or an anonymous fingerprint in the case of biometric sharing. If the identity matches that of a previous application, immigration information may be shared, such as whether the person has previously been refused a visa or removed from the other country. The same process would apply in reverse when a third country national applies to Canada for a visa or claims asylum. Biographic immigration information sharing is set to begin in 2013, and biometric sharing in 2014.

Under the agreement, information will not be shared regarding U.S. or Canadian citizens or permanent residents. Any information shared on travelers and asylum seekers will be handled responsibly and, as with other information sharing agreements, exchanged in accordance with relevant U.S. and Canadian laws.

* * * *

D. ASYLUM AND REFUGEE STATUS AND RELATED ISSUES

Section 244 of the Immigration and Nationality Act ("INA" or "Act"), as amended, 8 U.S.C. § 1254a, authorizes the Secretary of Homeland Security, after consultation with appropriate agencies, to designate a state (or any part of a state) for temporary protected status ("TPS") after finding that (1) there is an ongoing armed conflict within the state (or part thereof) that would pose a serious threat to the safety of nationals returned there; (2) the state has requested designation after an environmental disaster resulting in a substantial, but temporary, disruption of living conditions that renders the state temporarily unable to handle the return of its nationals; or (3) there are other extraordinary and temporary conditions in the state that prevent nationals from returning in safety, unless permitting the aliens to remain temporarily would be contrary to the national interests of the United States. The TPS designation means that eligible nationals of the state can remain in the United States and obtain work authorization documents. For background on previous designations of states for TPS, see *Digest 1989–1990* at 39–40; *Cumulative Digest 1991–1999* at 240-47; *Digest 2004* at 31-33; *Digest 2010* at 10-11; and *Digest 2011* at 6-9. In 2012, the United States designated Syria for TPS and extended TPS designations for El Salvador, Somalia, and Haiti, as discussed below.

1. Syria

Effective March 29, 2012, the Secretary of Homeland Security designated Syria for TPS for a period of 18 months until September 30, 2013, based on the extraordinary and temporary conditions in that country that prevent Syrian nationals from returning in safety. 77 Fed. Reg. 19,026-30 (March 29, 2012). Excerpts below from the Federal Register notice

announcing the designation further explain the basis for the action. See Chapter 17 for a discussion of UN action in response to the crisis in Syria. See also Chapter 6 for discussion of action at the Human Rights Council regarding Syria; see Chapter 9 for discussion of the recognition of the Syrian Opposition Coalition; and see Chapter 16 for a discussion of U.S. sanctions imposed relating to Syria.

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The Secretary has determined, after consultation with the Department of State (DOS) and other appropriate Government agencies, that there exist extraordinary and temporary conditions in Syria that prevent Syrian nationals from returning in safety, and that permitting such aliens to remain temporarily in the United States would not be contrary to the national interest of the United States.

Protest crowds began to gather in Damascus and Dar'a by mid to late March 2011, when citizens seeking greater political freedom rose up against the rule of President Bashar al-Assad. In response, President al-Assad used the military to suppress the movement, and the Syrian Arab Republic Government (SARG) launched a brutal crackdown, violently repressing and killing thousands of its own civilians. The SARG continues to use excessive force against civilians, arbitrary executions, killing and persecution of protestors and members of the media, arbitrary detention, disappearances, torture, and ill-treatment in an effort to retain control of the country.

The Independent International Commission of Inquiry (COI), in its second report to the United Nations Human Rights Council (HRC) dated February 22, 2012 (A/HRC/19/69), reports that the SARG's initial violent suppression of dissent was followed by military defections and the formation of anti-government armed groups. The main armed opposition group is the Free Syrian Army (FSA). Other anti-government armed groups include the Higher Military Council and Al Faroukh Battalion, both of which are engaged in combat with the Syrian security forces in Homs. According to the COI report, while anti-government groups have also committed abuses, their actions are not comparable in scale or organization to those carried out by the Syrian state.

The COI report states that army snipers and Shabbiha (mercenaries hired by the SARG) have terrorized the population, targeting and killing small children, women, and other unarmed civilians. Military defectors report that soldiers continue to receive "shoot to kill" orders. Individual officers in the Syrian military have also shot unarmed protestors, including children, medical doctors, ambulance drivers, and mourners at funerals in Da'ra, Rif Dimashq, and Almastoumah governates.

Observers generally agree that the conflict has become increasingly violent and militarized. As of February 2012, the UN Under-Secretary-General for Political Affairs indicated that approximately 7,500 Syrians have been killed since the violence began, and new casualties are reported daily. The COI report pointed out that "casualties rose steeply as the violence intensified" in recent months. In fact, the UN's February 2012 death toll estimate of 7,500 exceeds its January 2012 estimate by 2,100 deaths. As of February 2012, public UN estimates indicated that between 100,000 and 200,000 Syrians are internally displaced, and as many as 500,000 citizens may be trapped in affected areas within Syria. According to the Office of the

UN High Commissioner for Refugees (UNHCR), approximately 35,000 Syrians have sought shelter in the neighboring countries of Turkey, Lebanon, and Jordan.

The deteriorating security situation in Syria compelled the United States to suspend Embassy operations on February 6, 2012, and order the departure of all U.S. direct-hire personnel from the country. Several other diplomatic missions have also suspended operations due to security concerns. On April 25, 2011, DOS advised all United States citizens to avoid travel to Syria and urged United States citizens in Syria to depart immediately. DOS has reiterated the travel warning several times, most recently on March 6, 2012.

The international community has responded to the crisis in Syria by imposing economic sanctions. The regime's economic mismanagement and economic sanctions have negatively affected the whole of the Syrian economy. According to the COI report, the prices of basic food items have increased by as much as 37 percent, and the unemployment rate is in the range of 22 to 30 percent. The economy is estimated to have shrunk by 2 to 4 percent in 2011, and a higher drop is expected in 2012. Tourism, which accounted for 6 to 9 percent of Syria's gross domestic product, has collapsed.

Thousands of Syrians have been uprooted from their communities and sought shelter in Turkey, Lebanon, and Jordan. Many of those that remain in the country are trapped in danger zones and are experiencing the effects of the economic sanctions. As of June 2011, UNHCR reports an estimated 10,000 Syrians are displaced in Turkey. Approximately 15,000 Syrians are displaced in Lebanon. Although in January 2012 Jordan reported that it formally hosts 2,500 to 3,000 Syrians displaced by violence, UNHCR estimates approximately 10,000 displaced Syrians are in Jordan. In February 2012, Jordan government sources stated that approximately 73,000 Syrians have entered Jordan through border crossings.

Journalists and bloggers have been subject to harm, including arrest, prolonged detention, and death. Reports also indicate that medical doctors providing treatment to wounded members of the opposition have been arrested. The campaign group Avaaz, which has been monitoring attacks on medical workers, recorded more than 250 arrests between March and October 2011. This has led to the establishment of clandestine makeshift clinics in mosques and basements of homes. According to the UN General Assembly's Conflict-related sexual violence: report of the Secretary-General, published in January 2012, reports of conflict-related sexual violence from both Syrian security forces and anti-government armed groups also have surfaced.

International humanitarian organizations face significant obstacles to gaining access to Syrian cities such as Homs and Hama that are crippled by the brutality and violence. As a result, they cannot assure humanitarian assistance to citizens in need of emergency relief, including medical care, food, and other supplies.

Given extraordinary and temporary conditions on the ground in Syria, Syrian nationals in the United States would face serious danger and threats were they to return to Syria.

Based upon this review, and after consultation with appropriate Government agencies, the Secretary finds that:

Syrian nationals cannot return to Syria in safety due to extraordinary and temporary conditions. See section 244(b)(1)(C) of the Act, 8 U.S.C. 1254a(b)(1)(C);

It is not contrary to the national interest of the United States to permit Syrian nationals (and persons without nationality who last habitually resided in Syria) who meet the eligibility requirements of TPS to remain in the United States temporarily. See section 244(b)(1)(C), 8 U.S.C. 1254a(b)(1)(C);

The designation of Syria for TPS should be for an 18-month period from March 29, 2012 through September 30, 2013. See section 244(b)(2) of the Act, 8 U.S.C. 1254a(b)(2)…

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2. El Salvador

On January 11, 2012, the Department of Homeland Security ("DHS") announced the extension of the designation of El Salvador for TPS for 18 months from March 9, 2012 through September 9, 2013. 77 Fed. Reg. 1710 (Jan. 11, 2012). The extension was based on the determination that "there continues to be a substantial, but temporary, disruption of living conditions in El Salvador resulting from the series of earthquake that struck the country in 2001, and El Salvador remains unable, temporarily, to adequately handle the return of its nationals." *Id*. at 1711.

3. Somalia

On May 1, 2012, the Secretary of Homeland Security announced that she had simultaneously extended Somalia's designation for TPS and redesignated Somalia for TPS for a period of 18 months, from September 18, 2012 through March 17, 2014. 77 Fed. Reg. 25,723 (May 1, 2012). See *Digest 1991-98* at 245 for discussion of the original designation of Somalia for TPS on September 16, 1991. Excerpts below from the Federal Register notice announcing the extension and redesignation explain the basis for the action.

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Over the past year, the Department of Homeland Security (DHS) and the Department of State (DOS) have continued to review conditions in Somalia. Based on this review and after consulting with DOS, the Secretary has determined that an 18-month extension is warranted because the armed conflict is ongoing, and the extraordinary and temporary conditions that prompted the 2001 redesignation persist. The Secretary has further determined that the conditions have not only persisted, but have deteriorated in Somalia, supporting redesignating Somalia for TPS under section 244(b)(1)(A) and (C) of the Act and changing the "continuous residence" and "continuous physical presence" dates.

Two decades of conflict in Somalia and the country's most severe drought in 60 years have led to what has been referred to as the worst humanitarian crisis in the world. During this reporting period of 2010 and 2011, the number of armed groups involved on both sides of the conflict increased and the areas of intense conflict expanded. A dramatic upsurge in violence and severe drought were related factors contributing to famine experienced by six regions in south-central Somalia during 2011. All these conditions led to a rise in civilian deaths and population displacement, and left more than half the population in need of humanitarian assistance. Distribution of humanitarian aid increased significantly during 2011 and the international

community has doubled its pledge for humanitarian aid to Somalia for 2012. However, the delivery of humanitarian aid continues to be impeded by numerous factors, including piracy off the coast of Somalia, difficulty accessing areas affected by seasonal flooding, general insecurity, and most notably threats to aid workers and restrictions on the presence and work of humanitarian agencies.

Conflict between the Transitional Federal Government (TFG) and allied forces on one side and insurgent militias (including al-Shabaab) on the other continued to result in high levels of civilian casualties and population displacement. In early 2010, most of the country was in the hands of Islamist insurgents, with the TFG supported by the African Union Mission in Somalia (AMISOM) controlling only a few blocks of Mogadishu. Human Rights Watch (HRW) reported continual fighting between militant Islamist groups and the TFG raging in Mogadishu (Somalia's capital) throughout 2010, with all parties conducting random attacks causing high civilian casualties. HRW further reported that opposition fighters deployed unlawfully in densely populated civilian neighborhoods and at times used civilians as "shields" to fire mortars at TFG and AMISOM. These attacks were conducted so indiscriminately that they frequently destroyed civilian homes, but rarely struck military targets. According to the United Nations (UN) Secretary-General, by early November 2011, the TFG and AMISOM were present across almost all 16 districts of Mogadishu, but many districts remained insecure and terrorist attacks by al-Shabaab occurred almost daily.

During 2010 and 2011, the conflict intensified outside of Mogadishu. The UN Security Council reported that "the relatively stable northern regions of Puntland and Somaliland have suffered increasing spillover from the conflict to the south in the form of targeted killings and bombings." In late 2011, Kenya and Ethiopia provided assistance to the TFG and deployed troops into the border areas those countries share with Somalia to fight al-Shabaab.

An escalation in fighting contributed to high numbers of civilian casualties. An estimated 2,200 civilians were killed in 2010. Around 1,400 civilians were killed in the first half of 2011. Between January and July 2011 some 6,543 individuals were admitted to hospitals in Mogadishu with "weapon-related injuries." In addition to being caught in the middle of fighting, civilians were also targeted by armed groups. According to an August 2011 HRW report, all forces involved in the fighting in Mogadishu "have been responsible for serious violations of international humanitarian law * * * [including] indiscriminate attacks, extrajudicial killings, arbitrary arrests and detention, and unlawful forced recruitment" (including forced recruitment of children by al-Shabaab).

Worsening conditions, famine, and conflict led to the displacement of many people within and outside Somalia, with dire consequences for the health and safety of those populations. By the end of 2011, there were an estimated 1.5 million internally displaced people (IDP) within Somalia. Approximately 470,000 Somalis fled to IDP camps at or near Mogadishu. Makeshift IDP camps provided little access to humanitarian aid and placed IDPs at risk of harassment by local militia groups. In December 2011, the UN news agency Integrated Regional Information Networks reported a sharp rise in the number of rapes reported in IDP camps.

The number of Somalis fleeing to neighboring countries drastically increased. The Office of the UN High Commissioner for Refugees (UNHCR) reported that in 2011 new Somali refugee arrivals in neighboring countries increased to 286,487, bringing the total number of Somali refugees in the region to 944,692 as of November 2011. Approximately 1,500 refugees per day crossed the border from Somalia into Ethiopia and Kenya at the peak of the famine. UNHCR

expressed alarm at security incidents targeting the refugee complex in Kenya, where four targeted attacks took place between October and December 2011, including the kidnapping of three aid workers.

Conflict, displacement, and factors related to food insecurity--including severe drought, rising food prices, and restrictions on humanitarian aid--were at the root of the ongoing humanitarian crisis in Somalia during 2010 and 2011. In 2010, Amnesty International reported that the threat of piracy, insecurity, restrictions on movement and operations of aid agencies, and corruption were factors that hampered delivery of humanitarian aid to populations in need.

In July 2011 the UN declared a state of famine in parts of southern Somalia. According to the UN Office for the Coordination of Humanitarian Affairs (OCHA), by the second half of 2011, tens of thousands had died from famine. In August 2011, OCHA reported that "Somalia is currently facing the most serious food and nutrition crisis in the world in terms of both scale and severity." During this reporting period of 2010 and 2011, Somalia had the highest malnutrition rates in the world. According to the UN Food Security and Nutrition Analysis Unit, 450,000 children were acutely malnourished throughout the country. Only 30 percent of Somalis had access to safe water, the lowest rate globally. Furthermore, food prices had drastically increased in 2011. Local cereal prices in the south had increased 270 percent in some areas. Additionally, local food shortages, an increase in global oil and food prices, and piracy had contributed to an average increase of 29 percent on all imported commodities. By the end of 2011, the UN reported that an estimated four million Somalis were in urgent need of food aid, humanitarian aid, and other assistance--more than half the country's population; three million of those were in crisis, and 250,000 were suffering from famine and were at risk of starvation.

Despite the humanitarian crisis, al-Shabaab blocked aid distribution. TFG troops reportedly complicated aid distribution by stealing aid. Reports described blanket prohibition on humanitarian aid in al-Shabaab-controlled areas; and in late November 2011, al-Shabaab announced a ban on the operations of 16 relief organizations, including the UN Children's Fund, the World Health Organization and several UN agencies inside Somalia. This ban created concerns about renewed food insecurity and severe malnutrition. It also endangers the ability of Somali people in such areas to recover from the famine, rebuild community resilience, and build reserves for future adverse weather events.

Somalia currently does not have a national government capable of providing a minimum level of human security and law and order for its citizens, and public security is unstable in many parts of Somalia. The TFG has little or no presence outside of Mogadishu, and has limited capacity to provide normal government services in the areas it does control. The TFG's capacity to process, accommodate, and provide assistance to returnees is extremely limited. Somalia faces an uncertain political future as the TFG's mandate is scheduled to end in August 2012.

Based upon this review and after consultation with appropriate Government agencies, the Secretary finds that:

The conditions that prompted the September 4, 2001 redesignation of Somalia for TPS continue to be met. See section 244(b)(3)(A) and (C) of the Act, 8 U.S.C. 1254a(b)(3)(A) and (C).

There continues to be an ongoing armed conflict and extraordinary and temporary conditions in Somalia that prevent Somali nationals from returning to Somalia in safety. See section 244(b)(1)(A) and (C) of the Act, 8 U.S.C. 1254a(b)(1)(A) and (C).

It is not contrary to the national interest of the United States to permit Somalis (and persons who have no nationality who last habitually resided in Somalia) who meet the eligibility requirements of TPS to remain in the United States temporarily. See section 244(b)(1)(C) of the Act, 8 U.S.C. 1254a(b)(1)(C).

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4. Haiti

On October 1, 2012, DHS announced the extension of the designation of Haiti for TPS for 18 months from January 23, 2013 through July 22, 2014. 77 Fed. Reg. 59,943 (Oct. 1, 2012). The extension was based on the determination that "[t]here continue to be extraordinary and temporary conditions in Haiti resulting from the devastating effects of the January 2010 earthquake that prevent Haitians from returning to their country in safety" *Id*. at 1711. See *Digest 2010* at 10-11 discussing the initial designation of Haiti for TPS in 2010. See *Digest 2011* at 6-7 discussing the redesignation of Haiti in 2011.

Cross References

Syria, **Chapter 6.A.3.c.**, **Chapter 9.B.1.**, **Chapter 16.A.1., Chapter 17.B.1.**
Constitutionality of state laws concerning immigration, **Chapter 5.A.**
Women and children: right to nationality, **Chapter 6.B.2.b.**
Nationality in Libya claims cases, **Chapter 8.C.1.**
Diplomatic relations, **Chapter 9.A.**
Executive authority over passport issuance, **Chapter 9.C.**
Atrocities Prevention, **Chapter 17.C.1.**

Chapter 2

Consular and Judicial Assistance and Related Issues

A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE

1. Uniform Law Commission

On September 12, 2012, U.S. Department of State Legal Adviser Harold H. Koh sent a letter to the Uniform Law Commission ("ULC") expressing support for the ULC's work on a uniform state law on consular notification requirements. Set forth below is the body of Mr. Koh's letter to John A. Sebert, Executive Director of the ULC, and Grant Callow, Chair of the ULC's Study Committee on Implementation of Consular Notification Requirements. The letter is available at *www.state.gov/s/l/c8183.htm*. Further information on the ULC's work on a uniform state law on consular notification is available on its website at *www.uniformlaws.org/Committee.aspx?title=Article%2036%20of%20the%20Vienna%20Convention%20on%20Consular%20Relations*.

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I write to thank you and the Uniform Law Commission (ULC) for the work of the Study Committee on Implementation of Consular Notification Requirements and to express our strong support for a uniform law on this topic. The Department of State has long worked through a variety of means to raise domestic awareness and understanding of our international obligations to provide consular notification and access (CNA) in cases in which foreign nationals are arrested or detained in the United States, and we consider the ULC's work on this issue to be an invaluable contribution to this effort.

The consular notification and access rules codified in Article 36 of the Vienna Convention have been the law of the land for over forty years, when the United States ratified the Vienna Convention, and they are obligations with which federal, state, and local government authorities must comply. In this regard, the Vienna Convention and the consular notification and access rules found in many of our bilateral consular conventions are rather exceptional, in that it is often not the federal government but individual law enforcement officers in state and local jurisdictions across the country who are implementing these rules in actual cases every day.

While we believe that generally our law enforcement officers do a good job of complying, we know that we do not have a perfect track record. Non-compliance is especially likely at the state and local levels, and this is largely attributable to a lack of awareness of the obligations. At the federal level, thanks to federal regulations, training, and written guidance,

federal authorities are more likely to be aware of and understand their obligations. Uniform state legislation would play a similar role in informing state and local law enforcement both of what their CNA obligations are and how best to comply with them.

Again, we sincerely appreciate the work of the Study Committee to date, and we would welcome the referral of this issue to a drafting committee. The Department stands ready to assist the ULC as this effort moves forward.

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2. *Avena* Implementation and Related Issues

a. Legislation

In 2012, the U.S. Senate continued to consider legislation that would facilitate compliance with the consular notification and access provisions of the Vienna Convention on Consular Relations ("VCCR") and comparable bilateral agreements. Much of the text of the bill introduced in 2011 by U.S. Senator Patrick Leahy entitled the "Consular Notification Compliance Act," or CNCA, was incorporated into section 7090 of the State, Foreign Operations, and Related Agencies Appropriations Act, Fiscal Year 2013 (S. 3241), as reported by the Senate Appropriations Committee. The Senate Appropriations Committee's Report on the bill noted the key differences from the CNCA text, namely its omission of Section 3 of the CNCA, "which set forth practical guidance for compliance with U.S. consular notification and access obligations." The Committee explained that it wanted to "encourage the work already being done by the Judicial Conference's Committee on Rules of Practice and Procedure and the Uniform Law Commission to facilitate compliance with the Vienna Convention by Federal, State, and local officials." Report 112-172, to accompany S.3241 at 68-69 (May 24, 2012), available at *www.gpo.gov/fdsys/pkg/CRPT-112srpt172/pdf/CRPT-112srpt172.pdf*.

For background on efforts to facilitate compliance with the VCCR, as well as the ruling of the International Court of Justice ("ICJ") in the *Case Concerning Avena and Other Mexican Nationals (Mex. v. US.),* 2004 I.C.J. 12 (Mar. 31) ("*Avena*"), see *Digest 2004* at 37-43; *Digest 2005* at 29-30; *Digest 2007* at 73-77; *Digest 2008* at 35, 153, 175-215, *Digest 2011* at 11-23. For more information on the State Department's outreach efforts to members of local law enforcement to ensure their awareness of consular notification requirements, see the website of the Bureau of Consular Affairs at *http://travel.state.gov/law/consular/consular_753.html*.

b. State court actions to comply with Avena

On September 19, 2012, the Nevada Supreme Court reversed the denial of a petition for post-conviction relief on a writ of habeas corpus for one of the Mexican nationals whose sentence to death was at issue in *Avena*. In *Gutierrez v. Nevada*, the Nevada Supreme court remanded the case of Carlos Gutierrez, finding that he "arguably suffered actual prejudice due to [a] lack of consular assistance." The court concluded that Carlos Gutierrez was

entitled to an evidentiary hearing "regarding his ability to overcome the procedural bars to further consideration of his death sentence." Excerpts from the court's opinion appear below. The full text of the opinion is available at *www.state.gov/s/l/c8183.htm*.

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Gutierrez's death sentence has been addressed in two other, independent proceedings: (1) in *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)* (*Avena*), 2004 I.C.J. 12 (March 31), the International Court of Justice (ICJ) held that the United States violated Article 36(1)(b) of the Vienna Convention on Consular Relations, Dec. 14, 1969, 21 U.S.T. 77, by failing to inform Gutierrez of his right to consular assistance in defending his capital murder charge, id. at 51; and (2) in *State v. Gonzalez*, Case No. CR96-0562 (Nev. Second Jud. Dist. Ct.), the interpreter for the three-judge panel that sentenced Gutierrez to death was convicted of perjury for having falsified his credentials at Gutierrez's death penalty hearing.

Avena addressed the convictions and sentences of 51 Mexican nationals, of whom Gutierrez is one. On its face, "[t]he decision in *Avena* . . . obligates the United States 'to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals,' 'with a view to ascertaining' whether the failure to provide proper notice to consular officials 'caused actual prejudice to the defendant in the process of administration of criminal justice.'" *Medellin v. Texas* (*Medellin I*), 552 U.S. 491, 536 (2008) (Stevens, J., concurring) (third alteration in original) (citation omitted) (quoting *Avena*, 2004 I.C.J. at ¶153(9); id. at ¶ 121).

Avena does not obligate the states to subordinate their postconviction review procedures to the ICJ ruling. Thus, the Supreme Court has rejected post-conviction claims similar to Gutierrez's by two other *Avena* defendants, Humberto Leal Garcia and Jose Ernesto Medellin, holding that "neither the *Avena* decision nor the President's Memorandum purporting to implement that decision constituted directly enforceable federal law," *Leal Garcia v. Texas*, 564 U.S. „ 131 S. Ct. 2866, 2867 (2011) (5-4 decision), to which state procedural default rules must yield. *Medellin I*, 552 U.S. at 498-99. Nonetheless, in declining to stay Leal Garcia's and Medellin's executions, the Supreme Court noted that neither had shown actual prejudice to a constitutional right due to lack of timely consular access. *Medellin v. Texas* (*Medellin II*), 554 U.S. 759, 760 (2008) ("[t]he beginning premise for any stay [of execution] . . . must be that petitioner's confession was obtained unlawfully," and thus that the petitioner was "prejudiced by his lack of consular access"); *Leal Garcia*, 564 U.S. at , 131 S. Ct. at 2868 (noting that, in supporting Leal Garcia's application for a stay of execution, "the United States studiously refuses to argue that Leal was prejudiced by the Vienna Convention violation," and that "the District Court found that any violation of the Vienna Convention would have been harmless" (citing *Leal v. Quarterman*, No. SA-07-CA-214-RF, 2007 WL 4521519, at *7 (W.D. Tex. Dec. 17, 2007), *vacated in part sub nom. Leal Garcia v. Quarterman*, 573 F.3d 214, 224-225 (2009))). And while, without an implementing mandate from Congress, state procedural default rules do not have to yield to *Avena*, they may yield, if actual prejudice can be shown. See *Medellin I*, 552 U.S. at 533, 536-37 & n.4 (Stevens, J., concurring) (discussing *Torres v. State*, No. PCD-04-442, 2004 WL 3711623 (Okla. Crim. App. May 13, 2004), where the State of Oklahoma "unhesitatingly assumed" the burden of complying with *Avena* by ordering "an evidentiary hearing on whether Torres had been prejudiced by the lack of consular notification"; Justice Stevens rightly described this burden as "minimal" when balanced against the United

States' "plainly compelling interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law" (internal quotation marks omitted)).

Unlike Medellin and Leal Garcia but like Torres, Gutierrez arguably suffered actual prejudice due to the lack of consular assistance. The Mexican consulate in Sacramento (the closest to Reno, where Gutierrez's death penalty hearing occurred) has provided an affidavit swearing that it would have assisted Gutierrez had it been timely notified. Although the form its assistance would have taken remains unclear—a deficiency an evidentiary hearing may rectify—cases recognize that, "[in addition to providing a 'cultural bridge' between the foreign detainee and the American legal system, the consulate may …'conduct its own investigations, file amicus briefs and even intervene directly in a proceeding if it deems that necessary." *Sandoval v. United States*, 574 F.3d 847, 850 (7th Cir. 2009) (quoting *Osagiede v. United States*, 543 F.3d 399, 403 (7th Cir. 2008)).

It is apparent that Gutierrez needed help navigating the American criminal system…

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B. CHILDREN

1. Adoption

a. *Russia*

On November 1, 2012, the bilateral agreement between the United States and Russia "Regarding Cooperation in Adoption of Children" entered into force. See *Digest 2011* at 32-36 for a discussion of the background and signing of the agreement in 2011. The Russian Duma approved the agreement on July 10, 2012 and the Russian Federation Council approved the agreement on July 18, 2012. Russian President Vladimir Putin signed the agreement into law on July 28, 2012. See October 18, 2013 media note, available at *www.state.gov/r/pa/prs/ps/2012/10/199322.htm*. Details of the agreement, including the full text, are available at *adoption.state.gov*.[*]

b. *Report on Intercountry Adoption*

In January 2013, the State Department released its Annual Adoption Report to Congress. The report is available at *www.adoption.state.gov/content/pdf/fy2012_annual_report.pdf*. The report includes several tables showing numbers of intercountry adoptions by country

[*] Editor's note: On December 28, 2012, President Putin signed a law that took effect on January 1, 2013 that banned the adoption of Russian children by U.S. citizens, barred adoption service providers from assisting U.S. citizens in adopting Russian children, and required termination of the U.S.-Russia Adoption Agreement.
See Bureau of Consular Affairs January 24, 2013 alert regarding Russia, available at *http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=alerts&alert_notice_file=russia_10*. Article 17(5) of the U.S.-Russia Adoption Agreement provides that the agreement remains in force until one year from the date that one of the Parties informs the other of its intention to terminate.

during fiscal year 2012, average times to complete adoptions, and median fees charged by adoption service providers.

c. Intercountry Adoption Universal Accreditation Act ("UAA")

In December 2012, the Senate passed the Intercountry Adoption Universal Accreditation Act of 2012 ("UAA").[**] The UAA extends the safeguards provided by accreditation and oversight of adoption service providers ("ASPs") established in the Intercountry Adoption Act of 2000 ("IAA") and the IAA's enforcement mechanisms to U.S. adoptive parents, foreign children, and birth families involved in intercountry adoption that do not fall within the scope of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption done at The Hague on May 29, 1993 ("Convention"). Specifically, the UAA requires persons providing adoption services for intercountry adoptions from countries not party to the Convention to comply with the requirements of title II of the IAA and subjects such persons to the enforcement provisions of section 404 of the IAA for civil or criminal violations of title II.

Since the Convention entered into force with respect to the United States on April 1, 2008, two distinct processing tracks have existed for intercountry adoption under U.S. immigration law: the pre-existing "orphan" process and the process established by the IAA and the regulations that implement the IAA for children adopted under the Convention. While accreditation is a key requirement in Convention cases, prior to the UAA, it was not required to provide adoption services in orphan cases.

When UAA takes effect, any agency or person providing adoption services in Convention or orphan cases must be accredited or approved by a Department of State designated accrediting entity or be a supervised or exempted provider. Public domestic authorities may also provide adoptive services. The accrediting entity monitors the service provider's compliance with the applicable standards, investigates and responds to complaints, and takes adverse actions. Accredited and approved ASPs must substantially comply with the standards in 22 CFR Part 96, including standards concerning ethical practices and responsibilities, professional qualification and training for employees, information and fee disclosure, licensing and corporate governance, financial and risk management, responses to complaints, and record keeping.

2. Abduction

a. 2012 Hague Abduction Convention Compliance Report

In April 2012, the Department of State submitted to Congress its Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction ("Convention") pursuant to 42 U.S.C. § 11611. The report evaluated compliance by treaty partner countries with the Convention. The Convention

[**] Editor's note: The House passed the bill January 1, 2013, and the President signed the bill January 14, 2013. The UAA became Pub. L. 112-276.

provides a legal framework for securing the prompt return of wrongfully removed or retained children to the country of their habitual residence where a competent court can make decisions on issues of custody and the child's "best interests." The compliance report identifies the Department's concerns about those countries in which implementation of the Convention is incomplete or in which a particular country's executive, judicial, or law enforcement authorities do not appropriately undertake their obligations under the Convention. The 2012 report, covering the period January 1, 2011 through December 31, 2011, identified Costa Rica, Guatemala, and St. Kitts and Nevis as "Not Compliant with the Convention" and named Argentina, Brazil, Ecuador, Panama, and the Bahamas as states demonstrating "Patterns of Noncompliance." The report is available at *http://travel.state.gov/pdf/2012HagueComplianceReport.pdf*.

b. Entry into force of Hague Convention with additional U.S. partners

On May 1, 2012, the 1980 Hague Convention on the Civil Aspects of International Child Abduction entered into force between the United States and Singapore. On December 1, 2012, the Hague Convention entered into force between the United States and Morocco. Including Singapore and Morocco, the United States partners with 70 countries under the Convention, which establishes a formalized diplomatic channel through which partner countries cooperate on international parental child abduction. The Convention establishes an internationally recognized legal framework to resolve parental abduction issues and addresses where custody cases should be heard. See State Department May 3, 2012 media note (regarding Singapore), available at *www.state.gov/r/pa/prs/ps/2012/05/189236.htm* and November 29, 2012 media note (regarding Morocco), available at *www.state.gov/r/pa/prs/ps/2012/11/201224.htm*.

c. Hague Abduction Convention Litigation

See Chapter 15.C. for discussion of litigation relating to the Hague Convention in 2012 in which the United States participated as amicus curiae.

Cross References

Alien Tort Claims Act litigation, **Chapter 5.B.**
Protecting power agreement in Syria, **Chapter 9.A.**
Hague Convention on Civil Aspects of International Child Abduction, **Chapter 15.C.**

Chapter 3

International Criminal Law

A. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

1. U.S.-Bermuda Mutual Legal Assistance Treaty

On April 12, 2012, the Treaty between the Government of the United States of America and the Government of Bermuda relating to Mutual Legal Assistance in Criminal Matters, signed at Hamilton on January 12, 2009, entered into force. TIAS 12-412. See *Digest 2010* at 38-39; *Digest 2011* at 39.

2. Extraditions pursuant to the U.S. extradition treaty with the United Kingdom

On October 5, 2012, judicial authorities in the United Kingdom approved the extraditions of Abu Hamza al-Masri, Abel Abdul Bary, Khalid al-Fawwaz, Babar Ahmad, and Syed Talha Ahsan to the United States to face prosecution in U.S. courts on terrorism charges. Further information on the charges against Hamza, Bary, and Fawwaz is available at *www.justice.gov/usao/nys/pressreleases/October12/HamzaetalExtradition.html*. Information on the charges against Ahmad and Ahsan is available at *www.fbi.gov/newhaven/press-releases/2012/two-extradited-british-nationals-to-appear-in-new-haven-federal-court-to-face-terrorism-related-charges*. The judicial determination in the UK followed a decision by the European Court of Human Rights ("ECHR"). The U.S. Embassy in London issued a press release providing background on these extraditions, excerpted below and available at *http://london.usembassy.gov/ukpapress122.html*.

> These extraditions mark the end of a lengthy process of litigation through the UK courts and the ECHR. The extradition request for Khalid al-Fawwaz was submitted in 1998. The request for Adel Abdul Bary was submitted in 1999. The extradition requests for Abu Hamza al-Masri and Babar Ahmad were submitted in 2004 and the request for Syed Talha Ahsan was submitted in 2006.
>
> The U.S. Government agrees with the ECHR's findings that the conditions of confinement in U.S. prisons—including in maximum security facilities—do not violate

European standards. In fact, the Court found that services and activities provided in U.S. prisons surpass what is available in most European prisons.

3. Asset Sharing Agreement with the Dominican Republic

On April 19, 2012, the United States and the Dominican Republic signed an agreement on the "Sharing of Confiscated Proceeds and Instrumentalities of Crimes." The Agreement references the UN Convention against Transnational Organized Crime, the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and the International Convention for the Suppression of the Financing of Terrorism. The Agreement establishes a process whereby one party may share assets it has confiscated through cooperation provided by the other party, either at the other party's request or on its own initiative. The Agreement entered into force upon signature. The full text of the Agreement is available at *www.state.gov/documents/organization/197131.pdf*. The United States has entered into similar asset sharing agreements with a number of other countries, the most recent prior to the agreement with the Dominican Republic being an agreement with the Republic of Austria, signed in 2010 and available at *www.state.gov/documents/organization/161800.pdf*.

4. Extradition of Fugitive Alleging Fear of Torture: *Trinidad y Garcia*

On June 8, 2012, the U.S. Court of Appeals for the Ninth Circuit issued its en banc decision in *Trinidad y Garcia v. Thomas.* 683 F.3d 952 (9th Cir. 2012). Trinidad argued that his extradition to the Philippines would violate the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention"). A majority of the Court of Appeals for the Ninth Circuit, sitting en banc, determined that the case should be remanded to the district court for the United States to file a declaration that it had complied with the Torture Convention in determining that Trinidad should be extradited. The en banc court held that once the District Court receives a declaration signed by the Secretary or a properly designated senior official, "the court's inquiry shall have reached its end and Trinidad y Garcia's liberty interest shall be fully vindicated." See *Trinidad*, 683 F.3d at 957. For further background and previous developments in the case (which was formerly captioned *Trinidad y Garcia v. Benov*), see *Digest 2008* at 57–64, *Digest 2009* at 50–51, *Digest 2010* at 45-49, and *Digest 2011* at 39-47. Trinidad filed a petition for a writ of certiorari in the U.S. Supreme Court on October 4, 2012. The United States filed its brief in opposition in November 2012. The U.S. opposition brief, excerpted below (with footnotes and citations to the record in the case omitted), is available in full at *www.state.gov/s/l/c8183.htm*.[*]

[*] Editor's note: On January 7, 2013, the U.S. Supreme Court denied certiorari.

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* * * *

Petitioner contends that the Ninth Circuit's decision violates the Suspension Clause of the Constitution because the court did not provide for judicial review of the substance of the Secretary of State's rejection of a Torture Convention claim. He further argues that the court incorrectly concluded that *Munaf v. Geren*, 553 U.S. 674 (2008), forecloses his substantive due process claim. Those contentions lack merit and do not warrant further review.

Neither the Torture Convention nor any implementing provisions provide for judicial review of the Secretary of State's determination that a fugitive will not more likely than not be tortured if surrendered for extradition. And the longstanding rule of non-inquiry, as well as separation of powers considerations, preclude judicial review of a fugitive's claim that, if extradited to face foreign charges, he will be mistreated at the hands of a foreign government. The court of appeals' preclusion of such a claim thus did not violate the Suspension Clause. Similarly, this Court in *Munaf* rejected a substantive due process claim where the Executive Branch concludes that an individual is not likely to suffer torture upon surrender to a foreign state, noting that "[t]he Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." 553 U.S. at 702.

Petitioner argues that review is warranted because the Ninth Circuit's jurisdictional holding conflicts with holdings of the D.C. and Fourth Circuits that have found no jurisdiction to review a Torture Convention claim outside the immigration context. But that narrow disagreement does not warrant review in this case because it does not produce substantively different results in the extradition context and because petitioner received more favorable treatment below than he would have in other circuits. Indeed, petitioner received more judicial review than is warranted. He can identify no court that would give him greater review of his Torture Convention claim than did the court below.

Finally, petitioner's claims that, if left unreviewed, the decision below will lead to an increased likelihood of torture upon extradition is misguided. The United States has a comprehensive and searching process for determining whether a fugitive would face torture if extradited. That process fully draws upon the foreign-affairs resources of the Executive Branch to protect against the prospect of torture. Judicial intervention into that process is neither necessary nor appropriate. Indeed, it is likely to harm important foreign-relations interests of the United States by interposing substantial delays in effectuating bilateral extradition treaties. Rather than protract the already-prolonged litigation in this case, this Court should deny further review.

1. Petitioner contends that this Court's review is required because, in his view, the Suspension Clause of the Constitution requires substantive review of the Secretary of State's determination concerning petitioner's likely treatment after extradition. That claim rests on a fundamentally incorrect understanding of the role of habeas corpus in the extradition context. As a matter of history and practice, the role of a habeas court does not extend to issues concerning the treatment a fugitive will receive in a foreign state. Rather, a habeas court's role is the far more limited one of reviewing the complaint, and the supporting showing, to determine that the request falls within the scope of the treaty and that probable cause supports the complaint. Petitioner had full access to the jurisdiction of the habeas court to contest those issues. Indeed, he

had further access to a second round of habeas review to present his substantive and procedural due process claims. And petitioner obtained habeas review of his claim under the Torture Convention and its implementing statutes and regulations as well. That opportunity more than satisfied the Suspension Clause, and petitioner has no right to review of the substance of the Secretary's determination under the Torture Convention.

The writ of habeas corpus cannot be deemed "suspended" unless the petitioner can show that he would have enjoyed a greater degree of review at some earlier time. Petitioner makes no plausible Suspension Clause argument because at no time has this Court ever held that the treatment a fugitive might receive after extradition is a proper subject of judicial inquiry in habeas proceedings; quite the opposite is true. For example, in *Munaf*, the habeas petitioners contended that a federal court should enjoin their transfer to Iraqi authorities to face trial in Iraqi courts "because their transfer to Iraqi custody is likely to result in torture." 553 U.S. at 700. Relying on principles announced in extradition cases, this Court held that "[s]uch allegations are of course a matter of serious concern, but in the present context that concern is to be addressed by the political branches, not the judiciary." *Ibid*. The Court explained that, even where constitutional rights are concerned, "it is for the political branches, not the Judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments." *Id*. at 700-701.

The *Munaf* Court noted that the Solicitor General had represented that "it is the policy of the United States not to transfer an individual in circumstances where torture is likely to result," 553 U.S. at 702, and that such determinations rely on "the Executive's assessment of the foreign country's legal system and . . . the Executive['s] ability to obtain foreign assurances it considers reliable," *ibid*. (quoting Br. for Federal Parties 47). The Court concluded that "[t]he Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." *Ibid*. "In contrast," the Court explained, "the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is." *Ibid*. The Court rejected the view that the government would be indifferent to that prospect, concluding instead that "the other branches possess significant diplomatic tools and leverage the judiciary lacks." *Id*. at 702-703 (citation omitted).

Munaf built on a longstanding tradition of judicial reluctance to inquire into the treatment a fugitive would face in a foreign legal system if extradited. See, *e.g.*, *Neely v. Henkel*, 180 U.S. 109, 122 (1901). Applying equitable doctrines that "may require a federal court to forgo the exercise of its habeas corpus power," *Munaf*, 553 U.S. at 693 (citation omitted), the Court concluded that, even in the face of allegations of potential mistreatment by a foreign state, "[d]iplomacy," not judicial review, "was the means of addressing the petitioner's concerns," *id*. at 701. Thus, as a matter of traditional practice, and reaffirmed in *Munaf*, no valid claim exists that a habeas court's refusal to second-guess the Secretary of State's Torture-Convention determination violates the Suspension Clause.

Congress did not alter that historic rule by enacting the FARR Act. Congress enacted Section 2242 of the FARR Act to implement the United States' obligations in Article 3 of the Torture Convention. Those treaty obligations are not self-executing and do not themselves provide a basis for judicial review. …

* * * *

2. Petitioner further contends that this Court should review the court of appeals' determination that petitioner's "substantive due process claim is foreclosed by *Munaf*." According to petitioner, "[t]he *Munaf* Court never discussed, much less decided, a substantive due process claim, because the *Munaf* petitioners only asserted procedural due process challenges." That claim is incorrect. …

* * * *

In any event, petitioner's substantive due process claim—that he has a protected interest in freedom from extradition "to a country where he would face the prospect of torture"—fails as an original matter. Substantive due process "protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997) (citation omitted). The "deeply rooted" principle in history and tradition is that, in extradition cases, the Executive Branch has the exclusive means and competence to assess "whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is." *Munaf*, 553 U.S. at 702; see *Neely*, 180 U.S. at 122. The Secretary of State will not surrender petitioner absent a determination that it is not more likely than not that he would be tortured if extradited. Here, as in *Munaf*, petitioner does not face a "more extreme case" in which the government proposes to extradite him even if it is likely that he will be tortured. 553 U.S. at 702. His substantive due process claim therefore lacks merit.

3. Petitioner contends that this Court should grant certiorari to address two purported circuit splits: one concerning jurisdiction to review Torture Convention claims and the second concerning the scope of review of the Secretary's surrender decision. Petitioner does not stand to benefit from review of his claim of a jurisdictional split, and no court of appeals has granted a greater degree of review than petitioner received here. Indeed, if anything, petitioner received more judicial review than he is entitled to.

* * * *

4. Finally, petitioner contends that this Court's review is warranted because, in his view, absent judicial oversight of the Secretary of State's implementation of the Torture Convention, individuals facing extradition will experience an increased likelihood of torture. He claims that the separation of powers mandates judicial review in order to maintain proper checks and balances. Petitioner's claims are unfounded. Given that courts have never played a role in reviewing a fugitive's likely treatment by a foreign state if surrendered on an extradition warrant, petitioner's suggestion that the decision below "abdicate[s]" the role of the courts (Pet. 12) is misguided. Indeed, judicial review of the treatment that a fugitive is likely to receive in a foreign state—after the Secretary of State has determined that torture is not more likely than not to occur—itself would threaten to disrupt the proper balance between the branches by requiring the judiciary to pronounce foreign-policy judgments that are the province of the political branches. *Munaf*, 553 U.S. at 702.

* * * *

Significantly, the government is, as this Court recognized in *Munaf*, not "oblivious" to

concerns about possible torture. 553 U.S. at 702. Under the regulations that implement the FARR Act, "[i]n each case where allegations relating to torture are made," the "appropriate policy and legal offices" in the State Department "analyze information relevant to the case in preparing a recommendation to the Secretary as to whether to sign the surrender warrant." 22 C.F.R. 95.3. A State Department declaration filed in this case elaborated that State Department offices such as the "Bureau of Democracy, Human Rights, and Labor, which drafts the U.S. Government's annual Human Rights Reports," as well as regional offices and bureaus, which have direct knowledge of country conditions, are integral to the State Department's analysis. The Department also examines materials submitted by the fugitive as well as by others submitted on the fugitive's behalf. That process took place in this case. Based on the State Department's analysis, "the Secretary may decide to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions." 22 C.F.R. 95.3(b).

The State Department declaration in this case unequivocally represents that "[t]he Secretary will not approve an extradition whenever she determines that it is more likely than not that the particular fugitive will be tortured in the country requesting extradition." On a case-by-case basis, the Secretary may determine that obtaining specific assurances from the requesting country concerning the humanitarian treatment of the fugitive will sufficiently mitigate any concerns about possible torture. In considering the efficacy of assurances, State Department officials, "including the Secretary," consider the political and legal context in the requesting state and may also make judgments about "the requesting State's incentives and capacities to fulfill its assurances to the United States." *Id*. at 13. In appropriate cases, the State Department monitors or arranges for monitoring of the condition of the fugitive after extradition. *Ibid*. To function effectively, these sensitive processes require confidentiality. See *id*. at 16 ("Consistent with the diplomatic sensitivities that surround the Department's communications with requesting States concerning allegations relating to torture, the Department does not make public its decisions to seek assurances in extradition cases.").

* * * *

These processes confirm that "the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is." *Munaf*, 553 U.S. at 702…. Further review of the decision below, entrusting to the Executive Branch the responsibility to make these sensitive decisions without judicial oversight in the extradition context, is not warranted.

* * * *

5. Challenge to Extradition Prior to Secretary's Determination: *Meza*

In December 2012, the United States filed its brief in the U.S. Supreme Court in opposition to a petition for writ of certiorari brought by Carlos Meza, a Honduran national accused of murder in Honduras, who alleged that he would be tortured if he were extradited. Although a magistrate judge had certified Meza was subject to extradition pursuant to the extradition treaty between the United States and Honduras, the Secretary of State had yet to make her determination of extradition pursuant to the Convention Against Torture at the time

petitioner sought a writ of habeas corpus in district court. The district court denied the petition and the U.S. Court of Appeals for the Eleventh Circuit affirmed, directing that the torture-based claims be dismissed as unripe because the Secretary had not decided to surrender petitioner to Honduras. *Meza v. Holder*, 693 F.3d 1350 (11th Cir. 2012). The U.S. brief in opposition to Meza's petition for certiorari includes a discussion of the Secretary of State's determination process similar to that excerpted above from the U.S. brief in *Trinidad*. Excerpts below from the U.S. brief (with footnotes and citations to the record omitted) include the ripeness argument in the case. The U.S. brief in its entirety is available at *www.state.gov/s/l/c8183.htm*.[**]

* * * *

Petitioner contends that the court of appeals erred in dismissing as unripe his claim that extradition would violate petitioner's rights under the Torture Convention and the FARR Act. The court of appeals correctly held that, if petitioner's humanitarian claim is subject to judicial review at all, that claim would not be ripe until the Secretary of State decides to extradite him to Honduras, something which has not yet occurred. The court of appeals' ripeness ruling does not conflict with the decisions of this Court or any other court of appeals. And to the extent that petitioner contends that the habeas court should have addressed his Torture-Convention claim as an original matter, that claim lacks merit and is unsupported by authority. No further review is warranted.

1. A claim is not ripe for review "if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' " *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-581 (1985)). The court of appeals correctly applied that settled principle in determining that petitioner's claim under the Torture Convention and the FARR Act would not be ripe "until the Secretary decides to surrender him" for extradition. As the court explained, petitioner's claim rests on the assumption "that the Secretary will surrender him to Honduran officials." But the magistrate judge's determination that petitioner is extraditable does not mean that the Secretary will in fact decide to extradite him. The statute governing extradition procedures vests the Secretary with discretion to surrender a fugitive upon the issuance of an extradition certification. 18 U.S.C. 3186 (providing that the Secretary "*may* order the person" surrendered (emphasis added)). The Secretary may exercise that discretion by "declin[ing] to surrender the [fugitive] on any number of * * * grounds, including but not limited to[] humanitarian and foreign policy considerations." *United States v. Kin-Hong*, 110 F.3d 103, 109 (1st Cir.), stay denied, 520 U.S. 1206 (1997). The State Department regulations enacted pursuant to the FARR Act to implement the United States' obligations under the Torture Convention are to the same effect. They provide that, after considering the information relevant to an allegation that an individual will face torture if extradited, "the Secretary may decide to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions." 22 C.F.R. 95.3(b). The existence of "these different possibilities," as the court of appeals properly recognized, confirms that petitioner's claim is tied to an event that might not occur at all—the Secretary's

[**] Editor's note: On January 14, 2013, the U.S. Supreme Court denied Meza's petition.

decision to surrender him for extradition. Accordingly, the claim was not then (and still is not) ripe.

2. a. Petitioner's only argument directly responding to the court of appeals' ripeness holding contends that, in *Valentine v. United States*, 299 U.S. 5 (1936) and *Neely v. Henkel*, 180 U.S. 109 (1901), this Court reviewed a fugitive's claim that extradition would be unlawful, despite the fact that the Secretary of State had not made an extradition decision. …Petitioner's reliance on *Valentine* and *Neely* is misplaced.

The exact nature of petitioner's argument is unclear. To the extent that petitioner contends that the habeas courts should evaluate the Secretary of State's decision to extradite him notwithstanding his torture allegations, the court of appeals correctly held that the claim is not ripe, as the Secretary has not made an extradition decision. In neither *Valentine* nor *Neely* did the fugitive seek review of the Secretary of State's decision to issue a surrender warrant. In *Valentine* the fugitive challenged the extradition commissioner's jurisdiction under a predecessor to 18 U.S.C. 3184, arguing that the applicable extradition treaty did not allow for the extradition of citizens. *Valentine*, 299 U.S. at 6; see 18 U.S.C. 651 (1934) (authorizing issuance of extradition certification upon showing that evidence is "sufficient to sustain the charge under the provisions of the proper treaty"). That challenge to the extradition commissioner's jurisdiction was ripe, but it also has no bearing on petitioner's challenge to the Secretary's yet-to-be-made decision to surrender him. Similarly, in *Neely*, the fugitive challenged the constitutionality of an earlier predecessor to 18 U.S.C. 3184, arguing that the statute failed to protect "the fundamental guarantees of life, liberty and property." 180 U.S. at 122; see Rev. Stat. § 5270 (1875). That claim, too, was ripe, but also has no bearing on a decision the Secretary has yet to make.

To the extent that petitioner contends that the habeas court should consider his torture claims as an original matter, on collateral review of the extradition magistrate's extradition certification, petitioner's claim is ripe but fails as a matter of law. This Court has limited a habeas court's review of an extradition certification to determining whether the extradition magistrate "had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925). Under the longstanding rule of non-inquiry, review of a fugitive's claim that he will be mistreated if extradited is not available on habeas corpus. As the Court has explained, "[h]abeas corpus has been held not to be a valid means of inquiry into the treatment the [fugitive] is anticipated to receive in the requesting state." *Munaf v. Geren*, 553 U.S. 674, 700 (2008) (citation omitted); see *Neely*, 180 U.S. at 122.

Nothing in the Torture Convention or the United States' implementation of the treaty changes that rule. The FARR Act makes the Secretary of State, not the courts, the competent authority for consideration of torture claims in extradition matters. See FARR Act § 2242, 112 Stat. 2681-822; 22 C.F.R. 95.2-95.4. Thus, any claim that the habeas court should have considered petitioner's torture claims as an original matter fails on the merits, as the district court concluded. The court of appeals understood petitioner's challenge to be directed towards a Torture Convention decision the Secretary of State has not yet made and correctly found such a claim not to be ripe. Its omission to address explicitly why petitioner has no valid claim for original review does not warrant this Court's intervention. That case-specific claim raises no important issue of law, particularly where, as here, it is clear that petitioner has no right to have the habeas court decide a Torture-Convention claim.

* * * *

Finally, to the extent that petitioner seeks a judicial ruling on the merits of his claim, the court of appeals' ripeness holding left open the possibility that petitioner could seek habeas review of petitioner's torture claim after the Secretary issues any surrender warrant. Petitioner has submitted to the State Department the evidence he believes shows he will be tortured or killed if he is extradited. By regulation, the "appropriate policy and legal offices" in the State Department will analyze petitioner's evidence "in preparing a recommendation to the Secretary as to whether or not to sign the surrender warrant." 22 C.F.R. 95.3(a). Based on that recommendation, "the Secretary may decide to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions." 22 C.F.R. 95.3(b). The Secretary could, for instance, decide to surrender petitioner conditioned on any assurances and monitoring she deems appropriate. As this Court has recognized, the State Department is "well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is." *Munaf*, 553 U.S. at 702; see *ibid*. ("The Judiciary is not suited to second-guess such determinations.").

* * * *

6. Universal Jurisdiction

On October 18, 2012, Steven Hill, Counselor for the U.S. Mission to the UN, addressed the UN General Assembly's Sixth Committee (Legal) on the Sixth Committee's ongoing consideration of the topic of universal jurisdiction. Mr. Hill's remarks appear below and are available at *http://usun.state.gov/briefing/statements/199366.htm*.

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* * * *

We greatly appreciate the Sixth Committee's continued interest in this important item. We thank the Secretary-General for his reports, which have usefully summarized the submissions made by States on this topic.

Despite the importance of this issue and its long history as part of international law relating to piracy, basic questions remain about how jurisdiction should be exercised in relation to universal crimes and States' views and practices related to the topic. The submissions made by States to date, the work of the Working Group in this Committee, and the Secretary-General's reports on the issue are extremely useful in helping us to identify differences of opinion among States as well as points of consensus on this issue.

The work undertaken by this committee so far has highlighted numerous issues associated with universal jurisdiction, including the definition of what is meant by "universal jurisdiction," the appropriate scope of the principle, its relationship to treaty-based obligations and to the law of immunity, and the need to ensure that decisions to invoke such a principle are undertaken in an appropriate manner, including in cases where there are other States that may exercise jurisdiction. Questions about the practical application of universal jurisdiction also merit

further examination, such as the circumstances under which and how often it is invoked, whether alternative bases of jurisdiction are relied upon at the same time, and what safeguards are available to prevent inappropriate prosecutions.

The United States continues to analyze the contributions of other states and organizations. We welcome this group's continued consideration of this issue and the input of more states about their own practice and views. We look forward to exploring these issues in as practical a manner as possible.

* * * *

7. Agreements on Preventing and Combating Serious Crime

During 2012, the United States signed or initialed bilateral agreements with Luxembourg, New Zealand, Norway, Iceland, France, Andorra, Liechtenstein, Monaco, San Marino, Singapore, Slovenia, Bulgaria, Japan, and Switzerland on preventing and combating serious crime ("PCSC"). The agreements provide a mechanism for the parties' law enforcement authorities to exchange personal data, including biometric (fingerprint) information, for use in detecting, investigating, and prosecuting terrorists and other criminals. The PCSC agreement with Ireland signed in 2011 entered into force in 2012, as did the agreements signed in 2010 with Austria and Finland. For background, see *Digest 2008* at 80–83, *Digest 2009* at 66, and *Digest 2010* at 57-58. The agreement with Finland is available at *www.state.gov/documents/organization/203064.pdf*. As of the end of 2012, the United States continued to negotiate such data-sharing agreements with other members of the Visa Waiver Program, consistent with a federal statute requiring completion of such agreements with all members of the program.

B. INTERNATIONAL CRIMES

1. Terrorism

a. Country reports on terrorism

On July 31, 2012, the Department of State released the 2011 Country Reports on Terrorism. The annual report is submitted to Congress pursuant to 22 U.S.C. § 2656f, which requires the Department to provide Congress a full and complete annual report on terrorism for those countries and groups meeting the criteria set forth in the legislation. The report is available at *www.state.gov/j/ct/rls/crt/2011*. Daniel Benjamin, State Department Coordinator for Counterterrorism, provided a special briefing on the release of the 2011 Country Reports on Terrorism, available at *www.state.gov/j/ct/rls/rm/2012/195898.htm*.

b. UN General Assembly

On October 8, 2012, Cheryl Saban, U.S. Public Delegate-Designate, addressed the UN General Assembly's Sixth Committee on measures to eliminate international terrorism. In the excerpts below, Ms. Saban reviewed progress at the UN in developing the legal framework to counter terrorism. The remarks are available at *http://usun.state.gov/briefing/statements/198732.htm*.

* * * *

… [W]e recognize the great success of the United Nations, thanks in large part to the work of this Committee, in developing 18 universal instruments that establish a thorough legal framework for combating terrorism. The achievements of the past ten years are noteworthy. We have witnessed a dramatic increase in the number of states who have become party to these important counterterrorism conventions. For example, over the past ten years 170 states have become party to the Terrorist Financing Convention. The international community has also come together to conclude six new counterterrorism instruments, including a new convention on nuclear terrorism and updated instruments which cover new and emerging threats to civil aviation, maritime navigation, and the protection of nuclear material.

The United States recognizes that while the accomplishments of the international community in developing a robust legal counterterrorism regime are significant, there remains much work to be done. The 18 universal counterterrorism instruments are only effective if they are widely ratified and implemented. In this regard, we fully support efforts to promote ratification of these instruments, as well as efforts to promote their implementation. We draw particular attention to the six instruments concluded over the past decade—the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (Nuclear Terrorism Convention), the 2005 Amendment to the Convention on the Physical Protection of Nuclear Material (CPPNM Amendment), the 2005 Protocols to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Protocols), and the 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation and its Protocol. The work of the international community began with the negotiation and conclusion of those instruments. But that work will only be completed when those instruments are widely ratified and fully implemented.

The United States is advancing in its own efforts to ratify these instruments. We have been working closely with the U.S. Congress to pass legislation that would allow the United States to ratify the Nuclear Terrorism Convention, the CPPNM Amendment, and the SUA Protocols. As we undertake efforts to ratify these recent instruments, we urge other states not yet party to do likewise.

And as we move forward with our collective efforts to ratify and implement these instruments, the United States remains willing to work with other states to build upon and enhance the counterterrorism framework. Concerning the Comprehensive Convention on International Terrorism, we recognize that, despite the best efforts of the Ad Hoc Committee Chair and Coordinator, negotiations remain at an impasse on current proposals. We will listen carefully to the statements of other delegates at this session as we continue to grapple with these challenging issues.

* * * *

c. U.S. actions against support for terrorists

(1) U.S. targeted sanctions implementing UN Security Council resolutions

See Chapter 16.A.4.b.

(2) Foreign terrorist organizations

(i) New designations

In 2012 the Department of State announced the Secretary of State's designation of three additional organizations and their associated aliases as Foreign Terrorist Organizations ("FTOs") under § 219 of the Immigration and Nationality Act: Jemmah Anshorut Tauhid ("JAT") (77 Fed. Reg. 14,854 (March 13, 2012)); Abdallah Azzam Brigades ("AAB") (77 Fed. Reg. 31,909 (May 30, 2012)); and the Haqqani Network ("HQN") (77 Fed. Reg. 58,203 (Sept. 19, 2012)). See Chapter 16.A.4.b. for discussion of the simultaneous designation of these entities pursuant to Executive Order 13224.

The Department amended the designation of al-Qa'ida in the Arabian Peninsula to include the new alias, Ansar al-Shari'a ("AAS"). 77 Fed. Reg. 61,046 (Oct. 5, 2012). Likewise, the Department amended the designation of al-Qaida in Iraq ("AQI") twice in 2012 to add new aliases: Islamic State of Iraq (77 Fed. Reg. 4082 (Jan. 26, 2012)); Al-Nusrah Front, Jabhat al-Nusrah, Jabhet al-Nusra, The Victory Front, Al Nusrah Front for the People of the Levant (77 Fed. Reg. 73,732 (Dec. 11, 2012)).

U.S. financial institutions are required to block funds of designated FTOs or their agents within their possession or control; representatives and members of designated FTOs, if they are aliens, are inadmissible to, and in some cases removable from, the United States; and U.S. persons or persons subject to U.S. jurisdiction are subject to criminal prohibitions on knowingly providing "material support or resources" to a designated FTO. 18 U.S.C. § 2339B. See *www.state.gov/j/ct/rls/other/des/123085.htm* for background on the applicable sanctions and other legal consequences of designation as an FTO.

(ii) Reviews of FTO designations and the delisting of MEK

During 2012 the Secretary of State continued to review designations of entities as FTOs consistent with the procedures for reviewing and revoking FTO designations in § 219(a) of the Immigration and Nationality Act, as amended by the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. No. 108-458, 118 Stat. 3638. See *Digest 2005* at 113–16 and *Digest 2008* at 101–3 for additional details on the IRTPA amendments and

review procedures. The Secretary reviewed each FTO individually and determined that the circumstances that were the basis for the designations of the following FTOs have not changed in such a manner as to warrant revocation of the designations and the national security of the United States did not warrant revocation: al-Qaida in Iraq (77 Fed. Reg. 4082 (Jan. 26, 2012)); Aum Shinrikyo (77 Fed. Reg. 4614 (Jan. 30, 2012)); the Islamic Jihad Union (77 Fed. Reg. 11,186 (Feb. 24, 2012)); the Islamic Resistance Movement or Hamas. (77 Fed. Reg. 44,307 (July 27, 2012)); Jaish-e-Mohammed ("JEM") (77 Fed. Reg. 52,783 (Aug. 30, 2012)); al-Qaida in the Arabian Peninsula (77 Fed. Reg. 61,046 (Oct. 6, 2012); Al-Shabaab (77 Fed. Reg. 74,265 (Dec. 13, 2012));

On September 28, 2012, the Secretary announced the revocation of the designation of one organization as an FTO, the Mujahedin-e Khalq ("MEK"), and its aliases. 77 Fed. Reg. 60,741 (Oct. 4, 2012). In a media note and special briefing on that date, the Department of State provided background on the determination: "The Secretary's decision today took into account the MEK's public renunciation of violence, the absence of confirmed acts of terrorism by the MEK for more than a decade, and their cooperation in the peaceful closure of Camp Ashraf, their historic paramilitary base." The media note is available at *www.state.gov/r/pa/prs/ps/2012/09/198443.htm* and the briefing is available at *www.state.gov/r/pa/prs/ps/2012/09/198470.htm*.

The determination was announced in time to comply with an order of the Court of Appeals for the District of Colombia Circuit, issued June 1, 2012, requiring that the Secretary reach a determination on the petition for revocation brought by the People's Mojahedin Organization of Iran ("PMOI," an alias for MEK) within four months. *In re People's Mojahedin Organization of Iran*, 680 F.3d 832 (D.C. Cir. 2012). PMOI had petitioned the court for a writ of mandamus, ordering either the revocation of its designation as an FTO or that the Secretary make a determination on its petition for revocation within 30 days. The United States filed a brief on March 26, 2012 in opposition to PMOI's petition, explaining why additional time was needed for the determination and why the court should not displace the Secretary in exercising her role in reviewing the determination. The U.S. brief, excerpted below (with footnotes omitted), is available in full at *www.state.gov/s/l/c8183.htm*. The Secretary's most recent review of the designation had been ongoing since an earlier decision by the court of appeals in 2010. See *Digest 2010* at 67-79 and *Digest 2009* at 71-72.

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4. Since the remand order from this Court, the State Department has been carrying out the process directed by the Court. It has consulted with the U.S. Intelligence Community, and engaged in the difficult process of determining whether classified material may now be declassified and disclosed publicly; it has given the PMOI new opportunities to respond to the unclassified evidence, and that entity has submitted a substantial amount of material; it has gathered fresh relevant classified information; it has met with representatives of the PMOI, which made a lengthy in-person presentation; it has consulted with the Department of the Treasury and the Department of Justice; and it has engaged in extensive internal deliberations.

In addition, Secretary Clinton recently testified in Congress before the House Foreign Affairs Committee, and was asked about her consideration of the PMOI revocation petition. See "Assessing U.S. Foreign Policy Priorities Amidst Economic Challenges: The Foreign Relations Budget for Fiscal Year 2013," Hearing before the House of Representative Committee on Foreign Affairs (Feb. 29, 2012) (webcast of hearing available at *http://foreignaffairs.house.gov/hearing_notice.asp?id=1407*) . The Secretary explained that the State Department was "continu[ing] to work on our review of the [PMOI's] designation as a foreign terrorist organization in accordance with the D.C. Circuit's decision and applicable law."

Secretary Clinton made clear, however, that "first, we are deeply concerned about the security and safety of the residents of Camp Ashraf [where most of the PMOI personnel are still located in Iraq]. And we have supported the work of the United Nations to find a path forward to relocate the residents and that has now begun." *Ibid*. The Secretary described that several hundred of the Camp Ashraf residents had already transferred to a different facility in Iraq (Camp Hurriya), which is serving as a United Nations-monitored temporary transit facility as part of efforts by the United Nations High Commissioner for Refugees ("UNHCR") to assist the relocation of residents out of Iraq. *Ibid*. (Since the Secretary's public testimony, the State Department reports that approximately 800 additional Camp Ashraf residents have voluntarily transferred to the temporary transit facility at Camp Hurriya for UNHCR processing.)

Secretary Clinton made clear that she was principally focusing on trying to "resolve a complex situation, avoid bloodshed and violence, and have the people from Camp Ashraf move to Camp Hurriya and have them processed as soon as the United Nations can process them [for relocation out of Iraq]." *Ibid*. She explained that, "given the ongoing efforts to relocate the residents, [PMOI] cooperation in the successful and peaceful closure of Camp Ashraf, the [PMOI's] main paramilitary base, will be a key factor in any decision regarding the [PMOI's] FTO status." *Ibid*.

REASONS FOR DENYING A WRIT OF MANDAMUS

Issuance of a writ of mandamus to the Secretary of State is plainly inappropriate in the circumstances of this case, which already involves an unusual type of judicial review. See generally *People's Mojahedin*, 182 F.3d at 19-25 (remarking on the odd and limited nature of judicial review involving FTO designations). The PMOI urges this Court to revoke the entity's FTO designation because the Secretary of State is assertedly not acting quickly enough on remand from this Court. Such relief would—despite the PMOI's long history of terrorism—remove an important barrier to the PMOI's ability to operate freely in the United States, and is clearly unwarranted here. Moreover, an order directing the Secretary to act by a particular date is also inappropriate given the highly complex and delicate overall nature of the matter pending before her.

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…Secretary Clinton is assiduously carrying out the remand from this Court, which requires the State Department to analyze highly classified and complicated information, and make an extremely challenging, expert predictive judgment about whether the PMOI retains the capability and intent to continue to engage in terrorism, as it has done to deadly effect on many occasions in the past.

In addition, the Secretary must make an extremely delicate decision—assuming that she believes the evidence adequately shows that the PMOI continues to engage in terrorism or

terrorist activity—about the impact on the national security of the United States of the actions of the PMOI, including its capabilities and intentions. And she must do this in consultation with the Attorney General and the Secretary of the Treasury, against the backdrop of this nation's dealings with both Iraq and Iran.

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3. Moreover, as Secretary Clinton explained to Congress, the State Department is focused immediately on the humanitarian imperative of supporting a peaceful resolution to the impasse between the PMOI located at Camp Ashraf and the Iraqi government, which has ordered that camp closed and the residents to depart Iraq. The State Department is working with the Iraqi government at high levels on this issue, and with the United Nations, which is directly supporting the Iraqi government in transferring the inhabitants of Camp Ashraf to Camp Hurriya as part of efforts to safely relocate them out of Iraq. Not surprisingly, the State Department has given priority in this overall matter to this transfer activity, as it involves an effort to protect the physical safety of individuals who are or were resident at the PMOI camp in Iraq (at Camp Ashraf), and may have a significant bearing on the Secretary's decision regarding the organization's FTO status.

The Secretary is closely observing this transfer because the PMOI's actions in connection with it will likely provide further key information about the actual future intentions of the organization. If the process succeeds through cooperation between the PMOI , the Iraqi government, and the United Nations, this success might bear on the credibility of PMOI's claims that it has indeed abandoned its terrorist tactics. A crucial process is thus currently ongoing that could provide information of the highest relevance to the Secretary's predictive judgments about the PMOI.

Furthermore, the governing statute authorizes the Secretary to revoke an existing designation even if the statutory criteria continue to be met, if the Secretary believes that revocation is in the national interests of the United States.

Accordingly, the Secretary is acting quite reasonably in wishing to take into account the PMOI's actions with regard to the transfer from Camp Ashraf in order to determine if an FTO designation revocation is warranted. Action by this Court to revoke the designation anyway or to impose a short deadline on the Secretary would seriously interfere with the State Department's ongoing efforts to seek a peaceful resolution to the situation at Camp Ashraf.

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d. Global Counterterrorism Forum

In 2012, the United States continued its support for the Global Counterterrorism Forum ("GCTF"), an informal multilateral counterterrorism ("CT") platform with 30 founding members (29 countries plus the EU) that regularly convenes key CT policymakers and practitioners from around the world, as well as experts from the United Nations and other multilateral bodies, that was launched in 2011. See *Digest 2011* at 55. The United States and Turkey have served as initial co-chairs of the GCTF's Coordinating Committee and they led the GCTF Ministerial-Level Plenary on June 7, 2012 in Istanbul, Turkey.

In advance of the June 7 Ministerial Plenary, Turkey and the United States issued a fact sheet, available at *www.state.gov/r/pa/prs/ps/2012/06/191865.htm*, identifying the key deliverables of the Plenary, including: adoption of the Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector; adoption of the Rome Memorandum on Good Practices for Rehabilitation and Reintegration of Violent Extremist Offenders; announcements of capacity-building projects by GCTF members to train domestic criminal justice personnel; updates on establishing the International Center of Excellence for Countering Violent Extremism in the United Arab Emirates; and plans to establish an international training center for strengthening criminal justice and other rule of law institutions. The co-chairs issued an additional fact sheet on June 6, 2012, describing the background of the GCTF, which is available at *www.state.gov/r/pa/prs/ps/2012/06/191864.htm*.

Secretary Clinton delivered the opening remarks at the GCTF Ministerial Plenary in Istanbul. She highlighted the GCTF's efforts in the areas of combatting extremism and strengthening the rule of law. Secretary Clinton's remarks, excerpted below, are available in full at *www.state.gov/secretary/rm/2012/06/191912.htm*.

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* * * *

I am pleased that today this forum will adopt two sets of sound practices – one for the criminal justice sector, the other on rehabilitation and reintegration of violent extremist offenders in prison. These will advance our work, and I am proud to announce the United States is contributing $15 million to support training initiatives in these areas, and to launch new partnerships with the UN and others to make sure our assistance gets to those officials on the front lines who need it most.

And I am here today also to underscore that the United States will work with all of you to combat terrorists within the framework of the rule of law. Now some believe that when it comes to counterterrorism, the end always justifies the means; that torture, abuse, the suspension of civil liberties— no measure is too extreme in the name of keeping our citizens safe.

But unfortunately, this view is short-sighted and wrong. When nations violate human rights and undermine the rule of law, even in the pursuit of terrorists, it feeds radicalization, gives propaganda tools to the extremists, and ultimately undermines our efforts. The international community cannot turn our eyes away from the effects of these tactics because they are part of the problem.

I know that the United States has not always had a perfect record, and we can and must do a better job of addressing the mistaken belief that these tactics are ever permissible. That is why President Obama has made our standards very clear. We will always maintain our right to use force against groups such as al-Qaida that have attacked us and still threaten us with imminent attack. And in doing so, we will comply with the applicable law, including the laws of war, and go to extraordinary lengths to ensure precision and avoid the loss of innocent life.

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Turkey and the United States issued a new fact sheet in conjunction with the GCTF Ministerial Plenary held December 14, 2012 in Abu Dhabi. The December 14, 2012 fact sheet, available at *www.state.gov/j/ct/rls/other/des/202103.htm*, summarizes the deliverables from the June 2012 Ministerial and lists the GCTF's activities to-date. More information about the GCTF is available at *www.thegctf.org*.

2. Narcotics

For a discussion of the U.S. objection to Bolivia's proposed reservation to the 1961 UN Single Convention on Narcotic Drugs, see Chapter 4.A.3.

a. Majors List process

(1) International Narcotics Control Strategy Report

On March 7, 2012, the Department of State released the 2012 International Narcotics Control Strategy Report ("INCSR"), an annual report submitted to Congress in accordance with § 489 of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2291h(a). The report describes the efforts of key countries to attack all aspects of the international drug trade in calendar year 2011. Volume 1 of the report covers drug and chemical control activities and Volume 2 covers money laundering and financial crimes. The report is available at *www.state.gov/j/inl/rls/nrcrpt/2012/*.

(2) Major drug transit or illicit drug producing countries

On September 14, 2012, President Obama issued Presidential Determination 2012-15, "Memorandum for the Secretary of State: Presidential Determination on Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2013." Daily Comp. Pres. Docs., 2012 DCPD No. 00724, pp. 1–3. In this annual determination, the President named Afghanistan, The Bahamas, Belize, Bolivia, Burma, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, India, Jamaica, Laos, Mexico, Nicaragua, Pakistan, Panama, Peru, and Venezuela as countries meeting the definition of a major drug transit or major illicit drug producing country. A country's presence on the "Majors List" is not necessarily an adverse reflection of its government's counternarcotics efforts or level of cooperation with the United States. No new countries were added to the list in 2012. The President designated Bolivia, Burma, and Venezuela as countries that have failed demonstrably to adhere to their international obligations in fighting narcotrafficking. Simultaneously, the President determined that "support for programs to aid Bolivia, Burma, and Venezuela is vital to the national interests of the United States," thus ensuring that such U.S. assistance would not be restricted during fiscal year 2013 by virtue of § 706(3) of

the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1424.

b. Interdiction assistance

During 2012 President Obama again certified, with respect to Colombia (Daily Comp. Pres. Docs., 2012 DCPD No. 00633, p. 1, Aug. 10, 2012) and Brazil (Daily Comp. Pres. Docs., 2012 DCPD No. 00802, p. 1, Oct. 11, 2012), that (1) interdiction of aircraft reasonably suspected to be primarily engaged in illicit drug trafficking in that country's airspace is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and (2) the country has appropriate procedures in place to protect against innocent loss of life in the air and on the ground in connection with such interdiction, which shall at a minimum include effective means to identify and warn an aircraft before the use of force is directed against the aircraft. President Obama made his determinations pursuant to § 1012 of the National Defense Authorization Act for Fiscal Year 1995, as amended, 22 U.S.C. §§ 2291–4, following a thorough interagency review. For background on § 1012, see *Digest 2008* at 114.

3. Trafficking in Persons

a. Executive Order 13627 protecting against trafficking in persons in federal contracts

On September 25, 2012, President Obama issued Executive Order 13627, "Strengthening Protections Against Trafficking in Persons in Federal Contracts. 77 Fed. Reg. 60,029 (Oct. 2, 2012). The order was issued pursuant to the Trafficking Victims Protection Act of 2000, as amended ("TVPA") (Public Law 106-386, Division A), among other authorities. Section 1 of the order, set forth below, states the policy underlying the order and its general purpose of ensuring that government contractors comply with anti-trafficking laws. Section 2 of the order directs amendments to the Federal Acquisition Regulations ("FAR") in order to carry out the policy of zero tolerance for trafficking-related activities by federal contractors. Section 3 authorizes the provision of guidance and training to federal contractors in implementing internal procedures to monitor compliance with anti-trafficking laws and regulations.

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More than 20 million men, women, and children throughout the world are victims of severe forms of trafficking in persons ("trafficking" or "trafficking in persons")—defined in section 103 of the TVPA, 22 U.S.C. 7102(8), to include sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age, or the recruitment, harboring, transportation, provision, or obtaining of

a person for labor or services, through the use of force, fraud, or coercion, for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

The United States has long had a zero-tolerance policy regarding Government employees and contractor personnel engaging in any form of this criminal behavior. As the largest single purchaser of goods and services in the world, the United States Government bears a responsibility to ensure that taxpayer dollars do not contribute to trafficking in persons. By providing our Government workforce with additional tools and training to apply and enforce existing policy, and by providing additional clarity to Government contractors and subcontractors on the steps necessary to fully comply with that policy, this order will help to protect vulnerable individuals as contractors and subcontractors perform vital services and manufacture the goods procured by the United States.

In addition, the improved safeguards provided by this order to strengthen compliance with anti-trafficking laws will promote economy and efficiency in Government procurement. These safeguards, which have been largely modeled on successful practices in the private sector, will increase stability, productivity, and certainty in Federal contracting by avoiding the disruption and disarray caused by the use of trafficked labor and resulting investigative and enforcement actions.

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b. Trafficking in Persons report

On June 19, 2012, the Department of State released the 2012 Trafficking in Persons Report pursuant to § 110(b)(1) of the Trafficking Victims Protection Act of 2000 ("TVPA"), Div. A, Pub. L. No. 106-386, 114 Stat. 1464, as amended, 22 U.S.C. § 7107. The report covers the period April 2011 through March 2012 and evaluates the anti-trafficking efforts of countries around the world. In her remarks upon the release of the 2012 report, available at *www.state.gov/secretary/rm/2012/06/193368.htm*, Secretary of State Hillary Rodham Clinton explained:

> [T]he United States is not alone in this fight. Many governments have rallied around what we call the three P's of fighting modern slavery: prevention, prosecution, and protection. And this report, which is being issued today, gives a clear and honest assessment of where all of us are making progress on our commitments and where we are either standing still or even sliding backwards. It takes a hard look at every government in the world, including our own. Because when I became Secretary of State, I said, "When we are going to be issuing reports on human trafficking, on human rights that talk about other countries, we're also going to be examining what we're doing," because I think it's important that we hold ourselves to the same standard as everyone else.
>
> Now, this year's report tells us that we are making a lot of progress. Twenty-nine countries were upgraded from a lower tier to a higher one, which means that their governments are taking the right steps. This could mean enacting strong laws, stepping

up their investigations and prosecutions, or simply laying out a roadmap of steps they will take to respond.

Through the report, the Department determines the ranking of countries as Tier 1, Tier 2, Tier 2 Watch List, or Tier 3 based on an assessment of their efforts with regard to the minimum standards for the elimination of trafficking in persons as set out by the TVPA, as amended. The report lists 17 countries as Tier 3 countries, making them subject to certain restrictions on assistance in the absence of a Presidential national interest waiver. For details on the Department of State's methodology for designating states in the report, see *Digest 2008* at 115–17. The report is available at *www.state.gov/j/tip/rls/tiprpt/2012/*. Chapter 6.C.2.b. discusses the determinations relating to child soldiers.

c. Presidential determination

Consistent with § 110(c) of the Trafficking Victims Protection Act, as amended, 22 U.S.C. § 7107, the President annually submits to Congress notification of one of four specified determinations with respect to "each foreign country whose government, according to [the annual Trafficking in Persons report]—(A) does not comply with the minimum standards for the elimination of trafficking; and (B) is not making significant efforts to bring itself into compliance." The four determination options are set forth in § 110(d)(1)–(4).

On September 14, 2012, President Obama issued a memorandum for the Secretary of State, "Presidential Determination With Respect to Foreign Governments' Efforts Regarding Trafficking in Persons." Presidential Determination No. 2012-16, 77 Fed. Reg. 58,921 (Sept. 24, 2012). The President's memorandum conveys determinations concerning the 17 countries that the 2012 Trafficking in Persons Report lists as Tier 3 countries. See Chapter 3.B.3.a. *supra* for discussion of the 2012 report. The Memorandum of Justification Consistent with the Trafficking Victims Protection Act of 2000, Regarding Determinations with Respect to "Tier 3" Countries conveys the determinations the President made and their effect; the memorandum also includes a separate discussion of each of the named countries. The memorandum of justification is available at *www.state.gov/j/tip/rls/other/2012/197803.htm*.

4. Illicit Cross-Border Trafficking in Arms, Drugs, Weapons, and Other Items

In its role as president of the Security Council in April 2012, the United States convened a Security Council open debate on "Threats to International Security: Securing Borders Against Illicit Flows." U.S. Ambassador to the UN Susan Rice introduced the discussion in remarks available at *http://usun.state.gov/briefing/statements/188472.htm*. She explained the desire to better coordinate efforts to strengthen borders, stating:

> The Security Council has been involved in the question of illicit trafficking and movement for a long time. But we have tended to look at each item trafficked in isolation of the common feature they share: the vulnerabilities at poorly secured borders that are too easily exploited by nefarious networks.

As president of the Security Council, the United States also issued a presidential statement on the subject of illicit cross-border trafficking on April 25, 2012. U.N. Doc. S/PRST/2012/16. In the presidential statement, the Security Council tasks the Secretary-General with reporting on the UN's work to assist member states in improving border security. The Secretary-General submitted his report to the Security Council on October 19, 2012. U.N. Doc. S/2012/777. The presidential statement is excerpted below and available in full at *http://usun.state.gov/briefing/statements/188463.htm*.

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* * * *

The Security Council acknowledges the evolving challenges and threats to international peace and security including armed conflicts, terrorism, proliferation of weapons of mass destruction and small arms and light weapons, transnational organized crime, piracy, drug and human trafficking. The Council has addressed, when appropriate, related to these challenges and threats, illicit cross-border trafficking in arms, drug trafficking, trafficking by non-state actors in nuclear, chemical and biological weapons, their means of delivery and related materials, trafficking in conflict minerals and the movement of terrorists and their funds in violation of UN sanctions regimes imposed by the Security Council in accordance with Chapter VII of the UN Charter and other decisions taken under Chapter VII, in particular resolutions 1373 (2001) and 1540 (2004) as well as its other relevant decisions (hereinafter - illicit cross-border trafficking and movement). The Council is concerned that such illicit cross-border trafficking and movement contributes to these challenges and threats. The Council recognizes that such illicit cross-border trafficking and movement often involves cross-cutting issues, many of which are considered by the General Assembly and other UN organs and bodies.

The Council notes relevant international conventions such as the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol, the Convention on Psychotropic Substances of 1971, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, the United Nations Convention against Transnational organized crime of 2000 and the Protocols thereto, the United Nations Convention against Corruption of 2003 and the relevant international conventions and protocols related to terrorism. The Security Council recalls the United Nations Program of Action on Small Arms and Light Weapons as well as the International Tracing Instrument and the United Nations Global Plan of Action to Combat Trafficking in Persons.

The Security Council reaffirms the benefits of transborder communication, international exchange and international migration. The Security Council notes, however, that the various challenges and threats to international peace and security posed by illicit cross-border trafficking and movement have increased as the world has become more interconnected. The Security Council notes that, in a globalized society, organized criminal groups and networks, better equipped with new information and communication technologies, are becoming more diversified

and connected in their illicit operations, which in some cases may aggravate threats to international security.

The Security Council reaffirms that securing their borders is the sovereign prerogative of Member States and, in this context, reaffirms its commitment to the Purposes and Principles of the UN Charter, including the principles of sovereign equality and territorial integrity. The Security Council calls on all Member States to improve border management to effectively constrain the spread of transnational threats. The Security Council reaffirms that Member States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, and shall also give the UN every assistance in any action it takes in accordance with the UN Charter, and shall refrain from giving assistance to any State against which the UN is taking preventive or enforcement action.

The Security Council acknowledges that distinct strategies are required to address threats posed by illicit cross-border trafficking and movement. Nevertheless, the Council observes that illicit cross-border trafficking and movement are often facilitated by organized criminal groups and networks. The Council further notes that such illicit cross-border trafficking and movement, which in some cases exploits similar vulnerabilities experienced by Member States in securing their borders, can be addressed by improving Member States' abilities to secure their borders. The Security Council further acknowledges the importance of adopting a comprehensive and balanced approach, as necessary, to tackle the conditions conducive to facilitating illicit cross-border trafficking and movement, including demand and supply factors, and underlines the importance of international cooperation in this regard.

The Security Council calls on Member States to fully comply with relevant obligations under applicable international law, including human rights and international refugee and humanitarian law, relating to securing their borders against illicit cross-border trafficking and movement, including obligations stemming from relevant resolutions of the Security Council adopted under Chapter VII of the UN Charter. The Security Council calls on all Member States to fully respect and implement all of their relevant international obligations in this regard.

The Security Council encourages Member States and relevant organizations to enhance cooperation and strategies, as appropriate, to combat such illicit cross-border trafficking and movement.

The Security Council encourages Member States, as well as international organizations and relevant regional and subregional organizations, within existing mandates, as appropriate, to enhance efforts to assist Member States to build the capacity to secure their borders against illicit cross-border trafficking and movement, upon request and by mutual agreement, in accordance with international law. The Security Council commends the substantial efforts already underway in this field.

The Security Council observes that several UN entities, including subsidiary organs of the Security Council, already offer such assistance. The Security Council acknowledges the importance of coherent, system-wide UN action, in order to offer coordinated responses to transnational threats, including through the use of best practices and exchange of positive experiences from relevant initiatives elsewhere, such as the Paris Pact Initiative.

The Security Council invites the Secretary-General to submit in six months a report providing a comprehensive survey and assessment of the UN's relevant work to help Member States counter illicit cross-border trafficking and movement, as defined in the second paragraph above.

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5. Money Laundering

a. JSC CredexBank (Belarus)

On May 25, 2012, the Department of the Treasury, Financial Crimes Enforcement Network ("FinCEN") issued notice of its finding under § 311 of the USA PATRIOT Act, Pub. L. 107-56 that the Joint Stock Company CredexBank of Belarus ("Credex") is a financial institution of primary money laundering concern. 77 Fed. Reg. 31,434 (May 25, 2012). Based on this finding, FinCEN also issued a notice of proposed rulemaking under § 311. 77 Fed. Reg. 31,794 (May 30, 2012). The rule proposed would impose "both the first special measure (31 U.S.C. 5318A(b)(1)) and the fifth special measure (31 U.S.C. 5318A(b)(5))" against Credex. The first special measure imposes requirements with respect to recordkeeping and reporting of certain financial transactions. The fifth special measure prohibits or conditions the opening or maintaining of correspondent or payable-through accounts for Credex. Excerpts below from the notice of finding explain the action (with footnotes omitted).

* * * *

B. JSC (''Joint Stock Company'') CredexBank

JSC CredexBank (''Credex'') is a depository institution located and licensed in the Republic of Belarus that primarily services corporate entities. Originally established on September 27, 2001, as Nordic Investment Bank Corporation by Ximex Executive Limited (''Ximex''), the bank changed its name to Northern Investment Bank on April 5, 2006, and then to the current name of JSC CredexBank on February 12, 2007. Credex is 96.82% owned by Vicpart Holding SA, based in Fribourg, Switzerland. With 169 employees and a total capitalization of approximately $19 million, the bank currently ranks as the 22nd largest in total assets among 31 commercial banks in Belarus. Credex has six domestic branches and one representative office in the Czech Republic. While the majority of its correspondent banking relationships are with domestic banks, Credex maintains numerous correspondent relationships with Russian banks, and also single correspondent relationships in Latvia, Germany, and Austria. According to available public information, Credex does not have any direct U.S. correspondent relationships.

C. Belarus

The concentration of power in the hands of the Presidency and the lack of a system of checks and balances among the various branches of government are the greatest hindrances to the rule of law and transparency of governance in Belarus. In particular, economic decision-making is highly concentrated within the top levels of government, and financial institutions have little autonomy.

Under Belarusian law, most government transactions and those sanctioned by the President are exempt from reporting requirements. This is particularly worrisome given well documented cases of public corruption in Belarus, which has led the United States Government (''USG'') in recent years to take action to protect the U.S. financial system from abuse by the Belarusian government. In 2006, the President signed Executive Order (''E.O.'') 13405, which blocks the property and interests in property of Belarusian President Alexander Lukashenko and nine other individuals listed in the Annex, as well as authorizing subsequent designations of

other individuals and entities determined to be responsible for or to have participated in public corruption, human rights abuses, or political oppression. Pursuant to this E.O., the U.S. Department of the Treasury (''Treasury'') in November 2007 designated the state petrochemical conglomerate, Belneftekhim, for being controlled by President Lukashenko. Separately, Treasury in April 2006 issued an advisory highlighting abuse and theft of public resources by senior Belarusian regime elements, including senior executives in state-owned enterprises. Furthermore, in April 2004, Treasury identified Infobank, Minsk (later renamed PJSC Trustbank) as a primary money laundering concern under section 311 for laundering funds for the former Iraqi regime of Saddam Hussein. At the time of that action, Infobank was widely reported to be a bank specializing in financial transactions related to arms exports, including procuring and financing weapons and military equipment for several nations deemed by the United States to be State Sponsors of Terrorism.

Since January 2011, in response to the repression of democratic activists following fraudulent presidential elections in Belarus, the European Union (''EU'') has imposed a series of increasingly stiff sanctions against Belarus, including a travel ban and assets freeze extending to some 200 Belarusian officials and an assets freeze of three companies closely associated with President Lukashenko. Most recently, on March 23, 2012, the EU reinforced restrictive measures against the Belarusian government by adding 12 individuals and 29 entities to the sanctions list for their role in supporting the regime.

II. Analysis of Factors

Based upon a review and analysis of the administrative record in this matter, consultations with relevant Federal agencies and departments, and after consideration of the factors enumerated in section 311, the Director of FinCEN has determined that reasonable grounds exist for concluding that Credex is a financial institution of primary money laundering concern. In addition to the bank's location in a high risk jurisdiction, FinCEN has reason to believe that Credex (1) has engaged in high volumes of transactions that are indicative of money laundering on behalf of shell corporations; and (2) has a history of ownership by shell corporations whose own lack of transparency contributes to considerable uncertainty surrounding Credex's beneficial ownership. Taken as a whole, the lack of transparency associated with Credex indicates a high degree of money laundering risk and vulnerability to other financial crimes. The factors relevant to this finding are detailed below:

A. The Extent to Which Credex Has Been Used To Facilitate or Promote Money Laundering in or Through the Jurisdiction

Information made available to the USG shows that since 2006, Credex has engaged in highly questionable patterns of financial transactions that are indicative of money laundering. Such activity includes: high volumes of transactions involving foreign shell corporations incorporated and operating in high risk jurisdictions; disproportionate and evasive transactional behavior; and nested account activity.

The facts surrounding these transactions are consistent with typical "red flags" regarding shell company activity identified in most banking standards, including wire transfer volumes that are extremely large in proportion to the asset size of the bank; transacting businesses sharing the same address, providing only a registered agent's address, or having other address inconsistencies; and frequent involvement of multiple jurisdictions or beneficiaries located in higher-risk offshore financial centers.

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B. The Extent to Which Credex Is Used for Legitimate Business Purposes in the Jurisdiction

The lack of transparency—regarding the jurisdiction, beneficial ownership of the bank (discussed in Section II (D), below), and transactional activity with shell corporations—makes it difficult to assess the extent to which Credex is engaged in legitimate business. Thus, any legitimate use of Credex is significantly outweighed by the apparent use of Credex to facilitate or promote money laundering and other financial crimes.

C. The Extent to Which Such Action Is Sufficient To Ensure, With Respect to Transactions Involving Credex, That the Purposes of the BSA Continue To Be Fulfilled, and To Guard Against International Money Laundering and Other Financial Crimes

As detailed above, FinCEN has reasonable grounds to conclude that Credex is being used to promote or facilitate international money laundering, and is therefore an institution of primary money laundering concern. Currently, there are no protective measures that specifically target Credex. Thus, finding Credex to be a financial institution of primary money laundering concern, which would allow consideration by the Secretary of special measures to be imposed on the institution under section 311, is a necessary first step to prevent Credex from facilitating money laundering or other financial crime through the U.S. financial system. The finding of primary money laundering concern will bring any criminal conduct occurring at or through Credex to the attention of the international financial community and will further limit the bank's ability to be used for money laundering or for other criminal purposes.

D. Other Relevant Factor: Lack of Transparency

As outlined above, the pervasive lack of transparency surrounding Credex's business activities—including its high volume of suspicious transactions with shell corporations, the substantial uncertainty surrounding the transacting parties and purposes involved in those transactions, the bank's evasive conduct, and its operation in a high risk jurisdiction—makes it virtually impossible to discern the extent to which the bank is engaged in legitimate business, and most importantly, to evaluate its capacity to identify and mitigate risk and illicit finance. This situation is exacerbated by a similar lack of transparency in the bank's ownership, which has passed from one shell corporation to another, creating considerable uncertainty as to the identity of the true beneficial owner(s).

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b. Withdrawal of Finding: Myanmar Mayflower Bank and Asia Wealth Bank

On October 1, 2012, FinCEN withdrew a finding of primary money laundering concern and repealed the rule imposing special measures relating to Myanmar Mayflower Bank and Asia Wealth Bank, two banks based in Burma. 77 Fed. Reg. 59,747 (Oct. 1, 2012). See *Digest 2004* at 136-39 for discussion of the original finding and notice of proposed rulemaking for Myanmar Mayflower Bank and Asia Wealth Bank. The notice in the Federal Register explained that FinCEN made the determination because the Government of Burma responded to its 2004 finding by revoking the licenses of the two banks and neither of the banks exists any longer.

6. Organized Crime

See Chapter 16.A.7. for discussion of sanctions directed at transnational criminal organizations.

From October 15 to October 19, 2012, the Sixth Session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto convened in Vienna, Austria. Brian A. Nichols, Principal Deputy Assistant Secretary of State in the Bureau of International Narcotics and Law Enforcement, delivered opening remarks at the conference, available at *http://vienna.usmission.gov/121015untoc.html* and excerpted below. As discussed by Mr. Nichols, the U.S. had advanced the proposal for a review mechanism under the Transnational Organized Crime Convention. The Sixth Session of the Conference of the Parties concluded without adopting such a review mechanism.

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…[A]s we begin our deliberations, I take pride in announcing a new milestone.

The United States has now used the UN Convention against Transnational Organized Crime and its Protocols on more than 100 occasions for the purpose of international cooperation and with 37 countries spanning the globe. We have used the treaties for extradition and mutual legal assistance requests targeting a broad array of crimes, including arms trafficking, major fraud cases and migrant smuggling. We have used the Convention both to seek assistance and to provide it to our partners.

Our use of the Convention has increased by almost 50 percent in the past two years alone. This milestone demonstrates the practical functionality of the Convention and its Protocols, and their value as an important tool for our police, prosecutors and the judiciary. It also highlights the potential for enhancing cooperation in a relatively short period of time.

This week, we are also on the cusp of another potential milestone for State Parties to the Convention—the adoption of a new peer review mechanism. Since we last met two years ago, we have all been engaged in thoughtful negotiations towards the development of a new review mechanism; and specifically one that is cost effective, efficient and not unduly burdensome on participating experts. Ultimately, the review mechanism should bolster practical cooperation under the Convention, including by identifying technical assistance needs to assist states in doing so. Moving forward, we will need to remain vigilant so as not to lose sight of this core objective. We must ensure that the Conference is able to monitor the effectiveness and efficiency of the new review mechanism at each of its future sessions. The process should not undermine the true benefit of the review mechanism—promoting practical cooperation.

At the same time, we must recognize the valuable contributions of civil society in promoting implementation of the Convention and its Protocols. Non-governmental organizations and other civil society institutions are in many instances the first-line responders to victims of organized crime. Partnerships with civil society are critical to prevention efforts. For example, through partnerships with private business, we can help ensure that goods produced and bought are free from slave labor. Partnerships with the hospitality and travel industries can also promote responsible tourism and prevent commercial sexual exploitation, especially of children. Media

can also help raise awareness of the harms of transnational organized crime.

It is imperative that the Conference recognize the multiplicity of civil society contributions, particularly as we finalize the details for the new review mechanism and seek effective results from it.

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7. Corruption

On March 22, 2012, Secretary Clinton spoke at the Annual Integrity Award Dinner sponsored by Transparency International ("TI") in Washington, D.C. She summarized the Obama administration's efforts to fight corruption, including by promoting the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) and the UN Convention against Corruption. Secretary Clinton's remarks are excerpted below and are available in full at *www.state.gov/secretary/rm/2012/03/186703.htm*. See Chapter 6.K. for further discussion of the Open Government Partnership, highlighted in Secretary Clinton's remarks. And see Chapter 11.G .4. regarding further developments in 2012 in required disclosures in the extractive industries.

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… [W]e have made it a priority to fight corruption and promote transparency…. In 1996, the United States played a major role in developing the first legally-binding commitment by governments to fight corruption. And we've led on many important fronts since then. But I'd like to just briefly describe what this Administration is doing.

First, we're expanding and mobilizing a global consensus in support of greater transparency—a global architecture, if you will, of anticorruption institutions and practices. Along with Brazil, we launched the Open Government Partnership. It is a network of support for government leaders and citizens working to bring more transparency and accountability to governments.

… All told, 53 countries and dozens of civil society organizations are committing to these efforts. And I know that many of TI's country offices, including TI-USA, will be represented at the Open Government Partnership high-level summit in Brasilia that I will co-chair with the Brazilian foreign minister.

We're building this anticorruption consensus in other ways as well. In what is called the Deauville Partnership, we are working with our Arab partners on anticorruption, open government, and asset recovery efforts. At the OECD, we were pleased to welcome Colombia and Russia into the Working Group on Bribery last year. It will be an important milestone when both have become full parties to the Anti-Bribery Convention.

…And through our bilateral diplomacy and at the G-20, we are encouraging major economies such as China, India, Indonesia, Saudi Arabia to join the convention as well. We

support the follow-through that's necessary to enforce anticorruption norms such as the new review process that promotes implementation of the UN Convention against Corruption.

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Finally, because our credibility depends on practicing what we preach, we are trying to up our own game. We recently announced our intention to implement the Extractive Industries Transparency Initiative in the United States, which will require disclosure of payments made by companies to the government and of payments received by the government from companies. Additionally, the Cardin-Lugar Amendment requires extractive industry companies registered with the SEC to disclose, project by project, how much they pay foreign governments. Now I know this has been a difficult issue, and the SEC is still working on the regulations, but we do think it will have a very profound effect on our ability to try to help manage some of the worst practices that we see in the extractive industry and in the relationships with governments at local and national levels around the world.

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And of course, this Administration, like those before us, has taken a strong stand when it comes to American companies bribing foreign officials. We are unequivocally opposed to weakening the Foreign Corrupt Practices Act. We don't need to lower our standards. We need to work with other countries to raise theirs. I actually think a race to the bottom would probably disadvantage us. It would not give us the leverage and the credibility that we are seeking.

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8. Piracy

a. Overview

In 2012, as this section discusses in detail below, the United States continued its active efforts to counter piracy off the coast of Somalia through various international initiatives and domestic prosecutions of individuals suspected of piracy and related offenses. On October 26, 2012, Assistant Secretary of State Andrew J. Shapiro addressed the Atlantic Council on the progress made in combating piracy. Assistant Secretary Shapiro's remarks, excerpted below, are available in full at *www.state.gov/t/pm/rls/rm/199927.htm*. In addition to his October remarks, Assistant Secretary Shapiro also addressed the U.S. Chamber of Commerce on March 13, 2012 on the topic of private sector partnerships against piracy in remarks that are available at *www.state.gov/t/pm/rls/rm/185697.htm*. Other U.S. government officials also addressed the issue of piracy in remarks available at *www.state.gov/t/pm/rls/rm/186987.htm*, *www.state.gov/t/pm/rls/rm/191603.htm*, and *www.state.gov/t/pm/rls/rm/199929.htm*.

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…According to figures from the U.S. Navy, we are on track to experience a roughly 75 percent decline in overall pirate attacks this year compared with 2011. Independent, non-governmental sources, such as the International Maritime Bureau, also indicate a dramatic drop in attacks.

We are seeing fewer attempted attacks in no small measure because pirates are increasingly less successful at hijacking ships. In 2011, the number of successful pirate attacks fell by half compared to 2010. This year, in 2012, the number of successful attacks off the Horn of Africa has continued to decline. To date, pirates have captured just ten vessels this year, compared to 34 in 2011 and 68 in 2010. The last successful Somali pirate attack on a large commercial vessel was more than five months ago.

The lack of success at sea, means that Somali pirates are holding fewer and fewer hostages. In January 2011, pirates held 31 ships and 710 hostages. Today, pirates hold five ships and 143 hostages. That is roughly an 80 percent reduction in ships and hostages held by pirates since January 2011. While this is still unacceptably high, the trend is clear. We are making tremendous progress.

Today, I want to talk about the U.S. government response to piracy. I want to talk about how our response provides a model for dealing with shared global challenges and is an example of "smart power" in action.

This is a challenge where deliberate and concerted action by governments, international organizations, and the private sector resulted in a truly multilateral campaign that has suppressed piracy off the coast of Somalia to levels that seemed impossible only 18 months ago.

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…We have pursued an integrated multi-lateral and multi-dimensional approach. This "smart power" approach has involved utilizing every tool in our tool kit. The cooperation and coordination across the U.S. government to address piracy has been remarkable. It has included a wide swath of agencies: the Departments of State, Defense, Treasury, Justice, Transportation, and Homeland Security, as well as the intelligence community.

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In January 2009, the United States helped establish the Contact Group on Piracy off the Coast of Somalia. The Contact Group is based on voluntary membership of states looking to act and was established concurrent with the UN Security Council's passage of Resolution 1851. It now includes over 70 nations as well as international and maritime industry organizations. The Contact Group is an essential forum. It helps galvanize action and coordinate the counter-piracy efforts of states, as well as regional and international organizations. A number of specialized working groups were established within the Contact Group to address a variety of subjects, including: naval coordination at sea; judicial and legal issues involving captured pirates; and public diplomacy programs in Somalia to discourage piracy. While we don't always agree on everything, we agree on a lot, and this coordinated international engagement has spawned action.

Additionally, to utilize resources effectively and prevent duplication, a UN-managed Trust Fund to support counter-piracy initiatives was established. Through contributions from states and the private sector, the Trust Fund has funded a range of initiatives designed to counter-

piracy and build capacity ashore. This includes the construction of prisons, the training of judicial officials, and the purchase of equipment for law enforcement in Somalia. It has also helped underwrite the cost of piracy trials of countries in the region.

The issue of piracy has also become a regular part of our diplomatic engagement with countries around the world. When I engage in diplomatic talks with countries like Malaysia, India, and Brazil piracy is on the agenda. Countries are eager to discuss piracy and to find ways in which we can work together to address this shared challenge. The issue of piracy therefore can have an ancillary diplomatic benefit to the United States. As it can serve as a non-controversial security issue we can discuss with countries, in which we are seeking to develop our broader security relationships.

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Critical to the decline in piracy has been the deployment of naval forces. Encouraging the international community to take military action has been an essential component of our diplomatic efforts. For our part, on the high seas, the United States established Combined Task Force 151—a multinational naval effort charged with conducting counter-piracy patrols in the region, covering an area of over one million square miles.

But in addition to our efforts, there are a number of coordinated multinational naval patrols off the Horn of Africa. NATO is engaged with Operation OCEAN SHIELD and the European Union has Operation ATALANTA. Other national navies, including several from Asia and the Middle East conduct counter-piracy patrols and escort operations as well. These are independent from the multinational efforts but are coordinated through participation in Shared Awareness and Deconfliction meetings known as SHADE, which helps ensure that everyone is on the same page.

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The widespread adoption of Best Management Practices has clearly had a significant positive effect. These include practical measures, such as: proceeding at full-speed through high risk areas and erecting physical barriers, such as razor wire, to make it more difficult for pirates to come aboard. These measures help harden merchant ships against pirate attack. Recognizing the value of these measures, the U.S. government has required U.S.-flagged vessels sailing in designated high-risk waters to fully implement these measures.

But perhaps the ultimate security measure a commercial ship can adopt is the use of privately contracted armed security teams. These teams are often made up of former members of various armed forces, who embark on merchant ships and guard them during transits through high risk waters. The use of armed security teams has been a potential game changer in the effort to combat piracy. To date, not a single ship with armed security personnel aboard has been successfully pirated.

For our part, the U.S. government led by example, as early on in the crisis we permitted armed personnel aboard U.S.-flagged merchant vessels. We also mandated that U.S. vessels transiting high risk areas conduct a risk assessment with specific consideration given to supplementing onboard security with armed guards.

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Fully unraveling legal and policy conflicts related to armed security will take some time—and we are continuing to push for progress on this issue. Last month the State Department hosted a working level meeting of policy specialists from 23 nations and international organizations. The intent of the meeting was to share information about national or organizational policy and to give us a more complete picture of the overlaps and gaps in policy from country to country. This is an important step in figuring out a way forward that addresses the thorniest differences.

While we are finding ways to deter and suppress pirates and better protect vessels at sea, some still do not take all available security precautions. Approximately 20 percent of all ships off the Horn of Africa are not taking proper security measures. And predictably, these account for the overwhelming number of successfully pirated ships. Hijackings will therefore remain a danger for the foreseeable future.

In a hostage situation our foremost concern is always about the safety of the entire crew. However, every ransom paid only further institutionalizes piracy and increases the likelihood that others will face the threat of hijacking in the future. The United States has a long tradition of opposing the payment of ransoms, and we have worked to discourage or minimize ransom payments. When a hostage taking occurs we strongly encourage those involved to seek assistance from appropriate government authorities.

The American public should also know that this Administration will do everything it can to ensure the safety and security of American citizens threatened by pirates. We have made clear that we will act aggressively to rescue and protect American citizens threatened by piracy. For example, just months into office, President Obama was confronted with the hostage taking of the American captain of the MAERSK Alabama. The President authorized the use of force to rescue the captured captain and after a long standoff, U.S. Navy Seals successfully freed the captain. And in January this year, just hours before the State of the Union address, President Obama ordered U.S. Special Forces to rescue an American and a Danish aid worker being held hostage on the ground in Somalia. This dangerous mission clearly demonstrated our resolve. If you attack or capture an American citizen, we will act vigilantly and aggressively to make sure you face justice.

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Now let me turn to another aspect of our response—our efforts to deter piracy through effective apprehension, prosecution and incarceration of pirates and their supporters and financiers.

Today, over 1,000 pirates are in custody in 20 countries around the world. Most are, or will be, convicted and sentenced to lengthy prison terms.

An important element of our counter-piracy approach has involved a renewed emphasis on enhancing the capacity of states—particularly those in the region—to prosecute and incarcerate suspected pirates. The United States is currently supporting efforts to:

- increase prison capacity in Somalia;
- develop a framework for prisoner transfers so convicted pirates serve their sentence back in their home country of Somalia; and
- establish a specialized piracy chamber in the national courts of one or more regional states.

Prosecution is crucial and several regional nations have been bearing the lion's share of the burden in this area. Kenya, Seychelles, and the Maldives have each accepted for prosecution dozens of pirates captured by naval forces patrolling off the Horn of Africa. They have also agreed to incarcerate convicted prisoners until more durable solutions are found. These countries deserve both commendation from the international community and support for their judicial systems.

Going forward, however, we cannot expect Somalia's neighbors to host trial after trial and continue to absorb large numbers of imprisoned pirates. Many nations have laws that allow them to prosecute piracy as a crime of universal jurisdiction. Whenever possible, nations affected by piracy, even if only tangentially, should exercise that jurisdiction and help ease the burden.

Furthermore, it is imperative that the maritime industry do everything it can to support prosecutors trying to bring cases against pirates. Too often prosecutors decline cases because they do not believe the required witnesses will be available when a case goes to trial. With pirates from one country; prosecution in a second; a shipping company from a third country; and a merchant-mariner witness from a fourth; prosecutors often have little standing to compel testimony and instead must rely on voluntary cooperation. Crew members should be able to participate in the trials of their tormentors secure in the knowledge that their employers support their decision and will hold their job for them. To that end, the State Department and the United Nations Office on Drugs and Crime have worked together to support prosecutions. Together we recently provided funding and technical support for Kenyan judicial officials to hear testimony from crew members by video teleconference from their home countries for hearings held in Mombasa, Kenya.

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As piracy has evolved into an organized transnational criminal enterprise, it is increasingly clear that the arrest and prosecution of rank and file pirates captured at sea is insufficient on its own to meet our longer term counter-piracy goals. Most pirates captured at sea are often low-level operatives. The harsh reality of life in Somalia ensures there are willing replacements for pirates apprehended at sea. Prosecutions are essential but they must also include the masterminds along with the gunmen. After an intensive review of our strategy last year, Secretary Clinton approved a series of recommendations that constituted a new approach. A focus on pirate networks is at the heart of our strategy.

We are using all of the tools at our disposal in order to disrupt pirate networks and their financial flows. We are focused on identifying and apprehending the criminal conspirators who lead, manage, and finance the pirate enterprise. We are making progress in this effort. For instance, this past August, Pirate negotiator Mohammad Saaili Shibin received two consecutive life sentences from a U.S. federal court for his role in the attack that ended in the deaths of four Americans aboard the S/V Quest. This kind of sentence is exactly what is needed to create strong disincentives to piracy. Moreover, it is an important step against the upper tiers of the pirate hierarchy and demonstrates that individuals beyond the gunmen in skiffs are culpable and prosecutable.

The Contact Group also endorsed the focus on pirate networks and formed a new working group to facilitate multilateral coordination. This effort includes tracking pirate sources of financing and supplies, such as fuel, outboard motors, and weapons. For example, working closely with INTERPOL's National Central Bureau in Washington, we have helped to develop a

comprehensive database on Somali piracy that will make information accessible to law enforcement and help further criminal investigations against pirate ringleaders.

We are also supporting the effort to stand up an information fusion center in the region to facilitate the capture and prosecution of the financiers, investors, and ringleaders of Somali piracy. The Regional Anti-Piracy Prosecutions Intelligence Coordination Center known as RAPPICC is located in the Seychelles and in August broke ground on the Center's new facility, which will be located on an old Coast Guard base in the Seychelles. RAPPICC will be part of a larger "Crime Campus" with a 20-person holding facility for use in conducting interviews. We are confident that it will help prosecutors around the world, by equipping them with the evidentiary packages they need to win convictions against not just rank and file pirates, but the middle and top tier actors.

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b. International support for efforts to bring suspected pirates to justice

In international fora, the United States continued to underscore the importance of bringing suspected pirates to justice and took steps to help states enhance their capacities to pursue prosecutions and incarcerate individuals convicted of piracy and piracy-related crimes.

(1) UN Security Council

The Security Council adopted several resolutions on Somalia in 2012, including resolution 2077 renewing for another twelve months the authorizations granted to States and regional organizations cooperating with Somali authorities in the fight against piracy and armed robbery at sea off the coast of Somalia. U.N. Doc. S/RES/2077. The United States actively supported the work of the Security Council to counter piracy. At a Security Council session on piracy in Somalia on February 22, 2012, Jeffrey DeLaurentis, U.S. Alternate Representative to the United Nations for Special Political Affairs, provided the U.S. response to the latest report by the Secretary General on piracy. Ambassador DeLaurentis's statement, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/184563.htm*.

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… [E]ven as piracy continues to present challenges off the coast of Somalia, we are cautiously optimistic about some of the findings of the Secretary General's report—including that the success rate of attacks decreased in 2011. As more nations implement the guidance provided by the International Maritime Organization-the industry-developed Best Management Practices (BMP) for Protection against Somalia-Based Piracy-and employ the use of privately contracted, armed security personnel (PCASP), we are hopeful that the numbers will continue to decrease.

However, we remain extremely concerned by reports that the geographical expanse of pirate operations is intruding into the Southern Red Sea and extending as far as the Eastern

Indian Ocean. In addition to the human toll associated with piracy, the economic costs of dealing with the piracy threat are staggering. These grim statistics reinforce the need, as one part of the solution to the piracy problem, to establish specialized anti-piracy courts and increase the capacity to conduct prosecutions.

We note that an ultimate goal in this regard is enhancing Somali responsibility and active involvement in efforts to prosecute and incarcerate suspected pirates. As one aspect of this, we stress the importance of the Transitional Federal Government (TFG) of Somalia enacting anti-piracy legislation by May 18, as called for in the Roadmap to End the Transition, and the Transitional Federal Parliament (TFP) passing appropriate counter-piracy legislation before the end of the transitional period in August.

We applaud the tremendous amount of work already underway by UNODC, UNDP, and others to assist Somalia and regional states in conducting piracy prosecutions and are very encouraged by the projection that, with assistance, states in the region could collectively increase the number of piracy prosecutions per year by 125—involving up to 1,250 suspects—in accordance with international standards. This includes, as appropriate, prosecution of planners, facilitators, and financiers of piracy attacks. We thank, among others, the Government of the Seychelles for its indication of willingness to host a regional prosecution center contingent on the establishment of an effective, post-trial transfer framework, and look forward to the opening this year of its Regional Anti-Piracy Prosecution and Intelligence Coordination Center.

We also acknowledge UNSCR 2020 and its commendation of INTERPOL for the creation of a global piracy database designed to consolidate information about piracy off the coast of Somalia and facilitate the development of actionable analysis for law enforcement. We urge all States to share such information with INTERPOL for use in the database, through appropriate channels.

We recognize that any increase in prosecution capacity in the region necessarily will require an increase in prison capacity. In this regard, we support the continuing efforts of Somali authorities, UNODC, UNDP, and other international partners in supporting the construction and responsible operation of suitable and sufficient prisons in Somalia and elsewhere in the region.

The United States, for its part, will continue to aggressively prosecute suspected pirates in cases with a U.S. nexus. We have in custody a total of 28 Somalis in various stages of prosecution or incarceration in five cases of attacks on American citizens or American interests.

We believe that the Secretary General's report demonstrates that the experts of UNODC, UNDP, the Contact Group on Piracy off the Coast of Somalia, and other players understand clearly the problems and needs with respect to piracy prosecutions in the region, and how best to address those needs. That is why contributions to the Trust Fund to Support Initiatives of States Countering Piracy off the Coast of Somalia are so vitally important—to permit timely implementation by UNODC, UNDP, and others of as many of the specific steps called for in the Secretary General's report as possible. The United States contributes regularly to this Trust Fund and is confident that projects that it funds are making a real difference in building capacity related to the rule of law in the region and specifically to countering piracy.

We also recognize the importance to the Seychelles and other regional states' efforts of international assistance in the form of provision of personnel, as called for in the report. We are studying ways in which we can contribute materially to the joint UK-Seychelles proposed Regional Anti-Piracy Prosecution Intelligence and Information Center to be located in Victoria and believe this center will make a material contribution to the international effort to disrupt the piracy enterprise ashore.

Finally, we endorse the report's suggestion that, as a logical next step, an assessment be conducted—with the assistance of States active in naval operations—to help determine the numbers of piracy incidents where suspects are apprehended and released, as well as the reasons underlying these releases. As the report notes, this will assist both in sharpening of counter-piracy strategy and the determination of likely anticipated demand for prosecution capacity in the region for the foreseeable future.

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(2) Contact Group on Piracy off the Coast of Somalia

In 2012, the United States continued to actively participate in the Contact Group on Piracy off the Coast of Somalia ("CGPCS" or "Contact Group"). See *Digest 2009* at 464-67 regarding the creation of the CGPCS and the website of the CGPCS, *www.thecgpcs.org*, for more information. Three plenary sessions were held in 2012 in March, July, and December. Communiques released at the conclusion of each session are available at *www.thecgpcs.org/plenary.do?action=plenaryMain#*. On December 11, 2012, the 13th plenary session of the CGPCS convened in New York. The communique from that session, available at *www.state.gov/t/pm/rls/othr/misc/202270.htm*, is excerpted below.

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The Contact Group on Piracy off the Coast of Somalia (CGPCS) held its Thirteenth Plenary Session at the UN Headquarters in New York on December 11, 2012 under the Chairmanship of India and agreed to the following conclusions:

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6. The CGPCS … noted the Memorandum of Understanding of the Inter-Governmental Authority on Development (IGAD) Joint Committee for the Grand Stabilization Plan for South Central Somalia. It called on the international community to move swiftly to support the Somali authorities so that they can finally provide the security and peace dividends that Somalis deserve. It welcomed Somalia's commitment to combat piracy, as stated in the Program endorsed by its Parliament on November 13, 2012 and called on the Somali authorities to elaborate a maritime security strategy to facilitate close cooperation with the international community to disrupt and counter pirate activity.

7. As emphasized in several UN Security Council resolutions, the CGPCS reiterated the importance of an early declaration of an Exclusive Economic Zone off the coast of Somalia, in accordance with the 1982 UN Convention of the Law of the Sea, which will promote the effective governance of waters off the coast of Somalia.

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11. It also welcomed the efforts of Working Group (WG) 3 to analyze applicable clauses and implications of existing international conventions, agreements and guidelines to protect the rights of piracy victims. It noted the ongoing discussions in WG 3 on making draft guidelines for assisting victims or potential victims of piracy with a contribution of States, industry, the International Maritime Organization (IMO) and the International Labour Organization (ILO), among others.

12. The CGPCS appreciated the Hostage Support Programme being jointly implemented by the UN Political Office for Somalia (UNPOS) and UN Office on Drugs and Crime (UNODC), with funding from the Trust Fund to Support Initiatives of States Countering Piracy off the Coast of Somalia, for tracking and monitoring those held hostage by Somali pirates, delivering humanitarian support if possible, and repatriating those abandoned on shore in Somalia.

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17. The CGPCS noted the adoption by the IMO of revised interim guidance to ship owners, ship operators, and ship masters on the use of Privately Contracted Armed Security Personnel (PCASP) on board ships in the high risk area, as well as the revised interim recommendations for flag States, port States and coastal States regarding the use of PCASP on board ships in the high risk area, and the interim guidelines to private maritime security companies providing PCASP on board ships in the high risk area.

18. The CGPCS encouraged flag States and port States to further consider the development of safety and security measures onboard vessels, including regulations for the deployment of PCASP on board ships, through a consultative process, in close collaboration with the IMO's Maritime Safety Committee and the International Organization for Standardization (ISO).

19. The CGPCS noted that an Ad Hoc Meeting on PCASP was held with the participation of 24 countries, the IMO, and NATO in Washington D.C. on September 12, 2012, where different viewpoints on issues such as the legality of jurisdiction in cases of incidents related to use of PCASP, use of force by PCASP, standard protocols for PCASP, and the wide variation in coastal States' laws for transport of arms by PCASP were expressed. The WG 2 Chair subsequently agreed to undertake a full examination of all legal issues relevant to the use of PCASP in order to identify and prioritize—as a matter of urgency—areas of action.

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Progress on legal issues

29. The CGPCS welcomed the continued efforts of WG 2 to provide legal guidance on all issues related to the fight against piracy, including with a view to ensure the prosecution of suspected pirates in accordance with international standards. Noting that 1179 individuals are currently being prosecuted or have been prosecuted for piracy in 21 countries around the world, it welcomed the progress in the number of prosecutions undertaken against suspected pirates at a national level.

30. The CGPCS encouraged the Somali authorities to pass a complete set of counter-piracy laws without further delay, with a view to ensuring the effective prosecution of suspected pirates and those associated with piracy attacks off the coast of Somalia. It remains strongly committed to supporting them in this endeavor.

31. It welcomed the new publicly accessible United Nations Interregional Crime and Justice Research (UNICRI) Database on Court Decisions and Related Matters on piracy decisions at the global level, and encouraged States to contribute to the database.

32. It supported the continued implementation of the Post Trial Transfer system and the progress in the UNODC Piracy Prisoner Transfer Programme (PPTP) and noted the need for continued support for capacity building in the field.

33. It encouraged WG 2 to develop best practices for ensuring the protection of human rights during the detention and prosecution of suspected pirates, including with regard to juveniles.

34. The CGPCS recognized the need to strengthen the mechanisms of prosecution of pirates apprehended off the coast of Somalia and reiterated the urgent need to investigate and prosecute not only suspects captured at sea, but also anyone, who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy who illicitly plan, organize, facilitate or finance and profit from such attacks. It called upon the UN Security Council to keep under review the possibility of applying targeted sanctions against such individuals or entities if they meet the listing criteria set out in paragraph 8 of Resolution 1844 (2008).

35. The CGPCS noted the concern expressed by the maritime industry that any sanction measures leading to the prevention of ransom payments could adversely affect the welfare, security and release of seafarers who are held hostage.

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Disrupting financial flows and piracy networks

37. The CGPCS welcomed the progress of the joint UNODC-World Bank-INTERPOL study on illicit financial flows linked to piracy off the Coast of Somalia, which was presented to WG 5 on 9 November 2012. It looked forward to receiving the detailed findings of the first leg of the project in early 2013 and urged the donor community to ensure the full funding of the second leg that will be centered on building financial culture and surveillance capacity in the area.

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Future Chairmanship

49. The CGPCS decided that the fourteenth and fifteenth plenary sessions will be held under the Chairmanship of the United States of America in 2013.

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(3) Foreign prosecutions

In March 2012, the Republic of the Seychelles agreed to prosecute 15 suspected Somali pirates apprehended by the U.S. Navy after boarding an Iranian vessel and liberating Iranian nationals held as hostages. See State Department March 6, 2012 Press Statement, available at *www.state.gov/r/pa/prs/ps/2012/03/185289.htm*. The 15 suspects were subsequently convicted and sentenced in the Seychelles later in the year. In a November 7, 2012 press statement, available at *www.state.gov/r/pa/prs/ps/2012/11/200232.htm*, the State Department welcomed the conviction and sentencing and expressed appreciation for Seychelles' regional leadership in counter-piracy, including its conviction of 98 pirates thus far.

c. U.S. prosecutions

Domestically, the United States continued to pursue the prosecution of captured individuals suspected in several pirate attacks. As of the end of 2012, the United States had pursued the prosecution of 28 suspected pirates in U.S. courts for their involvement in attacks on seven ships that were either U.S. flagged or related to U.S. interests. Prosecutions resulted in 19 defendants receiving convictions.

Mohammad Saaili Shibin, the man convicted as the person in Somalia responsible for negotiating the ransom of an American yacht, the *S/V Quest*, and the *Marida Marguerite*, a German-owned vessel, was convicted in the U.S. District Court for the Eastern District of Virginia of fifteen counts of piracy and related crimes. He was sentenced on August 13. 2012 to ten concurrent life sentences for piracy, two consecutive life sentences for the use of a rocket propelled grenade and automatic weapons during crimes of violence, ten years consecutive on six counts charging discharge of a firearm during a crime of violence, and two twenty year sentences for the remaining counts of discharge of a firearm during a crime of violence. Neil H. MacBride, U.S. Attorney for the Eastern District of Virginia, noted following sentencing the importance of Shibin's conviction: "The Somalia piracy criminal enterprise could not function without skilled negotiators like Shibin and his multiple life sentences should put all pirates on notice that the Justice Department will hold you accountable in an U.S. courtroom for crimes on the high seas." See Department of Justice press release, available at *www.justice.gov/usao/vae/news/2012/08/20120813shibinnr.html*.

Also in 2012, the U.S. Court of Appeals for the Fourth Circuit issued its opinion in a case involving defendants convicted of piracy "as defined by the law of nations" as codified at 18 U.S.C. § 1651 who asserted that the district court had improperly defined the crime of piracy under that statute. *United States v. Dire*, 680 F.3d 446 (4th Cir. 2012). The 2010 opinion of the district court on the issue is discussed in *Digest 2010* at 109-15, which also excerpts the September 3, 2010 declaration of State Department Legal Adviser Harold Hongju Koh conveying the opinion that the definition of piracy under the law of nations is the definition contained in Article 15 of the Convention on the High Seas of 1958 and in Article 101 of the UN Convention on the Law of the Sea ("UNCLOS"). The court of appeals for the Fourth Circuit affirmed the convictions for piracy, agreeing with the district court

that piracy "as defined by the law of nations" refers to a definition of piracy under customary international law in its current state, and not to a static definition of piracy as it was understood at the time of codification. The court's opinion is excerpted below with footnotes omitted.[***] *Digest 2010* also discusses (at pp. 106-9) the 2010 opinion of another district court construing the definition of piracy to be more static and to include the element of robbery, *United States v. Said*, 757 F.Supp.2d. 554 (E.D.Va. 2010). As explained in a footnote to the opinion in *Dire*, the Fourth Circuit issued its opinion vacating the *Said* opinion in tandem with its decision in *Dire*. 680 F.3d. 374 (4th Cir. 2012).

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On appeal, the defendants maintain that the district court erred with respect to Count One both by misinstructing the jury on the elements of the piracy offense, and in refusing to award post-trial judgments of acquittal. Each aspect of the defendants' position obliges us to assess whether the court took a mistaken view of 18 U.S.C. § 1651 and the incorporated law of nations. …

Simply put, we agree with the conception of the law outlined by the court below. Indeed, we have carefully considered the defendants' appellate contentions—endorsed by the amicus curiae brief submitted on their behalf…—yet remain convinced of the correctness of the trial court's analysis.

The crux of the defendants' position is now, as it was in the district court, that the definition of general piracy was fixed in the early Nineteenth Century, when Congress passed the Act of 1819 first authorizing the exercise of universal jurisdiction by United States courts to adjudicate charges of "piracy as defined by the law of nations." Most notably, the defendants assert that the "law of nations," as understood in 1819, is not conterminous with the "customary international law" of today. The defendants rely on Chief Justice Marshall's observation that "[t]he law of nations is a law founded on the great and immutable principles of equity and natural justice," *The Venus*, 12 U.S. (8 Cranch) 253, 297, 3 L.Ed. 553 (1814) (Marshall, C.J., dissenting), to support their theory that "[t]he Congress that enacted the [Act of 1819] did not view the universal law of nations as an evolving body of law." Br. of Appellants 12; *see also* Br. of Amicus Curiae 11 (arguing that, in 1819, " 'the law of nations' was well understood to refer to an immutable set of obligations—not evolving practices of nations or future pronouncements of international organizations that did not yet exist").

The defendants' view is thoroughly refuted, however, by a bevy of precedent, including the Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*, [542 U.S. 692 (2004)]. The *Sosa* Court was called upon to determine whether Alvarez could recover under the Alien Tort Statute, 28 U.S.C. § 1350 (the "ATS"), for the U.S. Drug Enforcement Administration's instigation of his abduction from Mexico for criminal trial in the United States. *See* 542 U.S. at 697, 124 S.Ct. 2739. The ATS provides, in full, that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Significantly, the ATS predates the criminalization of

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[***] Editor's note: The defendants sought further review of their case by filing a petition for certiorari in the Supreme Court of the United States. The Supreme Court denied the petition for certiorari on January 22, 2013.

general piracy, in that it was passed by "[t]he first Congress ... as part of the Judiciary Act of 1789." *See Sosa,* 542 U.S. at 712–13, 124 S.Ct. 2739 (citing Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77 (authorizing federal district court jurisdiction over "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States")). Yet the *Sosa* Court did not regard the ATS as incorporating some stagnant notion of the law of nations. Rather, the Court concluded that, while the first Congress probably understood the ATS to confer jurisdiction over only the three paradigmatic law-of-nations torts of the time—including piracy—the door was open to ATS jurisdiction over additional "claim[s] based on the present-day law of nations," albeit in narrow circumstances. *See id.* at 724–25, 124 S.Ct. 2739. Those circumstances were lacking in the case of Alvarez, whose ATS claim could not withstand being "gauged against the current state of international law." *See id.* at 733, 124 S.Ct. 2739.

Although, as the defendants point out, the ATS involves civil claims and the general piracy statute entails criminal prosecutions, there is no reason to believe that the "law of nations" evolves in the civil context but stands immobile in the criminal context. Moreover, if the Congress of 1819 had believed either the law of nations generally or its piracy definition specifically to be inflexible, the Act of 1819 could easily have been drafted to specify that piracy consisted of "piracy as defined *on March 3, 1819* [the date of enactment], by the law of nations," or solely of, as the defendants would have it, "robbery upon the sea." The government helpfully identifies numerous criminal statutes "that incorporate a definition of an offense supplied by some other body of law that may change or develop over time," …. Additionally, the government underscores that Congress has explicitly equated piracy with "robbery" in other legislation, including the Act of 1790 that failed to define piracy as a universal jurisdiction crime.

For their part, the defendants highlight the Assimilated Crimes Act (the "ACA") as a statute that expressly incorporates state law "in force at the time of [the prohibited] act or omission." *See* 18 U.S.C. § 13(a). That reference was added to the ACA, however, only after the Supreme Court ruled that a prior version was "limited to the laws of the several states in force at the time of its enactment," *United States v. Paul,* 31 U.S. (6 Pet.) 141, 142, 8 L.Ed. 348 (1832)—a limitation that the Court has not found in various other statutes incorporating outside laws and that we do not perceive in 18 U.S.C. § 1651's proscription of "piracy as defined by the law of nations."

Additional theories posited by the defendants of a static piracy definition are no more persuasive. For example, the defendants contend that giving "piracy" an evolving definition would violate the principle that there are no federal common law crimes. *See* Br. of Appellants 32 (citing *United States v. Hudson,* 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812), for the proposition "that federal courts have no power to exercise 'criminal jurisdiction in common-law cases' "). The 18 U.S.C. § 1651 piracy offense cannot be considered a common law crime, however, because Congress properly "ma[de] an act a crime, affix[ed] a punishment to it, and declare[d] the court that shall have jurisdiction of the offence." *See Hudson,* 11 U.S. (7 Cranch) at 34. Moreover, in its 1820 *Smith* decision, the Supreme Court unhesitatingly approved of the piracy statute's incorporation of the law of nations, looking to various sources to ascertain how piracy was defined under the law of nations. *See Smith,* 18 U.S. (5 Wheat.) at 159–61.

The defendants would have us believe that, since the *Smith* era, the United States' proscription of general piracy has been limited to "robbery upon the sea." But that interpretation of our law would render it incongruous with the modern law of nations and prevent us from exercising universal jurisdiction in piracy cases. *See Sosa,* 542 U.S. at 761, 124 S.Ct. 2739

(Breyer, J., concurring in part and concurring in the judgment) (explaining that universal jurisdiction requires, inter alia, "substantive uniformity among the laws of [the exercising] nations"). At bottom, then, the defendants' position is irreconcilable with the noncontroversial notion that Congress intended in § 1651 to define piracy as a universal jurisdiction crime. In these circumstances, we are constrained to agree with the district court that § 1651 incorporates a definition of piracy that changes with advancements in the law of nations.

We also agree with the district court that the definition of piracy under the law of nations, at the time of the defendants' attack on the USS Nicholas and continuing today, had for decades encompassed their violent conduct. That definition, spelled out in the UNCLOS, as well as the High Seas Convention before it, has only been reaffirmed in recent years as nations around the world have banded together to combat the escalating scourge of piracy. For example, in November 2011, the United Nations Security Council adopted Resolution 2020, recalling a series of prior resolutions approved between 2008 and 2011 "concerning the situation in Somalia"; expressing "grave[ ] concern[ ] [about] the ongoing threat that piracy and armed robbery at sea against vessels pose"; and emphasizing "the need for a comprehensive response by the international community to repress piracy and armed robbery at sea and tackle its underlying causes." Of the utmost significance, Resolution 2020 reaffirmed "that international law, as reflected in the [UNCLOS], sets out the legal framework applicable to combating piracy and armed robbery at sea." Because the district court correctly applied the UNCLOS definition of piracy as customary international law, we reject the defendants' challenge to their Count One piracy convictions, as well as their mandatory life sentences.

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C. INTERNATIONAL, HYBRID, AND OTHER TRIBUNALS

1. Overview

In November 2012, Mr. Koh delivered remarks on international criminal justice at the Vera Institute of Justice in New York and at Leiden University, Campus The Hague. The remarks, excerpted below, are also available at *www.state.gov/s/l/releases/remarks/200957.htm*.

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In my time tonight, let me review the five phases of this historic global project, the role of the United States in advancing it, and the challenges that still loom ahead for international criminal justice and the United States.

I. International Criminal Justice 1.0: The Nuremberg Trials

Let me begin with Nuremberg, what could be called the "beta testing" phase for International Criminal Justice 1.0. Nearly 70 years after the Nuremberg Trials, what seems most

remarkable now is that they happened at all. Looking back, we sometimes think of trials—particularly the International Military Tribunal at Nuremberg and the subsequent U.S. Nuremberg proceedings—as the logical and inevitable response to the Nazi atrocities. But at the Tehran Conference, Stalin reportedly suggested that World War II conclude with the summary execution of at least 50,000 Germans. At Yalta, Churchill apparently "thought a list of the major war criminals … should be drawn up [and] they should be shot once their identity is established." Even Roosevelt's Secretary of the Treasury, Henry Morgenthau, suggested that war criminals be summarily liquidated.

But in the famous Yalta memo, it was three American Cabinet Secretaries—the U.S. Secretaries of State and War and Attorney General—who all urged President Roosevelt that "the just and effective solution lies in the use of the *judicial method*." They presciently pointed out the value in creating "an authentic record of Nazi crimes and criminality" that would be "available for all mankind to study in future years." And these U.S. officials backed up their idea with both action and resources. As some would say, we cared enough to send our very best: Attorney General Francis Biddle and Judge John J. Parker to serve as Judges, our most brilliant Supreme Court Justice Robert Jackson, to serve as Chief Prosecutor, aided by an all-star team of lawyers that included Telford Taylor, Herbert Wechsler, Whitney Harris, future Senator Tom Dodd, and Ben Ferencz.

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This past August, I visited Nuremberg for the first time, and learned much more about the nuts and bolts of those trials. What struck me most is that the historic success of Nuremberg turned not just on the particular people who were there, but on four *institutional attributes* of international criminal justice that those proceedings worked hard to establish*: legitimacy, professionalism, cooperation, and legality.* …

* * * *

The most enduring legacy of Nuremberg has been a set of seven legal principles—the Nuremberg Principles—that to this day continue to guide the project of international criminal justice:

- *Principles 1&2* –"Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment," regardless of whether the act is prohibited under local law.
- *Principles 3&4* – "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law," and the individual is not protected from criminal punishment simply because he (or she) was carrying out orders.
- *Principle 5* – Those accused of crimes have a right to a fair trial, and
- *Principles 6&7* – Describing punishable international crimes as including crimes against peace, war crimes, crimes against humanity, and complicity in any of the above.

As you know, these Nuremberg Principles do not stand alone; in four ways, they went on to galvanize an international criminal justice movement: first, by suggesting universal principles

that gave the movement one of its authoritative *texts*; second, by declaring that individuals are *subjects, not just objects*, of international law, thereby denying that international law is for States only; third, by *piercing the veil of state sovereignty* behind which war criminals had all too often previously hidden and recognizing that individuals can be held criminally responsible for international crimes, and fourth, by reaffirming that *criminal courts* can be appropriate forums for holding those individuals responsible for international crimes.

In short, Nuremberg and its principles provided what could be called the "intellectual operating software" for the international criminal justice movement. But for several decades after these Principles were developed, they lay largely dormant, lacking the necessary "hardware"—the functioning international institutions with the necessary legitimacy, legality, professionalism, and cooperation to implement those principles in real cases and crises.

B. International Criminal Justice 2.0: The Ad Hoc Tribunals

Only after the Cold War ended, did the two new international ad hoc tribunals—the ICTY and the ICTR—finally usher in the modern age of international criminal justice. When horrifying atrocities occurred in the Balkans and Rwanda, the United States led the push for accountability, resorting to the UN Security Council's Chapter VII authority to establish those ad hoc tribunals. As my old boss Madeleine Albright told the UN Security Council when the ICTY was established in 1993, "There is an echo in this chamber today. The Nuremberg principles have been reaffirmed. The lesson that we are all accountable to international law may finally have taken hold in our collective memory."

Nothing quite like the ICTY and ICTR had ever been attempted. Even in the United States and other countries invested in creating the tribunals, some quietly saw them as expressions of guilt for failing to prevent the atrocities, or distractions from the more serious work of peacemaking. The ICTY was simultaneously asked to deliver accountability and to help resolve a bloody conflict, all from a brand new architecture. And it began this work when Croatia, Serbia, and much of Bosnia remained openly hostile to the Tribunal. But like the Nuremberg tribunals, first the ICTY, then the ICTR, built their bona fides by strengthening the four basic institutional attributes I just mentioned: legitimacy, legality, cooperation, and professionalism.

First, *Legitimacy*. The question of legitimacy continued to dog international criminal justice—here, the claim was not, as in Nuremberg, that the tribunals exemplified "victors' justice" after a completed armed conflict, but rather were *biased* players favoring one party or another in an ongoing armed conflict. Despite their many accomplishments, the tribunals—which enjoyed primary jurisdiction—heard many criticisms about their legitimacy among the local populations. To this day, according to surveys, many Serbs tend to think that the ICTY is biased against Serbs, while Croats tend to think that the ICTY is biased against Croats.

To overcome such a critique, a true judicial institution must focus in part on the second attribute of international criminal justice, namely, *legality*. The ICTY and ICTR began developing a modern jurisprudence of criminal liability that was based on existing law as applied to a modern ethnic conflict. One of the ICTY's early accomplishments was the Dusko *Tadic* case, which involved a relatively low-level offender who—had he been caught only a few years later—would have been referred to Bosnia for domestic prosecution. The *Tadic* decision provided a reasoned basis for the seminal conclusions that (1) the UN Security Council had the *authority* to set up a criminal court under Chapter VII of the UN Charter; (2) the tribunal's jurisdiction extended to war crimes committed in the course of a *non-international armed conflict*; and (3) Tadic could be convicted for his association with a small group of offenders,

articulating the concept of *joint criminal enterprise ("JCE")* that later became a central feature of the ICTY's work.

As the late Judge Nino Cassese later explained, JCE allowed international courts to pursue in a reasoned and logical way the masterminds of mass atrocities even when they were not present at the scene of the crime. The ICTR applied similar reasoning to pursue not just the low-level offenders who carried out the Rwandan genocide, but officials as high ranking as the prime minister. Moreover, the early jurisprudence-building of the ad hoc tribunals provided the reasoned and logical basis for the important global conversation that has ensued on the issue of sexual violence. The post-WWII tribunals had largely ignored sexual violence, but the ICTY and ICTR situated the issue within the existing law of war crimes, crimes against humanity, and genocide. Although these decisions cannot, as a strictly legal matter "bind" other courts, there is no doubt that the jurisprudence of the ICTY and ICTR has been influential in the broader development of international criminal law.

Third, c*ooperation*. To deliver genuine accountability, a tribunal must win a strong measure of cooperation from the international community. In the early days of the ICTY, national cooperation proved sporadic. The Tribunal found itself without custody of many indictees, particularly high-level ones, and many of the local players were openly hostile. But over the years, the cooperation and support of the international community noticeably improved, as the United States, together with many EU countries, tied foreign assistance to States in the Balkans to their apprehension of suspected war criminals and cooperation with the ICTY. The United States also entered into an arrest and surrender agreement with the ICTY. NATO and UN peacekeepers conducted arrests. U.S. cooperation helped not just in securing defendants but in procuring evidence. To take just one example, my office helped provide the ICTY Prosecutor with aerial images showing the construction of mass graves at Srebrenica, and the Trial Chamber in the *Popovic* case specifically relied on these aerial images to determine that the Bosnian Serb Army had engineered the mass killing and burial of Muslim men and boys in July 1995. And my office, together with the U.S. Department of Justice, also gave the ICTR high-profile assistance in apprehending and transferring Pastor Ntakirutimana, a Rwandan who had come to live in Texas after the genocide, to the ICTR for a fair trial, after which, the suspect was convicted and sentenced.

A fourth and final attribute that helped the ad hoc tribunals succeed was the hard-won reputation of their component institutions—judiciary, prosecution, and defense—for *professionalism*. It is inevitable that countries will limit the sharing of sensitive information unless they have the confidence that the information will be appropriately protected by their tribunal counterparts. The ICTY developed effective rules to provide such protections, but the ultimate assurance was provided by a shared sense that the lawyers and institutions involved would in fact operate in the way that countries expect of true legal professionals.

In short, the phase that I call "International Criminal Justice 2.0" was an initial phase of hardware-building for the international criminal justice system. The UN Security Council created two new institutions that proved capable of doing hugely important work in promoting accountability. At the same time, it was becoming clear that these tribunals—which were expensive and lasted much longer than anyone had anticipated—would not necessarily be the all-purpose model for all international criminal justice going forward.

C. International Criminal Justice 3.0: The Hybrid Tribunals

Indeed, one lesson we came to appreciate in light of the ICTY/ICTR experiment was that justice for international crimes does not necessarily require justice before an *international*

tribunal. To the contrary, in many cases, the best outcome—from the perspective of international justice, transitional justice, and institution-building—is for *States* to investigate and, if appropriate, to prosecute international crimes. For that reason, over the past fifteen years, the process of architecture-building in international criminal justice has taken a turn towards a "third way" of creating hybrid national-international tribunals—what could be called "hybridity" and "complementarity," or simply "International Criminal Justice 3.0." In three very different countries—Sierra Leone, Cambodia, and Lebanon—different arrangements were reached to promote justice and accountability, each tailored to their particular local contexts.

Take for example the Special Court for Sierra Leone (SCSL), which was formed to bring accountability for horrific abuses—including brutal amputations, trade in "blood diamonds," and terror of civilians—during that country's civil war. "Tribunal fatigue" from the ICTY and ICTR had set in; contentious debates about forming the ICC were ongoing; and some were calling for domestic prosecutions only, even while the Sierra Leone government was requesting international help. I went to Sierra Leone as Assistant Secretary for human rights and worked with many other to help develop a novel hybrid tribunal—not imposed by the UN Security Council under Chapter VII and not purely a creature of domestic law, but rather the product of an innovative treaty between Sierra Leone and the UN, which created a tribunal based in Freetown. The Sierra Leone court became the first modern internationalized criminal tribunal to sit in the same country where the atrocities it was prosecuting occurred, although for security reasons the Charles Taylor prosecution—about which I will say more—took place in The Hague.

The hybrid model of the Sierra Leone tribunal illustrated new ways for international criminal justice to develop the four attributes of legitimacy, legality, cooperation, and professionalism that I have already mentioned. Surveys have shown support among Sierra Leoneans for the court, its contribution to peacekeeping, the fairness of its trials, and its role in deterring future violence. …

The Sierra Leone Court's key jurisprudential achievements have included its approach to *amnesty* and *liability rules*. Early on, the Court was confronted with a sweeping amnesty provision in the 1999 Lomé Peace Agreement between the Sierra Leone government and rebels. But—in accord with the UN's understanding—the Court determined that this domestic agreement could not block an *international* tribunal from prosecuting a serious *international* crime. Thus, in Sierra Leone, a domestic amnesty agreement was construed *not* to block international justice. And as scholars have noted, the inauguration of the SCSL coincided with notably diminished levels of violence on the ground, illustrating that accountability can be compatible with transition and peace.

Perhaps the greatest milestone achieved by the SCSL was the first conviction of a former head of state by an international tribunal since the end of WWII: President Charles Taylor of Liberia was convicted for aiding and abetting atrocity crimes carried out by rebels in Sierra Leone, including murder, rape, conscripting child soldiers, sexual slavery, and acts of terrorism. Although the verdict remains subject to appeal, the *Taylor* case reaffirmed the Nuremberg principle that high-ranking government officials should be held to account for their crimes, a result only possible after years of firmly rooting the criminal justice project within the broader fabric of international relations. Some have treated this as a shallow victory, questioning why Taylor was convicted "*only*" for aiding and abetting. But as the Nuremberg principles made clear, complicity in war crimes or crimes against humanity is no less a crime under international law than the predicate acts, fully worthy of international condemnation and punishment. These accomplishments in the courtroom required difficult work outside of it in the areas of

professionalism and cooperation—a particularly important example being the voluntary financial contributions provided by my government and others.

Similarly, in Cambodia, the international community worked long and hard with domestic authorities to pursue accountability for atrocity crimes that took place decades ago. The Khmer Rouge Tribunal—formally, the Extraordinary Chambers in the Courts of Cambodia (ECCC)—was a different type of hybrid, established under domestic law but regulated by a UN-Cambodia agreement. The ECCC has, with U.S. Government support, successfully held Duch—a Khmer Rouge perpetrator accountable, and we are supporting its continuing efforts to try the three living senior leaders of the Khmer Rouge: Nuon Chea, Khieu Samphan, and Ieng Sary.

Finally, the Special Tribunal for Lebanon, established by the UN Security Council in 2007, represents an entirely different attempt at hybridity. Unlike the other tribunals to date, the Lebanon Tribunal was created as a quasi-*international* tribunal to apply domestic law in connection with the assassination of former PM Rafiq Hariri and certain related political assassinations. For unique reasons, the Lebanese Government lacked the ability to prosecute locally but wanted an international-like tribunal with a clear Lebanese imprint—use of Lebanese law and procedure, and a mix of international and Lebanese judges and prosecutors. As you know, Lebanon continues to be a difficult environment for this effort. But as the Tribunal's work has finally gotten underway, the United States has continued to offer unwavering strong support.

D. International Criminal Justice 4.0: The ICC

This brings us to global criminal justice 4.0—the International Criminal Court or ICC. The struggles setting up the ICTY and ICTR made clear the value of a permanent, standing institution capable of delivering justice. And many forget that the United States was at the forefront in promoting the creation of an international criminal court.

You all know what happened afterwards. In 1998, a Statute for the ICC was developed in Rome, but the United States expressed serious reservations about certain aspects of the Rome Statute as it was eventually adopted. We did not initially sign the Rome Statute, but participated in drafting the elements of crimes, which helped ensure greater precision in the definitions of crimes within the court's jurisdiction. But before leaving office in 2000, President Clinton did sign the Rome Statute, signaling our good faith hope to keep working to improve the Court, even while noting that he could not recommend that the United States ratify the treaty "until our fundamental concerns are satisfied." … [U]nder the Bush Administration, the United States chose to abstain when the UN Security Council referred the Darfur situation to the Court. By the end of the second Bush term, my predecessor as Legal Adviser, John Bellinger, said explicitly that the United States needed to acknowledge that the ICC is a "reality."

This chronology shows that our relationship with the ICC has had ebbs and flows. But please do not misread our skepticism of certain institutions as hostility to the bedrock norms and values of international criminal justice. In fact, taking a stand for justice and the rule of law is part of our national character. Of course, many in our country still have fundamental concerns about the Rome Statute that have prevented us from becoming a party. This is hardly surprising, given concerns about the potential risks of politicized prosecutions, the United States' unique posture of having more troops and other personnel deployed overseas than any other nation, and that we are frequently called upon to help ensure global peace, justice and security. But if you ask Americans a concrete, practical question—should specific perpetrators of genocide, war crimes, or crimes against humanity be held accountable for their crimes in particular cases—the typical American answer to that question would be an unequivocal "yes."

Moreover, the United States has long recognized that international criminal justice, and accountability for those responsible for atrocities, is in our national security interests as well as in our humanitarian interests. Among other things, supporting global criminal justice serves U.S. national interests by promoting a culture of accountability that can help increase stability and thus decrease the need for far more costly military interventions in the future. We have much to gain from the effective functioning of the rule of law, and the architecture of international criminal justice can play an important part in that effort.

By early 2009, Secretary Clinton had made clear that "whether we work toward joining or not, we will end hostility toward the ICC, and look for opportunities to encourage effective ICC action in ways that promote U.S. interests by bringing war criminals to justice." And the United States has sought to make our approach to the ICC more congruent with our broader approach to international criminal justice. So, while the United States will always protect U.S. personnel, we are engaging with States parties to the Rome Statute on issues of concern and we have applied a pragmatic, case-by-case approach towards ICC issues. Let me review not only what we've said, but what we've done:

First, from the beginning of this administration we have dropped the hostile rhetoric. With almost 10 years' experience with the ICC under our belts, we had seen that the Court could play a key role in bringing perpetrators of the worst atrocities to justice and an important forum for advancing US interests.

Second, we have begun to engage with the Assembly of States Parties (ASP) and the Court. Our "smart power" view is that the way to advance U.S. interests is not to shut ourselves off to those with whom we disagree, but to engage and work for mutually beneficial improvements. Absenting ourselves from meetings of States parties and discussions about aggression allowed States parties to develop a definition of aggression without U.S. input, which greatly complicated our efforts when we did eventually engage on that topic in an effort to promote a more legally coherent outcome. We now regularly attend meetings of the ASP as an "observer" and we participated constructively at the Review Conference in Kampala. We are closely monitoring the evolving jurisprudence of the Court. And we have also actively engaged with the Office of the Prosecutor and the Registry to consider specific ways that we can support specific prosecutions already underway in all of the situations currently before the Court, including through cooperation on witness protection issues, and we have responded positively to a number of requests.

Third, we have publicly urged cooperation and expressed support for the Court's work in *all* of the ongoing situations in which the Court has begun formal investigations or prosecutions, both in our diplomacy and in multilateral settings. To take just a few examples, last year, we supported the UN Security Council's referral of the situation in Libya to the ICC, our first affirmative vote for a referral, adopted even as atrocities were being perpetrated. This represented an historic milestone in the fight against impunity, and we have continued to support the Court's engagement there. President Obama has made strong statements about the importance of accountability and cooperation with the ICC's efforts in Kenya and Cote d'Ivoire. Secretary Clinton has made equally strong statements throughout her travels about the ICC's work to ensure justice for the victims of atrocities in these and other situations before the Court. Following the landmark *Lubanga* judgment, both the White House and State Department issued strong statements about the historic nature of the conviction and the message that it sends to those who engage in the brutal practice of conscripting and using children to participate actively in hostilities. The United States has also supported recent UN Security Council presidential

statements urging cooperation with the Court and supporting regional efforts to arrest Joseph Kony and top Lord's Resistance Army (LRA) commanders, emphasizing the importance of Bosco Ntaganda's arrest in the DRC, and stressing the importance of accountability for abuses and violations on all sides in Cote d'Ivoire, while encouraging the Ivorian government to continue its cooperation with the ICC. Last summer, we engaged diplomatically to urge the swift resolution of the detention of ICC defense counsel in Libya, including by supporting a UN Security Council press statement on the issue.

Fourth, we continue to find it a serious cause for concern that nine individuals who are the subject of existing ICC arrest warrants have not yet been apprehended. For example, we have urged all States to refrain from providing political or financial support to the Sudanese suspects who remain at large, including by discouraging States from welcoming these individuals. In the UN Security Council, Ambassador Susan Rice and other senior diplomats have repeatedly called for Sudan to cooperate with the ICC and for States to oppose invitations, facilitation, or support for travel by those subject to existing arrest warrants.

Fifth, on a related front, we have noted that States can lend expertise and logistical assistance to apprehend current ICC fugitives.

Just four years ago, this list of examples of U.S. engagement with the ICC would have seemed like a surprise. But it shouldn't be. *Of course* we support international efforts to bring to justice those responsible for genocide, war crimes, and crimes against humanity in Darfur. *Of course* we think that the perpetrators of horrific war crimes in the Democratic Republic of the Congo ought to be punished. Everyone knows that the ICC is not the exact court we wanted, but it is the Court that exists, and we fully understand that the ICC has the potential in many cases to advance common goals in promoting accountability. Thus, the current policy toward the Court has been based less on an abstract debate about the value of the Court and more on a direct focus on the specific: *do the ICC's efforts in this context complement U.S. efforts to ensure that perpetrators of this particular atrocity be held accountable and advance U.S. interests and values?* If the answer to those questions is yes—and it nearly always has been—we've been able to view ICC prosecutions as part of the solution. This is part of our broader "smart power" approach: not to shut ourselves off to those with whom we disagree, but to engage and work for mutually beneficial improvements that advance U.S. interests, including our interest in justice and the rule of law.

Putting all of this together, as I made clear more than two years ago in a speech at New York University,

"What you quite explicitly do not see from this Administration is U.S. hostility towards the Court. You do not see what international lawyers might call a concerted effort to frustrate the object and purpose of the Rome Statute. That is explicitly not the policy of this administration. Because although the United States is not a party to the Rome Statute, we share with the States parties a deep and abiding interest in seeing the Court successfully complete the important prosecutions it has already begun."

When you look beyond rhetoric and the focus on the U.S. relationship with the Court, a crucial question remains: namely, where is this new institution going, and where does this "4.0" version fit within the broader architecture of international criminal justice? Let me point to three important considerations.

First, the development of the notion of *positive complementarity*: the ICC is a court of last resort that, if it is truly successful, will have fewer, not more, cases. The complementarity principle is easy to describe but hard to implement, and it is still in the earliest stages of

development. The ad hoc tribunals were designed to give the new international tribunals primary jurisdiction, and the hybrid courts were built on the premise that purely domestic justice was not possible in those particular cases. But the Rome Statute has codified the important lesson that domestic justice often remains the best form of justice. This idea underscores the importance of institution-building that can serve developing and post-conflict societies well. And when it works, positive complementarity empowers local populations to take ownership of the accountability process and to bear direct witness to the lesson that grave international crimes carry consequences.

Second, as I have noted, the ICC has finally achieved its first conviction, the conviction of Thomas Lubanga for the war crimes of enlisting and conscripting children and using them to participate actively in hostilities. This historic step in securing a measure of justice for the Congolese people also highlights the brutal practice of conscripting and using children to fight in armed conflict, a topic that is justifiably one of international concern. The ICC's Trial Chamber also recently issued an important decision on principles and procedures governing reparations for victims of Lubanga's crimes.

Third, we must remember that the ICC is still very much in its early stages, and that the bulk of its work is yet to come. The tribunals that came before it took many years to build their jurisprudence on atrocity crimes, to navigate difficult waters of international cooperation, and to establish legitimacy. For that reason, I often describe the ICC as a bicycle, which is now moving, but remains wobbly. The ICC faces several challenges. First, to strengthen the bicycle, by building up the Court's resources and institutional capacities. The tribunal needs to function in a fair and transparent manner with able and unbiased prosecutors and judges. Second, to avoid putting too much weight on the bicycle too early. This is a reminder of the imperative of States lending resources to advise and assist national systems in countering atrocity crimes, so that there will be fewer instances in which the ICC is called upon to act. Third, it will be important to improve the cooperation of States and enhance the efficiency and effectiveness of the Court's prosecutions, as well as to avoid unnecessary collisions with States, including by making prudent decisions about the cases it pursues and declines to pursue. The length of proceedings, as well as the existence of fugitives and lack of cooperation in many of the existing cases before the Court, remain serious problems for the ICC. But note that such criticism was also leveled in its early days against the Yugoslav Tribunal (the ICTY), now considered a mature, well-regarded institution that, remarkably, has no remaining fugitive defendants.

Finally there remain particularly live questions with regard to the implementation of the aggression amendments discussed in Kampala. The United States continues to have concerns about the amendments, and we do not support states moving forward with ratification at this time. Our concerns about the possibility of investigations and prosecutions in the absence of Security Council action are well-known. We believe that it was wise for the States Parties to subject the Court's exercise of jurisdiction over the crime of aggression to a decision to be taken sometime after January 1, 2017, which provides some breathing space in which measures that require attention can be considered, and in which progress on other issues—the effort to ensure accountability for perpetrators of war crimes, crimes against humanity, and genocide—can be consolidated.

In sum, the key to winning greater international and U.S. support going forward will be for the ICC to focus on strengthening itself as a fair and legitimate criminal justice institution that acts with prudence in deciding which cases to pursue. Critical to the future success of the ICC, and the views of the United States and others in the international community of it, will be

its attention to the four values I have already highlighted: (1) building institutional legitimacy; (2) promoting a jurisprudence of legality, with detailed reasoning and steeped in precedent; (3) fostering a spirit of international cooperation; and (4) developing an institutional reputation for professionalism and fairness.

E. International Criminal Justice 5.0

Where does all this leave us, nearly seventy years after Nuremberg and twenty years after the creation of the first ad hoc tribunal? Plainly, we have come to an end of the software and hardware-building phase—call it the "architectural stage"—of modern international criminal justice. But the real work is just beginning. What we have achieved in that time is a gradual, but real and important change in culture, one by which accountability has gone from being a subsidiary concern to an issue that now has a seat at the table as we face the great issues of the day.

Twenty years ago, the status quo was no international trials for war criminals; today, the status quo favors accountability, at least in principle. As important, we now have a menu of architectural options for pursuing justice—whether in an international framework, a domestic one, or some novel and flexible hybrid format. In the first instance, we continue to work to bolster the capacity of national governments to ensure justice for victims in the face of grave atrocities. For those cases where it is needed and appropriate, the architecture at the international level, however imperfect, now exists, and it presents the opportunity to focus on the full range of options for tackling concrete matters of accountability.

For the United States, the current challenge is how to build the accountability agenda of the past seventy years into a sustained "Smart Power Approach" to international criminal justice that sees accountability as part of a broader approach to diplomacy, development, rule of law, and atrocities prevention. To that end, a year ago the President announced the formation of an Atrocities Prevention Board, stating that "preventing mass atrocities and genocide is a core national security interest and a core moral responsibility of the United States of America." Through focused coordination, training, enhancing our civilian surge capacity, and many other efforts, the United States is working to put in place a whole-of-government approach to atrocities prevention. And as part of these efforts, as Secretary Clinton has said, "we want to deter atrocities by making clear that those who commit these crimes will be held accountable."

Let me discuss two recent cases: Libya and Syria, which illustrate the role that accountability should play in managing ongoing crises. When the United States supported a UN Security Council referral of the situation in Libya to the ICC, our focus was on the concrete question, "Can the ICC be an effective tool in this situation and does it advance U.S. interests and values"? And our pragmatism compelled us to find in the ICC a positive way of moving forward with accountability.

We have continued to stress the importance of cooperation by the Libyans with the Court, and to find ways to assist a post-Qadhafi Libya to address its justice sector reform goals, emphasizing the need for accountability in Libya for violations and abuses on all sides. Our concern has been with the <u>outcome</u> of accountability, not so much the venue for it. And as the ICC proceedings move forward on Libya's admissibility challenge in the case against Saif al-Islam Qadhafi, this will be an important moment for both Libya and the Court to show how the principle of complementarity will work in practice. In the meantime, we continue to stress the importance of Libya ensuring that the detention of and any domestic proceedings against Saif al-Islam and Abdullah al-Senussi fully comply with Libya's international obligations.

In Syria, we witness a tragic conflict unfold. Still, we have continued to press for accountability without prejudging these choices by calling for an ICC referral by the UN Security Council now. As the transition proceeds, and as the UN's Commission of Inquiry has recognized, the Syrian people should have a leading voice in deciding how to deal with those responsible for atrocities, in a manner consistent with international law. Perhaps the Syrian people will end up wanting to send cases to the ICC; perhaps they will wish to prosecute and punish perpetrators themselves. We are working with our Arab and other international partners to help the Syrian people ensure that those perpetrating horrific violence against them are ultimately held accountable, and we think it critically important to continue documenting violations and abuses and collecting evidence so that the international community can uncover and tell the truth about what is occurring. We and our international partners are continuing to support the recently launched Syria Justice & Accountability Centre to document human rights abuses and to support accountability efforts in Syria through training and other activities.

Seventy years ago, it would not have been clear that any of those who perpetrate these atrocities would ever be subject to individual criminal responsibility for their actions. Twenty years ago, it would not have been clear that the world would be willing to act on the principles recognized in Nuremberg. But today, there is in place not only an architecture of accountability, but an emerging *culture* that elevates preventing atrocities and accountability for perpetrators as principal concerns in policy discussions. That culture, and the anticipation of certain forms of post-transition accountability may now help to facilitate transition—for example, by opening up space for the Asad regime's opponents and encouraging defections by those officials who want to distance themselves from the regime's crime.

So where is all of this heading? Before too long, the work of the ad hoc tribunals will continue and conclude in the work of the Mechanism for the International Criminal Tribunals (MICT). The MICT was established as a small, temporary, stream-lined institution capable of wrapping up the work of the ICTY and ICTR (for example, handling the remaining appeals after the ICTY and ICTR finish their work, and dealing with legacy issues such as managing sentences). You can think of this as an "exit strategy" for International Criminal Justice 2.0, as we focus on the international criminal justice issues of the future.

I am often asked, in ten years, will the United States have become a party to the Rome Statute? With respect, I think this is the wrong question. The real questions for the next ten years should be: "Are the worst international criminals being held accountable? Is a culture in which perpetrators commit serious violations of international law with impunity slowly but surely eroding in favor of a culture of respect for international law and of accountability? And is the United States doing everything it can to help?"

In answering that question, I would argue, the United States should be judged by its actions, not just its words. Those actions, I have argued, reveal an impressive record of U.S. leadership since Nuremberg in the international criminal justice arena: whether at Nuremberg itself, at the Yugoslav and Rwanda Tribunals, the Hybrid Courts, and now with the ICC.

In short, for too long, the global conversation about international criminal justice has focused too much on what you might call "the reverberations of Rome:" on what did and did not happen at the Rome ICC Conference, and what it supposedly signals about America's perceived ambivalence toward international criminal justice. Let me suggest that going forward, we focus less on the reverberations of Rome and more on what Secretary Albright called the "echo of Nuremberg": the great and continuing efforts we have taken to embed the Principles recognized in Nuremberg into the fabric of international institutions and the culture of international

relations, and to support accountability as part of a broader, durable smart power approach to preventing atrocities and managing conflict. As Nuremberg's Principles approach their 70th birthday, it is my sincere belief that, we are on our way to building a new era of international criminal justice—"International Criminal Justice 5.0"—a better version of international criminal justice for the 21st Century that can endure and do good over the next seventy years and beyond.

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2. International Criminal Court

a. Overview

Stephen J. Rapp, U.S. Ambassador-at-Large for War Crimes Issues, delivered a statement on behalf of the U.S. observer delegation at the general debate of the Eleventh Session of the annual Assembly of States Parties ("ASP") to the International Criminal Court ("ICC") at The Hague on November 15, 2012. Ambassador Rapp's remarks at the general debate are excerpted below and available at *www.state.gov/j/gcj/us_releases/remarks/2012/200880.htm*

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… Since we last met in New York in December 2011, Fatou Bensouda has assumed the duty of Prosecutor of the ICC, and Judge Song has enjoyed re-election as President of the Court. We thank them both for their long and dedicated service, and look forward to continuing to work together.

…This is the fourth time I have stood before this body representing the United States. We also participated actively in the Review Conference in Kampala in 2010. We are pleased to have joined consensus on each of the last two General Assembly Resolutions on the ICC and last year's OAS Resolution. My colleagues in New York and The Hague regularly make positive contributions to meetings, working groups, and formal multilateral sessions devoted to various aspects of the work of the Court.

As Ambassador-at-Large of the Office of Global Criminal Justice, I have traveled around the world, working to bolster national capacities while urging cooperation with the ICC's work… . …[D]uring the past four years, President Obama and Secretary of State Clinton have consistently championed the cause of pursuing accountability for the world's worst crimes and preventing these crimes in the future.

In short, ensuring the prevention and deterrence of atrocities and making good on the promise of justice to the victims of these crimes, is an urgent priority for the highest levels of my government, one we see as both a moral imperative and a matter of national security. We have worked diligently to promote an end to impunity and have been supporting the work of the ICC in each of its current cases.

When I visit the places where grave crimes have occurred, I meet with the victims and members of civil society who stood up bravely and demanded justice in the aftermath of conflict. Our work is driven by their consistent calls for truth, accountability, and reparation. Victims the

world over have seen that even a "big man" like Charles Taylor must account for his actions and face judgment, and they have heard the promise of accountability implicit in the international community's commitment to his prosecution and to the prosecution of other defendants, at many levels, for their involvement in the commission of international crimes. The United States is dedicated to helping shape and deliver on this promise.

What does it mean for an institution like the ICC to succeed in ensuring justice for victims, and what has my government done to contribute to this project and advance our shared interests and values? There are a few issues that I would particularly like to focus on today that deserve the attention of friends of the Court, parties and non-parties alike. …

First, it is essential that the fugitives who currently remain at large in the ICC's cases are apprehended. And when the Court is successful in bringing them to trial, it is imperative that the witnesses who testify and the victims who wish to participate in the proceedings are assured of their safety. These are basic obligations for any court, anywhere in the world, but they pose particularly vexing challenges in the context of the ICC, in light of its structural constraints, its scope of work, the extreme vulnerability of victims, and the circumstances of the places where fugitives are able to elude capture. Without adequate solutions, the Court will eventually cease to be able to conduct its work or meet the expectations of victims and affected communities. I speak about these issues frequently, because they are so crucial and because so much work remains to be done.

…We use an array of tools to advance the causes of apprehension and witness protection.

On apprehension, we send clear messages: we forcefully and consistently speak out about the need to bring to justice individuals like Omar al-Bashir of Sudan, Joseph Kony of Uganda, Bosco Ntaganda and Sylvestre Mudacumura of the DRC, and their co-accused. We sponsor and impose sanctions on such individuals and the groups they head. …

On witness protection, we seek to focus international resources and attention on these challenges, both at the national and international level. As you may recall, last year, we co-hosted a side event at the ASP on this topic. We have offered assistance and training to states seeking to protect witnesses in their own cases. …

A ***second*** issue of great importance: it is crucial that members of the international community continue to reinforce the legal norms and prohibitions that led to the creation of institutions such as the ICC. Here, I am particularly pleased to report on President Obama's initiative on preventing atrocities. Since I last addressed this body, the United States has established the Atrocities Prevention Board, composed of high-ranking officials from across the government, to put in place a whole-of-government approach to detecting, preventing, deterring, and responding to atrocities. We are working to ensure that our government can effectively address this imperative, and we are socializing this work with our partners and colleagues around the world—in governments, in the NGO sector, and at the UN.

We are exploring ways to expand available tools for preventing and responding to atrocities, from additional financial measures, to early risk detection, to rapid response "surge" capacities in potential trouble spots, to improved information sharing, to expanded legal authorities on the domestic front. The APB has focused on strengthening accountability tools and efforts, and my office has worked with others to coordinate assistance to states and international institutions with respect to their investigations and prosecutions. It is not always easy, but it is imperative that we keep our sights focused on these broader goals: namely, to prevent and deter would-be perpetrators of such heinous acts, and in that way to assure victims of past crimes that we have learned from what they have suffered.

Third, we must continue to strive to improve our system of international justice. We do not yet have all the answers, and the ICC, even for its ten years' experience, is still very much in its early stages. I and my colleague Harold Koh, Legal Adviser of the Department of State, have often spoken of the need for the ICC to build a solid jurisprudence, navigate challenges that arise in international cooperation, and establish legitimacy in the years to come as a fair and efficient criminal justice institution that makes prudent decisions in the cases it pursues, and those it declines to pursue. Moreover, the international community must continue to search within itself for creative and innovative solutions to the problems that are sure to arise—some of which I have already focused on today.

For our part, in engaging constructively with the Court and supporting its work on a case-by-case basis as consistent with our laws and policy, we have examined our arsenal and pursued an array of tools in an effort to identify what works. Sometimes, diplomacy alone is the most powerful tool. We stand up for justice, such as when we issued strong statements of support from both the White House and the State Department upon Thomas Lubanga's conviction for the war crime of conscripting and using child soldiers; or when President Obama made strong statements about the importance of accountability and cooperation with the ICC's efforts in Kenya and Côte d'Ivoire.

We also work to calibrate decisions about assistance and sanctions to take into account concerns about accountability and atrocity crimes. We were pleased, for example, that following the suspension of Malawi's Millennium Challenge Corporation compact and under President Joyce Banda's strong leadership, Malawi has taken a number of positive steps toward democracy and good governance, and refused to host President Bashir for the July 2012 African Union summit. We welcomed this decision and the example it set. President Banda has demonstrated strong leadership and democratic commitment, and we were gratified to be able to reinstate the MCC compact in June 2012.

Fourth and finally, we all must continue to recognize that the ICC cannot and must not operate alone. States retain primacy, both legal and moral, in ensuring justice for grave crimes. Justice closer to the victims is always preferable, in a system that can account for local laws and custom, in a familiar language, and in an accessible setting. Even where the ICC does operate, tremendous work will remain to be done at the national level. We, as members of the international community, have an obligation to focus our resources and energies here as well.

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Ambassador Rapp also addressed a plenary session on complementarity at the ASP on November 19, 2012. His remarks during the plenary discussion are excerpted below and available at *www.state.gov/j/gcj/us_releases/remarks/2012/200950.htm*.

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It is crucial to be discussing the principle and the practice of complementarity here at the meeting of the Assembly of States Parties of the ICC. Although the ICC plays an important role in the system of international criminal justice, national courts have the primary role to play in ensuring justice for victims of atrocities. Indeed, the principle of complementarity is at the core of the ICC

Statute. I would also highlight the importance of states parties and non-states parties alike remaining committed to strengthening domestic judicial capacity. Beyond furthering accountability, a strong national justice system is conducive to peace, stability, the consolidation of democracy, and economic development.

This project is not one that can be undertaken solely through bilateral efforts; rather, we must act together in a concerted and coordinated fashion, pool our resources, and share our best practices, ideas, and expertise. All nations have something valuable to bring to this conversation. Although this initiative should be a priority for the ASP, it must also continue to be taken up by other multilateral fora, the development community, civil society, regional organizations, and others in the service of justice. In particular, as was discussed at the Greentree event last month, enhancing domestic judicial capacity requires integrating rule of law programs with broader development assistance.

To this end, we encourage all States to identify opportunities to work with national authorities to strengthen domestic judicial systems across a range of technical areas, from forensic investigations, to witness protection, to educating prosecutors, judges, and defense attorneys on international criminal law and due process principles. Mixed investigative teams or judicial panels—comprising international and national staff working side by side—can be an effective model for justice systems emerging from conflict. As national prosecutions increase, strengthening mutual legal assistance frameworks and encouraging cooperation between national judicial authorities can also be appropriate.

Let me speak briefly about some of the programs and policies the United States supports, using our efforts in the Democratic Republic of the Congo as an example. We have long worked on complementarity issues in the DRC even as we support the ICC's cases there. We have always recognized that most of the work toward justice in the DRC will have to be at the national level, including with hybrid institutions that support national courts with international expertise, personnel, and assistance. We hope we can join together in building strong justice institutions and that these endeavors will provide lessons applicable elsewhere as we seek to bolster the principle of complementarity and strengthen the community of courts around the world that prosecute perpetrators of the worst crimes.

Our work in the DRC involves four main lines of effort:

First, funding and supporting specific courts and justice programs: The United States has provided approximately $3.5 million dollars over the last three years to implementing partners in the eastern DRC, to provide legal representation to survivors of sexual and gender-based violence and to build the capacity of justice sector officials to competently and fairly adjudicate civilian and military sexual and gender based violence cases in North Kivu province. The Department of State will continue to support the legal aid clinic, mobile courts, and mobile investigation teams through 2014. …

Second, using the tools of diplomacy to promote complementarity. Over the past years, in my capacity as Ambassador-at-Large for War Crimes Issues, I have travelled seven times to the DRC to meet with governmental and nongovernmental actors, to facilitate better coordination and support for accountability efforts. In the DRC, I have engaged diplomatically with parliamentarians, the ministry of justice, and leading civil society members to support their legislative efforts to incorporate international crimes into their domestic code and to create a mixed chamber for the DRC; to support ongoing prosecutions of perpetrators of serious crimes by military prosecutors; and to support joint efforts by the UN and national authorities, such as the UN peacekeeping mission in the DRC's Prosecution Support Cells.

Third, providing technical and legal assistance to national authorities. Such assistance can come in the form of technical advice on national legislation or through supporting forensic investigators, police, and witness protection experts. …

Fourth, improving fugitive tracking efforts: Enhancing efforts to track war crimes fugitives is essential to fighting impunity. The United States has assisted the UN in compiling rigorous dossiers on key perpetrators and fugitives, which can serve as a focus of concerted attention by the international community. …

The United States government will do everything possible to help the government of the DRC bring to justice those responsible of such acts.

Our work on complementarity does not just take place elsewhere. As the White House announced on April 23 during the launch of the interagency Atrocity Prevention Board, "we will hold accountable perpetrators of mass atrocities and genocide and support others who do the same." Under the aegis of the APB, the United States is developing proposals that would strengthen our ability to prosecute perpetrators of atrocities and permit the more effective use of immigration laws and immigration fraud penalties to hold accountable perpetrators of mass atrocities.

To conclude, we reiterate our strong commitment to the principle of complementarity, not only in principle, but in practice. We urge all states, funders, and civil society partners to identify concrete steps – such as the ones I have outlined today – to realize the promise of complementarity and strengthen the continuum of justice.

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On October 17, 2012, Ambassador Rice addressed the UN Security Council during a thematic debate on "Peace and Justice, with a Special Focus on the Role of the International Criminal Court." Her remarks on the ICC are excerpted below and available at *http://usun.state.gov/briefing/statements/199261.htm*.

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Mr. President, strengthening the global system of accountability for the worst atrocities remains an important priority for the United States. President Obama has emphasized that preventing mass atrocities and genocide is a core national security interest and core moral responsibility for our nation. We are committed to bringing pressure to bear against perpetrators of atrocities, ensuring accountability for crimes committed, and prioritizing the rule of law and transitional justice in our efforts to respond to conflict.

Accountability and peace begin with governments taking care of their people. But the international community must continue to support rule of law capacity-building initiatives to advance transitional justice, including the creation of hybrid structures where appropriate. From the Democratic Republic of Congo to Cote d'Ivoire to Cambodia, the United States is supporting efforts to build fair, impartial, and capable national justice systems.

At the same time, more can be done to strengthen accountability mechanisms at the international level. The United States has strongly backed the ad hoc international criminal tribunals and other judicial institutions in Rwanda, the former Yugoslavia, Sierra Leone, and

Cambodia. Such tribunals and courts have been critical to ending impunity and helping these countries move forward. As these judicial institutions complete their mandates in the coming years, the International Criminal Court may become an even more important safeguard against impunity.

Although the United States is not a party to the Rome Statute, we recognize that the ICC can be an important tool for accountability. We have actively engaged with the ICC Prosecutor and Registrar to consider how we can support specific prosecutions already underway, and we've responded positively to informal requests for assistance. We will continue working with the ICC to identify practical ways to cooperate—particularly in areas such as information sharing and witness protection—on a case-by-case basis, as consistent with U.S. policy and law.

Last year, the Council made its first unanimous referral to the ICC of the situation in Libya. Resolution 1970 has kept the principle of accountability central to Libya's transition from authoritarianism to democracy. Moving forward, it's critical that Libya cooperate with the ICC and ensure that the detention of, and any domestic proceedings against, alleged perpetrators of atrocities are in full compliance with its international obligations. We are exploring ways to assist Libya in pursuing justice sector reform, and we reaffirm that there must be accountability in Libya for violations and abuses on all sides.

The Security Council also acted in response to the atrocities in Darfur. But justice has still not been served, and the lack of accountability continues to fuel resentment, reprisal, and conflict in Darfur and beyond. Despite constant calls on all parties to the conflict to cooperate fully with the ICC, Sudan has failed to meet its obligations under Resolution 1593, and individuals subject to outstanding arrest warrants remain at large. We continue to urge all states to refrain from providing political or financial support to these individuals, and we applaud the example Malawi set by refusing to host President Bashir. This Council should review additional steps that can be undertaken to complete the ICC's work in Darfur. We should take inspiration from the concerted European Union efforts that resulted in the arrest and detention of the final fugitives from the ICTY.

Mr. President, we should consider ways to improve cooperation and communication between the Security Council and the Court. For example, the Council should monitor the developments in situations it refers to the Court, since the ICC may face dangers in conducting its work. However, we must also recognize that the ICC is an independent organization. This status raises concerns about proposals to cover its expenses with UN-assessed funding.

The interests of peace, security and international criminal justice are best served when the Security Council and the ICC operate within their own realms but work in ways that are mutually reinforcing. We should not accept the false choice between the interests of justice and the interests of peace.

As we work to strengthen accountability, we support the States Parties' decision to delay until 2017 a final decision on the Court's exercise of jurisdiction over the crime of aggression. This delay will allow for consideration of issues about the aggression amendments that require attention and enable the Court to consolidate its progress in the investigation and prosecution of atrocity crimes.

Mr. President, how we act to halt violence against civilian populations and hold accountable those who perpetrate such crimes is a fundamental test of our time. The United States continues to press for accountability in Syria without prejudging the ultimate venue for it. As the UN Commission of Inquiry has recognized, the Syrian people should have a leading voice in determining how to deal with those responsible for atrocities in a manner consistent with

international law. We continue to help Syrians document abuses and collect evidence, to ensure that the perpetrators of horrific violence against the Syrian people are ultimately held accountable.

In conclusion, we must rededicate ourselves to preventing atrocities from happening and ensuring accountability in their aftermath. We have made progress on both fronts, but much work remains. The United States will not rest until those responsible for perpetrating mass atrocities face justice and those who would commit such crimes know they will never enjoy impunity.

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b. Kenya

On January 23, 2012, the ICC confirmed charges against four Kenyans based on their alleged roles in the violence in late 2007 and early 2008 following a disputed presidential election in Kenya. The U.S. Department of State responded to the ICC's action with a January 23, 2012 press statement urging the Kenyan government and people, as well as the individuals involved, to continue to cooperate fully with the ICC. That press statement is available at *www.state.gov/r/pa/prs/ps/2012/01/182349.htm*. The Government of Kenya is a party to the Rome Statute, and the ICC Prosecutor opened an investigation into the post-election violence in March 2010. See *Digest 2010* at 139.

c. Democratic Republic of Congo ("DRC")

On March 14, 2012, the ICC handed down its first conviction, that of Thomas Lubanga Dyilo, former commander of the Patriotic Forces for the Liberation of the Congo militia and president of the Union of Congolese Patriots, for his responsibility for the war crimes of enlisting and conscripting children and using them to participate actively in hostilities in the DRC in 2002 and 2003. The government of the DRC referred the situation in the DRC to the ICC in 2004. See *Digest 2010* at 138-39 for background. The State Department's press statement regarding the conviction, released on March 16, 2012 and available at *www.state.gov/r/pa/prs/ps/2012/03/185964*, is excerpted below. The White House also released a statement, available at *www.whitehouse.gov/the-press-office/2012/03/14/statement-national-security-council-spokesman-tommy-vietor-international*, which emphasized that the decision is an important reminder to those who engage in these brutal practices that they are committing crimes for which they will be held accountable.

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As the Court's first conviction, this ruling is an historic and important step in providing justice and accountability for the Congolese people. The conviction is also significant for highlighting as an issue of paramount international concern the brutal practice of

conscripting and using children to take a direct part in hostilities. These children are often sent to the front lines of combat or used as porters, guards, or sex slaves, and their conscription reverberates throughout entire communities. This conviction puts perpetrators and would-be perpetrators of unlawful child soldier recruitment and other atrocities on notice that they cannot expect their crimes to go unpunished.

Congolese institutions have a critical role to play in ending impunity in the DRC. The Congolese government has taken recent positive steps, such as the prosecution and conviction in national courts of several Congolese army officers for the mass rapes that took place in the town of Fizi on January 1, 2011. The United States continues to encourage the Congolese government to arrest other alleged human rights violators and abusers still at large.

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d. Libya

In 2011, the UN Security Council unanimously adopted Resolution 1970, referring the situation in Libya in 2011 to the ICC. U.N. Doc S/RES/1970. For background on the referral to the ICC, see *Digest 2011* at 91-93. Ambassador Rice mentioned the Libya-related cases at the ICC in remarks to the UN Security Council in October 2012, excerpted in section C.2.a. *supra*. She also addressed the subject more specifically at a May 16, 2012 Security Council briefing on Libya and actions taken to implement resolution 1970. Those remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/190099.htm*.

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We are pleased with the Prosecutor's report that his Office has received a high degree of cooperation from a variety of States and other actors in response to requests for assistance from the ICC.

As the Prosecutor described in his report, Libya recently filed an admissibility challenge with the Court on the grounds that it is actively investigating Saif al-Islam Qadhafi for the same and different crimes as the ICC. Libya also detailed the steps it has taken to conduct that investigation and its stated commitment to adhere to international standards in the process.

This is an important moment both for Libya and for the Court. The Rome Statute of the ICC is predicated on a system of complementary justice, and it contains provisions to deal with situations in which a State with jurisdiction wishes to pursue charges itself. In this regard, we are encouraged by the Prosecutor's report of the ongoing cooperation his office has received from Libya. That said, as the Prosecutor notes, ultimately it will be for the judges to decide whether to defer to Libyan proceedings.

As the ICC proceedings move forward, we will continue to encourage the government of Libya to maintain its cooperation with the Court and to adhere to its international obligations, including under Resolution 1970. In addition, we continue to emphasize that it is critical that Libya take all necessary steps to ensure the detention and any further domestic proceedings against Saif al-Islam fully comply with Libya's international obligations.

Moreover, there is much work to be done domestically in Libya not only to account for the grave crimes committed in the past but also to ensure a functioning justice system for the future.

It is vital that Libya build a fair and credible criminal justice system that guarantees humane treatment and due process and conforms to Libya's international human rights obligations. We agree with the Prosecutor that the Government of Libya faces critical challenges in assuming custody over the thousands of detainees that continue to be held by militias or local authorities and in arranging for the expeditious release or adjudication of their cases. The international community should respond to the needs of the Libyan government as it approaches this significant administrative, logistical, and judicial task.

We are deeply concerned by the patterns of rape documented by the International Commission of Inquiry, as highlighted in the Prosecutor's report. For the sake of the individual victims and in order to achieve a lasting and inclusive peace in Libya, sexual and gender-based violent crimes must not go unpunished.

It will be important to ensure that there is accountability for violations and abuses of applicable laws committed in Libya on all sides, including for alleged attacks committed against civilians for their perceived loyalties to the Qadhafi regime. Impunity for such crimes cannot be reconciled with respect for human rights and the rule of law. Independent and impartial investigations of all alleged crimes will be a critical part of the effort to create an inclusive, democratic state in which all Libyans, of all backgrounds, have a future and an opportunity to participate in the rebuilding of their country.

We are pleased to hear that the Government is working on a comprehensive strategy to address these issues and support the Ministry of Justice's expressed commitment to justice sector reforms. We welcome the government of Libya's statements in its submissions to the ICC that it is receptive to assistance and support from the international community in this important work. We are working with UNSMIL and the international community to assist the Libyan authorities in addressing these justice sector reform goals.

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On November 7, 2012, Rosemary DiCarlo, Deputy Permanent Representative to the United Nations, addressed the Security Council after a briefing by the ICC prosecutor on the situation in Libya. In her remarks, excerpted below and available at *http://usun.state.gov/briefing/statements/200336.htm*, Ambassador DiCarlo urged further cooperation with the ICC in carrying out its mandate.

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…[W]e continue to urge Libya to adhere to its international obligations, including under Resolution 1970, and continue its cooperation with the ICC. The cases involving Saif al-Islam Gaddafi and Abudullah al-Senussi will unfold against the backdrop of Libya's transition to democracy. This is an important moment both for Libya and the ICC, as they work together within their respective roles towards fostering and ensuring accountability during this historic transition.

We recall our comments last month at the Council debate on peace and justice and the role of the ICC that the Council's referral of situations to the ICC and subsequent developments highlight why we should consider ways to improve cooperation and communication between the Security Council and the Court. For example, the Council should continue to monitor the developments in situations it refers to the Court and the challenges that may be faced by ICC personnel in conducting their work. States should look for appropriate ways to ensure that Court staff are able to undertake their work safely and effectively.

Further, we note that the Prosecutor's statement that many requests for assistance to a variety of parties have yet to be fully executed. Resolution 1970 decided that Libyan authorities shall cooperate fully with and provide necessary assistance to the Court and Prosecutor, and also urged all other states and concerned organizations to cooperate fully. The United States has endeavored to respond positively to informal requests for assistance in the Libya situation, consistent with our law and policy.

We also remain deeply concerned by allegations of rape and sexual violence documented by the UN Commission of Inquiry, and look forward to further reports by the OTP about its efforts in this regard.

…[R]egardless of the outcome of the admissibility proceedings before the ICC, Libya will need to bolster domestic accountability structures and processes to create a robust and fair system of justice at home. After forty years of a dictatorship, no one has a better appreciation for the importance of due process and rule of law in Libya than Libyans themselves. The new government must work to combat impunity for perpetrators of serious crimes, regardless of their affiliation or the nature of their crimes; to ensure a comprehensive program of transitional justice consistent with Libya's international human rights obligations; and to commit to measures aimed at assisting victims.

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e. Darfur

On June 5, 2012, Ambassador DeLaurentis addressed a Security Council meeting on Darfur and the ICC at which Prosecutor Moreno-Ocampo presented his fifteenth report pursuant to UN Security Council Resolution 1593, which referred the situation in Darfur since July 1, 2002, to the ICC. This was Moreno-Ocampo's final report to the UN Security Council before his term as prosecutor ended on June 15 and Fatou Bensouda of The Gambia became ICC Prosecutor. Ambassador DeLaurentis's remarks are excerpted below and are available in full at *www.usun.state.gov/briefing/statements/191816.htm*.

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The United States is gravely concerned about the situation in Sudan, and the role that continuing impunity for crimes committed in Darfur has played in forestalling a just and enduring peace for the people of Sudan and the region.

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…[S]ince the adoption of Resolution 1593 and the initiation of these periodic reports, copious evidence has been collected and arrest warrants sought and granted. The most recent development has been the arrest warrant for Minister of Defense Abdel Raheem Hussein. Most importantly, promises have been made to the victims: that the crimes they suffered will not go unpunished, and the justice they seek will not go undelivered.

But as of today, justice has not been served. The ICC's prosecution of the key architects of the atrocities in Darfur is critical. But, as the Prosecutor has stressed, the individuals subject to the ICC's arrest warrants in Darfur continue to remain at large. We have consistently called on the government of Sudan and all parties to the conflict to cooperate fully with the ICC and its prosecutor, yet there is persistent failure to meet obligations under Resolution 1593. Local accountability initiatives, particularly those agreed to in the Doha Document for Peace in Darfur, remain largely unfulfilled. And the violence continues in Darfur and in other areas of Sudan where these patterns repeat themselves and similarly go unaddressed.

Today's report offers us an opportunity to reflect on what steps we can take to strengthen international efforts to hold accountable those who have committed atrocities in Darfur. We agree with the Prosecutor that the lack of progress to date in executing the arrest warrants and bringing those most responsible to justice merits renewed attention by this Council.

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...[W]e continue to urge all states to refrain from providing political or financial support to the Sudanese suspects subject to ICC arrest warrants and to bring diplomatic pressure to bear on States that invite or host these individuals. We stand with the many states who refuse to welcome the ICC indictees to their countries, and we commend those who have spoken out against President Bashir's continued travel, including to next month's AU summit. For our part, the United States has continued to oppose invitations, facilitation or support for travel by those subject to ICC arrest warrants in Darfur and to urge other states to do the same. We would welcome additional efforts by and better coordination with other members of the international community on these issues.

We encourage the Council to consider creative approaches and new tools. As members of the Security Council, we can and should review additional steps that can be undertaken to effectuate the ICC's work in Darfur, execute outstanding arrest warrants, and ensure compliance by states with relevant international obligations.

Continued impunity and the lack of accountability for heinous crimes fuel resentment, reprisal, and conflict in Darfur. We are deeply troubled by the increased violence in three out of the five Darfur states since the Prosecutor's last briefing in December 2011. Once again, we note that the Sudanese government continues its use of aerial bombardments, including of civilian areas in violation of resolutions issued by this Council. And we are deeply concerned about sexual and gender-based violence crimes there.

We are also deeply troubled that impunity continues for those who attack UNAMID peacekeepers. Since the Prosecutor's last report in December, UNAMID has been attacked four times and three peacekeepers have been killed in these attacks. We redouble our calls on the Government of Sudan to investigate these attacks and bring to justice those responsible. We note the progress made in the ongoing two cases against Darfur rebels, as described in the Prosecutor's report.

…[W]e are extremely concerned about the recurring violence in Southern Kordofan and Blue Nile. Unfortunately, we have seen in the Two Areas a concrete illustration that those who evade accountability all too often contribute to further cycles of violence. As the Prosecutor has reminded us, Ahmad Haroun is the subject of an outstanding arrest warrant for alleged crimes committed in Darfur. Yet rather than facing justice, he has been entrusted by the Government of Sudan to serve as governor of Southern Kordofan, where he engages in inflammatory rhetoric reminiscent of that which he deployed in Darfur, pursuing policies that in recent weeks has led to the displacement of nearly 700 people per day, while continuing to block humanitarian access to those remaining. We will continue to push for a credible, independent investigation into violations of international law there and to demand that those responsible are held to account.

We continue to urge the Government of Sudan to make good on its commitments in the July 2011 Doha Document for Peace in Darfur to make local justice and accountability mechanisms a reality, including by empowering its Special Prosecutor for crimes in Darfur, establishing the Special Courts for Darfur, and inviting observers from the African Union and the United Nations to monitor the proceedings of these Courts.

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Ambassador DeLaurentis also delivered remarks at a Security Council briefing on Darfur by Ms. Bensouda, the new ICC Prosecutor, on December 13, 2012. Ambassador DeLaurentis's remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/202135.htm*.

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The United States remains deeply concerned about the mounting violence in Darfur and reports of deliberate targeting of civilian areas, including increased incidents of aerial bombardments, sexual and gender based violence, and other crimes. The late September shelling of Hashaba that killed at least 60 civilians and the razing of the town of Sigili in early November by the Government of Sudan-aligned Popular Defense Forces are stark cases in point. Should the violence spread beyond North Darfur, threats to civilians will only multiply.

Growing attacks on civilians have come hand in hand with more frequent and serious attempts to deny UNAMID freedom of access. In both Hashaba and Sigili, the Government of Sudan denied UNAMID access to the affected areas immediately after the attacks. Since the initial deployment of UNAMID in December 2007, 43 peacekeepers have lost their lives, including six peacekeepers since the Prosecutor's report in June. Attacks on UNAMID peacekeepers can be prosecuted as war crimes. The Government of Sudan's deliberate obstruction of UNAMID and failure to investigate unwarranted attacks on UNAMID fosters a continued culture of impunity and is unacceptable. This Council should condemn in the strongest

possible terms any and all attacks on UNAMID personnel.

Reversing the cycle of violence and impunity requires accountability for the perpetrators. The ICC's prosecution of the architects of the atrocities in Darfur is crucial in this regard. We note the Prosecutor's report about proceedings in the case against Abdallah Banda and Saleh Jerbo as well as her Office's investigation and monitoring of ongoing crimes in Darfur. However, we are dismayed that the Government of Sudan is still not cooperating with the ICC to execute the outstanding arrest warrants in the Darfur cases, despite its obligation under Security Council Resolution 1593 to cooperate fully with the Court. The subjects of these warrants remain at large and continue to cross international borders. We continue to urge all states to refrain from providing political or financial support to these individuals and we'll work to prevent such support. Continued impunity for crimes committed in Darfur foments instability there and sends a dangerous message to the government that there are no consequences for attacking civilians elsewhere. These attacks have increased in the Two Areas in recent months, particularly in the form of indiscriminate aerial bombardments. We strongly condemn these attacks.

We urge the Government of Sudan to uphold its commitments to stand up credible local justice and accountability mechanisms. The Government of Sudan and the Darfur Regional Authority have repeatedly announced the establishment of investigative committees to determine responsibility for civilian deaths, but have not followed through. So far their announcements have been empty talk. The government-appointed Special Prosecutor for Darfur, moreover, has made not one significant arrest or prosecution. The government's refusal to take serious action in this regard is an abrogation of its commitments to the people of Darfur under the justice and reconciliation chapter of the Doha Document for Peace in Darfur.

Mr. President, we welcome the willingness of States to consider creative approaches and new tools to enable the ICC's work in Darfur, execute outstanding arrest warrants, and ensure compliance by states with relevant international obligations. We would welcome future discussions focused on ensuring full implementation of Council resolutions with ICC referrals.

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3. International Criminal Tribunals for the Former Yugoslavia and Rwanda

a. Overview

On June 7, 2012, Ambassador DeLaurentis addressed a UN Security Council session on the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"). His remarks, available at *http://usun.state.gov/briefing/statements/192061.htm*, are excerpted below.

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The United States commends the tribunal Presidents, Prosecutors and Registrars for their dedication and extensive preparation in setting up the Residual Mechanism (RM). We welcome the overall downsizing by both the ICTR and ICTY as trials end and remaining functions are gradually transferred to the Residual Mechanism.

We also appreciate efforts by the ICTY, ICTR and RM to share resources and enact cost-saving managerial and administrative measures. …

This Council must be flexible to ensure that both tribunals are able to administer justice expeditiously yet fairly. When the Council adopted Resolution1966 in 2010 and set December 31, 2014 as the requested date for completion of all remaining work by the tribunals, we did not have the benefit of knowing when indicted individuals would be arrested. Today, we are pleased that all ICTY fugitives have been apprehended, including the re-apprehension in January 2012 of convicted war criminal Radovan Stankovic. We recognize, however, that trial and appeal schedules will be difficult to accurately predict, and that flexibility in assigning cases is important in this regard.

Turning to the ICTY, we welcome the reported cooperation of Serbia, Croatia, and Bosnia and Herzegovina in providing access to documents, archives and witnesses in response to requests for assistance from the Office of the Prosecutor. We look forward to Serbia concluding and acting upon investigations into who was involved in and responsible for sheltering Ratko Mladic, Radovan Karadzic, and other notorious ICTY fugitives in Serbia over the course of so many years. Such cooperation is essential to completing ongoing trials and appeals. …

At the same time, the United States deplores the statement made this week denying genocide in Srebrenica. Genocide in Srebrenica is not a subjective determination – it is a defined criminal act which the ICTY has confirmed in final and binding verdicts in multiple cases. It cannot be denied.

Turning to the ICTR, there are, unfortunately, still nine ICTR fugitives at large. We call on all UN member states, particularly those in the Great Lakes region, to help apprehend them. …

We take note of the recent transfers of cases from the ICTR to Rwanda, and welcome Rwanda's willingness to fairly adjudicate transferred cases. … We applaud the ICTR's efforts to create a robust monitoring mechanism in cooperation with regional organizations to ensure the fairness of trials at the national level. … We welcome the news that the ICTR is close to completing all trial work as projected in the November 2011 completion strategy. …

As the ICTY and ICTR draw to an end and prepare to transition remaining functions to the Residual Mechanism, they represent a strong legacy in the international fight against impunity for those who commit atrocities. The defendants convicted in tribunal proceedings to date have been tried and found guilty of some the most heinous crimes known to mankind, including genocide, murder, and rape as crimes against humanity. Thanks to the hard work of the tribunals, the world knows about these crimes, and perpetrators are being held accountable for their actions. In addition, there are now archives and public records which will be accessible to generations to come…. In addition to combating impunity, the tribunals' contributions in the areas of local capacity-building and education will help foster long-term peace and reconciliation.

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b. International Criminal Tribunal for the Former Yugoslavia

(1) Developments in the case of Radovan Karadzic

The case against Radovan Karadzic proceeded before the ICTY in 2012. The Tribunal dismissed one count of genocide against Karadzic, finding that there was insufficient evidence to convict Karadzic of genocide in the murders that took place in a large number of municipalities in 1992. However, the court determined that ten other charges brought against Karadzic, including an additional count of genocide, should proceed. In a response to a taken question about the dismissal on June 28, 2012, available at *www.state.gov/r/pa/prs/ps/2012/06/194249.htm*, the Department of State spokesperson, explained:

> The International Criminal Tribunal for the Former Yugoslavia determination that there was not enough evidence to convict Karadzic of genocide in the murders that took place in a large number of municipalities in 1992 was not unexpected, given similar verdicts on these charges in previous cases.
>
> We note that the Court determined that there was sufficient evidence to support all of the other ten charges against Karadzic, including responsibility for acts of extermination and murder carried out in municipalities between March 1992 and November 30, 1995, other crimes against humanity, and genocide related to the events in and around Srebrenica in 1995.

(2) Other developments

See discussion in section C.3.d. *infra* of the Mechanism for International Tribunals.

c. International Criminal Tribunal for Rwanda

On May 8, 2012, the Appeals Chamber of the ICTR affirmed the convictions of Gaspard Kanyarukiga, Aloys Ntabakuze, and Ildephonse Hategekimana. The United States welcomed the decisions in a May 9, 2012 press statement, available at *www.state.gov/r/pa/prs/ps/2012/05/189573.htm*, and excerpted below.

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… The Appeals Chamber of the ICTR affirmed the convictions of these three individuals for genocide and crimes against humanity, among other crimes. Although some counts against Ntabakuze were set aside by the Appeals Chamber, the decision indicates a careful, transparent, and balanced judicial process.

The three were sentenced to 30 years, 35 years, and life in prison, respectively. Ntabakuze and Hategekimana were both officers in the Rwandan Army (commander and

lieutenant). Kanyarukiga, a businessman, was convicted of genocide based on his participation in the planning of the destruction of a church in Kivumu, which resulted in the death of approximately 2,000 civilians.

There are still nine ICTR fugitives at-large and the United States urges all countries to redouble their cooperation with the ICTR so that these fugitives can be expeditiously brought to justice.

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d. Mechanism for International Criminal Tribunals

On December 5, 2012, Ambassador DeLaurentis addressed the Security Council during a debate on ICTY and ICTR and mechanisms for international criminal tribunals. In 2010, the Security Council established a residual mechanism to continue the work of the criminal tribunals for Yugoslavia and Rwanda. See *Digest 2010* at 142-43. Ambassador DeLaurentis's remarks, available at *http://usun.state.gov/briefing/statements/201622.htm* and excerpted below, express the U.S. view of the importance of the effective functioning of the Mechanism for International Criminal Tribunals.

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Mr. President, as President Obama has said, "preventing mass atrocities and genocide is a core national security interest and a core moral responsibility of the United States of America." A key element of this endeavor is our commitment to seek justice for the perpetrators of heinous crimes, regardless of where or when they were committed. The system of international tribunals, which now includes the Mechanism for International Criminal Tribunals (the "MICT") as its newest member, is a critical institution in this process.

Since your last reports, much progress has been made. The MICT has passed down its first decision, to transfer a case for trial in Rwanda, and opened its Arusha Branch on schedule on July 1, 2012. The Hague branch of the MICT is slated to open in July, 2013. As we commend the tribunals for their historic contribution to justice and accountability, including the apprehension of all ICTY fugitives, we also recognize the substantial work which remains at both Tribunals in concluding trials, downsizing staff, and transferring remaining functions to the MICT. The Tribunals still face significant challenges in completing their mandate and we recognize the need for flexibility in assigning cases and determining the appeal and trial schedules.

In light of these tasks, we appreciate the ongoing efforts by the Tribunals to improve efficiency, share resources, and economize on costs. Efficiencies instituted by the MICT, including having a single set of principals—President, Prosecutor, and Registrar—for both the Arusha Branch and the branch in The Hague, and having the MICT President preside over the MICT Appeals Chamber will ensure a more efficient use of resources. We also welcome other cost-saving measures, such as allowing judges to carry out their functions remotely where possible, and the common use of certain administrative support services and other "best

practices." We look forward to future measures that economize on costs while maintaining the highest standards of justice.

Turning to the ICTY, we note the recent judgments of the Appeals and Trial Chambers and fully support the Tribunal and respect its rulings. The pace of work at the ICTY remains high, with eighteen individuals on trial and 15 in appeal proceedings at the close of the reporting period. The last of the ICTY trials has begun—that of Goran Hadžić. We commend the ICTY for expediting trials, such that it anticipates concluding all but three trials during 2013. While the Tribunal has implemented several reforms to expedite trials and appeals, it was not able to implement a 2009 Security Council authorization to redeploy four trial judges to the Appeals Chamber, because they are still needed at trial. We look forward to the President's proposals as to how this situation can be remedied. We recognize that staff retention will continue to be a problem as the Tribunal nears the end of its mandate, and we urge the General Assembly to reconsider proposals put forward earlier for a modest financial incentive to save funds through reduced staff turnover. We also support the Tribunal's outreach program, given the continued need for reconciliation in the states of the former Yugoslavia.

As regards the ICTR, we commend the Tribunal on the completion of numerous cases in the previous reporting period, including the completion of work at the trial level in regards to 92 of the 93 accused. The Trial Chamber delivered two judgments, in the Nzabonimana and the Nizeyimana cases, with a third trial judgment expected in December; and the Appeals Chamber delivered four judgments in 2012. We welcome the Tribunal's projection that it will conclude all cases at the trial level by the end of 2012.

We continue to urge all UN member states, particularly those in the Great Lakes region, to cooperate in the apprehension of the nine remaining fugitives from the ICTR. The United States continues to offer monetary rewards for information leading to the arrest or transfer of ICTR fugitives, whether those individuals will be prosecuted by the MICT or in Rwandan courts. Those who harbor fugitives obstruct justice and stand on the wrong side of history.

We also welcome Rwanda's commitment to adjudicating fairly the cases transferred from the ICTR to Rwanda, and we commend the ICTR and the MICT in creating a robust monitoring mechanism for the transferred cases. We will be watching these cases to satisfy ourselves that the conditions for referral continue to be met ahead of the MICT's transfer of six more cases to the courts of Rwanda as and when fugitives are apprehended. The ICTR and the Rwandan authorities have also shown close cooperation in holding skills-sharing workshops and capacity-building seminars which will ensure fair proceedings at the national level. Strengthening national legal and justice institutions is one of the most important and lasting legacies of international tribunals such as the ICTR.

The defendants convicted in tribunal proceedings have been found guilty of the most heinous crimes known to humanity. The legacy of the tribunals, however, does not only consist of bringing individual perpetrators to justice. Thanks to the dedication of the tribunals, these crimes have been etched in the ledger books of history, and the records and archives of these crimes will be accessible to future generations, providing a corrective against distortions of the historical narrative. The tribunals have fostered respect for the rule of law; developed capacity at the national level, and enhanced reconciliation and peace. These are long-term achievements which not only strengthen the societies affected by such heinous crimes, but help ensure that these crimes will not be repeated elsewhere. Our commitment to working with the international community on behalf of this collective moral responsibility is unwavering.

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4. Special Court for Sierra Leone

On April 26, 2012, the Special Court for Sierra Leone convicted Charles Taylor, the former president of Liberia, of war crimes and crimes against humanity. The State Department welcomed the judgment in a press statement available at *www.state.gov/r/pa/prs/ps/2012/04/188534.htm*. The press statement elaborated on the significance of the judgment:

> Today's judgment was an important step toward delivering justice and accountability for victims, restoring peace and stability in the country and the region, and completing the Special Court for Sierra Leone's mandate to prosecute those persons who bear the greatest responsibility for the atrocities committed in Sierra Leone. The Taylor prosecution at the Special Court delivers a strong message to all perpetrators of atrocities, including those in the highest positions of power, that they will be held accountable.
>
> The trial of Charles Taylor is of enormous historical and legal significance as it is the first of a powerful head of state to be brought to judgment before an international tribunal on charges of mass atrocities and serious violations of international humanitarian law. Over 90 witnesses testified during the trial, bringing to light the range of crimes committed during the war in Sierra Leone, and affirming the importance of justice for the victims. The United States has been a strong supporter and the leading donor of the Special Court for Sierra Leone since its inception. The successful completion of the Special Court's work remains a top U.S. Government priority.

Ambassador Susan Rice also issued a statement on April 26, 2012 welcoming the verdict in the Taylor case. Her statement is available at *http://usun.state.gov/briefing/statements/188560.htm*.

5. Khmer Rouge Tribunal ("ECCC")

In 2012, the United States continued to support the work of the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), also known as the Khmer Rouge Tribunal. On August 13, 2012, Deputy Secretary of State Thomas R. Nides certified that the United Nations and Government of Cambodia are taking credible steps to address allegations of corruption and mismanagement within the ECCC. 77 Fed. Reg. 51,604 (Aug. 24, 2012). Deputy Secretary Nides provided the certification pursuant to Section 7044(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2012 (Division I, Pub. L. 112-74) (SFOAA). See *Digest 2010* at 145 for background on the original certification requirement and *Digest 2011* at 106 discussing the certification in 2011.

The Federal Register notice also included the Memorandum of Justification accompanying the certification, which summarized recent developments at the ECCC. The Memorandum of Justification reported that in February 2012, the Supreme Court Chamber

upheld the conviction of Kaing Guek Eav (aka ``Duch''), former chief of the Tuol Sleng torture center, for crimes against humanity and war crimes, and extended his previous sentence of 35 years to life in prison. 77 Fed. Reg. at 51,605. In addition, the notice related that in January 2012, David Scheffer, former U.S. Ambassador-at-Large for War Crimes Issues, had succeeded J. Clint Williamson (also a former U.S. Ambassador-at-Large for War Crimes Issues) as the UN Special Expert to the Secretary-General of the ECC. *Id*. The Memorandum further stated that the U.S. government anticipates that Mark Harmon, a former U.S. Department of Justice prosecutor and ICTY prosecutor, would be effective as the newly confirmed co-investigative judge for the ECCC. *Id*. at 51,606.

Cross References

Visa waiver program, **Chapter 1.C.3.**
Somalia, **Chapter 1.D.3.**, **Chapter 16.A.5.e.**
Bolivia's reservation to the 19961 Narcotics Convention, **Chapter 4.A.3.**
*Jurisdiction over piracy (*Kiobel *case*), **Chapter 5.B.3.**
Children and armed conflict, **Chapter 6.C.2.**
International Law Commission, **Chapter 7.B.D.**
OAS General Assembly resolution on the ICC, **Chapter 7.E.1.a.**
Maritime security and law enforcement, **Chapter 12.A.5.**
*Terrorism related sanctions***, Chapter 16.A.4**
Atrocities prevention, **Chapter 17.C.1.**
Use of force issues regarding U.S. counterterrorism efforts, **Chapter 18.A.1.a.**
Detainee transfers, **Chapter 18.A.3.b.**
Detainee criminal prosecutions, **Chapter 18.A.3.d.**

Chapter 4

Treaty Affairs

A. CONCLUSION, ENTRY INTO FORCE, RESERVATIONS, APPLICATION, AND TERMINATION

1. Treaties and Agreements as part of Twenty-first Century International Lawmaking

On October 17, 2012, U.S. State Department Legal Adviser Harold H. Koh delivered the 33rd Thomas F. Ryan Lecture at Georgetown University Law Center in Washington, D.C. on the subject of "Twenty-First Century International Lawmaking." The excerpt of his remarks that follows discusses the support of the Obama administration for ratification of several treaties, including New START, the Law of the Sea Convention, the Disabilities Convention, and two key nuclear security treaties. The excerpt also includes Mr. Koh's discussion of the form that international agreements may take under U.S. law, including congressional-executive agreements and sole executive agreements. The entirety of Mr. Koh's address is available at *http://www.state.gov/s/l/releases/remarks/199319.htm*.

* * * *

Let me start with treaties. Even in this age of legislative near-deadlock, treaties—in the constitutional, Senate "advice and consent" sense—remain an integral part of our international lawmaking practice. Article II of the Constitution gives the President the power to "make treaties," subject to the advice and consent of two-thirds of the Senate, and the Supremacy Clause, Article VI, makes those treaties "the supreme law of the land."

But in modern times, Article II treaties have never been the only option. The long-dominant view in the Academy—articulated by my late Yale colleague Myres McDougal and Asher Lans in the Yale Law Journal as far back as 1945—has been that treaties and congressional-executive agreements are in fact interchangeable, legally available options for binding the United States in its international relations. At the same time, a governmental practice has arisen of doing certain types of agreements by treaty: for example, extradition, human rights, membership in international organizations, and arms control matters. Other forms of international lawmaking have traditionally been done by congressional-executive agreement. For example, free-trade agreements have traditionally been entered into with the ex post approval of Congress expressed through subsequent legislation.

I am sometimes asked, why don't we just ratify a particular convention by congressional-executive agreement, rather than Article II Treaty? If it is so hard to get 67 votes for a treaty,

why don't we just accede to it by statute? The short answer, which you will understand sitting here less than a mile from the Capitol, is that a particular non-treaty route might be legally available to the Executive for entering into certain kinds of international agreements, but may not be politically advisable as a matter of comity to Congress. Congress has its own strong views on how certain types of agreements should be entered into and will fight for those outcomes as a matter of institutional and political prerogative. That does not mean that the Executive's hands are tied in any given case. But what it does mean is that a key part of being an Executive Branch lawyer is accurately forecasting to your clients when choosing a particular legal route—even if lawful—may foster bitter political conflict and invite unnecessary trouble.

Every time we enter into an international agreement, we also send the world a message. Securing a 67-vote Senate supermajority for a treaty is particularly hard work, and requires a very high degree of bipartisanship. In any given case, concluding a treaty with the requisite two-thirds support sends a powerful political message about how united our nation is behind a particular international obligation. And so, for all their difficulties, Article II treaties remain a critically important focus of our international lawmaking practice.

Take the New START treaty, which passed the Senate in 2010 by a hard-won vote of 71-26. Under New START, the United States and Russia agreed to limits on the number of deployed warheads and nuclear weapon delivery vehicles, as well as complicated verification procedures. Lawyers in my office played a key role in this massive effort—advising policymakers, working on language at the negotiating table, and working with the Senate every step of the way to ensure ratification. Why was New START so important? Because that treaty allowed us to resume on-site inspections of Russian facilities, a right that had expired along with the previous START treaty. Restoring this "trust but verify" regime was critical to a genuine system of arms control, which is why President Obama called ratifying the New START treaty a "national security imperative."

Currently before the Senate, as you probably know, are two more treaties that the Obama Administration is strongly supporting. The first is the 1982 Law of the Sea Convention, which Secretary Clinton testified in support of in May of this year. Although that treaty has long enjoyed substantial bipartisan support, and was also pushed by our predecessors in the Bush Administration, some critics have alleged that joining it would sacrifice our national sovereignty. But nothing could be further from the truth. In fact, the opposite is true: joining the Convention would enhance our sovereignty. It would secure for the United States sovereign rights over vast new areas and resources, including vast continental shelf areas extending off our coasts and into the Arctic, at least 600 miles off Alaska. It would give U.S. companies the legal certainty they need to make expensive investments and create American jobs. It would enhance our national security by guaranteeing our military the freedom of navigation principles enshrined in the Convention. And it would amplify our voice when we use the Law of the Sea platform to speak about the numerous maritime issues that implicate our national interests, such as the ongoing tensions in the South China Sea. For these reasons, we continue to be hopeful that the Senate will soon act on these interests and give advice and consent to the Law of the Sea Convention.

Second, we also are urging the Senate to give its advice and consent to the Disabilities Convention, the Convention on the Rights of Persons with Disabilities. Here in the United States, we have a long history of bipartisan leadership on domestic disability legislation—including the Americans with Disabilities Act (ADA), legislation that is not only the gold standard worldwide but served as the model for this very Convention. At its heart, the Convention promotes a core principle of our Constitution: nondiscrimination. It seeks to ensure that all persons with

disabilities would be able to enjoy the same rights as non-disabled persons, on an equal basis with them. My office, with substantial input from the Department of Justice and other key agencies, prepared the article-by-article analysis and proposed reservations, understandings, and declaration in the transmittal package for this treaty, and has actively assisted the ratification efforts. This past July 26th, the 22nd Anniversary of the Americans with Disabilities Act, the Senate Foreign Relations Committee sent the treaty to the Senate floor with bipartisan support. Again, we hope to see the full Senate give its advice and consent soon.

Finally, despite having completed in 2008 the advice and consent phase of treaty accession, this Administration is seeking Congressional action to complete our ratification of two key nuclear security treaties designed to strengthen our legal basis for securing nuclear materials and preventing nuclear terrorism: the 2005 Amendment to the Convention on the Physical Protection of Nuclear Material, and the International Convention for the Suppression of Acts of Nuclear Terrorism. These treaties require updates to the United States criminal code, for which the Administration presented draft legislation in 2010 and again last year. The House passed a version of this bill this summer, and we await Senate action that would permit us finally to deposit our instruments of ratification.

Now just a few generations ago, what you just heard me say would have been both the beginning and the end of a speech on international lawmaking: the Constitution specifies treaties as the constitutionally enumerated mechanism for entering international agreements, and that's that. Indeed, scholars such as my friend and former Obama Administration colleague Larry Tribe made such an argument in the 1990s, when he called unconstitutional the mechanism by which the Clinton Administration joined NAFTA—by an Act of Congress, or as a congressional-executive agreement. But the overwhelming consensus in the legal academy rejected that view and approved of the way our constitutional practice has developed to permit binding agreements entered into by the Executive and approved by majorities of both houses of Congress.

The constitutionality of these congressional-executive agreements is now well-settled, particularly where Congress is exercising its foreign commerce power. Indeed, the United States used a congressional-executive agreement as the procedure to conclude the 1945 Bretton Woods Agreement, which did nothing short of establishing the post-war global economic order. Since that time the same type of legislative instrument has been used to join NAFTA and the Agreement Establishing the World Trade Organization. And during this Administration, Congress has now approved three new free trade agreements—with the Republic of Korea, Colombia, and Panama. Because the process for domestic approval of such agreements not only eliminates the need for a 67-vote supermajority, but also includes the House, it allows implementing legislation to become part of the international lawmaking process.

What is also well-settled, with Supreme Court case law to prove it, is that there is a category of cases where the President can enter a binding international agreement based on his own independent, Article II authorities, without action from Congress. This was the holding of the famous Belmont and Pink cases where President Franklin Roosevelt, as part of his recognition of the Soviet Union, agreed to settle certain interstate claims. The Court recognized not only that the President had authority to enter into the Agreement on his own authority as President, but also found, under the Supremacy Clause, that that agreement prevailed over any contrary state law.

None of this is news—you can learn it all from reading Lou Henkin's Foreign Affairs and the Constitution or the ALI's Restatement (Third) of Foreign Relations Law. But when you dig into the details, the clarity starts to fade. Academics like to put things in boxes, and tend to

treat this area of law as divided into three. You have your treaty box. You have your congressional-executive agreement box, which is subdivided into "ex ante" agreements, where Congress first authorizes the agreement by statute, and the Executive then negotiates and concludes it; and "ex post" agreements, where the Executive first negotiates an agreement and then brings it to Congress for subsequent approval. Third, you have your "sole executive agreement" box, covering those areas where the President makes international law based on his independent constitutional authority.

But in the real world, this tidy framework grossly over-simplifies reality. There are a wealth of international agreements that are consistent with, and can be implemented under, existing law, but that do not fall neatly into any of these boxes. Many of these agreements may not even be intended to affect legal interests at the domestic level (e.g., by being judicially enforceable like in the Pink and Belmont cases). For example, recently, we in the Legal Adviser's Office were surprised to find controversy surrounding the Executive's authority to enter into the Anti-Counterfeiting Trade Agreement, or ACTA, a multilateral agreement on enforcing intellectual property rights. Certainly, some of that controversy may have derived from policy disagreements with the goals of the ACTA, but a surprisingly large number of law professors questioned the Executive's legal authority even to enter the agreement. They said, "I don't see an express ex ante congressional authorization, so it can't fit into the congressional-executive agreement box, nor does this look like a traditional topic for a sole executive agreement. Since it falls between the stools, that must mean the U.S. lacks any authority to enter the agreement!"

But authority in this area sits not on isolated stools, but rather runs in a spectrum. Why was entering the agreement a legally available option? First, while Congress did not expressly pre-authorize this particular agreement, it did pass legislation calling on the Executive to "work[] with other countries to establish international standards and policies for the effective protection and enforcement of intellectual property rights." Further, we and USTR determined that the agreement negotiated fit within the fabric of existing law; it was fully consistent with existing law and did not require any further legislation to implement. We also surveyed how the political branches have dealt with similar agreements in the past, and found that Congress' call for executive action to protect intellectual property rights arose against the background of a long series of agreements on the specific question of intellectual property protection done in a similar fashion. What we saw in practice resembles a phenomenon I called in my book The National Security Constitution "quasi-constitutional custom," a widespread and consistent practice of executive branch activity that Congress, by its conduct, has essentially accepted. In this respect, the ACTA resembled the Algiers Accords that ended the Iranian Hostages crisis, whose constitutionality was broadly upheld by the Supreme Court 31 years ago in Dames & Moore v. Regan. There, the Supreme Court upheld the Algiers Accords by relying not on any particular express ex ante congressional authorization, but rather, on "closely related" legislation enacted in the same area and a long history of Executive Branch practice of concluding claims settlement agreements. Although the Algiers Accords, like ACTA, did not fall neatly into any of these three "boxes", the Supreme Court in Dames & Moore easily upheld the constitutionality of the Algiers Accords and found a "legislative intent to accord the President broad discretion" and, citing the Steel Seizure Case, noted that such legislation "may be considered to invite 'measures on independent presidential responsibility.'"

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2. The Anti-Counterfeiting Trade Agreement

As Mr. Koh mentioned in the remarks excerpted above, the Obama administration continued to face concerns in 2012 about the United States joining the Anti-Counterfeiting Trade Agreement ("ACTA"). For more information and the text of the agreement, see *www.ustr.gov/acta*. In an exchange of letters in 2012 with U.S. Senator Ron Wyden, Mr. Koh explained the constitutionality of the United States entering into ACTA without further Congressional action. Mr. Koh's March 6, 2012 letter is set forth below. Both Senator Wyden's letter to Mr. Koh and Mr. Koh's response are available at *www.state.gov/s/l/c8183.htm*. See *Digest 2011* at 109-10 for the exchange of letters between Senator Wyden and U.S. Trade Representative Ron Kirk regarding the same issue.

* * * *

Thank you for your letter, dated January 5, 2012, regarding the Anti-Counterfeiting Trade Agreement (ACTA). As Ambassador Kirk has stated, the ACTA represents a crucial advance in the international fight against counterfeiting and piracy. It will support and promote American jobs in our innovative and creative industries by helping to protect them against the global proliferation of intellectual property theft in a manner fully consistent with the principles of freedom of expression and access to information in the digital environment. I welcome the opportunity to respond to your further questions regarding the Agreement.

Under international law, the ACTA is a legally binding international agreement. By its terms, the ACTA enters into force when at least six parties have deposited instruments indicating their consent to be bound. Accordingly, once in force for the United States, the ACTA will impose obligations on the United States that are governed by international law. As in the case of other international agreements, it is possible that Congress could enact subsequent changes in U.S. law that are inconsistent with U.S. international obligations. If Congress were to enact a law that put the United States in breach of its ACTA obligations, the United States could, of course, seek to convince the other parties that the ACTA should be amended to make it consistent with the change in U.S. law. Alternatively, the United States could withdraw from the ACTA, in accordance with its provisions. Obviously, this answer is a general one: the precise ramifications of any subsequent legislation would depend on a careful analysis of that legislation, related laws, and the ACTA provisions implicated.

I share Ambassador Kirk's view that the Administration is currently in a position to accept the ACTA for the United States. As reflected in his letter, the United States would be relying on existing U.S. intellectual property law for implementation of the ACTA, including the Copyright Act of 1976, the Lanham Act, the Digital Millennium Copyright Act, and other statutes. Pursuant to these laws, the United States would be in a position to fulfill all of the obligations that it would undertake as a party to the ACTA, such as providing civil remedies, border enforcement mechanisms, and criminal penalties for certain intellectual property offenses. The ACTA was negotiated in response to express Congressional calls for international cooperation to enhance enforcement of intellectual property rights. Congress has passed legislation explicitly calling for the Executive Branch to work with other countries to enhance enforcement of intellectual property rights. For example, the Prioritizing Resources and

Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, codified at 15 U.S.C. 8113(a), calls for the Executive Branch to develop and implement a plan aimed at "eliminating ... international counterfeiting and infringement networks" and to "work[] with other countries to establish international standards and policies for the effective protection and enforcement of intellectual property rights." The ACTA helps to answer that legislative call. As also pointed out by Ambassador Kirk, the ACTA is part of a long line of trade agreements that were similarly concluded by successive Administrations.

I hope you find this response helpful, and I thank you for your continued interest in the ACTA.

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3. U.S. Objection to Bolivia's Reservation to the 1961 Narcotics Convention

On July 3, 2012, the United States notified the depositary for the UN Single Convention on Narcotic Drugs of its objection to the proposed reservation to the convention submitted by Bolivia on January 10, 2012. Bolivia's proposed reservation relates to the use of coca leaf. The text of the U.S. objection appears below and is also available on the UN Treaty Collections website at *http://treaties.un.org/doc/Publication/CN/2012/CN.361.2012-Eng.pdf*.

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The United States Mission to the United Nations presents its compliments to the United Nations and refers to the Secretary-General's note C.N.829.2011.TREATIES-28 (Depositary Notification), dated January 10, 2012, which communicated that the Secretary-General had received from the Plurinational State of Bolivia an instrument of accession to the Single Convention on Narcotic Drugs, 1961, as amended (the Convention), with a proposed reservation submitted in accordance with Article 50, paragraph 3 of the Convention.

The Mission informs the United Nations that the United States objects to the proposed reservation. The United States considers the Convention to be one of the cornerstones of international efforts to prevent the illicit production, manufacture, traffic in and abuse of drugs, while ensuring that licit drugs are available for medical and scientific purposes. The United States is concerned that Bolivia's reservation is likely to lead to a greater supply of available coca, and as a result, more cocaine will be available for the global cocaine market, further fueling narcotics trafficking and related criminal activities in Bolivia and the countries along the cocaine trafficking route.

The United States welcomes Bolivia's renewed commitment to continue to take all necessary legal measures to control the illicit cultivation of coca in order to prevent its abuse and the illicit production of the narcotic drugs which may be extracted from the leaf.

Should Bolivia's reservation be deemed to be permitted in accordance with Article 50, paragraph 3 of the Convention, this objection would not constitute an obstacle to the entry into force of the Convention between the United States and Bolivia, but the United States would not

assume toward Bolivia any legal obligation under the Convention that is affected by the reservation.

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B. LITIGATION INVOLVING TREATY LAW ISSUES

1. Constitutionality of U.S. Statute Implementing the Chemical Weapons Convention

In 2011, the United States filed a supplemental brief and a supplemental reply brief in the U.S. Court of Appeals for the Third Circuit in an appeal brought by a defendant who was convicted under the U.S. statute enacted to implement U.S. obligations under the Chemical Weapons Convention, 18 U.S.C. § 229-229F. *United States v. Carol Anne Bond*, No. 08-2677 (3d Cir. 2011). See *Digest 2011* at 111-17. The court heard oral arguments in the case in November 2011 and issued its decision on May 3, 2012, holding that the statute is a valid exercise of Congress's power to enact treaty implementing legislation as a Necessary and Proper effectuation of the Article II Treaty Power of the Constitution. 681 F.3d.149 (3d. Cir. 2012). Excerpts from the majority opinion of the court follow (two separate concurring opinions are not excerpted; footnotes and citations to the record have been omitted).

* * * *

Whatever the Treaty Power's proper bounds may be, …we are confident that the Convention we are dealing with here falls comfortably within them. The Convention, after all, regulates the proliferation and use of chemical weapons. One need not be a student of modern warfare to have some appreciation for the devastation chemical weapons can cause and the corresponding impetus for international collaboration to take steps against their use. Given its quintessentially international character, we conclude that the Convention is valid under any reasonable conception of the Treaty Power's scope. In fact, as we discuss at greater length herein, because the Convention relates to war, peace, and perhaps commerce, it fits at the core of the Treaty Power. …

* * * *

3. *The Necessary and Proper Clause*

Thus, because the Convention falls comfortably within the Treaty Power's traditional subject matter limitation, the Act is within the constitutional powers of the federal government under the Necessary and Proper Clause and the Treaty Power, unless it somehow goes beyond the Convention. Bond argues that it does.

She says that the Act covers a range of activity not actually banned by the Convention and thus cannot be sustained by the Necessary and Proper Clause. Whether that argument amounts to a facial or an as-applied attack on the Act, … it fails. We stated in *Bond I* that "Section 229 ... closely adheres to the language of the ... Convention," 581 F.3d at 138, and so it does. True, as Bond notes, the Convention bans persons from using, developing, acquiring, stockpiling, or retaining chemical weapons, 32 I.L.M. at 804, while the Act makes it unlawful to "receive, stockpile, retain, own, possess, use, or threaten to use" a chemical weapon, 18 U.S.C.

§ 229(a)(1), but those differences in wording do not prove that the Act has materially expanded on the Convention. *See United States v. Belfast*, 611 F.3d 783, 806 (11th Cir.2010) ("[T]he existence of slight variances between a treaty and its congressional implementing legislation do not make the enactment unconstitutional; identicality is not required."). The meaning of the list in the former seems rather to fairly encompass the latter (with the possible exception of the "threaten to use" provision of the Act) and, if the Act goes beyond the Convention at all, does not do so in the "use" aspect at issue here.

So while Bond's prosecution seems a questionable exercise of prosecutorial discretion, and indeed appears to justify her assertion that this case "trivializes the concept of chemical weapons", the treaty that gave rise to it was implemented by sufficiently related legislation. *See Comstock*, 130 S.Ct. at 1956 ("[I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power."); *Lue*, 134 F.3d at 84 (rejecting the argument "that because the Hostage Taking Convention targets a specific aspect of international terrorism—hostage taking—the statute effectuating the Convention must deal narrowly with international terrorism or risk invalidity" as a "cramped" view of Congressional authority, because treaty-implementing legislation must simply "bear a rational relationship to a permissible constitutional end").

In short, because the Convention pertains to the proliferation and use of chemical weapons, which are matters plainly relating to war and peace, we think it clear that the Convention falls within the Treaty Power's core. … Consequently, we cannot say that the Act disrupts the balance of power between the federal government and the states, regardless of how it has been applied here. *See Gonzales v. Raich*, 545 U.S. 1, 23, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) ("[W]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." (citations and internal quotation marks omitted)); *Holland*, 252 U.S. at 432, 40 S.Ct. 382 ("If the treaty is valid there can be no dispute about the validity of the [implementing] statute...."); *cf.* U.S. Const. art. VI, cl. 2 ("[A]ll Treaties made ... shall be the supreme Law of the Land.").

* * * *

After the Court of Appeals decided the case, Bond filed a petition for writ of certiorari on August 1, 2012. The United States filed its brief in opposition to certiorari on October 4, 2012.[*] Excerpts from the U.S. brief follow (with citations to the record omitted).

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The court of appeals explained that petitioner's claim fails under the rule of [*Missouri v.*] *Holland* that "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government." 252 U.S. at 432. But even setting aside *Holland*, the court said it would be untroubled by the exercise of federal authority in this case because, "[w]hatever the Treaty Power's proper bounds may be," it was "confident that the Convention [it was] dealing with here falls comfortably within them."

[*] Editor's note: On January 18, 2013, the Supreme Court granted the petition for writ of certiorari. *Digest 2013* will discuss further developments in the case.

Id. at 26.

The Act's terms very closely track those of the concededly-valid Convention in all material respects, so there is no argument that the Act goes beyond the scope of the Convention. Further, even assuming that federalism principles had a role to play in evaluating the validity of treaty-based legislation, as explained below, the Act would not infringe on such hypothetical federalism limits.

Petitioner nowhere plainly explains what her proposed test for the constitutionality of treaty-implementing legislation should be. She appears to assert that her prosecution contravenes federalism principles because Pennsylvania could have prosecuted her for assault, but it is well-settled that the Constitution does not prohibit federal prosecution in an area of overlapping federal and state authority. See, *e.g.*, *Cleveland v. United States*, 329 U.S. 14, 16 (1946) (Mann Act's criminalization of interstate transportation for "purpose of prostitution or debauchery, or for any other immoral purpose" not unconstitutional invasion of traditional area of state regulation); *United States v. Johnson*, 114 F.3d 476, 481 (4th Cir.) ("[f]ederal laws criminalizing conduct within traditional areas of state law, whether the states criminalize the same conduct or decline to criminalize it, are of course commonplace under the dual-sovereign concept and involve no infringement *per se* of states' sovereignty in the administration of their criminal laws"), cert. denied, 522 U.S. 904 (1997).

Under the dual-sovereign doctrine, Pennsylvania remained free to prosecute petitioner for assault notwithstanding the federal prosecution. See *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 782 n.22 (1994). This federal prosecution therefore in no way impinged on Pennsylvania's sovereign powers. Indeed, the Act, which did not preempt any Pennsylvania law, has less of an impact on state prerogatives than other historic exercises of the treaty power. See, *e.g.*, *Hopkirk v. Bell*, 7 U.S. (3 Cranch) 454, 458 (1806) (treaty between United States and Great Britain ending Revolutionary War preempted state statute of limitations for recovery of a debt); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

Petitioner is incorrect that, assuming that federalism principles apply to legislation implementing a valid treaty, Congress violated such limitations by not deferring to state law to implement "any treaty obligation the United States had to criminalize her conduct." The Necessary and Proper Clause affords Congress discretion to decide how best to execute the powers set forth in the Constitution. See *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (explaining that the "constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people"). In fact, because the relevant provisions of the Convention are not directly judicially enforceable, the absence of federal legislation to implement the Convention's requirements could have left the federal government without adequate means to ensure the United States' compliance with the Convention.

Petitioner's argument echoes one side of a debate that occurred leading up to the Constitutional Convention regarding the treaty power. That debate was textually resolved in the Constitution, which granted the treaty power to the Executive, with advice and consent by the Senate. U.S. Const. Art. II, § 2. The Framers made that choice because of the government's inability, under the Articles of Confederation, to induce the states to implement treaties. See, *e.g.*, *The Federalist*, No. 42, at 264 (James Madison); No. 22, at 150-151 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Samuel B. Crandall, *Treaties: Their Making and Enforcement* 34-35, 51-52 (2d ed. 1916). The Constitution also expressly withheld the treaty power from the

States. U.S. Const. Art. I, § 10. Thus it cannot be said that the decision below represents a "reconfigur[ing]" of constitutional structures.

Moreover, a rule that Congress cannot exercise its power to implement treaties if a state law provision arguably overlaps with a treaty requirement would be wholly unworkable. Congress would have to conduct 50-state surveys of state law, and perhaps of municipal law as well, for each treaty provision to determine if the provision were implemented locally. Under petitioner's reading, such surveys would also have to ascertain whether provisions that were not directly related to the subject matter (*e.g.*, assault laws) might overlap with the treaty provisions. In this case, the government has never maintained that state law would be sufficient to implement the Convention, and petitioner's premise that a generic assault statute would adequately implement the Nation's treaty obligations to restrict not only the use, but also the development, production, acquisition, retention, and transfer, of toxic chemicals is not tenable.

Petitioner claims that *Medellin v. Texas*, 552 U.S. 491 (2008), supports her view that the federal government should have deferred to state law rather than enacting Section 229. But *Medellin*, to the extent that it is relevant to this case, demonstrates petitioner's error. The *Medellin* Court held that "[t]he responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress." *Id.* at 525-526. *Medellin* found ineffective a presidential memorandum that directed States to comply with a judgment of the International Court of Justice regarding the Vienna Convention on Consular Relations. Instead, it was *Congress* under the Constitution that had the power to give effect to the international decision. *Ibid.* (And, of course, in this case Congress did act.) The facts in *Medellin* also illustrate the fundamental flaw in petitioner's proposed reliance on States to execute the United States' international obligations. Because the actions of the State of Texas did not fulfill the United States' international obligations, the United States was found in breach of the Vienna Convention. See *Medellin v. Texas*, 554 U.S. 759 (2008) (per curiam).

Finally, there is no requirement that the government establish that the prosecution of petitioner in particular "is necessary and proper to complying with the Convention." This Court "ha[s] often reiterated that '[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class.' " *Raich*, 545 U.S. at 23 (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971)) (some internal quotation marks omitted; brackets in original).

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2. Constitutionality of Statue Implementing Berne (Copyright) Convention: Golan v. Holder

The Supreme Court issued its opinion in *Golan v. Holder*, No. 10-545, on January 18, 2012. The Court upheld the U.S. statute implementing the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention") under both the First Amendment and the Copyright Clause of the Constitution. The United States filed its brief in the United States Supreme Court in 2011, as discussed in *Digest 2011* at 117-20.

3. Rights of U.S. Citizens in Puerto Rico Under International Treaty: Igartua v. United States

The Supreme Court denied a petition for certiorari on May 14, 2012 brought by petitioners contending that United States citizens residing in Puerto Rico are entitled, under the Constitution and international law (in particular, the International Covenant on Civil and Political Rights ("ICCPR")), to elect voting members of the U.S. House of Representatives. *Igartua v. United States*, 132 S.Ct. 2376 (2012). In the district court, plaintiffs' complaint was dismissed. On appeal, the Court of Appeals for the First Circuit affirmed. 626 F.3d 592 (1st Cir. 2010). The United States filed a brief in opposition to the petition for certiorari on April 3, 2012, excerpted below (with citations to the record and most footnotes omitted).

* * * *

2. The court of appeals correctly held that the people of Puerto Rico are not entitled under the Constitution to elect voting members of the House of Representatives. As the district court concluded, moreover, a federal court is powerless to adjudicate a claim that the Constitution *should* provide something other than what it does—even if a grievance against the Constitution were a cognizable injury under Article III, it would not be subject to redress by judicial order. Further review is not warranted.

a. The election of members of the House of Representatives, like the election of the President, is "governed neither by rhetoric nor intuitive values but by a provision of the Constitution." *Igartua-De La Rosa v. United States*, 417 F.3d 145, 147 (1st Cir. 2005) (en banc), cert. denied, 547 U.S. 1035 (2006). The Constitution provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several *States*." U.S. Const. Art. I, § 2, Cl. 1 (emphasis added). The Framers expressly distinguished between "States" and "Territor[ies]," see *id.* Art. IV, § 3, and reserved to "the People of the several States" alone the right of representation in the House. Nor is there any doubt about what, for these purposes, counts as a "State[]": after identifying the original 13 States by name, see *id.* Art. I, § 2, Cl. 3, the Constitution provides that Congress may vote to admit new States to the Union, *id.* Art. IV, § 3. Each of the remaining 37 States has been admitted by that process. Puerto Rico has not.

Nor has Puerto Rico acquired electoral representation in the federal government by the only other means contemplated by the Framers: amendment of the Constitution. See U.S. Const. Art. V. It was by that process that United States citizens residing in the District of Columbia acquired the right to participate in presidential—but not congressional—elections. See Amend. XXIII, § 1 (authorizing the District of Columbia to appoint electors that "shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State"). Nothing in the text, structure, or history of the Constitution suggests that the Framers intended any other mechanism for a territory to gain representation in Congress. See *Adams v. Clinton*, 90 F. Supp. 2d 35, 56 (D.D.C. 2000) (three-judge court), aff'd, 531 U.S. 941 (2000) ("[T]he overlapping and interconnected use of the term 'state' in the relevant provisions of Article I, the historical evidence of contemporary understandings, and the opinions of our judicial forebears all reinforce how deeply Congressional representation is tied to the structure of statehood. *** There is simply no evidence that the Framers intended that not only citizens of states, but unspecified others as well, would share in the congressional franchise.").

In light of the plain language of the Constitution, the courts of appeals have uniformly rejected claims that citizens of United States territories are entitled to vote in federal elections.

See *Igartua III*, 417 F.3d at 148 (Puerto Rico) (presidential elections); *Ballentine v. United States*, 486 F.3d 806, 810-812 (3d Cir. 2007) (Virgin Islands) (presidential and congressional elections); *Attorney Gen. of Territory of Guam v. United States*, 738 F.2d 1017, 1019 (9th Cir. 1984) (Guam) (presidential elections), cert. denied, 469 U.S. 1209 (1985).

b. Petitioners' arguments to the contrary do not warrant review. Petitioners contend that the inability of Puerto Rico residents to participate in federal elections violates constitutional principles of due process and equal protection. But Article I's restriction of voting representation in the House to the "People of the several States" cannot be unconstitutional "because it is what the Constitution itself provides." *Igartua III*, 417 F.3d at 148. This Court's decision in *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982), is not to the contrary. The Court in *Rodriguez* recognized that a citizen of Puerto Rico, like a citizen of a State, "has a constitutionally protected right to participate in elections on an equal basis with other citizens *in the jurisdiction.*" 457 U.S. at 10 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)) (emphasis added). The Court did not hold or suggest in *Rodriguez* that the Constitution entitles citizens residing in Puerto Rico participate in federal elections on the same terms as those who reside in States.

Petitioners correctly observe that this Court and the First Circuit have sometimes treated Puerto Rico as though it were a State for statutory purposes, and that the First Circuit has done so with respect to at least some constitutional principles that apply only to States, such as Eleventh Amendment immunity. See, *e.g.*, *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108 (2003). But neither this Court nor the court of appeals has concluded that Puerto Rico *is* a State under the Constitution. Nor has any court of appeals suggested that the Commonwealth is entitled to claim the most fundamental prerogative of statehood: electoral representation in the government of the United States. The Framers did not anticipate that the federal courts would decide, under any rubric of *de facto* or functional statehood, whether a particular territory should be entitled to claim the privileges of membership in the Union. The Constitution commits that quintessentially political question to Congress. U.S. Const. Art. IV, § 3; see *Baker v. Carr*, 369 U.S. 186, 217 (1962).

Petitioners emphasize that all persons born in Puerto Rico are natural-born United States citizens, see 8 U.S.C. 1402, and that their lack of voting representation in Congress denies them a voice in crafting the laws that apply to all Americans. The United States does not underestimate the importance of voting or electoral representation, and, like the court of appeals, "recognize[s] the loyalty, contributions, and sacrifices of those who are in common citizens of Puerto Rico and the United States." *Igartua III*, 417 F.3d at 148. As a legal proposition, however, petitioners' contention that "the source of the right to vote in Federal elections is citizenship" is mistaken. In cases brought by United States citizens residing in the District of Columbia, this Court has repeatedly rejected the claim that a right to electoral representation inheres in national citizenship. In *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317 (1820), for example, Chief Justice Marshall upheld the power of Congress to tax residents of the District, rejecting arguments premised on "that great principle which was asserted in our revolution, that representation is inseparable from taxation." *Id.* at 324-325; see also *Heald v. District of Columbia*, 259 U.S. 114, 124 (1922) (Brandeis, J.) ("There is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation.").

c. Petitioners also contend that "the Constitution does not *prohibit* United States citizens residing in Puerto Rico from voting for representatives in the U.S. House of Representatives," implying that Congress could alter the status quo if it wished. That question, however, is not

presented by this case. Even if Congress could use its powers under the Territory Clause to grant voting representation in Congress to citizens in Puerto Rico, it has not sought to do so: it has not, for example, altered the statutory process for apportioning Representatives among the States, see 2 U.S.C. 2a, or granted Puerto Rico's territorial delegate, see 48 U.S.C. 891, the right to vote on the floor of the House. Cf. *Michel v. Anderson*, 14 F.3d 623, 630-632 (D.C. Cir. 1994) (discussing constitutional limitations on the powers of non-voting territorial delegates in the House of Representatives). The statutory process for electing members of the House remains unchanged. The question whether Congress could constitutionally alter that process thus remains purely hypothetical.

3. For similar reasons, petitioners' contentions regarding the ICCPR and other international instruments do not warrant this Court's review. Even if petitioners were correct about the meaning and domestic effect of the instruments on which they rely, no international agreement may override the express terms of the Constitution. *Reid v. Covert*, 354 U.S. 1, 16-18 (1957) (plurality opinion); see also *Igartua III*, 417 F.3d at 148. Further review is additionally unwarranted because, as Chief Judge Lynch observed (626 F.3d at 603), petitioners failed to preserve in the court of appeals their argument that the ICCPR is self-executing. In their briefs below, petitioners did not make an argument "as to how the [ICCPR] bind[s] federal courts," and instead "cite[d] the ICCPR merely 'as supportive,' noting that it has 'been used by many courts to interpret existing U.S. law or to determine legal rights when the plaintiff has an independent cause of action.' " 626 F.3d at 603. As Judge Lynch correctly noted, "[t]his amounts to forfeiture if not waiver." *Ibid.*

In any event, petitioners' arguments concerning international law fail on their own terms. As the court of appeals recognized, see 626 F.3d at 602-603 & n.11; *Igartua III*, 417 F.3d at 148-150, none of the international agreements on which petitioners rely is self-executing. "[N]ot all international law obligations automatically constitute binding federal law enforceable in United States courts." *Medellin v. Texas*, 552 U.S. 491, 504 (2008). As a matter of domestic law, a treaty provision that is not self-executing "can only be enforced pursuant to legislation to carry [it] into effect." *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); Restatement (Third) of Foreign Relations Law of the United States § 111 cmt. h (1987).[10]

Petitioners principally rely on the ICCPR. The ICCPR, however, is not a self-executing treaty and therefore does not create any rights directly enforceable in the courts of the United States. See *Sosa*, 542 U.S. at 728, 735. This Court in *Sosa* cited the ICCPR as an example of a circumstance in which "the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law." *Id.* at 728. Because "the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts," *id.* at 735, the Court explained, the ICCPR alone could not "establish the relevant and applicable rule of international law" governing litigation in a United States court, *ibid.*

Although members of the court of appeals characterized this portion of *Sosa* as dicta, see, *e.g.*, 626 F.3d at 628 (Torruella, J., dissenting), the Court in *Sosa* discussed the ICCPR in the course of rejecting the plaintiff's argument that the Covenant established an international norm against arbitrary arrest sufficient to support a cause of action for damages under the Alien Tort

[10] Indeed, some of the instruments cited by petitioners, such as the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948), do not themselves impose binding obligations as a matter of domestic *or* international law. See *Sosa,* 542 U.S. at 734.

Statute, 28 U.S.C. 1350. See *Sosa*, 542 U.S. at 733-737. A considered rationale of that kind, integral to the outcome of the case, is not mere *obiter dicta.* See *County of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring and dissenting) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law."). And every court of appeals to consider the question has likewise concluded that the ICCPR is not self-executing.[12] Further review is not warranted.

* * * *

4. Constitutionality of MARPOL Amendment Procedure: Alaska v. Clinton

On November 9, 2012, the United States filed a brief in support of its motion to dismiss and in opposition to plaintiff's motion for a preliminary injunction in *Alaska v. Clinton et al.*, Case No. 12-cv-00142-SLG, in U.S. District Court for the District of Alaska. The complaint brought by the State of Alaska challenged the procedure by which an emissions control area ("ECA") that includes waters off the coast of Alaska was established pursuant to the International Convention for the Prevention of Pollution from Ships ("MARPOL"), including Annex V, and domestic implementing legislation (the Act to Prevent Pollution from Ships, 33 U.S.C. §§ 1901 to 1915). Excerpts below from the U.S. brief (with footnotes omitted) include the introduction and the section discussing why Alaska's complaint fails to state a claim under the Treaty Clause of the Constitution. The brief in its entirety is available at *www.state.gov/s/l/c8183.htm*.

The United States also filed a brief on December 20, 2012 in support of its motion to dismiss the complaint brought by Intervenor-Plaintiff Resource Development Council for Alaska, Inc. ("RDC"), which asserts claims similar to and in support of those brought by Alaska. That brief, which incorporates and summarizes arguments made in the U.S. brief supporting the motion to dismiss Alaska's complaint, is also available at *www.state.gov/s/l/c8183.htm*.

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Air pollution from ocean-going ships is an international problem that cannot be adequately addressed by any individual country. That is why the United States, Canada and 70 other countries entered into an international treaty to lower the amount of pollution from ships. Because air pollution from ships can have a more direct impact on human health and the environment in certain locations, the treaty established a procedure for the treaty parties to

[12] See *Serra v. Lappin*, 600 F.3d 1191, 1196-1197 (9th Cir. 2010); *Clancy v. Office of Foreign Assets Control*, 559 F.3d 595, 603-604 (7th Cir. 2009); *Ballentine*, 486 F.3d at 814-815; *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 133, 137 (2d Cir. 2005); *Bannerman v. Snyder*, 325 F.3d 722, 724 (6th Cir. 2003); *United States v. Duarte-Acero*, 296 F.3d 1277, 1283 (11th Cir.), cert. denied, 537 U.S. 1038 (2002); *Hain v. Gibson*, 287 F.3d 1224, 1243 (10th Cir. 2002), cert. denied, 537 U.S. 1173 (2003); *United States ex rel. Perez v. Warden, FMC Rochester*, 286 F.3d 1059, 1063 (8th Cir.), cert. denied, *Ruotolo v. United States*, 537 U.S. 869 (2002); *Beazley v. Johnson*, 242 F.3d 248, 267-268 (5th Cir.), cert. denied, *Beazley v. Cockrell*, 534 U.S. 945 (2001).

jointly designate "emission control areas," or "ECAs," that would have more stringent limits regarding ship emissions. The treaty, known as the International Convention for the Prevention of Pollution from Ships (MARPOL or Convention), and Annex VI to the treaty, under which ECAs are designated, received the advice and consent of the Senate and are implemented domestically through the Act to Prevent Pollution from Ships (APPS). 33 U.S.C. §§ 1901 to 1915.

Alaska challenges the approach of the Executive and Legislative branches to implement MARPOL because the treaty parties designated waters adjacent to most of the United States and Canadian shorelines in the Atlantic and Pacific oceans, including waters off part of Alaska, as an ECA. In support of its challenge, Alaska asserts an array of faulty statutory, constitutional and Administrative Procedure Act (APA) arguments, all aimed at asking this Court to force the United States to act in a manner that likely would be considered by the treaty parties as a breach of our obligations under MARPOL. Alaska's claims fundamentally misconstrue the process through which Congress, the Executive, and the MARPOL parties address the relevant amendments to MARPOL, including ECAs. Viewed properly, none of Alaska's arguments changes the fundamental points that APPS provides explicit domestic legal authority to implement and enforce the ECA and that the United States properly became a party to the ECA amendment, consistent with MARPOL, APPS and the Senate's understanding during its consideration of Annex VI that the United States might seek establishment of an ECA.

This Court should dismiss Alaska's Second Amended Complaint for lack of subject matter jurisdiction and because Alaska's claims fail to state a claim upon which relief can be granted. Specifically, Alaska's first cause of action, which alleges that the Secretary of State's acceptance of the ECA under APPS was improper because the ECA did not comply with an appendix to Annex VI, is barred by the political question doctrine, and also seeks review that is expressly precluded under the APA. In addition, there are sound scientific bases for including the seas off the coast of Alaska's southern and southeastern shores in the ECA. Alaska's second cause of action alleges violations of the Treaty Clause of the Constitution and the separation of powers doctrine; however, that challenge fails because Congress properly provided the domestic legal authority to enforce the ECA, and it also is barred in part by the political question doctrine.

Alaska's third cause of action fails to state a claim upon which relief can be granted because it incorrectly asserts that the Environmental Protection Agency (EPA) was required to undertake notice and comment rulemaking to establish the geographic scope of the ECA. EPA, however, did not establish those boundaries; the MARPOL parties did when they adopted the ECA, and the Secretary of State then accepted the ECA as adopted. Finally, Alaska's fourth cause of action fails to state a claim upon which relief can be granted because its assertion that ECAs need to be designated through an EPA rulemaking under section 1903 of APPS is simply incorrect under the APPS' terms and, even if such rulemaking were necessary, the APA's "foreign affairs" exception exempts such actions from notice and comment requirements.

Finally, Alaska has failed to meet the demanding standards for the extraordinary remedy of a preliminary injunction. Accordingly, this Court should deny Alaska's motion for preliminary injunction and dismiss the Second Amended Complaint.

I. LEGAL AND FACTUAL BACKGROUND

A. MARPOL

MARPOL is the most prominent global agreement to control pollution from ships. It consists of certain obligations that are set forth in the articles of the Convention, and six annexes of regulations prescribing more specific obligations with respect to six particular types of

pollution from ships. Article 16 to the MARPOL Convention sets out the requirements for amending the Convention, which the Parties generally do by acting through the Marine Environment Protection Committee (MEPC) of the International Maritime Organization (IMO). *Id.* art. 16(2). A proposed amendment is circulated to all Parties for consideration no less than six months following submittal. *Id.* art. 16(2)(a)-(c). After consideration by the MEPC, an amendment requires a two-thirds majority of present and voting Parties for adoption. *Id.* art. 16(2)(d)-(e).

Once adopted, amendments to the articles of the MARPOL convention and amendments which add new annexes to it enter into force only with respect to Parties which affirmatively declare that they have accepted such amendments. *Id.* arts. 16(2)(g)(i), 16(5). Amendments to existing annexes or their appendices may be made through a simplified amendment procedure. *Id.* art. 16(2)(f)(ii)-(iii).

Under the simplified procedure, an amendment is deemed accepted at the end of a specified period (which can be no sooner than ten months after adoption) unless, within that period, at least either one-third of the Parties, or Parties whose combined merchant fleets constitute at least half of the gross tonnage of the world's merchant fleet, communicate their objections. *Id.* art. 16(2)(f)(iii). An amendment subject to the simplified procedure then enters into force six months after the acceptance date for all parties except those that have made a declaration of non-acceptance. *Id.* art. 16(g)(ii). An individual Party to MARPOL can thus determine that an amendment to an annex will not enter into force for that Party.

B. Annex VI

Annex VI creates a program to address air pollution from ships, including through engine and fuel standards. Specifically, and as modified by amendments adopted in 2008 pursuant to the simplified amendment procedure, Annex VI sets tiered fuel sulfur content limits generally applicable world-wide, with a limit of 3.5 percent beginning in 2012, and a further limit of 0.5 percent as early as 2020 depending on a 2018 fuel availability review.4 MARPOL Annex VI, reg. 14. In its original form, MARPOL Annex VI included provisions for Sulfur Emission Control Areas (SECAs), which provided for more stringent controls for sulfur oxides (SOx) in designated geographical areas. The 2008 amendments set nitrogen oxides (NOx) performance standards for new marine diesel engines on vessels operating in a designated ECA beginning in 2016, and fuel sulfur content limits for vessels operating in a designated ECA at 1 percent after July 20105 and 0.1 percent beginning on January 1, 2015. *Id.* Annex VI, reg. 13 ¶ 5, reg. 14 ¶ 4.

The 2008 amendments to Annex VI broadened the SECA concept to the more generalized concept of ECAs, and tightened controls for NOx and/or SOx and particulate emissions, as set forth in Regulations 13 and 14 of Annex VI, as amended. *Id.* Annex VI, regs. 13-14.

Parties to MARPOL may seek to add new ECAs by submitting a proposal to amend Annex VI in accordance with the MARPOL amendment procedures described above. Appendix III to Annex VI sets forth criteria that the proposal shall include—including a description of the scope of the proposed ECA, the environmental and shipping conditions giving rise to the proposal, and the economic impacts of the proposal—and directs that these criteria are to be "take[n] into account" as "factors to be considered in the assessment" by the IMO. *Id.* Annex VI, App. III ¶ 1.1, 3.1, 4.2 (available at 2d Am. Compl., Ex. C).

C. The United States' Ratification of Annex VI

In 1998, the United States signed the protocol creating Annex VI, which President

George W. Bush transmitted to the Senate in May 2003 for advice and consent. Message from the President of the United States Transmitting Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, 1973, as Modified by the Protocol of 1978 Thereto, S. Treaty Doc. No. 108-7 (2003)(excerpt attached as Ex. A). (Ex. A). That package transmitted to the Senate included the Secretary of State's submission to the President, which specified that the United States might seek to designate a SECA and explained that, consistent with the United States government's long-standing practice with respect to amendments of the MARPOL Convention, such an action and any similar future United States acceptances of amendments to Annex VI could enter into force for the United States without further Senate advice and consent. Ex. A at A-5, A-9.

Following transmittal, in 2005 the Senate Foreign Relations Committee held a hearing on Annex VI. *Treaties Before the Comm. On Foreign Relations*, 109th Cong. (2005) In testimony before the Committee and in answers to additional questions for the record, the United States discussed the possibility that it would propose one or more SECAs on its Atlantic, Pacific, and Gulf of Mexico coasts to address air quality problems caused by ship emissions; the simplified amendment procedure for future amendments to Annex VI; and the shared understanding of the Senate and the Executive branch, consistent with long-standing practice under the MARPOL Convention, that obtaining Senate advice and consent for future amendments of such nature undertaken pursuant to MARPOL's simplified amendment procedure was not necessary. Ex. B at B-9, B-12, B-19, B-20, B-24, B-28 (statement of Hon. David A. Balton, Deputy Assistant Secretary for Oceans and International Environmental and Scientific Affairs, Department of State, and responses to additional questions for the record). The Senate Foreign Relations Committee report, recommending Senate consent to Annex VI, reiterated that "[t]he executive branch has indicated that, upon ratification of Annex VI, the United States may seek the establishment of one or more SECAs in the United States pursuant to the procedures set out in Appendix III to Annex VI," and noted that "[t]he Environmental Protection Agency is currently conducting studies to evaluate proposed SECAs along the Pacific, Atlantic, and Gulf Coasts of the United States." S. Exec. Rep. No. 109-13, at 4 (2006). The Senate gave its advice and consent to Annex VI in April 2006. 152 Cong. Rec. S3400 (daily ed. April 7, 2006). After Congress enacted implementing legislation by amending the Act to Prevent Pollution from Ships, Pub. L. 110-280 (2008), the United States deposited with the IMO its instrument of ratification on October 8, 2008. *See* IMO Status of Convention documents (available at http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx).

D. The Act to Prevent Pollution from Ships (APPS)

MARPOL is implemented domestically through the Act to Prevent Pollution from Ships (APPS), 33 U.S.C. §§ 1901-1915, enacted in 1980. Section 1907 of APPS provides that "[i]t is unlawful to act in violation of the MARPOL Protocol, . . . [APPS], or the regulations issued hereunder." 33 U.S.C. § 1907(a). APPS has been amended several times, including in 2008 by the Marine Pollution Prevention Act, Pub. L. 110-280, to require compliance with Annex VI and to grant EPA and the Department of Homeland Security (DHS) the authority to administer and enforce Annex VI. 33 U.S.C. § 1903. APPS Section 1902 specifies where APPS applies to U.S.-flagged and foreign-flagged ships. APPS is to be construed and applied in a manner consistent with international law, including navigational rights and freedoms. *Id*. § 1902(i).

APPS also addresses the domestic procedure for acceptance of amendments to MARPOL. Proposed amendments to Annex VI may be accepted on behalf of the United States by the Secretary of State in consultation with the Secretary of Homeland Security or the EPA

Administrator, without further approval by the Senate. APPS recognizes that the Secretary of State may also make a declaration of nonacceptance to such proposed amendments following consultation with the Secretary of Homeland Security. 33 U.S.C. § 1909(c).

E. The North American ECA

Even before the Senate gave advice and consent to Annex VI, the United States government began to engage in well-publicized efforts to establish more stringent emission standards applicable to vessels in or proximate to United States' waters through the international designation of an emission control area. In 2002, in response to concerns that EPA needed to address emissions from ocean-going vessels to fulfill its mandate under the Clean Air Act, EPA proposed a rule regarding the applicability of the Clean Air Act to marine engines and foreignflagged vessels. 67 Fed. Reg. 37,548 (May 29, 2002). EPA noted in the Federal Register Notice that it "intend[ed] to work through the MARPOL process to designate certain areas in the U.S. as sulfur [emission] control areas," and gave notice regarding the issue of "whether all waters under U.S. jurisdiction or only specific areas should be designated as SECAs, and whether such designation(s) could be expected to have an adverse impact on port traffic within SECAs." *Id.* at 37,574. After the Senate gave its advice and consent to Annex VI, EPA discussed setting geographic limits for more stringent emission controls in an advanced notice of proposed rulemaking (ANPRM) that discussed the IMO process, proposed more stringent NOx, SOx, and PM controls, and sought public comment on the geographic scope for such controls. 72 Fed. Reg. 69,522, 69,543 (Dec. 7, 2007) (Proposed Rule). EPA conducted further public outreach subsequent to this notice.

The United States and Canada submitted a joint proposal for a North American ECA to the MEPC, and that submittal was published on April 2, 2009. Concurrently, a Technical Support Document providing a more detailed account of the scientific analyses performed in developing the ECA Proposal was also published.

Based on detailed ship emission inventories covering ships operating in areas up to 200 nautical miles from shore, as well as meteorological data affecting those emissions, the ECA Proposal concluded that such emissions generally reached inland areas; correspondingly, emissions from ships within the proposed ECA were expected to contribute to on-shore concentrations of air pollution. *See, e.g.*, ECA Proposal 4, 6; ECA Proposal, Annex 1 at 9-11.

As part of the support for the conclusion that emissions would contribute to concentrations of air pollution in inland areas, the ECA proposal quantified emissions transporting to inland areas using a sophisticated air quality modeling tool developed in support of national air quality standards and national regulations under the Clean Air Act (CAA). ECA Proposal, Annex 1 at 14-19. This confirmed that emissions from ships within 200 nautical miles from shore "affect air quality far inland on all U.S. coastlines," TSD 3-22, necessarily impacting air quality in ports, and in large and small cities from near the shore stretching far inland. Although this modeling tool includes gridded meteorological data only for the 48 contiguous states and therefore did not provide the same quantified estimate of emissions contributions to ambient concentrations of air pollution in Alaska, emissions from ships in the Alaska portion of the proposed ECA were expected to behave in a similar manner as those for the northern Pacific areas. ECA Proposal, Annex 1 at 19.

The MEPC forwarded the ECA Proposal to its Technical Group for further consideration. Report of the [MEPC] on its Fifty-Ninth Session ("MEPC 59 Report") at 25 (available at http://www.crs.hr/en-us/data/imoandeu/imo/mepcreports.aspx). The Technical Group "determined that the ECA proposal for the coastal waters of the United States and Canada

satisfied the criteria set forth in appendix III to MARPOL Annex VI" and, noting this determination, the MEPC approved the ECA for consideration at its next meeting, MEPC 60. *Id.* at 25, 29.

Using MARPOL's simplified amendment framework, the ECA was adopted at the MEPC 60 meeting and entered into force on August 1, 2011. Annex 11, Resolution MEPC.190(60), at 1. The one-percent first-phase fuel sulfur standard for ships operating within the North American ECA entered into effect on August 1, 2012, and the second phase setting fuel sulfur content limits at 0.1 percent will take effect on January 1, 2015.

* * * *

C. Alaska's Second Cause of Action Fails Because Congress Properly Provided the Domestic Legal Authority to Enforce the North American ECA

Alaska's assertions in its second cause of action that the ECA amendment "did not create domestic federal law" because it was neither "made by the President with the advice and consent of the Senate" under the Treaty Clause nor "implemented pursuant to legislation passed by both houses of Congress," and that "Congress has unconstitutionally yielded its lawmaking powers and the Senate's treaty-making role" through APPS to the Executive Branch. 2d. Am. Compl. ¶¶ 49-51, 53, are premised on a fundamental misunderstanding of how MARPOL and its amendments are implemented as a matter of United States domestic law.

The North American ECA amendment to MARPOL Annex VI is implemented through APPS, which provides the domestic legal authority to implement the MARPOL Convention and the annexes to which the United States is a party. The ECA amendment validly entered into force in accordance with the simplified amendment procedure set forth under MARPOL. This simplified amendment procedure is expressly provided for in Section 1909 of APPS and is consistent with the Senate's understanding of the domestic procedures that would be followed before amendments to Annex VI, like one designating an ECA, would be accepted by the United States. Furthermore, the text of APPS and the ratification history of Annex VI provide an acceptable delineation of the area in which the Secretary of State exercises her discretion in taking action with respect to amendments to the MARPOL annexes, particularly in light of the wide latitude accorded to the Executive Branch in the arena of foreign affairs. Accordingly, Alaska's second cause of action fails to state a claim upon which relief can be granted, and should be dismissed.

1. APPS Provides Explicit Domestic Legal Authority to Enforce the ECA

Alaska argues that the Annex VI amendment creating the ECA is not domestic federal law because it was neither "made by the President with the advice and consent of the Senate" pursuant to the Treaty Clause nor "implemented pursuant to legislation passed by both houses of Congress." 2d Am. Compl. ¶¶ 50-51. Alaska's contention is plainly wrong as a matter of law. The ECA entered into force for the United States consistent with both the Senate's understanding in giving its advice and consent to Annex VI and with its implementation through legislation passed by both houses of Congress.

As amended in 2008, APPS expressly provides legal authority for domestic implementation of Annex VI and subsequent amendments. By its plain language, APPS authorizes "the Secretary [of the department in which the Coast Guard is operating to] enforce the MARPOL Protocol." 33 U.S.C. § 1903(a). It provides that "[i]t is unlawful to act in violation

of the MARPOL Protocol," 33 U.S.C. § 1907(a), and authorizes investigations of and imposes civil and criminal penalties for violations of the MARPOL Protocol. 33 U.S.C. §§ 1907(b), 1908.

Moreover, APPS defines "MARPOL Protocol" as "the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, and includes the Convention." 33 U.S.C. § 1901(a)(4). "Convention," in turn, is defined as "the International Convention for the Prevention of Pollution from Ships, 1973, including Protocols I and II and Annexes I, II, V, and VI thereto, *including any modification or amendments to the Convention, Protocols or Annexes which have entered into force for the United States*." 33 U.S.C.§ 1901(a)(5) (emphasis added). Thus, every reference to the "MARPOL Protocol" throughout APPS, by definition, includes Annex VI and its amendments. Given that the definition of "MARPOL Protocol" includes Annex VI and its amendments, APPS clearly provides that the ECA, as an amendment to Annex VI, is enforceable domestic law. Accordingly, APPS explicitly provides the legal authority to implement the ECA amendment.

To the extent Alaska is arguing that implementing legislation can only render an international commitment enforceable if Congress passes such legislation following the negotiation and conclusion of the international commitment, that is equally wrong. Congressional *ex ante* authorization for international agreements extends to the earliest days of the nation. In 1792, Congress authorized the Postmaster General to enter into mail-exchange agreements. Act of Feb. 20, 1792, ch. 7, § 26, 1 Stat. 239; this authorization now takes the form of a grant of authority to the Secretary of State "to conclude postal treaties, conventions, and amendments related to international postal services . . . ." 39 U.S.C. § 407(b)(1). *See also B. Altman & Co. v. United States*, 224 U.S. 583, 597 (1912) (finding that an executive agreement had been properly made pursuant to the authority of the Tariff Act of 1897, which had been enacted years earlier, and which had created domestically enforceable tariff rates).

Alaska's reliance on *Medellin v. Texas*, 552 U.S. 491 (2008), is misplaced. While *Medellin* turned on the question of whether Article 94 of the Charter of the United Nations was "self-executing" and thus directly enforceable in court, *id.* at 504, the United States does not contend that the ECA amendment is self-executing. Rather, the domestic legal authority for EPA and the Coast Guard to enforce the ECA is not MARPOL, but APPS.

Further, there is no support for Alaska's suggestion that language in the Senate Foreign Relations Committee Report noting that Annex VI "will require implementing legislation" means that the Senate "implicitly prohibited the executive branch from unilaterally making any of the treaty obligations in Annex VI—including any obligations flowing from amendments—domestic federal law." Plaintiff's Memorandum in Support of Motion for Preliminary Injunction (State's Br.) at 30 (ECF Doc. No. 19). This argument is based on a misunderstanding of the meaning of the Committee Report statement and ignores the chronology of the ratification of Annex VI and amendments to APPS. At the time of the Senate hearings regarding Annex VI, APPS was not applicable to Annex VI, because Congress had not yet amended APPS to implement Annex VI. Indeed, Ambassador David Balton acknowledged at the Senate Foreign Relations Committee hearing on Annex VI that legislation to implement Annex VI was necessary and "would likely take the form of a series of amendments" to APPS. *See* HearingBefore the Committee on Foreign Relations, United States Senate, S. Hrg. No. 109-324, at 16 (Sept. 29, 2005). After the Senate gave advice and consent to Annex VI, APPS the overarching implementing legislation for MARPOL—was amended to encompass and grant enforcement authority for Annex VI. The need for implementing legislation identified by the Senate Foreign Relations Committee was thus satisfied by the 2008 amendment to APPS.

Accordingly, the language Alaska identifies in the Committee Report does not draw into question the plain meaning of APPS authority and definitions, 33 U.S.C. §§ 1901(4), 1901(5), 1903(a), 1907(b), 1908, which provide the domestic federal law implementing the MARPOL Protocol, including the ECA.

2. The ECA Amendment Was Validly Brought into Force for the United States, Consistent with the Senate's Understanding and as Confirmed in APPS

As addressed above, the relevant source of domestic law to implement MARPOL in this case is APPS and not the ECA amendment itself. In addition, the ECA amendment itself also validly entered into force for the United States in accordance with the simplified amendment procedure set forth in MARPOL without the need to return to the Senate for advice and consent.

On April 2, 2009, the United States and Canada submitted the ECA Proposal to the MEPC. The MEPC thereafter approved the proposal for potential adoption at the next MEPC meeting. At that meeting, the parties to Annex VI, acting through the MEPC, adopted the annex amendment through MEPC resolution 190(60) on March 26, 2010. In accordance with the requirements of MARPOL, the amendment entered into force on August 1, 2011 for all parties.

In giving its advice and consent to Annex VI, the Senate understood that Annex VI amendments, like the one designating an ECA, would be subject to the simplified amendment procedure and would not go back to the Senate for further advice and consent. The treaty package transmitted to the Senate for advice and consent expressly stated that "amendments to Annex VI could . . . be adopted and enter into force through the . . . simplified amendment procedure specified in Article 16(2) of the MARPOL Convention of 1973," and that "[p]ursuant to longstanding practice under the MARPOL Convention, U.S. acceptance of amendments to Annex VI will not require further advice and consent by the Senate." Protocol of 1997 Amending MARPOL Convention, S. Treaty Doc. No. 108-7, at X (2003). In a question submitted for the record following a Senate committee hearing on Annex VI, Senator Biden acknowledged that "[a]mendments to MARPOL Annexes proceed through a simplified amendment procedure [and that] U.S. acceptance of amendments to Annex VI would not, therefore, involve Senate consent." S. Hrg. No. 109-324, at 41. The same simplified amendment process had *already* applied for decades to amendments to other MARPOL annexes, and the Senate similarly did not object.

Other MARPOL Annex amendments adopted and accepted through these procedures have varied both in substance and in scope, including, among many other examples dating back to the 1980s, amendments to other MARPOL Annexes creating special geographic areas where similarly heightened standards apply, *e.g.* resolution MEPC.48.31 (1991) (designating the Gulf of Mexico and the Caribbean Sea as a special area under Annex V regarding garbage from ships), and amendments designating which noxious liquid substances are regulated at all under Annex II, *see* resolution MEPC.118(52) (2004). In some cases, both before and after the Senate's advice and consent to Annex VI and the 2008 amendments to APPS, these amendments have affected enough provisions that they replace the entire text of a MARPOL Annex with a modified version. *See, e.g.*, resolution MEPC.117(52) (2004) (thoroughly reorganizing and adding new provisions to Annex I on oil pollution); resolution MEPC.176(58) (2008) (increasing the stringency of Annex VI requirements globally, not only in ECAs but also in all marine areas, and making other changes).

The amendment designating the North American ECA was among the types of amendments *expressly* highlighted by the Senate in its consideration that certain MARPOL amendments would not be brought to the Senate for its advice and consent. The Secretary of State's letter to the President transmitting Annex VI for approval specified that "[t]he United

States may seek the establishment of SOx Emission Control Areas in certain areas pursuant to the procedures set out in Appendix III to Annex VI." S. Treaty Doc. No. 108-7, at VI. The Senate Foreign Relations Committee Report on Annex VI acknowledged that "[t]he executive branch has indicated that, upon ratification of Annex VI, the United States may seek the establishment of one or more SECAs in the United States pursuant to the procedures set out in Appendix III to Annex VI." S. Exec. Rep. No. 109-13, at 4. At the Senate committee hearing regarding Annex VI, Senator Lugar asked about the process for ECA designation. S. Hrg. No. 109-324, at 15. Ambassador Balton acknowledged that the possibility of a North American ECA proposal was under consideration, and Bryan Wood-Thomas, then Associate Director of the Office of Transportation and Air Quality at EPA explained that an ECA proposal must meet specific criteria outlined in the treaty. *Id.* at 15-16. In response to a question from Senator Biden submitted following the Senate committee hearing, Ambassador Balton explained that EPA was working with interested states of the United States to study whether an ECA designation was warranted for any of the United States coastal waters. *Id.* at 41.

Additionally, APPS confirms this understanding of the simplified amendment procedure under MARPOL. APPS provides that a proposed amendment to Annex VI or its appendices "may be the subject of appropriate action on behalf of the United States by the Secretary of State." 33 U.S.C. § 1909(b). APPS is similar to other implementing statutes that both provide *ex ante* authority to implement amendments to treaties and contemplate a domestic process for implementing amendments that do not have to receive Senate advice and consent. For example, the Whaling Convention Act of 1949, which implements the International Convention for the Regulation of Whaling, including an annexed schedule of regulations and its amendments, provides that the Secretary of State, with the concurrence of the Secretary of Commerce, may "present or withdraw any objections on behalf of the United States Government to such regulations or amendments of the schedule to the convention as are adopted by the [International Whaling] Commission and submitted to the United States Government in accordance with article V of the convention." 16 U.S.C. § 916b. The Coast Guard Authorization Act of 2010 implements the Anti-Fouling Convention and authorizes the Secretary of Homeland Security to administer and enforce the treaty and its annexes, "including any amendments to the Convention or annexes which have entered into force for the United States," and is accompanied by legislative history making clear that the Senate did not expect amendments to certain parts of the treaty to require Senate advice and consent. 33 U.S.C. §§ 3801(3), 3803; International Convention on the Control of Harmful Anti-Fouling Systems on Ships, S. Exec. Rep. No. 110-19, at 9 (2008) (recognizing that the Anti-Fouling Convention provided for a simplified amendment procedure and indicating that "[a]mendments to Annexes 2, 3, and 4 [of the convention] should not, in the normal course, rise to the level of those that require the advice and consent of the Senate").

* * * *

5. APA Challenge Alleging Conflict with International Agreement

In *Lakes Pilots Association v. United States Coast Guard*, Civ. No. 11-cv-15462-SJM-MJR, plaintiff Lake Pilots Association ("LPA") brought an action in U.S. district court for the Eastern District of Michigan seeking review of a final decision finding that LPA overbilled the

shipping industry for pilotage services during 2006 and 2007 and ordering repayment. The action was brought under the Administrative Procedure Act ("APA") and alleged, among other things, that the Coast Guard's decision was in conflict with the international agreement reached between the United States and Canada relating to the provision of pilotage services on the Great Lakes. The United States filed its brief in support of summary judgment on August 10, 2012. Excerpts below from the U.S. brief (with footnotes and citations to the record omitted) include the U.S. arguments that the Coast Guard's actions do not conflict with the international agreement and that the international agreement does not create enforceable rights for private parties such as the plaintiff. The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*.

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1. The Memorandum of Arrangements Does Not Identify Change Points for Purposes of United States Regulations.

The Memorandum of Arrangements upon which LPA relies (AR002895-2907) was concluded by an exchange of notes on March 29, 1979, but has an effective date of January 18, 1977. *Id.* The Memorandum does not identify change points for purposes of determining when a U.S. pilot may charge for overcarriage under U.S. regulations. LPA instead relies on the definition of "District 2" in the definitions section of the Memorandum.

Elsewhere in the Memorandum, where participation in pilotage services are divided between U.S. and Canadian pilots, "Welland Canal" is designated "Canadian pilots only," and pilot services are split between U.S. and Canadian pilots "[b]etween Port Colborne and Port Huron, with no intermediate ports of call" based on 8-vessel blocks. The Memorandum further delineates which country's pilots will serve vessels stopping at ports within the District, other than Welland Canal.

Nothing in the Memorandum suggests that this general divvying up of the waters of "District 2" is intended to have any effect on when U.S. pilots can or cannot charge overcarriage fees. The Memorandum does not purport to establish "designated change points" for purposes of that regulation. And nothing in the inclusion of a definition for the Welland Canal for purposes of defining District 2 establishes that LPA is entitled to charge the daily overcarriage rate anytime it does not make the change precisely on the one mile arc mentioned in that definition.

Further, LPA was charging this fee while providing pilotage services assigned to U.S. pilots under 4(b)(2) [of the Memorandum], which speaks of services "[b]etween Port Colborne and Port Huron." Yet, Port Colborne itself is certainly inside the one mile arc included in the definition on which LPA relies. This seeming conflict also counsels against the interpretation advanced by LPA. Likewise, as set out in the same Memorandum, the pilot boat in use in this situation is to be stationed at Port Colborne.

* * * *

3. LPA Cannot Rely on the Memorandum of Arrangements to Avoid Repayment.

As discussed above, there is no conflict between the Memorandum and the regulations because the Memorandum does not define change points or address when overcarriage fees may

be charged. However, it is worth emphasizing that the United States–Canada Memorandum does not purport to provide any individually enforceable rights that LPA could use to avoid the repayment ordered by the Coast Guard. The Memorandum is an international agreement between the U.S. and Canada. It simply, in relevant part, obligates the States Parties to coordinate revenue sharing and the provision of pilotage services on the Great Lakes. The rights and obligations with respect to the international agreement are thus held by the U.S. and Canada, not LPA. *Cf. United States v. Emuegbunam*, 268 F.3d 377, 389 (6th Cir. 2001) (holding that even in the case of treaties, they do not, "[a]s a general rule . . . create rights that are privately enforceable in the federal courts. 'A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it.'") (*quoting Head Money Cases*, 112 U.S. 580, 598 (1884).

In briefing this issue, LPA mistakenly relies on a series of cases to support the argument that it may invoke the Memorandum as a basis for refusing repayment that would otherwise be required under § 401.450. However, these cases are easily distinguishable. For example, LPA cites *Department of Defense v. FLRA*, 685 F.2d 641 (D.C. Cir. 1982) for the proposition that an executive agreement may be regarded as equivalent to "federal law." *Id*. at 648. But this case only held that a particular agreement was equivalent to federal law for purposes of statutory interpretation. Similarly, in *Weinberger v. Rossi*, 456 U.S. 25 (1982) as well as *B. Altman & Co. v. United States*, 224 U.S. 583 (1912), the precedent that the D.C. Circuit relied on, the Court held that an executive agreement was a "treaty" but made clear that the designation was solely one of statutory interpretation.

The plaintiff next cites *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 416-17 (2003) for the proposition that "valid executive agreements are fit to preempt state law, just as treaties are." While this is certainly true of some executive agreements, the agreement in *Garamendi* differs significantly from the agreement in this case. The agreement in *Garamendi* falls into a narrow category of international claims settlement agreements. Such agreements, concluded without the specific ex post approval of Congress or advice and consent of the Senate, have the potential to preempt state law, because of "a systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned."

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On September 21, 2012, the United States filed its reply brief in support of summary judgment. The excerpt below from the reply brief refutes additional arguments made by LRA in opposing summary judgment relating to the role of the international agreement between the U.S. and Canada.

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* * * *

D. LPA Misconstrues the Coast Guard's Argument Regarding the Role of the Memorandum of Arrangements in this Litigation.

The Coast Guard does not argue that the Memorandum is not a binding agreement between the United States and Canada. And it certainly does not agree that it is violating that agreement. Rather, the Coast Guard's point in its opening brief was that the agreement does not confer rights on private individuals enforceable in domestic courts.

International agreements are primarily compacts between nations providing for rights and obligations of governments. *See Head Money Cases*, 112 U.S. 580, 598 (1884). As such, they generally do not confer rights on private individuals enforceable in domestic courts and are instead enforced through "the interest and the honor of the governments which are parties . . ." *Id. See also Mora v. New York*, 524 F.3d 183, 201 & n.25 (2nd Cir. 2008) (collecting cases). In the context of an advice and consent treaty, the D.C. Circuit held that the United States' alleged violation of a treaty is reviewable under the APA only if the treaty itself confers rights on private individuals. *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938, 942-43 (D.C. Cir. 1988). *See also De La Torre v. United States*, Case No. No. C 02–1942 CRB, 2004 WL 3710194, at *9-*10 (N.D. Cal. Apr. 14, 2004) (no claim under the APA where "[t]here is nothing in the executive agreements to indicate an intent by its creators that any of the terms of the agreements would give rise to affirmative, judicially-enforceable obligations on behalf of the [plaintiffs] in federal district court.").

To determine whether an international agreement confers rights on private individuals, courts look to the text of the agreement, which controls unless it "effects a result inconsistent with the intent or expectations of its signatories." *Gross v. German Foundation Indus. Initiative*, 549 F.3d 605, 612 (3rd Cir. 2008) (*citing Sumitomo Shoji Am., Inc. v. Avagliano*, 504 U.S. 655, 663 (1992) (internal citation omitted)). Based on the text of the agreement, there is no intent to confer private rights: It speaks only to the obligations of the two governments regarding the coordination of pilotage services on the Great Lakes.

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6. Constitutional Challenge to Tax Treaties

In a case in U.S. district court for the Northern Mariana Islands, a manufacturer and some of its employees and affiliates filed suit claiming that the U.S. government cannot collect Federal Insurance Contributions Act ("FICA") taxes on wages paid to nonresident alien contract workers temporarily admitted to the Commonwealth of the Northern Mariana Islands ("CNMI"). *Ai, Fang, et al., Concorde Garment Manufacturing Corporation and Does 1-1000 v. United States*, No. 11-cv-0014 (D.N.M.I. 2012). On December 5, 2012, the United States filed its brief in support of judgment on the pleadings and dismissal, or, in the alternative, summary judgment. The excerpt below from the U.S. brief (with most footnotes omitted) addresses the plaintiffs' argument that requiring certain employees to pay FICA taxes, when some U.S. tax treaties make certain other employees exempt, violates the U.S. Constitution. The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*.

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The exceptions from FICA taxes for certain residents of the Philippines and Korea are not a violation of equal protection under the Fifth Amendment. As an initial matter, the Court's review should be highly deferential because the political branches have extremely broad discretion in the areas of taxation, immigration, and the conduct of foreign relations.

Furthermore, these exceptions do not create classifications involving a suspect class, and therefore, at most, the constitutionality of these exceptions would be reviewed under rational

basis review. Plaintiffs' claim that a suspect class is involved is based on a mischaracterization of the nature of the exceptions for certain residents of the Philippines and Korea. These exceptions do not involve classifications of race, national origin, or alienage. Rather, the exceptions only require that the temporary workers have legal residency in either the Philippines or Korea and enter under certain immigration provisions. These are narrow exceptions to the rule that ALL workers—whether Chinese nationals, U.S. citizens, or even residents of the Philippines or Korea admitted under the other provisions of immigration law—are subject to the FICA taxes. Because these exceptions create a preference based on these special factors, and not on their class of race, national origin or alienage, there is no suspect class. Further, even if the Court were to deem that the exceptions created preferences based on alienage or national origin, the Court would review under a rational basis because the laws governing the treatment of aliens are federal, not state, laws.

Finally, the application of FICA taxes in the CNMI is not so vague or arbitrary that it unconstitutionally violates due process.

The FICA tax exceptions for certain residents of the Philippines and Korea are not a violation of equal protection under the Fifth Amendment

a) *The exceptions for residents of the Philippines and Korea are analyzed with deference to the political branches, and, at most, are analyzed under a rational basis standard*

Decisions about the treatment of a foreign country's residents, including for immigration, taxation, or other purposes, have long been a core element of the conduct of foreign relations handled by the Executive and the Legislative branches. The United States has extensive and important ongoing military, political, security, and economic relations with the Philippines and Korea, and these relations provide more than sufficient rationale for treating certain of their residents working in certain areas in the United States under certain immigration provisions differently than residents of China[35] or other countries. As the Supreme Court in *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) stated, the "reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President" in an area dealing with residents of foreign countries coming to the United States.

Plaintiffs allege that because certain residents of the Philippines and Korea admitted to Guam and the CNMI were allegedly exempt from FICA taxes, whereas Individual Plaintiffs who are alleged to be residents of China were not, there is an equal protection violation based on either race, national origin, or alienage. Amend. Compl. ¶¶ 65-66, 69-70. Plaintiffs, however, misconstrue these exceptions, and the plain statutory and treaty language reflects that no classification is made on the basis of race, national origin, or alienage.

First, and notably, the relevant language of the exception for residents of the Philippines provides that "service performed in Guam by *a resident of the Republic of the Philippines* while in Guam on a temporary basis as a nonimmigrant alien admitted to Guam pursuant to 101(a)(15)(H)(ii) of the Immigration and Nationality Act" does not meet the definition of

[35] In 1984, the United States concluded a tax treaty with China but those negotiations did not lead to the creation of a FICA tax exemption for Chinese residents in either Guam or the CNMI. Agreement between the Government of the United States of America and the Government of the Peoples Republic of China for the Avoidance of Double Taxation and the Prevention of Tax Evasion with Respect to Taxes on Income, signed at Beijing, April 30, 1984, T.I.A.S. 12065. ("the U.S.-China Tax Treaty")

"employment." 26 U.S.C. §3121(b)(18) (emphasis added). Article 25 of the Korea Tax Treaty mirrors the language of the exceptions for residents of the Philippines. It provides, "(1) The taxes imposed by Chapter 21 of the Internal Revenue Code shall not apply with respect to wages paid for services performed in Guam by a resident of Korea while in Guam on a temporary basis as a non-immigrant alien admitted to Guam pursuant to section 101 (a) (15) (H) (ii) of the United States Immigration and Nationality Act (8 U.S.C. 1101 (a) (15) (H) (ii))" and "(2) The exemption provided in paragraph (1) shall continue only so long as the similar exemption provided by section 3121 (b) (18) of the Internal Revenue Code." (emphasis added). Thus, the plain language of the statute and treaty clearly demonstrates that these exceptions are not limited to any single national origin or race. Instead, the exceptions apply to *all* national origins and *all* races as long as the individual is both (i) a resident of the Philippines or Korea and (ii) admitted on a temporary basis as a non-immigrant alien pursuant to certain immigration provisions. Thus, it is indisputable that the exceptions do not make classifications on the basis of race or national origin.

Further, Plaintiffs are also incorrect that the exceptions create a preference based on alienage. Whereas a statute which creates a preference on the basis of alienage provides a preference to a class of individuals based upon their immigration status in the United States (i.e., nonresident aliens versus U.S. resident aliens versus U.S. citizens), the exceptions at issue here do not provide a preference to nonresident aliens or resident aliens or citizens *as a class*. Rather, they simply exempt from FICA taxes certain residents of the Philippines or Korea admitted to certain locations under certain immigration provisions. Thus, residents of the Philippines and Korea not covered by these specific FICA tax exceptions, such as residents admitted under other immigration provisions, are subject to the FICA taxes, just as are residents of other countries. There is no classification here on the basis of one's alienage.

Thus, because these exceptions do not employ a suspect classification such as race, national origin, or alienage, they are valid if they bear a rational relation to a legitimate government purpose. See *Regan v. Taxation With Representation*, 461 U.S. 540, 547 (1983). Under the rational basis standard, "a legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated to or perceived by the courts." *United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6 (1970); *Regan*, 461 U.S. at 547.

Moreover, even if the Court were to find that these exceptions employ the classification of alienage, it would be a federal classification *between* aliens and this Court's standard of review, would be as deferential or more deferential than rational basis review because the exceptions involve the question of federal power in the area of the conduct of foreign relations, immigration, and taxation.

The powers in the conduct of foreign affairs under the Constitution are broad and expansive[37] and, as explained above, the formulation of statutes and treaties in the confluent areas of foreign relations, taxation and international commerce involve delicate decisions and judgments by the Executive and Congress, to which the courts should give deference. It is a long and well-established practice in conducting foreign relations to make distinctions in treatment

[37] As the Supreme Court emphasized in discussing the equal protection clause and treatment of aliens in *Toll v. Moreno* (a case striking down a state—not a federal—classification based on alienage), "[o]ur cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders. Federal authority to regulate the status of aliens derives from various sources, including the federal Government's power '[t]o establish [a] uniform Rule of Naturalization,' U.S. Const., Art. I, § 8, cl. 4, its power '[t]o regulate Commerce with foreign Nations', *id*., cl. 3, and its broad authority over foreign affairs." (internal citations omitted).

among different types of aliens.[38] The Supreme Court in *Mathews*, a case involving the equal protection question and the question of whether the federal government could grant certain medical benefits to some aliens, but deny them to others, on the basis of how long the aliens had been in the country, stated as follows:

> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in light of the changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or to the Executive than to the Judiciary.... Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution. The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization. *Mathews*, 426 U.S. at 81.

The *Mathews* Court went on to define the scope of its deferential standard of review in cases involving a challenged classification between aliens as follows:

> Since it is obvious that Congress has no constitutional duty to provide all aliens with the welfare benefits provided to citizens, the party challenging the constitutionality of the particular line Congress has drawn has the burden of advancing principled reasoning that will at once invalidate that line and yet tolerate a different line separating some aliens from others. *Id*. at 82.

The Supreme Court declined to substitute its judgment for the political branches of government in determining whether a statute that discriminated between classes of aliens entitled to certain medical benefits had a rational basis:

> The task of classifying persons for medical benefits, like the task of drawing lines for federal tax purposes, inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line; the differences between the eligible and the ineligible are differences in degree rather than differences in the character of their respective claims. When this kind of policy choice must be made, we are especially reluctant to question the exercise of congressional judgment. In this case, since appellees have not identified a principled basis for prescribing a different standard of review than the one selected by Congress, they have, in effect, merely invited us to substitute our judgment for that of Congress in deciding which aliens shall be

[38] From the Jay Treaty of 1794, which is replete with provisions governing how Great Britain and the United States would treat each other's citizens including with respect to duties, up to the present, such as with bilateral investment treaties, the Executive has treated residents and nationals of other countries differently, as a result of negotiations with foreign sovereigns to advance the national interests of the United States. The United States currently has in force over 60 tax treaties, which set forth different tax treatment for residents of those countries depending on a number of factors. The U.S.-China Tax Treaty and the U.S.-Korea Tax Treaty are examples of these treaties, which confer prescribed tax treatment for certain Chinese and Korean residents in return for the prescribed tax treatment for certain U.S. citizens and residents. See Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2011, U.S. Department of State. See also List of United States Income Tax Treaties – A to Z, available at http://www.irs.gov/Businesses/International-Businesses/United-States-Income-Tax-Treaties---A-to-Z

> eligible to participate in the supplementary insurance program upon the same conditions as citizens. We decline the invitation. *Id*.at 83-84.

Applying this narrow standard, the Court found that the statutory classification at issue did not violate equal protection because it was not "wholly irrational." *Id*. at 83.

In line with *Mathews*, courts have consistently upheld federal differentiation between U.S. citizens and aliens or among aliens. …

Furthermore, subsequent to *Mathews*, the Ninth Circuit has equated the "wholly irrational" standard in *Mathews* with the rational basis test. *Aleman v. Glickman*, 217 F.3d 1191, 1197-98 (9th Cir. 2000). It is now well established that whereas classifications based on alienage are subject to strict scrutiny when enacted by a state, see, *e.g.*, *Graham v. Richardson*, 403 U.S. 365, 372 (1971), alienage classifications are subject to rational-basis review when enacted by the federal government because "[f]ederal interests regarding aliens are significantly different than those of the states." *United States v. Lopez-Flores*, 63 F.3d 1468, 1473 (9th Cir. 1995); see also, *e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 84-85 (1976); *Aleman v. Glickman*, 217 F.3d 1191, 1197-98 (9th Cir. 2000). Under rational-basis review, a statutory classification must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," even if there is an "imperfect fit between means and ends."*Aleman*, 217 F.3d at 1201 (internal quotation marks omitted).

The Second Circuit similarly determined that a rational basis standard—not strict scrutiny—applied in a case raising an equal protection challenge to federal law the different treatment of Haitians and aliens from Cuba and certain other countries. *Midi v. Holder*, 566 F.3d 132, 137 (2nd Cir. 2009). That court explained, "This is so because Congress has plenary power over immigration and naturalization, and may "permissibly set immigration criteria based on an alien's nationality," *Kandamar v. Gonzales*, 464 F.3d 65, 72 (1st Cir.2006), even though such distinctions would be suspect if applied to American citizens." *Ibid*.

These cases make clear that a court should be extremely cautious about substituting its judgment for that of the political branches of government which determined that residents of the Philippines and Korea admitted into certain areas of the United States under certain immigration provisions were exempt from FICA taxes, while others were not, as this area of law gives great flexibility to those branches and prescribes a very deferential standard of judicial review of policy choices made in this area, especially when, as is the case here, there is indisputably no classification between aliens and citizens or aliens and legal residents, and, even if a court were to find that the exceptions do employ the classification of alienage, it should review this classification under rational-basis review, at most.

Finally, as alluded to by the *Mathews* court, "the task of drawing lines for federal tax purposes" gives the political branches an extremely broad power to categorize and classify for tax purposes. *Mathews*, 426 U.S. at 83; see also *Regan*, 461 U.S. at 547; *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 584 (1937); *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 26 (1916); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 158 (1911). Tax legislation carries a "presumption of constitutionality," (*id*.) which is particularly strong. *Nammack v. Commissioner*, 56 T.C. 1379, 1385 (1971), aff'd per curiam 459 F.2d 1045 (2d Cir. 1972); see *Black v.Commissioner*, 69 T.C. 505, 507-508 (1977). "Perfect equality or absolute logical consistency between persons subject to the Internal Revenue Code … [is not] a constitutional sine qua non." *Barter v. United States*, 550 F.2d 1239, 1240 (7th Cir.1977) (per curiam)). When legislating tax statutes, the Supreme Court has stated that

> [t]he broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized.... The passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.

Regan, 461 U.S. at 547-48 (quoting *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940) (footnotes omitted)).

Thus, because these exceptions involve the task of drawing lines for federal tax purposes, this Court's review should be extremely deferential: at most it would be rational basis review, and possibly even more deferential. See *Brushaber*, 240 U.S. at 24-25 (holding that the application of the taxing power is constitutional unless it so arbitrary or grossly inequitable in its basis for classifying taxpayers that it must be regarded as confiscatory, pursuant to the Fifth Amendment meaning of a taking); *Georgeff v. United States*, 67 Fed. Cl. 598, 607 (2005); *Bruinooge v. United States*, 213 Ct.Cl. 26, 29 (1977) ("It is unclear whether such a test [from Brushaber, requiring that the tax legislation be so arbitrary or grossly inequitable that it must be regarded as confiscatory], if it is in fact more lenient than the traditional test [of rational basis review], still exists. At least, we are unaware that it has ever been invoked, for the Supreme Court has sustained discriminations in federal tax statutes that have been constitutionally challenged upon finding that a sufficient rational basis existed.").

In sum, the Court should review these exceptions, at most, under a rational basis review, for all the reasons presented above.

b) *The exception for certain residents of the Philippines survives rational basis review*

As described above, if any rational basis for the exception for the residents of the Philippines can be perceived by this Court, whether or not considered by Congress, the exception withstands scrutiny.

The legislative history reflects an intention by Congress to exempt certain residents of the Philippines from FICA taxes because practically none of the residents of the Philippines would acquire sufficient credits to qualify for social security benefits. Other possible reasons for this exception are readily apparent, however. First, and most importantly, the federal government decided to extend different treatment for certain residents of the Philippines—and later Korea—as part of its handling of bilateral relations, an exercise in foreign affairs which inherently serves a legitimate and rational governmental purpose, and which inherently requires a delicate balancing of competing interests. Moreover, the United States-Philippines ongoing "relations are based on shared history and commitment to democratic as well as economic and military ties," and Congress was also likely motivated by these strong historical, geographical, military, and economic ties in deciding to enact this exception. Additionally, residents of the Philippines have been assisting with Guam's labor needs since World War II to the present with the build-up of

military presence in Guam., and Congress was likely motivated by this consideration as well." *Id*.

In sum, the exception for residents of the Philippines admitted pursuant to section 101(a)(15)(H)(ii) of the Immigration and Nationality Act bears a rational relation to the legitimate government purposes of maintaining good bilateral relations with the Philippines, serving the labor needs of Guam, preserving economic ties, preserving military ties, and maintaining the historical connection between the two nations.

The above possible reasons for the exception provide more than a sufficient basis for this Court to find that the exception for residents of the Philippines survives a very deferential rational basis review.

c) *The exception for certain residents of Korea survives rational basis review*

The exception for certain residents of Korea under the U.S.-Korea Tax Treaty also survives rational basis review. The letter from President Ford, dated September 3, 1976, which became part of the legislative record, states that the primary purpose of the treaty is "to identify clearly the tax interests of the two countries to avoid double taxation and to help prevent illegal evasion of taxation." It adds, "[t]his Convention [tax treaty] would promote closer economic cooperation and more active trade between the United States and Korea." *Id*. at fn. 42. The President ratified the US-Korea Tax Treaty after the treaty received the advice and consent of the Senate to such ratification. The United States' interest in fostering better foreign relations with a key military and economic ally, including coordination of taxation and fiscal issues, bears a rational relation to a legitimate government interest of ratifying the US-Korea Treaty, and this exception was an integral part of the negotiated treaty accomplishing these interests, and it therefore survives the deferential rational basis review.

* * * *

Cross References

Consular Notification and Compliance Act, **Chapter 2.A.2.c.**
Bermuda Mutual Legal Assistance Treaty, **Chapter 3.A.4. and 3.A.5.**
*Extradition of fugitive alleging fear of torture (*Trinidad y Garcia v. Benov), **Chapter 3.A.3**
Submission of Disabilities Convention for ratification, **Chapter 6.B.5.**
International Law Commission, **Ch. 7.D.**
UN Convention on the Law of the Sea, **Chapter 12.A.1.**
U.S. statement on negotiations under Durban Platform on climate change, **Chapter 13.A.1.b.(1)**
U.S. ratification of 2001 Anti-Fouling Convention, **Chapter 13.B.1.a.**

Chapter 5

Foreign Relations

A. CONSTITUTIONALITY OF STATE LAWS CONCERNING IMMIGRATION

1. Arizona

As discussed in *Digest 2010* at 163-68 and *Digest 2011* at 121-22, the United States government challenged certain provisions of an Arizona immigration law, S.B. 1070, in federal court. On June 25, 2012, the United States Supreme Court issued its opinion in the case. *Arizona v. United States*, No. 11-182 (2012). The Court held that three of the four provisions challenged by the United States were preempted by federal law, and therefore unenforceable. The Court invalidated Section 3 of the Arizona law, which would have made it a crime to fail to complete or carry a registration document, finding that Congress had established a "careful framework" for alien registration and therefore preempted "even complementary state regulation" in that area. The Court also invalidated Section 5(C), which would have made it a state crime for an unauthorized alien to seek or perform work in Arizona, finding that the provision conflicted with Congress's determination to impose criminal penalties on employers of unauthorized workers, but not employees. The Court also invalidated Section 6, which would have allowed state officers to arrest without a warrant a person whom the officer had probable cause to believe to have committed an offense making him removable from the U.S., finding that the removal process is entrusted to the discretion of the Federal Government.

The challenged provision upheld by the Court, Section 2(B), requires state officers to make a "reasonable attempt" to determine the immigration status of any person they stop, detain or arrest for a legitimate purpose if there is "reasonable suspicion" the person is an unauthorized alien, and to check an arrestee's immigration status before that person is released. The Court held that Section 2(B) was not preempted on its face because it was possible to read the provision narrowly, in a way that would not raise constitutional concerns. The Court noted that the constitutionality of Section 2(B) would depend on how it was construed by state courts and left open the possibility of future challenges to the provision as applied.

Excerpts from the majority opinion, which echoed many of the arguments presented by the United States in its briefs, appear below. President Obama issued a statement regarding the Court's decision. Daily Comp. Pres. Docs., 2012 DCPD No. 00509, p. 1 (June 25, 2012).

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* * * *

The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. See *Toll v. Moreno*, 458 U. S. 1, 10 (1982); see generally S. Legomsky & C. Rodríguez, Immigration and Refugee Law and Policy 115-132 (5th ed. 2009). This authority rests, in part, on the National Government's constitutional power to "establish an uniform Rule of Naturalization," U. S. Const., Art. I, § 8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations, see *Toll*, supra, at 10 (citing *United States v. Curtiss-Wright Export Corp*., 299 U. S. 304, 318 (1936)).

The federal power to determine immigration policy is well settled. Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws. See, e.g., Brief for Argentina et al. as *Amici Curiae*; see also *Harisiades v. Shaughnessy*, 342 U. S. 580, 588-589 (1952). Perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad. See Brief for Madeleine K. Albright et al. as *Amici Curiae* 24-30.

It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States. See *Chy Lung v. Freeman*, 92 U. S. 275, 279-280 (1876); see also The Federalist No. 3, p. 39 (C. Rossiter ed. 2003) (J. Jay) (observing that federal power would be necessary in part because "bordering States . . . under the impulse of sudden irritation, and a quick sense of apparent interest or injury" might take action that would undermine foreign relations). This Court has reaffirmed that "[o]ne of the most important and delicate of all international relationships . . . has to do with the protection of the just rights of a country's own nationals when those nationals are in another country." *Hines v. Davidowitz*, 312 U. S. 52, 64 (1941).

Federal governance of immigration and alien status is extensive and complex. Congress has specified categories of aliens who may not be admitted to the United States. See 8 U. S. C. § 1182. Unlawful entry and unlawful reentry into the country are federal offenses. §§ 1325, 1326. Once here, aliens are required to register with the Federal Government and to carry proof of status on their person. See §§ 1301-1306. Failure to do so is a federal misdemeanor. §§ 1304(e), 1306(a). Federal law also authorizes States to deny noncitizens a range of public benefits, § 1622; and it imposes sanctions on employers who hire unauthorized workers, § 1324a.

Congress has specified which aliens may be removed from the United States and the procedures for doing so. Aliens may be removed if they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law. See § 1227. Removal is a civil, not criminal, matter. A principal feature of the removal system is the broad discretion exercised by immigration officials. See Brief for Former Commissioners of the United States Immigration and Naturalization Service as *Amici Curiae* 8-13 (hereinafter Brief for Former INS Commissioners). Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. If removal proceedings commence, aliens may seek asylum and other discretionary relief allowing them to remain in the country or at least to leave without formal removal. See § 1229a(c)(4); see also, e.g., §§ 1158 (asylum), 1229b (cancellation of removal), 1229c (voluntary departure).

Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may

turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.

* * * *

2. Alabama

The United States also sought to enjoin enforcement of provisions of an Alabama immigration law. See *Digest 2011* at 122-27. Following the Supreme Court's decision in *Arizona*, the U.S. Court of Appeals for the Eleventh Circuit preliminarily enjoined several sections of the Alabama law that were similar to or even more extensive than those struck down by the Supreme Court in *Arizona*. *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012). Notably, the court struck down a new state crime for "harboring" unauthorized aliens, including by renting them housing, and an exceptionally broad prohibition on unauthorized aliens entering into nearly all contracts. The court found the latter provision to effectively "expel" unauthorized aliens from Alabama, inconsistent with the principle of federal control over the removal process and the federal government's power to exercise discretion in that process. In invaliding this provision, the court emphasized the connection between immigration regulation and foreign relations. As in Arizona, the court struck down the criminalization of failure to carry registration documents and the criminalization of application for employment. Also as in Arizona, the court did not facially invalidate a provision requiring a mandatory investigation of an individual's immigration status during lawful stops, detentions, and arrests. Additionally, the court upheld an amended provision, prohibiting entering into five specific types of "public records transactions." The Alabama law had originally barred unauthorized aliens from entering "any business transaction" with the state, but amended the law to apply only to five specific transactions. The court further struck down the requirement that public schools collect documents on immigration status, finding this to violate Equal Protection. The court denied rehearing en banc on October 7, 2012.

3. South Carolina

A district court in South Carolina issued a preliminary injunction against enforcement of that state's immigration law (Act 69) in 2011. See *Digest 2011* at 127. Following the Supreme Court's decision in *Arizona*, the U.S. Court of Appeals for the Fourth Circuit remanded the case to the district court for reconsideration—before any oral argument had been held or an opinion had issued in the appeal. On November 15, 2012, the district court modified its

original order, lifting the preliminary injunction on Section 6 of Act 69 (except as to section 6(B)(2)) and leaving the rest of the preliminary injunction in place. South Carolina appealed the decision December 7, 2012.

4. Utah

In 2011, the United States filed a complaint challenging Utah's immigration law and seeking a preliminary injunction. See *Digest 2011* at 127-28. Oral argument was held in February 2012. The district court reserved ruling on the preliminary injunction until after the Supreme Court's decision in *Arizona*. Subsequent to that decision, the district court scheduled a second oral argument for February 2013.

B. ALIEN TORT CLAIMS ACT AND TORTURE VICTIM PROTECTION ACT

1. Overview

The Alien Tort Claims Act ("ATCA"), also referred to as the Alien Tort Statute ("ATS"), was enacted as part of the First Judiciary Act in 1789 and is now codified at 28 U.S.C. § 1350. It provides that U.S. federal district courts "shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States." The statute was rarely invoked until *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); following *Filartiga*, the statute has been interpreted by the federal courts in cases raising human rights claims under international law. In 2004 the Supreme Court held that the ATCA is "in terms only jurisdictional" but that, in enacting the ATCA in 1789, Congress intended to "enable[] federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). By its terms, this statutory basis for suit is available only to aliens. In an *amicus curiae* memorandum filed in the Second Circuit in *Filartiga v. Pena-Irala,* the United States described the ATCA as one avenue through which "an individual's fundamental human rights [can be] in certain situations directly enforceable in domestic courts." Memorandum for the United States as Amicus Curiae at 21, *Filartiga v. Pena-Irala*, 630 F.2d. 876 (2d Cir. 1980) (No. 79-6090).

The Torture Victim Protection Act ("TVPA"), which was enacted in 1992, Pub. L. No. 102-256, 106 Stat. 73, appears as a note to 28 U.S.C. § 1350. It provides a cause of action in federal courts against "[a]n individual . . . [acting] under actual or apparent authority, or color of law, of any foreign nation" for individuals, including U.S. nationals, who are victims of official torture or extrajudicial killing. The TVPA contains an exhaustion requirement and a ten-year statute of limitations.

The following entries discuss 2012 developments in a selection of cases brought under the ATCA and the TVPA.

2. *Mohamad v. Palestinian Authority*

The U.S. Supreme Court unanimously decided, in an opinion issued April 18, 2012, that the TVPA uses the word "individual" to mean a natural person and therefore does not provide a basis for a cause of action against an organization. *Mohamad v. Palestinian Authority*, No. 11-88 (2012). The case was brought by relatives of a U.S. citizen who, during a visit to the West Bank, was apprehended by Palestinian Authority intelligence officers, tortured, and ultimately killed while in their custody. The district court dismissed the case, concluding that the TVPA extended liability only to natural persons. The appeals court affirmed. The United States had filed a brief as *amicus curiae* on February 3, 2012. The U.S. *amicus* brief, available at *www.state.gov/s/l/c8183.htm* (not excerpted herein) described how the text, structure, and legislative history of the TVPA all demonstrate that only natural persons could be liable. Excerpts from the Supreme Court's opinion affirming dismissal appear below.

* * * *

Because the TVPA does not define the term "individual," we look first to the word's ordinary meaning. See *FCC* v. *AT&T Inc.*, 562 U. S. ___, ___ (2011) (slip op., at 5) ("When a statute does not define a term, we typically give the phrase its ordinary meaning" (internal quotation marks omitted)). As a noun, "individual" ordinarily means "[a]human being, a person." 7 Oxford English Dictionary 880 (2d ed. 1989); see also, *e.g.*, Random House Dictionary of the English Language 974 (2d ed. 1987) ("a person"); Webster's Third New International Dictionary 1152 (1986) ("a particular person") (hereinafter Webster's). After all, that is how we use the word in everyday parlance. We say "the individual went to the store," "the individual left the room," and "the individual took the car," each time referring unmistakably to a natural person. And no one, we hazard to guess, refers in normal parlance to an organization as an "individual." Evidencing that common usage, this Court routinely uses "individual" to denote a natural person, and in particular to distinguish between a natural person and a corporation. See, *e.g.*, *Goodyear Dunlop Tires Operations, S. A.* v. *Brown*, 564 U. S. __, __ (2011) (slip op., at 7) ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home").

Congress does not, in the ordinary course, employ the word any differently. The Dictionary Act instructs that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the wor[d] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, *and* joint stock companies, *as well as* individuals." 1 U. S. C. §1 (emphasis added). With the phrase "as well as," the definition marks "individual" as distinct from the list of artificial entities that precedes it.

In a like manner, federal statutes routinely distinguish between an "individual" and an organizational entity of some kind. See, *e.g.*, 7 U. S. C. §92(k) ("'Person' includes partnerships, associations, and corporations, as well as individuals"); §511 (same); 15 U. S. C. §717a ("'Person'includes an individual or a corporation"); 16 U. S. C. §796("'[P]erson' means an individual or a corporation"); 8 U. S. C. §1101(b)(3) ("'[P]erson' means an individual or an organization"). Indeed, the very same Congress that enacted the TVPA also established a cause

of action for U. S. nationals injured "by reason of an act of international terrorism" and defined "person" as it appears in the statute to include "any individual *or entity* capable of holding a legal or beneficial interest in property." Federal Courts Administration Act of 1992, 18 U. S. C. §§2333(a),2331(3) (emphasis added)).

This is not to say that the word "individual" invariably means "natural person" when used in a statute. Congress remains free, as always, to give the word a broader or different meaning. But before we will assume it has done so, there must be *some* indication Congress intended such a result. Perhaps it is the rare statute (petitioners point to only one such example, located in the Internal Revenue Code) in which Congress expressly defines "individual" to include corporate entities. See 26 U. S. C. §542(a)(2). Or perhaps, as was the case in *Clinton* v. *City of New York*, 524 U. S. 417, 429 (1998), the statutory context makes that intention clear, because any other reading of "individual" would lead to an "'absurd'" result Congress could not plausibly have intended. There are no such indications in the TVPA. As noted, the Act does not define "individual," much less do so in a manner that extends the term beyond its ordinary usage. And the statutory context strengthens—not undermines—the conclusion that Congress intended to create a cause of action against natural persons alone. The Act's liability provision uses the word "individual" five times in the same sentence: once to refer to the perpetrator (*i.e.*, the defendant) and four times to refer to the victim. See §2(a). Only a natural person can be a victim of torture or extrajudicial killing. "Since there is a presumption that a given term is used to mean the same thing throughout a statute, a presumption surely at its most vigorous when a term is repeated within a given sentence," *Brown* v. *Gardner*, 513 U. S. 115, 118 (1994) (citation omitted), it is difficult indeed to conclude that Congress employed the term "individual" four times in one sentence to refer to a natural person and once to refer to a natural person *and* any nonsovereign organization. See also §3(b)(1) (using term "individual" six times in referring to victims of torture).

It is also revealing that the Act holds perpetrators liable for extrajudicial killing to "any *person* who may be a claimant in an action for wrongful death." §2(a)(2) (emphasis added). "Person," we have recognized, often has a broader meaning in the law than "individual," see *Clinton*, 524 U. S., at 428, n. 13, and frequently includes nonnatural persons, see, *e.g.*, 1 U. S. C. §1. We generally seek to respect Congress' decision to use different terms to describe different categories of people or things. See *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 711, n. 9 (2004). Our construction of "individual" to encompass solely natural persons credits Congress' use of the disparate terms; petitioners' construction does not.

In sum, the text of the statute persuades us that the Act authorizes liability solely against natural persons.

* * * *

3. Kiobel v. Royal Dutch Petroleum

On March 5, 2012, the United States Supreme Court issued an order in the *Kiobel* case directing the parties to file supplemental briefs addressing the issue of "Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." The United States filed its supplemental brief in response to the Court's order in June, answering that the Court should decline to create

categorical rules about the circumstances in which a court may recognize a cause of action for violations occurring outside the territory of the United States, but that the Court should not fashion a federal common-law cause of action in the circumstances of this case. Oral argument was held in October. The United States had filed a brief previously addressing other issues in the case, including whether liability under the ATS could extend to corporations. See *Digest 2011* at 129-36 for background on the case and excerpts from the U.S. brief filed in the Supreme Court as *amicus curiae* in December 2011. The June 2012 supplemental brief of the United States is available at *www.justice.gov/osg/briefs/2011/3mer/1ami/2010-1491.mer.supp.ami.pdf.*[*]

C. ACT OF STATE AND POLITICAL QUESTION DOCTRINES

1. *McKesson v. Iran*

On February 28, 2012, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in the case *McKesson Corp. v. Islamic Republic of Iran*, No. 10-7174. The United States had filed a brief as *amicus curiae* in the case in 2011, presenting three arguments relating to U.S. interests implicated in the case. See *Digest 2011* at 139-41 for excerpts of the section of the U.S. brief relating to the act of state doctrine. The court's opinion, like the U.S. brief, found that the act of state doctrine did not preclude adjudication. The case was brought decades earlier by an American corporation, alleging that the government of Iran had expropriated its interest in the joint venture Pak Dairy. The court's opinion relating to the act of state doctrine is excerpted below.

* * * *

The act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964). It applies when "the relief sought or the defense interposed would [require] a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory." *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990). When it applies, the doctrine serves as a "rule of decision for the courts of this country," *id*. at 406, which requires courts to deem valid the acts of foreign sovereigns taken within their own jurisdictions. *Id*. at 409.

Iran now claims that beginning in February 1980, the government imposed currency control regulations "which Pak had no choice but to follow." Appellant's Br. 38. It claims that

[*] Editor's note: On April 17, 2013, the U.S. Supreme Court issued its decision in the case, affirming the appeals court's dismissal of all claims.

evidence from the 2007 trial demonstrates that the currency control regulations prevented Pak from paying McKesson in any currency from February 1980 through September 29, 1981, and that after September 29, 1981, Pak could not pay McKesson in dollars without proper application and authorization by the Central Bank. We disagree with both Iran's interpretation of the act of state doctrine and the underlying factual premises of its argument.

Although the Supreme Court has not defined the contours of the "official action" requirement of the act of state doctrine, the courts of appeals have understood the concept as referring to conduct that is by nature distinctly sovereign, *i.e.*, conduct that cannot be undertaken by a private individual or entity. For example, this Court held that the denial of an official license permitting the removal of uranium from Kazakhstan was a sovereign act, as was a transfer of corporate shares to a state entity. *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1165–66 (D.C.Cir.2002). In direct contrast to the facts in this case, the Court emphasized that the "transfer and alleged conversion were accomplished pursuant to an official decree of the Republic of Kazakhstan." *Id*. at 1166. Similarly, this Court applied the act of state doctrine where a foreign government's finance minister officially ordered payment of a tax to the foreign government through a "private letter ruling, which under Brazilian law binds the parties." *Riggs Nat. Corp. v. Comm 'r of Internal Revenue Serv.*, 163 F.3d 1363, 1366–68 (D.C.Cir.1999). *See also Society of Lloyd's v. Siemon–Netto*, 457 F.3d 94, 102–03 (D.C.Cir.2006) (applying the act of state doctrine to preclude a challenge to the validity of a foreign statute). In each of these cases, the Court applied the act of state doctrine to preclude challenges to actions that, by their nature, could only be undertaken by a sovereign power.

The facts of this case differ dramatically from prior cases in which the act of state doctrine applied. Although McKesson has characterized its claim as one for "expropriation," this is not a typical expropriation case in which a foreign government acts in its sovereign capacity to take private property for a public purpose. Rather, this case turns on claims that agents of the Iranian government—acting as representatives of various agencies and companies—took over Pak's board of directors, "froze out McKesson's board members, and stopped paying McKesson's dividends." *McKesson III*, 271 F.3d at 1103. The facts allege a pattern of conduct by Iran's agents that cannot fairly be characterized as public or official acts of a sovereign government. Iran did not pass a law, issue an edict or decree, or engage in formal governmental action explicitly taking McKesson's property for the benefit of the Iranian public. Instead, it allegedly took control of Pak's board of directors and abused its position as majority shareholder, making McKesson's claims "akin to a corporate dispute between majority and minority shareholders," *McKesson 1997*, 1997 WL 361177, at *10 n. 17. This is not the type of "public act[ ][of] a foreign sovereign power" to which the act of state doctrine applies. *Sabbatino*, 376 U.S. at 401; *see also Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 706, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976) (declining to extend the act of state doctrine "to acts committed by foreign sovereigns in the course of their purely commercial operations," such as conduct by Cuba's agents in the operation of cigar businesses for profit); *Malewicz v. City of Amsterdam*, 517 F.Supp.2d 322, 339 (D.D.C.2007) (holding that the act of state doctrine did not apply to actions that could be taken by "any private person or entity").

* * * *

2. *Zivotofsky*

See Ch. 9.C. for discussion of further developments in a case involving the Executive Branch's authority over foreign state recognition and the issuance of passports.

Cross References

Immigration and nationality, **Chapter 1.**
Counter-piracy, **Chapter 3.B.8.**
International tribunals, **Chapter 3.C.**
Constitutional challenge to tax treaties, **Chapter 4.B.5**
Protecting power in Syria, **Chapter 9.A.**
Executive Branch authority over foreign state recognition, **Chapter 9.C.**
Foreign Sovereign Immunity Act, **Chapter 10.A.**
Foreign official immunity, **Chapter 10.B.**
Case challenging California vessel fuel emission standards, **Chapter 13.B.1.d.**

Chapter 6

Human Rights

A. GENERAL

1. Country Reports on Human Rights Practices

On May 24, 2012, the Department of State released the 2011 Country Reports on Human Rights Practices. The Department of State submits the document annually to Congress in compliance with §§ 116(d) and 502B(b) of the Foreign Assistance Act of 1961 ("FAA"), as amended, and § 504 of the Trade Act of 1974, as amended. These reports are often cited as a source for U.S. views on various aspects of human rights practice in other countries. The reports are available at *www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper*; Secretary of State Hillary Rodham Clinton's remarks on the release of the reports are available at *www.state.gov/secretary/rm/2012/05/190826.htm*.

2. UN General Assembly Resolutions

The United States co-sponsored three separate UN General Assembly resolutions in 2012 condemning human rights abuses in Iran, North Korea, and Syria. The resolutions were adopted by the General Assembly's Third Committee in November 2012. U.N. Doc. A/C.3/67/L.50 (North Korea); U.N.Doc. A/C.3/67/L.51 (Iran); U.N. Doc. A/C.3/67/L.52 (Syria). The draft resolutions were subsequently adopted by the entirety of the General Assembly in December. U.N. Doc. A/RES/67/181 (North Korea); U.N. Doc. A/RES/67/182 (Iran); U.N. Doc. A/RES/67/183 (Syria). Ambassador Susan E. Rice, U.S. Permanent Representative to the UN, delivered a statement at the time the resolutions were adopted in the Third Committee, on November 27, 2012. Her statement is excerpted below and available at *http://usun.state.gov/briefing/statements/201113.htm*.

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The United States is pleased to co-sponsor three important resolutions adopted by the UN General Assembly's Third Committee condemning human rights abuses in Iran, North Korea and Syria. Today's votes show the international community deplores these continued violations of fundamental human rights.

On Iran, we share the General Assembly's deep concern at serious ongoing and recurring human rights violations, including torture and such cruel, inhuman and degrading punishments as flogging, amputations and arbitrary executions. Lawyers, journalists, Internet providers, bloggers and netizens face harassment, intimidation and arbitrary detention in Iran, which also continues to violently repress women and minority groups. The General Assembly called upon the Government of Iran to cooperate fully with the UN Special Rapporteur on human rights.

On North Korea, for the first time ever, the General Assembly adopted by consensus a resolution condemning the atrocious state of human rights there. Today's resolution expresses serious concern about "persistent reports of systematic, widespread and grave violations of civil, political, economic, social and cultural rights" in the DPRK, including torture, the absence of due process, restrictions of movement, the mistreatment of refugees and asylum-seekers and pervasive and severe restrictions on the freedom of thought.

On Syria, the General Assembly strongly condemned the continued widespread and systematic gross violations of human rights by Syrian authorities and the government-controlled "shabbiha" militia…. The resolution condemns the massacres, arbitrary executions, extrajudicial killings, torture, sexual violence, ill-treatment against children, and the killing and persecution of protestors, human rights defenders and journalists. Importantly, today's resolution urges Syrian authorities to release immediately all persons arbitrarily detained, including the members of the Syrian Centre for Media and Freedom of Expression, which works to promote freedom of opinion and expression in Syria and throughout the Arab world, and is the only Syrian NGO accredited to the UN.

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3. Human Rights Council

a. Overview

The United States participated in three regular sessions of the Human Rights Council in 2012. The Council convened for its 19th session in late February. For the U.S. statement on key outcomes at the 19th session, see *http://geneva.usmission.gov/2012/03/29/key-outcomes/*. Key outcomes at the 20th session, which concluded on July 6, are also described on the website of the U.S. Mission in Geneva at *http://geneva.usmission.gov/2012/07/07/key-u-s-outcomes-at-the-un-human-rights-council-20th-session/*. Ambassador Eileen Chamberlain Donahue, U.S. Permanent Representative to the Human Rights Council, summarized key accomplishments at the 21st session, which concluded on October 9, in a post available at *http://geneva.usmission.gov/2012/10/09/ambassador-donahoe-on-accomplishments-at-the-hrc-21st-session/*.

The United States was elected to a second three-year term on the Human Rights Council on November 12, 2012. Upon reelection, the State Department released a fact sheet summarizing accomplishments during its first term on the Council, available at *www.state.gov/r/pa/prs/ps/2012/11/200447.htm*, and excerpted below.

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The United States is pleased and proud of its reelection to the UN Human Rights Council earlier today. Since joining the Council in 2009, the United States has ardently worked to help the Council realize its full potential. Our efforts to reform the Council from within have resulted in historic and concrete actions against human rights violators around the world. While much work remains to be done at the Council, in particular ending its excessive and unbalanced focus on Israel, with U.S. leadership the Council has spoken up for those who are suffering major human rights violations and are living under the grip of the world's cruelest regimes. The Council also has taken action to promote accountability for violations and expand human rights and fundamental freedoms worldwide. Today's vote will allow us to further strengthen the Council and build on what we have already accomplished at the Council by working together with our international partners.

As we prepare for another three years of close collaboration with partners from all corners of the globe to address the many human rights challenges remaining before us, we reflect on the Council's key accomplishments during our first term, including:

Robust Response to Country-Specific Situations:

Syria: The Human Rights Council has been an active, vocal body in condemning the atrocities in Syria, holding four special sessions and establishing an independent International Commission of Inquiry, as well as a Special Rapporteur to follow up on the work of the Commission of Inquiry once its mandate expires. The Council has adopted eight resolutions on Syria since 2011, all of which the United States co-sponsored, sharply and repeatedly criticizing and illuminating the conduct of the Syrian government.

Libya: Similarly, in 2011 the Council took assertive action to address the dire human rights situation in Libya, establishing a Commission of Inquiry mandated, among other things, to investigate all alleged violations of international human rights law in Libya and to make recommendations on accountability measures. With the support of the United States and on the recommendation of the Council, the UN General Assembly took unprecedented action in March 2011 to suspend Libya's membership rights on the Council helping to catalyze broader UN action to prevent the slaughter of civilians in Libya.

Iran: In 2011, the United States led the Council in adopting a resolution that re-instituted the mandate of a Special Rapporteur on Iran to highlight Iran's deteriorating human rights situation. Today, the Special Rapporteur is speaking out on behalf of those Iranians who have suffered egregious human rights violations by the Iranian government.

Belarus: In 2012, the United States co-sponsored a resolution at the Council that established a Special Rapporteur to highlight human rights abuses in Belarus. In doing so, the Council re-instituted a mandate that the Council eliminated in 2006, when the United States was not a member.

Sri Lanka: In 2012, the United States led the Council in adopting a resolution on Sri Lanka, which sent a strong signal that Sri Lanka still needs to address outstanding issues of reconciliation and accountability.

Cote d'Ivoire: When the political and human rights environment in Cote d'Ivoire deteriorated in 2011, the Council acted quickly to establish a Commission of Inquiry to investigate human rights abuses. The Council later created an Independent Expert on human

rights in Cote d'Ivoire, with a mandate to follow up on the Commission of Inquiry's recommendations and assist the Government of Cote d'Ivoire in combating impunity.

Burma: Since joining the Council in 2009, the United States supported the adoption of four resolutions addressing the human rights situation in Burma. The most recent resolution extended the mandate of the Special Rapporteur on the situation of human rights for another year. In doing so, the Council took into account the many recent positive changes in Burma, including the Government of Burma's stated commitment to democratization and the reconciliation process as well as the Government's engagement with Aung San Suu Kyi and opposition parties.

Promoting Universal Human Rights:

Advancing the Rights of LGBT Persons: In June 2011 the Council adopted the first-ever UN resolution on the human rights of lesbian, gay, bisexual and transgender (LGBT) persons. This resolution commissioned a groundbreaking UN report on the human rights abuses that LGBT persons face around the globe, and has opened a broader international discussion on how to best promote and protect the human rights of LGBT persons. As a co-sponsor of this resolution, the United States demonstrated its commitment to an active role in ensuring fair treatment and equality for all people.

Promoting Freedom of Assembly and Association: Since 2010, the United States has led a cross-regional core group of countries in successfully presenting two landmark resolutions on the protection and promotion of freedom of assembly and association. The first resolution created the first new special rapporteur focused on fundamental freedoms in 17 years, the Special Rapporteur on the rights to freedom of peaceful assembly and freedom of association. The second resolution underscores the important role that civil society plays in the promotion and protection of human rights.

Highlighting Internet Freedom: In July 2012, the United States co-sponsored a landmark resolution, that underscores that all individuals are entitled to the same human rights and fundamental freedoms online as they are offline, including the freedom of expression, and that all governments must protect those rights regardless of the medium.

Underscoring the Right to Nationality: In 2012 the United States successfully introduced a landmark resolution addressing the right to a nationality, with a specific focus on women and children. The equal right to a nationality for women, including the ability to acquire and retain nationality and confer it on their children, reduces the likelihood that women and children will become stateless and vulnerable to serious harm.

Reinforcing Freedom of Expression in the Context of Religious Intolerance: The United States worked with a wide range of partners, including the Organization of Islamic Cooperation, to secure adoption in 2011 of the "Combating Discrimination and Violence" resolution, also known as resolution 16/18, which calls on states to take a range of positive actions to combat discrimination, violence, and intolerance on the basis of religion or belief without violating the freedom of expression. This resolution marked a sea change in the global dialogue on countering offensive and hateful speech based upon religion or belief.

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b. Guiding Principles on Business and Human Rights

In 2012, the State Department hosted workshops on implementation of the Guiding Principles on Business and Human Rights, which were endorsed by the Human Rights Council in 2011 in resolution 17/4, and were the result of the work of the Special Representative of the Secretary General on human rights and transnational corporations and other business enterprises, John Ruggie. See *Digest 2011* at 148-50. On April 30, 2012, representatives of major multinational corporations attended one such workshop, focusing on best practices and key challenges in respecting human rights in business operations. See State Department media note, available at *www.state.gov/r/pa/prs/ps/2012/04/188980.htm*. A similar workshop for representatives of civil society organizations, think tanks, and multilateral and academic institutions was held on July 30, 2012. See State Department media note, available at *www.state.gov/r/pa/prs/ps/2012/07/195901.htm*.

On September 27, 2012, Ambassador Eileen Chamberlain Donahoe, U.S. Representative to the HRC, delivered a general statement by the United States on the issue of business and human rights. Her statement appears below and is available at *http://geneva.usmission.gov/2012/09/27/u-s-statement-on-business-and-human-rights/*.

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The United States is pleased to co-sponsor and join consensus on the important issue of business and human rights, including the implementation of the Guiding Principles as a framework for addressing a wide range of challenges raised by the business and human rights agenda.

In this context, we continue to stress the importance of States' implementation of their obligations under human rights law with respect to their own conduct. [In] states that violate human rights, it is then difficult for businesses to respect them. As the Guiding Principles remind us, it is important that States govern justly and effectively, and that individuals are protected from misconduct from both State and non-State actors. Our conviction regarding the State's "duty to protect" is grounded in the moral and political imperative to engage in good governance, [including] by properly addressing acts of abuse by private actors. International human rights law tells us that, in certain circumstances, a State's obligations can be implicated by private conduct. Yet governments have an imperative to provide for and improve the well-being of our populations, even where our obligations under international law do not require it. Our support for the resolution is based on this understanding.

We thank the Office of the Secretary General for the recommendations of its important report and its continued efforts in pushing forward the business and human rights agenda. The United States supports the integration and operationalization of the Guiding Principles into the UN system where appropriate. These efforts will prove to be a valuable approach towards progress on the business and human rights issue.

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c. Actions regarding Syria

By the end of 2012, the Human Rights Commission had issued five resolutions on Syria. The Commission renewed the mandate of the Commission of Inquiry. The United States persisted as a strong advocate for further action on Syria. For a discussion of UN Security Council and General Assembly actions on Syria, see Chapter 17. For a discussion of U.S. sanctions directed at the Syrian regime, see Chapter 16.

(1) Actions at the 19th session

On February 22, 2012, the Commission of Inquiry established in 2011 by HRC Resolution S-17/1 delivered its second report on Syria at the 19th session of the Human Rights Council. U.N. Doc. A/HRC/19/69. The United States hailed the report for its indictment of the Assad regime in a February 23 statement by Ambassador Rice, available at *http://usun.state.gov/briefing/statements/184589.htm*:

> The United States welcomes the second report of the Independent International Commission of Inquiry on Syria and notes its indictment of the Assad regime's comprehensive campaign of violence against the Syrian people. Among the report's findings: the Syrian government has accelerated the killing of its people, particularly in Homs, resulting in the deaths of nearly 800 civilians in the first two weeks of February alone. Protestors have been arrested without cause, tortured, and summarily executed. Many of the dead are children.
>
> The report vividly portrays the violence that has continued unabated for nearly a year at a breathtaking scale, in an environment of total impunity. We appreciate those who took great risks to contribute to the report.

The Human Rights Council also adopted two resolutions on Syria at its 19th session. U.N. Doc. A/HRC/RES/19/1; U.N. Doc. A/HRC/RES/19/22. On March 1, 2012, Ambassador Donahoe issued a statement on the adoption of resolution 19/1. That statement is excerpted below and available at *http://geneva.usmission.gov/2012/03/01/hrc-resolution-on-syria-sends-forceful-message-about-international-communitys-outrage/*.

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The outcome of today's vote at the Human Rights Council speaks for itself. It sends a forceful message about the international community's outrage at the ongoing human rights violations and deepening humanitarian crisis created by the Assad regime.

Over the past weeks the Syrian regime has intensified its inhumane campaign of cruelty in defiance of its obligations under human rights law. It has continued to block emergency humanitarian relief that is so desperately needed to respond to the humanitarian crisis caused by these gross human rights violations.

We urge all states to assist the Syrian people in their time of need as they struggle to realize their aspirations for universal human rights. The three countries that chose to vote no at the Human Rights Council today find themselves isolated from the strong international consensus on the need to protect the people of Syria.

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On March 23, 2012. Ambassador Donahoe issued a press statement on the adoption of resolution 19/22, available at *http://geneva.usmission.gov/2012/03/23/syria-resolution-highlights-growing-unity-of-international-community-isolation-of-three-who-voted-against/*, and excerpted below.

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This session of the Human Rights Council opened with an Urgent Debate on Syria and the adoption of a resolution focused on humanitarian access, and we have remained seized with the situation throughout, even as events on the ground have sharply deteriorated.

Today, on the session's final day, Council members came together in their strongest show of unity yet to demand end to the violence by the Assad regime. The resolution on Syria we have just adopted highlights the growing unity of the international community and the increasing isolation of the three countries which stood alone to oppose the text.

Today's resolution is important. It renews and significantly strengthens the work of the Commission of Inquiry (COI), the team of investigators tasked by the HRC with documenting the situation inside Syria with a view to ensuring that those who are responsible are held to account.

For the first time, the Council has asked its team of investigators to provide continuous mapping of both human rights violations and casualties.

Expressing grave concern about systemic impunity for human rights violations, the Council has also asked the Office of the U.N. High Commissioner for Human Rights to ensure the safe and secure storage of all evidence of human rights violations gathered by the COI. This is the first time such a request has been included in a Human Rights Council resolution.

The Council has demanded that the regime lift without delay its blockade on Homs, Dar'a, Zabadani and all other cities under siege and that it ensure timely, safe, and unhindered access for medical and humanitarian aid.

With today's vote the Council sends a message to the people of Syria. We are with you. We support your aspirations. We are working to ensure that crimes against you will not go unpunished. Together we demand an end to the brutality of the Assad regime.

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(2) Special Session on Syria

In June 2012, the Human Rights Council convened a special session on Syria and adopted a resolution calling for an in-depth investigation by the Commission of Inquiry on Syria into the massacre in Houla in May 2012, in which over 100 Syrian civilians were killed, including over 40 children. Secretary Clinton's press statement on the special session is available at *www.state.gov/secretary/rm/2012/06/191673.htm* and included the following:

> Our message is clear: to the people of Syria, the world stands by you, and we will not ignore your plight in the face of ongoing violence; to the Assad regime, the time has come to end the flagrant abuses of the human rights of your people and to step aside so that Syria can transition peacefully and democratically.

(3) Actions at the 20th session

At the 20th session of the Human Rights Council, the United States introduced a resolution on the situation of human rights in Syria that was adopted by the Council by a vote of 41 in favor with 3 opposed and 3 abstentions. U.N. Doc. A/HRC/RES/20/22. Ambassador Donahoe's introductory statement on the resolution is excerpted below and available at *http://geneva.usmission.gov/2012/07/06/syria-resolution-2/*.

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The United States is very pleased to introduce, with our partner Turkey, draft resolution L.22 Rev.1, on the Situation of Human Rights in the Syrian Arab Republic. This resolution, as was just mentioned, enjoys the broad support of over 50 co-sponsors.

This Council must continue to speak out clearly and forcefully on the gross human rights violations and atrocities being carried out by the Assad government. The Assad regime is waging a brutal campaign of violence against the Syrian people, characterized by aerial bombardment, mass killings, summary executions, torture, including rape, and other atrocities. We demand an end to these outrageous crimes against the people of Syria.

The Assad government has made no serious effort to comply with its commitment to the Annan six-point proposal and with UN Security Council resolutions 2042 and 2043. Assad continues to use heavy weapons against civilians; deploy tanks and troops in urban areas; detain activists, journalists, and others arbitrarily and without any pretense of due process and to torture them; and restrict fundamental freedoms. As long as Assad continues to attack the Syrian people, the international community must keep ratcheting up the pressure on the regime to halt the violence and do more to allow access for humanitarian assistance to civilians in need. This resolution reaffirms the international community's full commitment to supporting Joint Special Envoy Annan and his efforts on the implementation of his six-point proposal. This resolution reflects the Geneva Action Group's communiqué supporting Kofi Annan's principles and

guidelines for a Syrian-led political transition, one in which the regime cedes full executive power to a transitional governing body.

It is vital that the Commission of Inquiry continue documenting violations and collecting evidence so that those who are responsible for gross human rights violations can be held accountable. This resolution appropriately calls for continued support and immediate, full, unfettered, and secure access on the ground for the COI. And it also rightly emphasizes the need for accountability for the atrocities and gross human rights violations being committed against the Syrian people. Several Syrian and international groups, like the Syria Justice and Accountability Center, are also working toward this end, to ensure that a comprehensive record of abuses is available to the Syrian people.

We have a clear message to the Syrian security forces: "Don't let Assad abuse your national loyalty. Your mission as the armed forces of Syria is to protect the Syrian people, not to prolong Assad's hold on power. The way to meet your responsibility is to end the repression and help set up a broad based interim administration that will lead Syria to a democratic future."

Madame President, distinguished delegates, the actions of the Assad government are contrary to the principles and values upon which the Human Rights Council was founded—no State that engages in such actions should ever serve on this Council. Supporting this resolution is just one way to demonstrate our solidarity with the Syrian people. I call on all Council members to support this resolution and the people of Syria in their desperate time of need.

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(4) Actions at the 21st session

On September 28, 2012, the Human Rights Council adopted a resolution to renew the mandate of the Commission of Inquiry on Syria. U.N. Doc. A/HRC/RES/21/26. The vote was 41 in favor, with 3 opposed and 3 abstaining. Ambassador Donahoe provided the statement for the U.S. delegation on the continuation of the work of the COI. Her statement is excerpted below and available at *http://geneva.usmission.gov/2012/09/28/coi-will-continue-its-work-documenting-widespread-crimes-against-the-people-of-syria/*.

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The United States is proud to co-sponsor this resolution and thanks the main sponsors Morocco, Qatar and other members of the Arab Group for their leadership.

As you all know—the Human Rights Council began focusing on the human rights calamity in Syria in April 2011 with our first Special Session on the topic. Sadly as this 21st Council Session comes to a close, Assad continues to cling to power, and his campaign of brutality has sparked a deepening humanitarian crisis. We cannot afford to be silent.

This resolution strengthens our support for the work of the Commission of Inquiry, instituted by this Council more than a year ago. The COI has been doing its job—documenting widespread and systematic crimes against the people of Syria. In its current report to the Council, the COI has found that the crimes committed against the Syrian people are indicative of a deliberate state policy of collective punishment. The COI has also found that reasonable ground exist to believe that Government forces and the Shabbiha, have committed crimes against

humanity, war crimes, and gross violations of international humanitarian law. With respect to its investigation of the specific case of Al-Houla, the COI was able to determine that Government forces, acting in concert with Shabbiha members, were responsible for the massacre in which dozens of women and children were killed.

The work of the COI is important because as they continue to document the names of individuals responsible for these crimes and violations, they help ensure that this will not be a case where impunity prevail, but rather that those responsible for these crimes against the Syrian people will face justice and accountability.

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d. Sri Lanka

On March 22, 2012, the Human Rights Council adopted a resolution on Sri Lanka. U.N. Doc. A/HRC/RES/19/2. Ambassador Rice's statement strongly endorsing the resolution appears below and is available at *http://usun.state.gov/briefing/statements/186670.htm*.

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Today, the UN Human Rights Council took strong action to promote a durable, just and equitable peace in Sri Lanka. The resolution adopted convincingly today promotes reconciliation and accountability after decades of terrorism and civil war. Through this resolution, a broad and diverse coalition of the international community sends a powerful message to the Government of Sri Lanka that the time for concrete action is now.

The resolution welcomes the constructive recommendations in the Lessons Learned and Reconciliation Commission, while acknowledging the need to address key issues of accountability. It also calls upon the Government of Sri Lanka to present a plan to implement the recommendations and address alleged violations of international law. To advance these efforts, the resolution encourages the UN to offer advice and technical assistance to Sri Lanka. We welcome these next steps and the United States stands ready to support the government and the people of Sri Lanka as they move forward with these important efforts.

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On the same day, Secretary Clinton also issued a statement on the Sri Lanka resolution, available at *http://geneva.usmission.gov/2012/03/22/clinton-statement/*. Secretary Clinton said:

> Today's action by the UN Human Rights Council encourages the Government of Sri Lanka to continue on the path toward reconciliation following 27 years of civil war. The United States, together with the international community, sent a strong signal that Sri Lanka will only achieve lasting peace through real reconciliation and accountability, and the international community stands ready to help. The next steps are clear. We look to

the Government of Sri Lanka to implement the constructive recommendations of the Lessons Learnt and Reconciliation Commission (LLRC) and take the necessary measures to address accountability. We are committed to working with the Sri Lankan government to help realize this goal, and I look forward to discussing future actions with Foreign Minister Peiris soon. We will continue the productive working relationship we have with the Sri Lankan Government based on shared values, respect and constructive dialogue. Most important, we seek to strengthen our partnership with all the people of Sri Lanka.

e. Belarus

At its 20th session, the Human Rights Council established a special rapporteur on the human rights situation in Belarus. U.N. Doc. A/HRC/RES/20/13. The resolution passed with 22 votes in favor, 5 against, and 20 abstentions. Ambassador Donahoe's July 6, 2012 press statement on the new rapporteur is excerpted below and available at *http://geneva.usmission.gov/2012/07/06/donahoe-special-rapporteur-will-monitor-and-highlight-the-grave-human-rights-situation-in-belarus/*.

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The 20th Session of the Human Rights Council in Geneva passed a resolution that will create a new independent Special Rapporteur on the human rights situation in Belarus. This effort was led by the European Union, with close cooperation and strong support from the United States. We were pleased to work with our EU partners to create the rapporteur, who will work to monitor and highlight the grave human rights situation in this country. This is the fifth country-specific monitor created by the Council since the United States joined in 2009.

Since the flawed 2010 Presidential elections, the Belarusian government has significantly curtailed the freedoms of association, assembly and expression, and the right to a fair trial. The United States is deeply concerned about the suppression of these and other fundamental freedoms and human rights, as well as widespread allegations of torture and ill-treatment. We also remain deeply concerned by the government's crackdown against human rights activists, independent journalists and media, and civil society. As Secretary Clinton has said, "Each time a reporter is silenced, or an activist is threatened, it doesn't strengthen a government, it weakens a nation. A stool cannot balance on one leg or even two. The system will not be sustainable."

The Special Rapporteur will encourage the government of Belarus to release and rehabilitate political prisoners, stop oppressive measures against journalists and human rights activists, and end the crackdown on civil society. The United States looks forward to continuing to work with our European partners to improve the situation in Belarus and to address key human rights concerns around the world.

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f. Eritrea

The 20th Session of the Human Rights Council also included passage of a resolution establishing a special rapporteur on the human rights situation in Eritrea. U.N. Doc. A/HRC/RES/20/20. Ambassador Donahoe's July 6, 2012 press statement on the Eritrea resolution is excerpted below and available at *http://geneva.usmission.gov/2012/07/06/ambassador-donahoe-u-s-welcomes-creation-of-a-special-rapporteur-on-eritrea/*.

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Today members of the Human Rights Council in Geneva adopted [by consensus] a resolution on the human rights situation in Eritrea. Nigeria, Djibouti and Somalia led the drafting of the resolution, which calls for the creation of a Special Rapporteur on Eritrea. This independent human rights expert will focus urgent attention on one of the most dire human rights situations in the world.

The Eritrean government continues to commit widespread human rights abuses. Eritreans suffer arbitrary and indefinite detention; inhumane conditions of confinement; restrictions on freedom of speech, movement, and belief. The government of Eritrea forces men and women to participate in the national service program from which there [are] no clear criteria for demobilization. Severe violations of religious freedom continue, including torture, detention, and denial of the right to life, liberty, and security. Elections have not taken place since the country's independence from Ethiopia in 1993. The constitution was unilaterally adopted in 1997, but has not been implemented.

The United States co-sponsored this important resolution along with a cross-regional group of supporters, including a strong African group, EU members, and other delegations. This is the first non-cooperative country mandate created by the Council by consensus. This speaks to both the increased credibility of the Council, and the international community's concern over human rights violations in Eritrea. Since joining the Council two years ago, U.S. engagement has made the Human Rights Council (HRC) a more effective and credible multilateral forum for responding to the world's most urgent human rights situations.

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g. Mali

Also on July 6, 2012, at its 20th session, the Human Rights Council adopted a resolution on the situation in Mali. U.N. Doc. A/HRC/RES/20/17. The U.S. explanation of position on the resolution, which was delivered by Patrick Reilly, is excerpted below and available at *http://geneva.usmission.gov/2012/07/06/u-s-joins-consensus-on-human-rights-council-resolution-on-the-situation-in-mali/*.

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The United States is pleased to join consensus on this resolution. We are pleased that the Council has focused on the situation in Mali and joins the international community in insisting that all actors in Mali respect international law. We also appreciate the willingness of the interim government of Mali to engage with the Council to address the human rights situation in their country. The people of Mali must be able to live in a secure environment, free from oppression where they can practice their human rights such as freedom of religion and expression. We support the interim government and ECOWAS's leadership in restoring democratically elected government in Mali.

We believe the resolution would have benefited from addressing the situation across Mali, rather than focusing solely on the situation in the north. We also believe the resolution would have benefited from properly characterizing the legal nature of the abuses committed by groups in northern Mali.

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4. Strengthening the Human Rights Treaty Body System

In February 2012, the United States requested a vote and abstained on a resolution in the UN General Assembly on the "Intergovernmental process of the General Assembly on strengthening and enhancing the effective functioning of the human rights treaty body system." A/RES/66/254. The resolution was adopted by a vote of 85 in favor, none opposed, with 66 abstaining, including the United States. The U.S. statement explaining its position on the resolution was delivered by Mr. John F. Sammis, Deputy U.S. Representative of the Economic and Social Council. Mr. Sammis's statement is excerpted below and available in full at *http://usun.state.gov/briefing/statements/184603.htm*.

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We continue in particular to have significant concerns about the timing and content of the inter-governmental process set forward in [the resolution]. We also think the text inadequately addresses the important concerns raised by civil society organizations and others regarding their participation in the proposed process.

The United States, along with many other member states, has been disappointed with the lack of flexibility the sponsors have shown during the final stages of the negotiations on this draft resolution. They unfortunately rejected a number of constructive proposals that would have allowed this resolution to be adopted by consensus—as the United States would very much have preferred.

The current text requires further consideration and improvement through continued negotiations. It sets up a comparable process to one already underway under the auspices of OHCHR, while leaving the timeline and the relationship between the two processes unclear.

The United States looks forward to participating in the intergovernmental process envisioned in this resolution. At the same time, we believe that the new intergovernmental process in New York should not begin until after the presentation of the report of the Office of

the High Commissioner for Human Rights in June. The Office of the High Commissioner (OHCHR) has led an extensive multi-stakeholder process, with the participation of States Parties to the human rights treaties, treaty body experts, national human rights institutions, and civil society. We were pleased to submit our views in writing to the OHCHR in advance of our participation in the February 7-8 consultations in Geneva, and also look forward to the April consultations in New York.

While decisions on the strengthening of the treaty body system are a matter for States Parties to decide, the United States believes that the OHCHR should be given the time to complete its process of soliciting input from States and other stakeholders and to inform the inter-governmental deliberations.

We should make additional efforts to avoid duplication of work, redundancies, and waste of resources in New York and Geneva. We should also provide a clear timeline for the completion of this process. While OHCHR is conducting consultations and issuing its report, the intergovernmental process should not be started. We hope that the OHCHR report will fully reflect perspectives expressed in Geneva, and we do not think there is a need for any alternate consultation process under the auspices of the Presidency of the Human Rights Council at this time. Moreover, we do not view this resolution as providing a mandate for any such consultation process.

As this process moves forward, it is important for the Member States of the UN to respect the independence of the treaty bodies and the role of the States Parties themselves in deciding on issues related to the scope and implementation of the respective treaties. In that regard, this process should avoid proposals that would endanger that independence or that would require treaty amendments.

For the avoidance of doubt, I would like to underline that the United States does not interpret any element of the draft resolution as altering the existing legal competences of the relevant institutions, including the General Assembly and any conferences of states parties that would be convened with respect to each treaty.

As we discuss the various proposals in more depth, and look for ways to strengthen the treaty body system, we believe it would be useful to better understand the budgetary implications of each proposal. In our view, throughout the discussion of the range of proposals, detailed budgetary analysis would help to better inform our discussions. This is yet another reason why the intergovernmental process should not begin until OHCHR has completed its report, as we understand that that report will include budgetary information that will better inform these discussions.

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As mentioned in Mr. Sammis's statement above, the United States submitted its views on strengthening the treaty body system to the Office of High Commissioner for Human Rights ("OHCHR"). Excerpts follow from the submission made by the United States on February 2, 2012. The submission is also available on the OHCHR website at *www2.ohchr.org/english/bodies/HRTD/docs/submissions2011-12/states/USSubmission.pdf.*

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The United States thanks OHCHR for leading a process of extensive consultations on measures to strengthen the treaty body system. The United States appreciates OHCHR's ongoing multi-stakeholder consultations, including OHCHR's extensive efforts to engage States Parties to the human rights treaties (the "States Parties"), treaty body experts, national human rights institutions, and civil society. The comprehensiveness and thoroughness of this process is essential to its success. Given OHCHR's broad perspective and expertise built on working with all of the human rights treaty bodies, the United States believes that OHCHR is uniquely positioned to conduct this work. While ultimately decisions on the strengthening of the treaty body system are a matter for States Parties to decide, it is important that OHCHR's work inform such deliberations. The United States looks forward to engaging with OHCHR and other States Parties during the forthcoming consultations in Geneva and New York. It is crucial that all States Parties have the opportunity to participate in the OHCHR process, so the United States welcomes the breadth of OHCHR's consultations, and in particular the fact that OHCHR's efforts are being conducted in both Geneva and New York to ensure the greatest possible participation. This includes those States without representation in Geneva. The United States also welcomes OHCHR's efforts to make available through the internet comments by States Parties. Such broad consultations will ensure that the OHCHR process will have the necessary level of inclusiveness.

The United States believes that treaty bodies play a critical role in reviewing States Parties' implementation of their human rights obligations, and supports ongoing efforts to strengthen their work.

This Note is in response to the High Commissioner's November 14, 2011 request to Permanent Representatives in Geneva to provide "suggestions to enhance the efficiency, effectiveness and impact of the treaty body system...

At this time, before getting into the specifics of the non-exhaustive list of proposals OHCHR has provided, the United States wanted to provide some general comments for stakeholders to consider as this process moves forward.

The United States Government's suggestions are as follows:

Strengthening the Existing Treaty Framework

It bears emphasizing that the discussion of strengthening the treaty bodies and enhancing their effectiveness must take into account the framework that is set forth in the treaties themselves. In negotiating the treaties and through their ratification, States vested the treaty bodies with certain enumerated functions. It is important to bear this in mind when reviewing the various proposals to ensure that all are cognizant of when a recommendation would alter the existing framework, and possibly require consideration of an amendment to a treaty. For example, pursuant to the treaties, treaty bodies are assigned responsibility for establishing their own rules of procedure, thereby recognizing the independence of the treaty bodies. In light of the cumbersome process for amending multilateral treaties, in the view of the United States, discussion of proposals requiring treaty amendments should be avoided.

Qualifications and Independence of Experts

The United States takes the process of nominating and electing qualified and independent experts to applicable treaty bodies as a privilege and serious responsibility. In the last two years, the United States conducted rigorous vetting processes to be able to nominate highly qualified candidates to the Human Rights Committee, the Committee Against Torture, and the Committee on the Elimination of Racial Discrimination.

Once candidates have been nominated by States Parties, and before elections, the United States would welcome additional voluntary transparent mechanisms for interested civil society

organizations, national human rights institutions, and academic experts to be able to provide input and analysis on candidates. It remains the prerogative and duty of individual States Parties to nominate and vote for those candidates they feel are best qualified, but outside actors can play an important role in helping to provide increased transparency, information, and recommendations to States Parties.

The United States strongly believes that candidates should be independent, and should therefore not be employed or directly affiliated with any government at the time of their candidacy or while serving on a treaty body, and also have strong substantive and legal background in the treaty subject area.

Core Competencies

Given the serious backlog of reports, the United States believes it is increasingly important for treaty bodies to focus on their core function of considering States Parties' reports, and, as mandated, individual communications.

The Secretary General estimates that 19 percent of treaty body meeting time was used for activities other than considering States Parties' reports and individual communications. The United States would appreciate a more detailed breakdown of how this percentage was calculated, a better sense of what time and resources are devoted outside of formal sessions, and how this may vary for each individual treaty body. While the United States notes that some of this time was used by the treaty bodies to discuss improvement and harmonization of their working methods, it also included time for the elaboration of general comments or recommendations, days of general discussion, informal meetings with States Parties, inquiries, etc.

Recognizing the profound budgetary implications associated with increasing the amount of meeting time to reduce the backlog in reviewing States Parties' reports alone, not to mention costs associated with any proposals for work in new areas not contemplated by the treaties, the United States would welcome proposals that encourage and allow for the treaty bodies to increase the percentage of time spent working on responding to States Parties' reports and individual communications, and reduce the amount of time spent on other activities.

More Focused Exchange of Views

The United States is in favor of exploring ways to encourage a more focused exchange of information at all stages of the reporting process, including the development of the report, the hearing and the concluding recommendations. The United States is interested in exploring whether use of the List of Issues Prior to Reporting as has been utilized by the Committee Against Torture and the Human Rights Committee has resulted in more targeted reporting and constructive dialogue on significant issues related to treaty implementation. The United States would also welcome improved time management practices during the sessions that encourage a more focused exchange of views between the treaty body members and the representatives of the States Parties. Additionally, the United States anticipates more limited and targeted conclusions and recommendations would result in further efficiencies throughout the process.

Transparency/Digital Video Teleconferencing

The United States believes that the proposals that would make use of the latest technologies deserve further discussion. The United States believes it would be worthwhile for OHCHR to work with treaty body experts to offer, as a pilot program, to conduct a limited number of reviews through digital video teleconferencing.

Reviews and discussions of State Party reports could also be webcast. This would allow for greater transparency and contribute to the quality of reporting.

The United States would encourage OHCHR to explore launching a pilot program in this area within existing resources.

Additional Efficiencies and Budgetary Implications

As the various proposals are discussed in more depth, and ways to strengthen the treaty body system are looked for, the United States believes it would be useful to better understand the budgetary implications of each proposal. The United States therefore encourages OHCHR to provide potential budgetary implications for each of the proposals, and also indicate which proposals may be implemented without additional resources.

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B. DISCRIMINATION

1. Race

a. Overview

In 2012 the United States continued to promote implementation by States Parties of their obligations under the International Convention on the Elimination of All Forms of Racial Discrimination and to advocate international cooperation to combat racial discrimination. The United States also pursued its domestic efforts to counter racial discrimination and stressed its view that combating racial discrimination and intolerance must not and need not occur at the expense of the right to freedom of expression. See section L.4., *infra*, for a discussion of U.S. views on racist hate speech, including the U.S. submission to the CERD Committee in August 2012.

b. Human Rights Council

On September 28, 2012, at the 21st session of the Human Rights Council, the United States provided an explanation of its "no" vote on a resolution entitled, "From rhetoric to reality: a global call for concrete action against racism, racial discrimination, xenophobia and related intolerance." U.N. Doc. A/HRC/RES/21/33. The U.S. explanation of vote follows, and is available at *http://geneva.usmission.gov/2012/09/28/22558/*.

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The United States remains fully and firmly committed to combating racism, racial discrimination, and related forms of intolerance. We believe the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") provides comprehensive protections in this area and constitutes the relevant international framework to address all forms of racial discrimination.

For the United States, our commitment to combat these problems is rooted in the saddest chapters of our history and reflected in the most cherished values of our union. And it is an ongoing challenge, as we heard from some of our colleagues in civil society at this session. We will continue to work with civil society and all nations of goodwill to combat racism, racial discrimination, and related forms of intolerance in all forms and all places, including through enhancing our implementation of the CERD.

Nevertheless, while we agree with many elements of this resolution, we regret that we cannot support it for a number of reasons, including the ones described here. We believe it serves as a vehicle to prolong the divisions caused by the Durban conference and its follow-up rather than a concrete approach for the international community to combat racism and racial discrimination. Our concerns about the Durban Declaration are well-known, including its unfair and unacceptable singling out of Israel and its endorsement of overly broad restrictions on freedom of expression that run counter to the U.S. commitment to robust free speech.

This resolution also inappropriately attempts to revive the concept of defamation of religions, which had been correctly set aside by the OIC in resolution 16/18. Additionally, while we agree with the Working Group of Experts on People of African Descent about the need for continued vigilance and concrete efforts to address the inequality faced by persons of African descent, as well as members of other racial and ethnic minorities, we are concerned that its proposed draft Programme of Action for a Decade for People of African Descent, including efforts to create new human rights instruments and programs, will—in our view—do little to advance the needs of those it attempts to serve.

For these reasons we have voted no on this resolution.

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c. Statement on U.S. efforts to eliminate racial discrimination at home and abroad

At the 19th session of the Human Rights Council, the United States delivered a statement in the context of discussing item 9 on the agenda: racism, racial discrimination, xenophobia, and related forms of intolerance. The discussion followed up on implementation of the Durban Declaration and Programme of Action, on which the United States has consistently voiced its concerns. For background on Durban, see *Digest 2001* at 267-68, *Digest 2007* at 315-17, *Digest 2008* at 284-85, *Digest 2009* at 174-75, *Digest 2010* at 222-23, and *Digest 2011* at 159-62. The U.S. statement at the 19th session of the HRC, as delivered by Kelly C. Landry on March 20, 2012, is available at *http://geneva.usmission.gov/2012/03/20/u-s-strongly-supports-efforts-to-eliminate-racial-discrimination-both-at-home-and-abroad/* and is excerpted below.

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The United States strongly supports the elimination of racial discrimination at home and abroad. U.S. history reflects lapses, challenges, struggles, and, encouragingly, ongoing progress. We continue to examine ourselves, knowing that we still need to make progress in addressing discrimination and intolerance within our own country, and that it is only through hard work and

careful scrutiny that we can push back against intolerance and discrimination both at home and around the world.

This battle continues as we enforce laws within the United States that protect the human rights of all individuals, including members of racial and ethnic minorities. Our laws recognize that promotion and protection of civil rights, non-discrimination, and equal opportunity are fundamental to ensuring universal respect for human rights.

The U.S. Department of Justice enforces some of our nation's most significant laws in this area – laws that combat discrimination based on race, ethnicity, religion, national origin, gender, sexual orientation and disability, so that our nation can fulfill its promise of true equal opportunity and equal justice. Thematically, we have been working to protect and promote human rights of minority individuals in many areas: law enforcement, housing, education, employment, and political participation.

In the area of law enforcement, in the last three years the United States has filed a record number of law enforcement misconduct and human trafficking cases.

We secured a landmark conviction against five New Orleans police officers involved in shootings of civilians and an extensive cover-up that occurred in the wake of Hurricane Katrina.

In housing, in December 2011 the U.S. Government filed its largest residential fair lending settlement in history to resolve allegations that a mortgage company engaged in a widespread pattern or practice of discrimination against qualified African-American and Hispanic borrowers.

In the area of education, we entered into a comprehensive settlement agreement that resolved allegations of severe and pervasive harassment of Asian-American students.

Another area in which we continue to work toward the elimination of racial discrimination is in protecting the right to vote. We are committed to ensuring full participation in our democratic process through enforcement of our voting rights laws.

The right to vote is not only the cornerstone of our system of government—it is the lifeblood of our democracy. And no force has proved more powerful—or more integral to the success of the great American experiment—than efforts to expand the right to vote.

The United States also seeks to strengthen its partnership with other countries in the fight against racial discrimination. We are proud of this effort, including the U.S.-Brazil Joint Action Plan to Eliminate Racial and Ethnic Discrimination and Promote Equality, and a similar Action Plan with Colombia.

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On July 3, 2012, at the 20th session of the HRC, the U.S. delegation again delivered a statement that referred to its concerns about Durban. The statement, delivered by Emily Fleckner at an interactive dialogue with the special rapporteur on "Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance" emphasized that free expression exposes bigotry and hatred to the forces of reason and criticism. The statement is excerpted below and available in full at *http://geneva.usmission.gov/2012/07/03/open-and-free-expression-exposes-bigotry-and-hatred-to-the-forces-of-reason-and-criticism/*.

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The United States thanks the Special Rapporteur for his two reports—the first he has submitted to this Council since his appointment. We are profoundly committed to combating racism, racial discrimination, xenophobia and related intolerance and firmly agree with the Special Rapporteur that the importance and value of preventive measures cannot be overemphasized.

We support his recognition, in particular, that efforts to prevent and combat racism and racial discrimination must have meaningful participation by groups or individuals discriminated against in political life and decision-making processes on the grounds of their race, color, descent, or national or ethnic origin. For our part, the United States is committed to ensuring full political participation in our democratic process through enforcement of our voting rights laws. The right to vote is not only the cornerstone of our system of government—it is the lifeblood of our democracy.

We also welcome the Special Rapporteur's call, in particular, to leaders to condemn political messages based on racism, racial discrimination and other forms of intolerance and xenophobia—including religious intolerance, anti-Semitism, and the targeting of individuals on account of their sexual orientation or gender identity.

In response to the Special Rapporteur's reliance throughout his reports on the Durban Declaration and Programme of Action as a normative framework, we would like to reiterate our well-known concerns. We cannot agree with the idea that criminalizing speech or prohibiting expression are effective approaches to combating the roots of racial discrimination and bigotry. We have learned over the course of our history that open and free expression exposes bigotry and hatred to the forces of reason and criticism and is therefore part of the solution in ending discrimination. Further, we cannot support the DDPA's unfair singling out of one country.

The United States is committed to effectively implementing our human rights treaty obligations with respect to non-discrimination and equal opportunity, including under the International Convention on the Elimination of All Forms of Racial Discrimination. To this end, the United States recently created an Equality Working Group to coordinate efforts by U.S. federal agencies in this regard. The Working Group will provide a mechanism to integrate and implement more fully a human rights perspective in U.S. agencies' programmatic and enforcement responsibilities in this area and engage with civil society.

The United States is deeply committed to engaging in an ongoing, thoughtful dialogue that can result in vigorous action to effectively combat racism and racial discrimination. We hope to work together to find common ground on concrete approaches that both protect the freedom of expression and combat all forms of racism and racial discrimination through constructive mechanisms.

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d. OAS Resolution on the Draft Inter-American Convention Against Racism

On June 4, 2012, the General Assembly of the Organization of American States ("OAS") adopted a resolution at its second plenary session relating to the Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance. AG/RES. 2718 (XLII-O/12). As in 2011 when the OAS General Assembly passed a similar resolution (see *Digest 2011* at 165-66), the United States provided a footnote (note 1) to the resolution expressing its views:

> The United States continues to object to the negotiation of new legally binding instruments against racism, racial discrimination and other forms of discrimination or intolerance and reiterates our longstanding reservations and concerns with this and prior resolutions on the topic. The International Convention on the Elimination of All Forms of Racial Discrimination, to which some 170 countries are States Parties, including 33 members of this organization, prohibits discrimination on the basis of race, color, descent, or national or ethnic origin, and obliges States Parties to "undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms." As this robust global treaty regime already provides comprehensive protections in this area, a regional instrument is not necessary and runs the risk of creating inconsistencies with this global regime. As early as 2002, the Inter-American Juridical Committee articulated similar concerns, concluding that it was not advisable to negotiate a new convention in this area. The United States believes that the resources of the OAS and of its member states would be better utilized at identifying practical steps that governments in the Americas might adopt to combat racism, racial discrimination and other forms of discrimination and intolerance, including best practices in the form of national legislation and enhanced implementation of existing international instruments. Such efforts should be aimed at bringing immediate and real-world protection against discrimination.

e. Ad Hoc Committee on the Elaboration of Complementary Standards

For background on U.S. work with the Human Rights Council's Ad Hoc Committee on the Elaboration of Complementary Standards, see *Digest 2009* at 179-83). On September 28, 2012, the United States provided an explanation of position on a resolution adopted without a vote at the 21st session of the Human Rights Council on the elaboration of complementary standards for the International Convention on the Elimination of All Forms of Racial Discrimination. U.N. Doc. A/HRC/RES/21/30. The U.S. explanation of position follows, and is available at *http://geneva.usmission.gov/2012/10/10/u-s-explanation-of-position-complementary-standards-to-icerd/*.

> The United States strongly supports concrete actions to better address racial and religious discrimination and intolerance. We believe it is evident that there are gaps in effective implementation by governments of their existing obligations under international human rights law. It was for this reason that we presented an extensive action plan to the Ad Hoc Committee in October 2009 that suggested concrete measures States can take to combat discrimination and intolerance in their nations. We look forward to working within the Committee to strengthen implementation as an effective approach to complementary standards.

2. Gender

a. Women, Peace, and Security

In 2012, both the Obama Administration and the United Nations continued efforts to promote the important role of women in conflict resolution and promoting and maintaining peace. Some of those initiatives, which follow on UN Security Council Resolution 1325 and related resolutions, are discussed below. See *Digest 2010* at 232-35 for a discussion of the efforts to implement Resolution 1325 as of its tenth anniversary.

(1) The United States National Action Plan on Women, Peace, and Security

See discussion in Chapter 17.C.3.

(2) United Nations actions on women, peace, and security

On February 23, 2012, U.S. Deputy Permanent Representative to the UN Rosemary A. DiCarlo delivered remarks during an open debate in the Security Council on women, peace, and security. In her remarks, excerpted below and available in full at *http://usun.state.gov/briefing/statements/184579.htm*, Ambassador DiCarlo praised the work of the UN Secretary General's special representative on sexual violence in conflict.

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…[T]he Secretary-General's report on conflict-related sexual violence demonstrates the importance of having a Special Representative on Sexual Violence in Conflict. In just the past year she was able, together with the Team of Experts, to assemble the evidence available in this report, and to begin to address some of the horrors it describes. From the beginning, the United States has supported the Special Representative and the Team of Experts, both in advocating their mandates and financing their work. It is time and money well spent.

The Special Representative has, first of all, gathered facts. We know now how rape was used to humiliate and punish during the post-election crisis in Cote d'Ivoire. We now know that 625 cases of sexual violence by warring parties were recorded by the United Nations from December 2010 to November 2011 in the provinces of North and South Kivu and Orientale, in the Democratic Republic of Congo. We have before us figures, dates, and names of perpetrators and perpetrating forces in these countries as well as in Burma, Somalia, Sudan and South Sudan. We also now have information, sometimes very extensive information, about sexual violence perpetrated in post-conflict situations and situations of civil unrest, in the Central African Republic, Syria, Guinea, Nepal and elsewhere.

The Special Representative and the Team of Experts have demonstrated the extent of the problem. Their work is also increasing awareness of the issue and encouraging best practices. In the reporting period, more than 150 people in the DRC, from various types of security forces, were sentenced after trial to punishment for crimes of sexual violence. 9,534 Congolese

survivors of sexual violence in North and South Kivu and Ituri provinces, including at least 1,700 children, received medical and psychosocial support. Congolese officers in two conflict-affected provinces are now receiving training from MONUSCO to train their own soldiers in how to prevent sexual violence and deal properly with witnesses and victims. These training modules will become the national standard for the DRC. In Cote d'Ivoire, the Special Representative received a commitment from the president of the Truth and Reconciliation Commission that reparations for victims of sexual violence would be part of the commission's mandate. In Liberia and South Sudan, the Team of Experts has worked with national justice sectors on sentencing guidelines, training of police, Constitution drafting, and a host of other initiatives.

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The problem, unfortunately, remains vast. We have only begun. Impunity is still alarmingly common. In the DRC, Sheka Ntaberi ran as a candidate for office even as a warrant was out for his arrest for sexual violence. In Guinea, as detailed in the Secretary General's report, two men connected to the violence of September 2009, which included sexual violence, have since been given high government positions. Such impunity should not be tolerated. Apart from keeping a strong focus on ending impunity, we need to build our institutional capacity for early warning. We applaud the efforts of the Special Representative, United Nations Action, and UN Women to develop an early-warning framework.

As Council members, we need to make combating sexual violence part of our discussions with briefers, so that it becomes an integral part of our practice. We have recognized for some time that conflict-related sexual violence is a security issue, but this report places that matter beyond dispute. As is shown quite clearly, it is a security matter that impacts entire countries as well as individual communities, families, and individuals. It is also one that very much affects men and boys as well as women and girls. The report shows that in many places men are forced to watch their wives and daughters as they are being abused, and there are numerous cases of men and boys being sexually attacked by other men as a deliberate tactic of conflict. This is a security issue, not a women's issue. We must treat it as such, and develop the same strategies of early warning and prevention that we use for other security threats.

The United States welcomes and supports the recommendations in the Secretary-General's report, particularly the need for all parties to conflict to make specific and time-bound commitments to cease acts of sexual violence and bring perpetrators to justice. We particularly endorse the recommendation to address conflict-related sexual violence in the context of security-sector reform initiatives, including personnel training and civilian oversight mechanisms. The Council should also continue to consider conflict-related sexual violence in authorizing and renewing the mandates of peacekeeping missions, including monitoring, analysis and reporting arrangements.

…[T]he United States will stay engaged with this issue. As part of our new National Action Plan on Women, Peace and Security, the United States is working to strengthen our efforts to prevent and combat conflict-related sexual violence as we advance women's participation in preventing conflict and keeping peace. Our ultimate objective is to incorporate women and girls into our diplomatic, security, and humanitarian and development efforts in conflict-affected countries—not simply as beneficiaries, but as agents of peace, reconciliation, development, growth, and stability.

For example, the United States believes it is crucial to increase women's participation in security forces involved in preventing conflict and building peace as one way to reduce conflict-related sexual violence. The United States funds and implements the Global Peace Operations Initiative, which has facilitated the training of 2,451 female peacekeepers worldwide. This initiative supports instruction on prevention of sexual exploitation and abuse. Beginning last year, we have supported the pre-deployment training of Peruvian women peacekeepers focused on women, peace, and security issues in support of the United Nations Stabilization Mission in Haiti. And in Afghanistan, U.S. and Afghan officers provide instruction and mentoring to female soldiers in the Afghan National Army. In 2014, 10 percent of the Afghan military academy's class will be women, and there are already more than 1,200 women serving in the Afghan National Police, many of whom serve in leadership positions.

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On July 2, 2012, at the 20th session of the Human Rights Council, the United States co-sponsored a statement on women's rights, peace, and security that was joined by 66 countries. The statement appears below and is available at *http://geneva.usmission.gov/2012/07/02/u-s-co-sponsors-joint-statement-on-womens-rights-peace-and-security/*.

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We recognise women's vital role in achieving and maintaining international peace and security and as such understand the need for equal political, civic and economic participation in times of peace, conflict and during periods of political transition. We also recognise that failure to respect human rights impacts on the wider peace and security agenda and reaffirm that women are equally entitled as men to the same rights enshrined in the UDHR and the two international covenants.

As such, we call on States:

- To protect the rights of women, especially in conflict and post-conflict situations;
- To promote equal involvement in all aspects of life during times of transition;
- And to ensure women's access to positions of decision making in order to build and maintain democratic and stable societies

…Sexual violence, specifically during periods of armed conflict, insecurity and transition as well as in post-conflict situations, disproportionately affects women and girls. Such violence not only undermines the safety, dignity and human rights of women and girls, but also undermines the critical contributions they make to society and hinders inclusive and sustainable peace processes. Sexual violence must therefore be addressed throughout all stages of conflict resolution, starting with ceasefire agreements, and we encourage the presence of adequate gender expertise at the peace table.

The Vienna World Conference on Human Rights expressed its dismay at massive violations of human rights including systematic rape of women in conflict. It stressed that perpetrators must be punished and such practices immediately stopped.

Sexual violence may constitute a war crime or crime against humanity and states are responsible for complying with their relevant international obligations to prosecute these crimes.

We therefore commit to work through appropriate national and international mechanisms towards the prevention, early warning and effective response to sexual violence in conflict-related situations, including through tackling impunity and increasing the number of prosecutions.

We remind all States, particularly parties to conflict, of their obligations under applicable international law with regard to the prohibition of all forms of sexual violence.

…Times of transition have many causes. Elections or political change, conflict and natural disasters can all create uncertainty and upheaval. Whatever the cause, these times can present a period of immense vulnerability for women, but also a unique window of opportunity. Human rights violations and abuses must be prevented and the foundation for women's longer term empowerment must be laid.

To this end, we call upon all States, including those affected by conflict and undergoing political transitions, to protect and promote the human rights of women including such rights as education and to the enjoyment of the highest attainable standard of health. We encourage all States to take proactive measures to address the barriers that prevent and discourage women from meaningful civic, economic and political participation, such as gender-based violence, poverty, unequal access to financing and to justice. We urge States to ratify CEDAW and implement their obligations under it. We urge all States to implement fully Security Council Resolution 1325 and its follow-up resolutions on Women and Peace and Security and General Assembly Resolution 66/130 on women and political participation

Finally we reaffirm and express full support for the important role of the UN in promoting gender equality between men and women and advancing the status of women. We welcome the role of UN Women and efforts to strengthen internal accountability and coordination. We especially note the role that the Human Rights Council and its Special Procedures could play within their respective mandates in supporting implementation of 1325.

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(3) G8 work on women, peace, and security

The Foreign Ministers of the G8 met in Washington, DC from April 11-12, 2012 to discuss a wide range of issues. Among the meetings hosted by the United States was an expert meeting on women, peace, and security. The G8 Foreign Ministers Meeting Chair's Statement, available at *www.state.gov/r/pa/prs/ps/2012/04/187815.htm*, includes the following on the role of women in international peace and security:

> Women can be powerful actors for peace, security, and prosperity. When women participate in peace processes and other formal decision-making processes, they can initiate and inspire more progress on human rights, justice, national reconciliation, and economic revitalization. They can build coalitions across ethnic and sectarian lines and speak up for marginalized and minority groups. Yet women are regularly excluded, whether in peace negotiations or in political transitions. Recognizing that the political transitions in the Middle East and North Africa are unprecedented opportunities to broaden political participation and legitimacy across the region, the Ministers noted that more needs to be done to take advantage of this opportunity. The Ministers have

> strong concerns that women's political participation has been reduced in some countries and human rights and fundamental freedoms of women are at the risk of even further regression. They expressed strong concern over the continuing violence against women and girls worldwide, particularly sexual and gender-based violence in conflict and post-conflict situations and the fact that gender discrimination remains enshrined in many countries' legal systems. In response to these concerns, Ministers noted the important role the G8 can have in advancing the implementation of relevant UN Security Council resolutions on women, peace and security issues, and requested that G8 experts develop options for how the G8 might work together and with others to enhance the role of women in international peace and security.

b. Female Genital Cutting

On February 16, 2012, Secretary Clinton marked the day of zero tolerance for female genital mutilation with remarks delivered at the Department of State in Washington, DC. Her remarks are available at *www.state.gov/secretary/rm/2012/02/184071.htm*. Among other comments, Secretary Clinton announced U.S. support for a center in Kenya to advance strategies to end female genital cutting ("FGC"), lauded the growing number of African states that have outlawed the practice, and pledged to support a UN resolution banning it:

> I'm very proud to announce today that we will join with the University of Nairobi to fund a pan-African Center of Excellence in Kenya, which will advance African research and strategies to address FGC. This center will focus on developing local solutions to end the practice and offer medical training on how to support the women who have been hurt and damaged by it. I hope others in the business and international communities will join the United States in supporting this very important new initiative based in Africa, where we think it needs to be.
>
> Now, Kenya has just passed an outright national ban on FGC, becoming the 18th African country to do so. Last year, the African Union called on the UN General Assembly to adopt a resolution banning it, and we will certainly work in any way we can to support the African Union in that. There is more to be done. We need more advocacy, more interaction between policy makers and those in the field. We need to empower men and women, and especially girls, to speak up for themselves. We need to ultimately overcome the deeply-rooted gender inequalities that, either tacitly or actively, permit and promote such practices.

At the end of 2012, the UN General Assembly adopted its first ever resolution aimed at ending female genital mutilation. U.N. Doc. A/RES/67/146. The United States joined consensus on the resolution.

c. Women and children: right to nationality

On July 5, 2012, the Human Rights Council adopted by consensus a U.S.-led resolution on the right to nationality, with a specific focus on women and children. A State Department

media note on the resolution is excerpted below and available at *www.state.gov/r/pa/prs/ps/2012/07/194615.htm*. Ambassador Donahoe also delivered an introductory statement at the time the United States introduced the resolution, available at *http://geneva.usmission.gov/2012/07/05/u-s-introduces-human-rights-council-resolution-on-the-right-to-a-nationality/*.

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…This is the first time that the Human Rights Council has addressed the issue of discriminatory nationality laws targeting women, which can lead to statelessness. In total, there were 49 co-sponsors supporting the resolution, with representation from every geographical region.

The resolution focused on the issues of protecting both a woman's and a child's right to a nationality, with the goal of reducing statelessness. The equal right to a nationality for women, including the ability to acquire and retain nationality and confer it on their children, reduces the likelihood that they will become stateless and vulnerable to serious harm. As many as 12 million people around the world are stateless. Without recognition as citizens by any government, stateless persons often lack access to legal employment, birth registration, marriage and property ownership, and face travel restrictions, all of which can increase the risk of exploitation and abuse, including forced migration and trafficking in persons.

While recognizing the right of each State to determine by law who its nationals are, the resolution urged States to refrain from enacting or maintaining discriminatory nationality legislation and to reform nationality laws that discriminate against women. Such actions would be consistent with States' obligations under international law, including Article 2 of the Universal Declaration of Human Rights, which provide that everyone is entitled to the rights and freedoms set forth in the Declaration without distinction on the basis of sex. In this regard, the United States recalls our own history of seeking to achieve equal nationality rights for women.

The resolution also welcomed the increased efforts of the United Nations High Commissioner for Refugees to prevent and reduce statelessness among women and children, particularly in light of last year's 50th anniversary of the 1961 Convention on the Reduction of Statelessness. The resolution also called for free birth registration for every child.

This resolution supports the Secretary's initiative to promote women's equal right to nationality, which emphasizes that women's rights are human rights.

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d. Opposition to resolution on "traditional values"

On September 27, 2012, Ambassador Donahoe delivered the statement by the United States explaining the U.S. vote in opposition to the resolution at the 21st session of the Human Rights Council on "Traditional Values." Ambassador Donahoe's statement, excerpted below, is available at *http://geneva.usmission.gov/2012/09/27/u-s-opposes-resolution-on-traditional-values-could-have-negative-effect-on-women-minorities-vulnerable-groups/*.

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Thank you. As we have said in the past, the concept of Traditional Values, not anchored to, or in conformity with, human rights law, undermines the universal principles enshrined in international human rights instruments, such as the Universal Declaration of Human Rights, and can have a particularly negative effect on the rights of women, minorities, LGBT individuals, and other vulnerable groups. We continue to have concerns about this resolution, and, for the following reasons, we will request a vote and will vote NO.

First, as the Human Rights Council's Advisory Committee noted in its initial Report (footnote 42), the common set of values of humankind are those in the Universal Declaration of Human Rights.

Second, we are also concerned, as was the Advisory Committee in its initial report, that the term "Traditional Values" has no internationally agreed-upon definition. The term has thus far been vague and open-ended and, as the Advisory Committee recognized, it could be used to legitimize human rights abuses.

Third, we also observe that the resolution quotes selectively from the Advisory Committee initial Report, disregarding core themes, thus presenting the Committee's conclusions in a wholly imbalanced and distorted manner. By way of example, and there are many, the initial Report makes the following salient points, all of which were ignored in the resolution:

Paragraph 40: "[I]t was equally necessary to recognize that some practices and attitudes at odds with human dignity also derived from traditional values."

Paragraph 41: "Those who benefit most from the status quo are more likely to appeal to tradition … while those most marginalized and disenfranchised have the most to lose from a traditional values approach to human rights."

Paragraph 43: "[T]hose who challenge gender roles reinforced by values said to be traditional, cultural, or religious are particularly subject to violence and abuse of human rights."

Paragraph 48: "The negative impact of traditional values can be felt not only in non-Western countries… Traditional and cultural values in Western countries propagate harmful practices, such as domestic violence."

Paragraph 74: "[T]raditional Values must never be presented as a substitute for international standards, given the generally vague, subjective, and unclear framing of values when compared to human rights."

Paragraph 77: "In international human rights law, responsibility describes the State's obligation to promote and protect all human rights for all people. States have a responsibility to take sustained and systematic action to modify or eliminate stereotypes and negative traditional values and practices, and are encouraged to identify progress in this regard when reporting to international human rights monitoring mechanisms."

For these reasons, the United States will vote NO on this resolution.

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e. UN Commission on the Status of Women

The United States participated in the 56th session of the UN Commission on the Status of Women ("CSW") in February 2012. In her remarks at the session on February 29, Ambassador Rice spoke about the importance to global development of empowering rural women. Her remarks are excerpted below and available in full at *http://usun.state.gov/briefing/statements/184903.htm*.

* * * *

Thank you, Madame Chair. It is a great pleasure to join you today at the Commission on the Status of Women to speak about why the empowerment of rural women is vital to global development.

Growing evidence shows that investing in women is not only the right thing to do—it is the smart thing to do.

As Secretary Clinton has said, "To achieve the economic expansion we all seek, we need to unlock a vital source of growth that can power our economies in the decades to come. And that vital source of growth is women." In rural economies—on which 70 percent of the world's poor depend—women have a unique potential not only to help drive economic growth but also to help solve the crucial development challenges of our time, from food security to sustainable energy to global health. It is for this reason that the United States champions the advancement of rural women across a wide range of policies in key areas.

Take food security. Women are a sizable part of the world's agricultural workforce, and are the outright majority in dozens of countries. They manage this in addition to caring for children and families, preparing meals and managing households, procuring water and firewood, and often also laboring in small-scale trading and enterprise.

Yet many rural women lack access to the capital, property, education and physical security that are essential to unlocking their potential. Women receive fewer and smaller loans than men do, and lack equal access to seeds, tools, and fertilizer. Closing the gender gap in agriculture would generate significant gains. According to the Food and Agriculture Organization, providing women equal access to productive resources could raise total agricultural output in developing countries by 2.5 to 4 percent and reduce the number of hungry by 100 to 150 million people worldwide.

That is why women are central to the U.S. global hunger and food security initiative, Feed the Future. In Kenya, we are tailoring agriculture extension services to fit women's schedules and training women in leadership and business development. In Uganda, we are working with partners to implement a women-led "community connector" program that addresses nutrition, sanitation, and agriculture in an integrated way. And we are piloting new tools to measure gender-specific results, including an innovative "Women's Empowerment in Agriculture Index" that was launched yesterday here at the CSW.

Rural women also have significant potential to contribute to sustainable energy solutions. Nearly 3 billion people globally still rely on traditional cookstoves and open fires to prepare food. Smoke exposure from these traditional methods causes an estimated two million premature deaths annually, predominantly women and children. Cookstoves also emit black carbon and greenhouse gases. As we work to build a global market for clean cookstoves, we need to involve women at every step in order to increase adoption rates and generate new economic

opportunities, such as local businesses for sales, distribution and repair. We also need to make women a high priority at Rio+20.

Women can drive global health outcomes, and unlocking the potential of rural women requires focusing on the health needs of women and girls. That is why a key priority of the Obama Administration's Global Health Initiative (GHI) is the Women, Girls, and Gender Equality Principle, which aims to redress gender imbalances related to health. We know it can work: in countries with a long-term commitment to family planning and maternal and newborn health, we have seen maternal mortality drop 30 percent or more. That is also why United States is proud to co-sponsor this year's resolution on maternal mortality— as we have done in prior years—with dozens of partners from every continent.

Finally, women and girls should be at the forefront of our common efforts to combat violence, abuse and discrimination, with special attention to lesbian and transgender women, ethnic minorities, and the displaced, who are among the most vulnerable.

When President Obama signed his landmark Presidential Policy Directive on Global Development, the first of its kind by a U.S. administration, he elevated development as a core pillar of American foreign policy. He also called for new investment in women and girls as powerful forces for change in their economies and societies.

In my travels around the world, I seek out women to hear their views on the future, and I am always honored and humbled by their courage, ingenuity, and determination. A few months ago, I met with brave women in Libya. They spoke proudly of their role in the revolution and sought no less of a role in leading Libya into the future. Their experience, like so many others, shows us that we cannot leave half of any country's rich human potential untapped.

Speaking before the UN General Assembly last fall, President Obama challenged UN member states to "announce the steps we are taking to break down economic and political barriers that stand in the way of women and girls. That is what our commitment to human progress demands." This is why we are here today. This session is an opportunity for us to challenge ourselves to go still farther, for there is much work yet to be done.

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3. Sexual Orientation

a. U.S. opposition to removing references to sexual orientation in UNGA resolution on extrajudicial, summary, and arbitrary executions

On November 20, 2012, Ambassador Elizabeth Cousens, U.S. Representative to ECOSOC, delivered the U.S. explanation of vote in opposition to a proposed amendment removing "sexual orientation" and "gender identity" from the UNGA resolution on extrajudicial, summary, and arbitrary executions. Ambassador Cousens' statement appears below and is available at *http://usun.state.gov/briefing/statements/200946.htm*.

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The United States strongly opposes the proposed amendment to remove reference to sexual orientation and gender identity from resolution L.36. We will be voting "no" against the amendment and urge that all delegations do the same.

The deletion of this specific language suggests that people targeted for extrajudicial killing on account of their sexual orientation or gender identity do not enjoy the same right to life as others. Surely no country here today would condone the extrajudicial, summary, or arbitrary execution of any individual on the basis of sexual orientation or gender identity. That basic right to life is what is at stake. We must affirm that "all human rights apply to all" by voting to oppose this measure.

Two years ago, the General Assembly overwhelmingly voted to reinsert language on sexual orientation to this very resolution. Since that time, the Human Rights Council has affirmed that all human rights apply to everyone, regardless of their sexual orientation or gender identity. As in 2010, we must reaffirm that principle by opposing this amendment today.
The United States urges all delegations present here to oppose the deletion of this language and vote NO on this amendment to ensure that this language remains in the text that the Third Committee adopts today.

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b. Follow-up to resolution adopted on LGBT rights at HRC 17

One of the key outcomes to the United States from the 19th session of the Human Rights Council was the UN's first panel discussion on discrimination and violence based on sexual orientation and gender identity, as called for in resolution 17/19. See *Digest 2011* at 177-79 for discussion of this landmark resolution at the Human Rights Council on human rights, sexual orientation, and gender identity. Daniel B. Baer, Deputy Assistant Secretary of State for Democracy, Human Rights and Labor, delivered the U.S. statement at the panel discussion at the 19th session of the Human Rights Council on March 7, 2012, affirming support for the human rights of LGBT persons. That statement appears below and is also available at *http://geneva.usmission.gov/2012/03/07/lgbt-panel-2/*.

* * * *

The United States thanks the High Commissioner for her continued promotion of the human rights of LGBT persons, and for her office's December report clarifying the numerous ways in which the human rights of LGBT persons are protected under international law. We thank the 85 countries who joined a joint statement calling for an end to criminalization or violence against LGBT people in March of 2011. And we express our appreciation for South Africa's leadership on the resolution last June—the first-ever UN resolution affirming the human rights of LGBT people—which called for the High Commissioner's report and our discussion today.

In December, Secretary of State Clinton spoke here in Geneva about how protecting the human rights of all people, including LGBT people, remains part of the urgent unfinished work for those committed to making human rights a human reality. She came in a spirit of humility. She spoke about our own country's ongoing work—including the repeal of "don't ask, don't tell" which took effect last year and allows gay men and lesbians to serve openly in our armed forces. And she acknowledged that, for many, accepting that sexual orientation and gender identity do

not affect a person's human rights is hard. But she also explained why it is both necessary and right.

So while she noted that sometimes religious or cultural values are offered as a reason to violate or not to protect the human rights of LGBT people, she also observed that "our commitments to protect the freedom of religion and to defend the dignity of LGBT people emanate from a common source. For many of us, religious belief and practice is a vital source of meaning and identity, and fundamental to who we are as people. And likewise, for most of us, the bonds of love and family that we forge are also vital sources of meaning and identity…Human rights are universal and cut across all religions and cultures… While we are each free to believe whatever we choose, we cannot do whatever we choose, not in a world where we protect the human rights of all."

And so, she said, "Like being a woman, like being a racial, religious, tribal, or ethnic minority, being LGBT does not make you less human. And that is why gay rights are human rights, and human rights are gay rights. … No matter what we look like, where we come from, or who we are, we are all equally entitled to our human rights and dignity." And that's why a commitment to the universality of human rights remains a central tenet of U.S. foreign policy.

There is much work to be done. Today, 76 countries still criminalize consensual same-sex relationships or conduct, five under penalty of death, and in far more countries, LGBT people face hatred, discrimination, violence or even death because of who they are or who they love.

The United States would welcome the panel's comments on how protection of the human rights of LGBT persons is fully compatible with and in fact enhances protection of human rights—including freedom of religion, freedom of expression, and freedom of association and assembly—for all individuals.

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c. Presidential proclamation of Lesbian, Gay, Bisexual, and Transgender Pride Month, 2012

On June 1, 2012, President Obama issued proclamation 8834, making June 2012 "Lesbian, Gay, Bisexual, and Transgender Pride Month" and calling on "the people of the United States to eliminate prejudice everywhere it exists, and to celebrate the great diversity of the American people." Daily Comp. Pres. Docs. 2012 DCPD No. 00439. Excerpts from the proclamation appear below.

* * * *

Since I took office, my Administration has worked to broaden opportunity, advance equality, and level the playing field for LGBT people and communities. We have fought to secure justice for all under the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, and we have taken action to end housing discrimination based on sexual orientation and gender identity. We expanded hospital visitation rights for LGBT patients and their loved ones, and under the Affordable Care Act, we ensured that insurance companies will no longer be able to deny coverage to someone just because they are lesbian, gay, bisexual, or transgender. Because we understand that LGBT rights are human rights, we continue to engage with the international

community in promoting and protecting the rights of LGBT persons around the world. Because we repealed "Don't Ask, Don't Tell," gay, lesbian, and bisexual Americans can serve their country openly, honestly, and without fear of losing their jobs because of whom they love. And because we must treat others the way we want to be treated, I personally believe in marriage equality for same-sex couples.

More remains to be done to ensure every single American is treated equally, regardless of sexual orientation or gender identity. Moving forward, my Administration will continue its work to advance the rights of LGBT Americans. This month, as we reflect on how far we have come and how far we have yet to go, let us recall that the progress we have made is built on the words and deeds of ordinary Americans. Let us pay tribute to those who came before us, and those who continue their work today; and let us rededicate ourselves to a task that is unending—the pursuit of a Nation where all are equal, and all have the full and unfettered opportunity to pursue happiness and live openly and freely.

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The State Department observed Pride month, with remarks by Secretary Clinton broadcast on-line, available at *www.state.gov/secretary/rm/2012/06/192136.htm?goMobile=0*. Secretary Clinton described State Department efforts on behalf of LGBT persons:

> United States Embassies and Missions throughout the world are working to defend the rights of LGBT people of all races, religions, and nationalities as part of our comprehensive human rights policy and as a priority of our foreign policy. From Riga, where two U.S. Ambassadors and a Deputy Assistant Secretary marched in solidarity with Baltic Pride; to Nassau, where the Embassy joined together with civil society to screen a film about LGBT issues in Caribbean societies; to Albania, where our Embassy is coordinating the first-ever regional Pride conference for diplomats and activists to discuss human rights and shared experiences. And through the Global Equality Fund that I launched last December, we have strengthened our support for civil society and programs to protect and promote human rights.
>
> We will not rest until full and equal rights are a reality for everyone. History proves that the march toward equality and justice will overcome barriers of intolerance and discrimination. But it requires a concerted effort from all of us. No matter how long the road ahead, I'm confident that we will travel it successfully together.

d. Organization of American States

On June 4, 2012, the General Assembly of the Organization of American States ("OAS") adopted a resolution on "Human Rights, Sexual Orientation, and Gender Identity." OAS Doc. No. AG/RES. 2721 (XLII-O/12) (included among the declarations and resolutions of the forty-second regular session, available at *www.oas.org/consejo/GENERAL%20ASSEMBLY/Resoluciones-Declaraciones.asp*). The United States was among the co-sponsors of the resolution, which, among other things, resolves:

To condemn discrimination against persons by reason of their sexual orientation and gender identity; to urge member states within the parameters of the legal institutions of their domestic systems to eliminate, where they exist, barriers faced by lesbians, gays, and bisexual, transsexual, and intersex (LGBTI) persons in access to political participation and to other areas of public life; and to prevent interference in their private life.

4. Age

a. UN Working Group

In 2012, the United States continued to participate in the United Nations Open-Ended Working Group on Ageing. On August 21, 2012, Henry Claypool, a principal deputy administrator at the U.S. Department of Health and Human Services, delivered the U.S. statement at the working group's third session in New York. His statement, excerpted below and available in full at *http://usun.state.gov/briefing/statements/196777.htm*, emphasized the U.S. view that states should focus on implementing existing international obligations applicable to older persons as a more timely way of addressing aging issues than pursuing a new convention.

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In deliberating on whether or not to support a new convention, we urge member states to consider what new protections this treaty would contain that are not already present in existing treaties, as the rights articulated in existing treaties apply to older persons as well as younger persons. Furthermore, under the best of circumstances, producing a new convention will take years to negotiate and enter into force. And, as we know, unless a country has ratified a particular convention, it has no obligations under the treaty. Therefore, the U.S. government continues to favor the full exploration of options in addition to that of a new UN convention on the rights of older persons. We continue to favor actions that review and assess the status of aging in member countries and that effect improvements in older persons' lives in a timely way.

It is important to focus attention on implementing provisions in existing treaties as they apply to older persons, and to call upon existing Special Rapporteurs to examine aging issues within their mandates. Special Rapporteurs should, for example, identify aging-related concerns in countries they visit and advise on best practices for addressing them.

The United States attaches great importance to the completion of the ten-year review of the Madrid International Plan of Action on Ageing and the report to be presented to the UN Commission for Social Development in 2013. Countries are being asked to comment on all ten priority areas, including the topic of "realization of all human rights and fundamental freedoms of all older persons." After this process, we should then have a much better idea of how best to proceed to protect the rights of older persons, whether through a convention, a Special Rapporteur, or by other measures. We will have a better understanding of what is in place in countries, what gaps exist, and what best practices countries could implement.

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At the conclusion of the third session of the Open-Ended Working Group on Aging in August 2012, Courtney Nemroff delivered the U.S. closing statement, which follows. The closing statement looks forward to further action on the Madrid International Plan of Action on Ageing ("MIPAA" or "Madrid Plan"). The United States favors the Madrid Plan as a useful, balanced, pragmatic approach to the various difficulties facing older persons.

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The United States thanks Argentina for chairing this Third Working Group session, and has listened with interest to the panelists, member states, and civil society groups offering their views. We would like to address a topic of much discussion: whether it is advisable to pursue a UN convention on the rights of older persons.

Our overall goal should be to have states protect the rights of older persons. And this must be done in a timely way, to respond to the challenges older persons face now. After three Open-Ended Working Group sessions, no consensus has emerged on whether a new UN convention is the best way to do this. As many states and NGOs have pointed out, the rights of older persons are protected by current human rights law. It is not clear that a convention would be the best way to ensure implementation of these rights. A new convention would take sustained time and resources to develop. The U.S. government therefore continues to favor exploring all possible options to protect the rights of older persons, while not ruling out the possibility of a new UN convention.

The United States continues to favor focusing on identifying gaps and best practices to address them. The September meeting in Vienna on the Madrid International Plan of Action on Ageing offers an excellent opportunity for that. The U.S. delegation to that meeting will be reporting on all ten priority areas, including the topic of "realization of all human rights and fundamental freedoms of all older persons." After the Madrid review and appraisal and the discussion of the report to the Commission on Social Development in 2013, we will have a better idea of what is needed to best protect the rights of older persons. In addition to a convention, one idea to consider might be the creation of a special procedure or independent expert on the rights of older persons, who could identify problems with the implementation of older persons' rights and formulate best practices for addressing them.

There are also actions that can be taken in the very short term. Provisions in existing treaties applicable to older persons should be implemented. States Parties' reports to existing treaty bodies could include specific information on implementation of their provisions with regard to older persons. Existing Special Rapporteurs could examine ageing issues within their mandates. And States and NGOs can discuss best practices, as they have been doing over the past few days.

Regarding the separate initiatives within the OAS and ECLAC, we would caution against proceeding with activities that would potentially be inconsistent with the work of the Open-Ended Working Group. ECLAC and OAS nations should await the results of the Open-Ended Working Group before deciding how to move forward. We firmly believe that a multilateral

process involving member states and civil society representatives from all geographic regions would have more credibility and support than a regional effort.

We have heard much about the challenges and difficulties facing older persons in their day-to-day lives, as well as many interesting best practices from various countries. We would like to encourage governments and civil society to put into practice steps to improve the living conditions and protect the rights of older persons, so that they may overcome those challenges and continue to contribute to the richness of society. Thank you for your attention.

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b. Third Committee proposal for legal instrument to protect older persons

On November 27, 2012, U.S. Deputy Representative to ECOSOC Teri Robl provided the U.S. explanation of vote in the Third Committee of the UN General Assembly on a proposal to develop a new legal instrument on the rights of older persons. The U.S. explanation of vote follows, and is available at *http://usun.state.gov/briefing/statements/201377.htm*.

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Thank you, Mr. Chair. The United States has a strong history of policies, legislation, and programs that have focused on establishing and protecting the rights and dignity of older people, while promoting their independence. The goals of U.S. domestic policy are to increase older persons' access to services and full participation in the community, and focus attention and resources on the unique needs of older Americans.

During this Third Committee session, a consensus resolution on ageing issues and older persons has been put forward by the Group of 77 and is expected to be adopted with strong support from the United States and many other delegations. That resolution, entitled "Follow-up to the Second World Assembly on Ageing," and numbered A/C.3/67/L.13, calls for a fourth session of the Open-Ended Working Group on Ageing to be held in 2013, without pre-judging what its mandate should be. That resolution focuses on the Madrid International Plan of Action on Ageing and its upcoming Second Global Review, and looks forward to synergies between the Madrid Process and the work of the Open-Ended Working Group on Ageing. The United States will co-sponsor the G-77 resolution on the Follow-up to the Second World Assembly on Ageing.

In contrast, the resolution now before us would give the Open-Ended Working Group a mandate of considering proposals for a new international legal instrument on older persons, asking the Working Group to present to the General Assembly a proposal containing the main elements that should be included in such an instrument.

The main thrust of this resolution does not take into account the considerable discussions at the three Open-Ended Working Group sessions taking place during 2011 and 2012. During these discussions, no consensus has emerged on whether a new convention is the best way to protect older persons and advance their well-being.

Older persons face critical challenges involving violence and abuse, economic security, and health and nutrition needs—but older persons are already entitled to human rights protections under existing human rights instruments that provide for promotion and protection of

human rights for all. There are actions that can be taken in the short term and within existing instruments that should be considered. Therefore, at this time, we find it inappropriate to have a resolution that would initiate steps towards drafting an international legally binding instrument. Scarce resources would be better spent on implementation of these existing rights, rather than on negotiation of a new document that reiterated those rights.

Negotiating a convention or other international instrument would require substantial human and monetary resources. Member state delegations would need to meet multiple times, most likely in a process lasting several years, in order to arrive at a document that could be adopted by consensus. Considering the budget constraints the UN, member states, and civil society organizations currently face, more reflection is needed to decide on the wisdom of such a course of action, which would inevitably divert resources from addressing the more immediate and concrete needs of older persons.

For these reasons, the United States will vote no on the resolution "Towards a comprehensive and integral international legal instrument to promote and protect the rights and dignity of older persons." We urge other Member States to do the same, in order to avoid sending conflicting messages about the appropriate way forward to address the issues of ageing and older persons.

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c. Human Rights Council

On September 28, 2012, the U.S. delegation to the 21st session of the Human Rights Council provided the U.S. explanation of position on a resolution on the human rights of older persons. U.N. Doc. A/HRC/RES/21/23. The U.S. explanation of position is excerpted below, and is available at *http://geneva.usmission.gov/2012/10/10/u-s-explanation-of-position-the-human-rights-of-older-persons/*.

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The United States places great importance on protecting the rights of older persons. We have sent senior representation from the Department of Health and Human Services to the Open Ended Working Group on Ageing in New York. In the conversations in New York, it has become apparent that there is no consensus among the member states on whether there is a normative gap with respect to the rights of older persons.

This resolution notes that older persons face many challenges, and highlights issues that affect older persons, such as abuse and violence. It does not, however, enumerate any new human rights. Rather, it stresses the importance of ensuring that older persons enjoy the same human rights as all other persons.

The working group in New York has also taken up the issues that this resolution proposes to address in an inter-sessional meeting. We feel this is duplicative of ongoing work and represents an inefficiency in the United Nations. We are also concerned about the significant budgetary strain this resolution places on OHCHR, and the limited ability of member states to

provide increasing amounts of resources to enable OHCHR to perform the substantial amount of work that we have given it.

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5. Persons with Disabilities

a. Submission of Disabilities Convention for U.S. Senate Ratification

In May 2012, the U.S. Department of State hosted a major civil society conference on international disability rights. State Department Legal Adviser Harold H. Koh was one of the speakers at the conference. His remarks, excerpted below and available at *www.humanrights.gov/2012/08/02/remarks-by-u-s-state-department-legal-advisor-koh-and-special-advisor-heumann-at-the-international-disability-rights-leadership-conference/*, focused on U.S. support for the Convention on the Rights of Persons with Disabilities in anticipation of its submission later that month to the U.S. Senate for its advice and consent to ratification.

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…Today, let me stress that this administration is committed to the ratification of the Convention on the Rights of Persons with Disabilities ….

The treaty, as you know, internationalizes core domestic principles on disabilities that have been embodied in our law since at least 1973, when the Rehabilitation Act was passed, which includes principles of non-discrimination, reasonable accommodations, and equality of opportunity. And it has been carried forward, of course, in the American with Disabilities Act, which continue to address these points: non-discrimination, access, inclusion, and proactive exercise. At its core, the treaty expresses that these are universal values and applies existing human rights law to this context with specific detailed guidance on such rights as political participation, access to employment, and liberty of movement and how these should be applied and interpreted to protect persons with disabilities. Your presence here at the State Department should convince you of the importance and urgency of this issue to all of our State Department leaders and officials as well as the Secretary of State's own personal commitment on this issue.

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…[L]et's … start to crystallize and agree upon the reasons why ratifying the disabilities convention is strongly in our national interest. And let me give you seven reasons which are the ones that I will be using in the days ahead. Not just on behalf of the U.S. government, but as an American committed to these issues. First, to ratify the Disabilities Convention would be a paradigm shift as with existing landmark domestic legislation. It would we be a paradigm shift in the treatment of persons abroad, anchored in principles of inclusion, equality, and non-discrimination that Americans enjoy at home. It would underscore our commitment to these rights and enhance our ability to promote these rights overseas.

Second, and this is something that obviously matters to legislators, it would be good for Americans. The Disabilities Convention is intended to improve protections around the world for

all persons with disabilities, but it would extend abroad rights that Americans with disabilities already enjoy at home. Partly because of the successful domestic legislation, there have been tremendous changes in our time here the United States.

Those of you who are my age remember when it was very unusual to have good access, when it was very rare to have signing at public events. We take these things now as things that we expect at ordinary occasions. But, when you travel abroad, when you conduct business, when you study, reside or retire overseas, if you're a U.S. citizen with disabilities, you will not be assured of these accommodations. And ratification would help to lead to greater protections, opportunities and benefits for millions of Americans with disabilities.

And let me underscore, those Americans include our veterans, and our wounded warriors for whom Congress has always shown in various ways unusual concern. And I think this issue ought to be emphasized if you really care about our veteran, you should care about whether those who live abroad are going to enjoy benefits because of disabilities rights being extended through the disabilities convention. Third, ratification would be good for U.S. leadership. It would better position for us to guide and encourage other countries to ratify and implement the Convention. And it would also help to level the playing field for the benefit of U.S. companies.

This is a fourth point: ratification would be good for U.S. business. And it would be a pretty straight forward point to make. American companies abide by disability principles in the United States. And the question is, how can their competitive edge be enhanced, given that they have already gone through the exercise of meeting accessibility requirements? Think about this as comparable to environmental rules. Once our companies made the change and internalized the cost of complying with environmental rules, it was very much in their interest to take those rules overseas and imbed them elsewhere. It also is critically important because our businesses excel at innovative exported products and technologies, electronic wheelchairs, mobility devices, accessibility computers, other electronic issues, create jobs, and this stimulates jobs here in the United States. So disability rights is good for business. And as you know, what's good for GM is good for the country.

Fifth, this will drive a race to the top. Ratification would drive a race to the top. Compare the Disabilities Convention with anti-corruption. When the United States Congress and the President signed the Foreign Corrupt Practices Act, U.S. companies had to clean up their act with regard to good governance. Then it became very much in their interest to drive the conduct of other countries and other companies up to their level rather than to recreate a race to the bottom. The fact of the matter is that as you all know, the Disabilities Convention does not require new legislation. If ratified with appropriation reservations, understanding, and declarations, it would be very much in the interest of U.S. companies, businesses and private entities to support ratification of this convention to take the obligations with which they already obey worldwide.

Sixth, ratification of the Disabilities Convention would be an advance in our own Disabilities Rights Movement. In the 40 plus years of domestic disability rights protection, we have accomplished a great deal. This is the next step. There is no "other" clear next step which is a clear advance forward. The Disability Rights Movement has so much momentum, it can move forward only if it is done at international level.

And seventh, ratification will allow the United States to cooperate with other countries on a web of future bilateral and multilateral arrangements to build, promote, and deepen an international regime on disability rights. There was discussion at this conference about why we need better coordination among multilateral and bilateral entities. The treaty contains an article – Article 32 – which discusses international cooperation, and recognizes the importance of state

cooperation and national effort to implement accessible development programs, cooperation in research and science, and providing technical and economic assistance. These are just words now. But if we ratify the treaty and join others who do, in the web of international cooperation on this issue, under the guiding principles of this treaty, we will go a great deal to greatly deepen and strengthen the international regime. Those of us who work in the human rights and rule of law field here at the State Department, everyday engage with the regime of human rights that has developed since the Universal Declaration. This is an obvious and necessary piece of it.

So, in conclusion, let me say this, you have accomplished a great deal in these few days. The State Department is with you, committed to these issues that we believe that disability rights are human rights, and that the human right of persons with disabilities are mainstream. That the concept of different but equal means non-discrimination, it means access, it means inclusion, and it means proactivity that we are determined to push this forward in the next step, which is through the ratification of the Disabilities Convention. That our challenge now is to define for others the seven reasons why ratification is very strongly in our interest. And that our goal should be to build a regime in our lifetime that will really make a difference here.

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On May 17, 2012, President Obama transmitted to the Senate for advice and consent the Convention on the Rights of Persons with Disabilities. S. Treaty Doc. 112-7. President Obama's transmittal message to the Senate appears below. Daily Comp. Pres. Docs. 2012 No. 00385 (May 17, 2012).

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I transmit herewith, for advice and consent of the Senate to its ratification, the Convention on the Rights of Persons with Disabilities, adopted by the United Nations General Assembly on December 13, 2006, and signed by the United States of America on June 30, 2009 (the "Convention"). I also transmit, for the information of the Senate, the report of the Secretary of State with respect to the Convention.

Anchored in the principles of equality of opportunity, nondiscrimination, respect for dignity and individual autonomy, and inclusion of persons with disabilities, the Convention seeks to promote, protect, and ensure the full and equal enjoyment of all human rights by persons with disabilities. While Americans with disabilities already enjoy these rights at home, U.S. citizens and other individuals with disabilities frequently face barriers when they travel, work, serve, study, and reside in other countries. The rights of Americans with disabilities should not end at our Nation's shores. Ratification of the Disabilities Convention by the United States would position the United States to occupy the global leadership role to which our domestic record already attests. We would thus seek to use the Convention as a tool through which to enhance the rights of Americans with disabilities, including our veterans. Becoming a State Party to the Convention and mobilizing greater international compliance could also level the playing field for American businesses, who already must comply with U.S. disability laws, as well as those whose products and services might find new markets in countries whose disability standards move closer to those of the United States.

Protection of the rights of persons with disabilities has historically been grounded in bipartisan support in the United States, and the principles anchoring the Convention find clear expression in our own domestic law. As described more fully in the accompanying report, the strong guarantees of nondiscrimination and equality of access and opportunity for persons with disabilities in existing U.S. law are consistent with and sufficient to implement the requirements of the Convention as it would be ratified by the United States.

I recommend that the Senate give prompt and favorable consideration to this Convention and give its advice and consent to its ratification, subject to the reservations, understandings, and declaration set forth in the accompanying report.

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The transmittal package also included Secretary Clinton's letter of submittal to the President, enclosing an executive summary, article-by-article analysis, and text of the Convention. As stated in Secretary Clinton's letter of submittal, excerpted below, the Convention was submitted with recommended reservations, understandings, and a declaration.

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I have the honor to submit to you the Convention on the Rights of Persons with Disabilities (the convention), adopted by the United Nations General Assembly on December 13, 2006, and signed by the United States of America on July 30, 2009. I recommend the convention be transmitted to the Senate for its advice and consent to ratification. Ratification of the convention would serve both to underscore our commitment to the rights of persons with disabilities and to enhance our ability to promote those rights internationally.

At its core, the convention seeks to ensure that persons with disabilities enjoy the same rights as everyone else and are able to lead their lives productively as do other individuals, if given the same opportunities. The United States has always been a world leader in ensuring the rights of individuals with disabilities, through legislation and enforcement measures. The United States has made great progress toward the goals of inclusion, equal opportunity, full participation, independent living, and economic self-sufficiency. By becoming a party to the convention, the United States would continue its leadership role and would be in a better position to support, assist, and encourage other states to ratify and implement the convention, thereby contributing to verifiable improvements in guaranteeing to persons with disabilities equality of opportunity, nondiscrimination, accessibility, and reasonable accommodation in foreign countries. In short, ratification would position us as a leader in promoting the rights of approximately 650 million people in the world who have a disability, including the large number of Americans with disabilities who travel, study, do business, and reside abroad. Ultimately, it will be persons with disabilities, both inside and outside the United States, who will benefit from the global acceptance and implementation of the convention.

Equality of treatment and nondiscrimination, precepts anchored in the United States Constitution, are the primary principles permeating the entire treaty. The convention's provisions apply these principles in a number of key areas, such as:

• Participation in political life and access to justice,

• Freedom from torture and cruel, inhuman, and degrading treatment.
• Accessibility, personal mobility, and reasonable accommodation,
• Health,
• Education,
• Employment,
• Housing, and
• Rehabilitation.

To assist the Senate in its consideration of the convention, I am enclosing a detailed report containing an article-by-article analysis, which addresses U.S. convention implementation. Included in that analysis are three reservations, five understandings, and one declaration that are recommended for inclusion in the Senate's resolution of advice and consent. As further discussed in the enclosed report, if the United States makes the proposed reservations, understandings, and declaration, existing domestic law will serve to implement the convention.

It is my belief that if ratified as outlined above, adoption of the convention would be advantageous to the United States. All relevant U.S. government departments and agencies, including key implementing departments and agencies, participated actively in this review of the convention's provisions with respect to their domestic authorities. In particular, the Departments of Justice and Health and Human Services and the Equal Employment Opportunity Commission join me in recommending that the convention be submitted to the Senate for its early and favorable consideration and advice and consent to ratification, subject to the reservations, understandings, and declaration set forth in the enclosed report.

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On July 31, 2012, the Senate Committee on Foreign Relations issued its report on the Disabilities Convention, recommending the full Senate give its advice and consent to ratification with the reservations, understandings, and declaration recommended in the transmittal package. S. Exec. Rept. 112-6. The Senate Report includes the testimony of witnesses at the July 12, 2012 committee hearing on the Convention. Excerpts follow from the prepared statement of Judith Heumann, Special Adviser for International Disability Rights at the U.S. Department of State, in support of U.S. ratification.

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As the Special Adviser for International Disability Rights at the U.S. Department of State, I firmly believe ratification will help us to advance our diplomacy abroad, enabling us to highlight how our advances have helped improve the lives of millions of disabled people and their family members. I grew up at a time when our country was just beginning to realize the value of ensuring the rights of persons with disabilities. Thanks to unstinting leadership from parents and disabled people, and the advocacy of many people, including Members of Congress and disabled veterans, we had begun the process of recognizing that our society should respect and promote the dignity, equality, and contributions of disabled individuals. However, as a child I did not have the benefit of accessible communities, inclusive schools, or accessible transportation. Without even simple curb cuts, I wheeled in the streets amongst oncoming traffic. I could not

ride our buses or trains. I was not allowed to go to school until I was 9 years old, and then received poor quality education segregated from the rest of my peers. When I applied for my first job as a teacher, I was initially denied my certification simply because I could not walk.

Today, I am proud to say that such blatant forms of discrimination are no longer permissible in our society. The United States has been a leader in this area. With strong legislation and effective enforcement honed over more than four decades of experience, Americans with disabilities are respected and included in our society to a degree unrivalled in our history. We can live, work, and travel with our fellow citizens, and we see Americans with disabilities serving at the highest levels of government and industry. Unfortunately, the same cannot be said for the majority of the 1 billion disabled people around the world, or Americans with disabilities, including veterans, who live, work, serve, retire, study, travel, and reside abroad. In developing countries it is estimated that 90 percent of children with disabilities do not attend school. Many disabled children are killed at birth simply because of their disability. I know from my own international work that basic physical access for disabled people is still a dream in many countries, and that enduring cultural stigmas force people with disabilities, who yearn to work and contribute to their families and societies, into abject poverty. I have also experienced firsthand the frustration of traveling in places where it is unfathomable that a significantly disabled person like me would ever leave their home, much less wish to board an international flight.

Against this backdrop of exclusion and discrimination is the vision of progress that we have achieved in the United States, made real through the rule of law, which inspired the international community to draft the Disabilities Convention. At its core, the Convention seeks to ensure that persons with disabilities enjoy the same rights as everyone else and lead their lives as do other individuals, if given the same opportunities. As with the comprehensive network of U.S. Federal disability law, the Convention expresses the principles and goals of inclusion, respect for human dignity and individual autonomy, accessibility, and equal enjoyment of rights. Equality of opportunity and nondiscrimination are the primary principles permeating both the Convention and U.S. domestic disability law. They animate the important issues addressed by the Convention, including: political participation; access to justice; respect for home and the family; education; access to health care; employment; freedom of expression; and respect for individual autonomy including the freedom to make decisions about how a person wishes to live their life. By requiring equality of opportunity and reasonable accommodation for persons with disabilities, the Convention is reflective of the principles of U.S. disability law, drawn from such core legislation as the Americans with Disabilities Act (ADA), the Rehabilitation Act, and the Individuals with Disabilities Education Act (IDEA). This principle of equality is of course enshrined in the Fifth and Fourteenth Amendments to the United States Constitution.

Given that the Disabilities Convention is animated by the principles underlying U.S. disabilities law, and that it does not create new rights for disabled people, no new legislation would be required to implement the Convention if ratified with the recommended reservations, understandings, and declaration. Significantly, the United States would implement its obligations under existing law; the Convention would not give rise to any new individually enforceable rights. Therefore, you may ask why we should bother to ratify the Convention? Simply put, ratification of the Disabilities Convention will strengthen U.S. interests. It will promote tangible benefits for U.S. business and the approximately 50 million Americans with disabilities, including the 5.5 million American veterans with disabilities, who wish to live, work, serve, retire, study, travel, and reside abroad. By ratifying this Convention we will be putting ourselves

in a position to assist our international partners to do as much as we have done domestically to enhance disability rights.

Prior to the adoption of the Convention, fewer than 50 countries around the world had adopted some form of nondiscrimination legislation to protect the rights of persons with disabilities. Ratification of the Convention by over 114 countries has since led to a dramatic increase in international interest in addressing the rights of persons with disabilities. However, overall standards of protection around the world typically remain subpar, as does enforcement of the protections that do exist. Such conditions limit opportunities abroad for Americans with disabilities. U.S citizens with disabilities frequently face barriers when they travel, conduct business, study, serve, reside, or retire overseas. With our extensive domestic experience in promoting equality and inclusion of persons with disabilities, the United States is uniquely positioned to help interested countries understand how to effectively comply with their obligations under the Convention. Indeed, provision of such technical assistance and knowledge sharing forms an important part of my work with the Department of State. However, the fact that we have yet to ratify the Disabilities Convention is frequently raised by foreign officials, and deflects from what should be center stage: how their own record of promoting disability rights could be improved. Though I take great pride in the U.S. record, it is frankly difficult to make best use of the ''bully pulpit'' to challenge disability rights violations on behalf of Americans with disabilities and others, when we have not ratified the Convention. Ratification would give the United States legitimacy and a platform from which to push for the adoption and implementation of the Convention's standards in other countries. This in turn will likely result in concrete improvements (such as fewer architectural barriers and accessible air travel) in those nations that bring their national laws into compliance, thus affording greater protections, opportunities, and benefits to the millions of U.S. citizens with disabilities who currently face barriers abroad.

Our failure to ratify has also undermined our advocacy for persons with disabilities in multilateral and regional fora, where ratification of the Convention has become a de-facto prerequisite for meaningful engagement in discussions on promotion of disability rights. For example, by ratifying we would be able to amplify our voice in the Disabilities Convention's Conference of States Parties, to which the United States sends delegations of disability rights experts but currently only as an observer. This severely curtails the role that the United States can play in such meetings, particularly as more countries ratify. By joining the 114 other States Parties to the Convention, we could help shape the international disability agenda by taking a more prominent role in future Conferences, shaping and leading Conference meetings and panel discussions and more actively contributing to the international disability rights dialogue. We will be a leading force in the drive to both improve lives and increase understanding and cooperation among States, as well as to impact the development of international standards on accessibility. Disability diplomacy will have a positive effect on overall bilateral and regional diplomacy of the United States, by allowing us to leverage the shared value of disability rights to promote dialogue on other issues of importance to U.S. foreign policy. We have found that inclusion of disability rights in the work of the State Department amplifies our ability to achieve our broader foreign policy objectives. However, this work is unduly hampered by our not having a seat at the table as a State Party.

Ratification would also be good for American business. By encouraging other countries to join and implement the Convention, we would also help level the playing field to the benefit of U.S. companies. It would enhance the competitive edge for our companies whose operations

and hiring already meet accessibility requirements. Guiding and encouraging improved disability standards abroad would also afford U.S. businesses increased opportunities to export innovative products and technologies (such as electronic wheelchairs and other mobility devices, as well as accessible computers and electronics), thereby potentially stimulating job creation at home. As accessibility standards become more harmonized—a business objective that the United States can more credibly support if it becomes a State Party—the competitive edge increases for U.S. companies even further with the opening of markets.

As I travel and meet disabled people from around the world, I am often reminded of how far we have come in the United States over the course of my lifetime, and how far so many countries have yet to go in ensuring that persons with disabilities are full and equal members of their societies. I also meet Americans with disabilities and their family members, who talk of the struggles they have faced abroad to live, work, and study with dignity and respect. Just as the ADA and related laws have become the gold standard for domestic disabilities legislation, U.S. ratification of the Disabilities Convention would represent a paradigm shift in the international treatment of persons with disabilities. The treaty is anchored in the overarching principles of inclusion, equality, and nondiscrimination that Americans already value at home. Ratification would serve both to underscore the enduring U.S. commitment to disability rights and to enhance the ability of the United States to promote these rights overseas. U.S. ratification would better position the United States to exercise its leadership role to guide and encourage other countries to ratify and implement the Convention. Leading by example, in what we do and what we say, is a hallmark of America's principles and policies. Any opportunity that we have to positively influence the practice of other countries in respecting the rights of persons with disabilities helps to create a world in which Americans with disabilities can promote American values by pursuing travel, work and study abroad unhindered by the barriers they currently face. Such opportunities can only be enhanced by our ratification of the Disabilities Convention.

In sum, ratification is good for America and good for Americans. It will provide the United States with a critical platform from which to urge other countries to improve equality of individuals with disabilities, including Americans who travel or live abroad, and including children with disabilities, whose plight is particularly neglected in many parts of the world. The transformation which paved the way in the United States for children with disabilities to grow up with their families, go to school, and live as full participants in society has simply not taken place in much of the rest of the world. To promote the rights of individuals with disabilities overseas more effectively, the United States can use its ratification of the Convention as a vehicle to encourage, guide, pressure, and persuade other States Parties to implement better disability standards and provide greater disability rights protection in their countries, including to Americans. Ratification is a win-win, as protections in the United States would not need to be changed, and joining would not affect U.S. sovereignty. Ratification would open up opportunities for U.S. citizens, organizations, and businesses abroad, including our disabled youth, who rightly expect to be full participants in shaping our world's future.

Ratification of the Disabilities Convention would mark a momentous step toward the protection and advancement of the rights of persons with disabilities wherever they may live. It is a significant step for both its profound impact on our diplomatic leadership and for its tangible benefits to everyday Americans. Finally, in keeping with America's longstanding bipartisan tradition of support for the rights of disabled people, ratification of the Disabilities Convention is the right and just thing to do.

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The Senate Committee Report recommending ratification also included the testimony and prepared statement of Eve Hill, Senior Counselor to the Assistant Attorney General for Civil Rights at the U.S. Department of Justice. Ms. Hill's prepared statement, supporting U.S. ratification of the Disabilities Convention with the reservations, understanding, and declaration recommended by the executive branch of the U.S. government, is excerpted below.

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We in the United States are world leaders in the effort to protect the rights of persons with disabilities. Our early initiatives to protect disability rights and the subsequent decades-long effort to enhance disability rights have resulted in a panoply of American laws that protect the rights of persons with disabilities to a greater extent than any other country on the globe. Where many other countries approach disability rights from an aspirational vantage, we match our legislation with concrete, effective enforcement mechanisms that have led to visible, notable changes in our society in our lifetimes. Curb cuts, ramps, accessible parking spaces, American Sign Language interpreters, service animals—these are just a few of the groundbreaking changes that have swept through our society thanks to our vigorous enforcement of disability-rights laws.

While we in the United States too often take the tremendous advances in disability rights for granted, much work remains to be done and the Department of Justice and other Federal agencies are actively addressing discrimination on the basis of disability arising in a variety of arenas. These implementation efforts are driven by domestic law and practice and this approach would not change with the ratification of the Disabilities Convention. The Americans with Disabilities Act (ADA) addresses the disability nondiscrimination obligations of State and local governmental entities, including educational institutions, local government offices, parks, libraries, hospitals, nursing homes, and more, and by private entities, including stores, restaurants, recreational facilities, banks, and other providers of goods and services. The ADA also prohibits disability discrimination by employers with 15 or more employees. Our disability-rights laws affect more than 6 million businesses and nonprofit agencies, 80,000 units of State and local government, and 54 million people with disabilities. In addition, our Federal government has been committed to disability rights in its own programs and services, as well as those it funds, for decades through the Rehabilitation Act of 1973, the Architectural Barriers Act, and many other Federal laws.

Along with the Department of Justice, a panoply of other Federal agencies and entities are engaged in efforts to address discrimination on the basis of disability, including the Department of Housing and Urban Development, the Department of Education, the Department of Veterans Affairs, the Department of Health and Human Services, the Department of Transportation, the Federal Communications Commission, the U.S. Access Board, and the Equal Employment Opportunity Commission (EEOC), each of which takes on significant responsibilities for the enforcement of our domestic disability-rights laws.

The Disabilities Convention is firmly grounded in, and animated by, the principles underlying U.S. disabilities laws, including the Rehabilitation Act of 1973, the ADA, and the Individuals with Disabilities Education Act. Therefore, ratifying the Disabilities Convention will

not require new legislation and will not create any new rights, so long as it moves forward with the recommended Reservations, Understandings, and Declaration (or RUDs). The Convention was finalized in December 2006 after several years of drafting and negotiations, during which a U.S. delegation played an active role and joined in the consensus adoption of the Convention. The influence of U.S. disability law on the Disabilities Convention is apparent in the way the Convention mirrors our robust and well-developed U.S. disability-rights legislation. The Disabilities Convention follows the core principles of U.S. disability-rights laws— equality of treatment and nondiscrimination, with an emphasis throughout the Convention of rights provided ''on an equal basis with others.'' It incorporates concepts central to U.S. disability-rights law, such as independent living, inclusive education, and reasonable accommodation, limited, as it is in U.S. law, by the qualification that an accommodation need not be made if it entails undue burden or expense.

The administration has proposed that the Senate consider a package of three Reservations, five Understandings, and one Declaration that will allow the United States to be in full compliance with the Convention without any changes to U.S. law. These are detailed in the transmittal package, but I would like to speak to three of them today.

First, the package includes a federalism reservation, similar to the federalism RUDs that were taken with the ratification of the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD). This federalism reservation would limit the obligations of the United States in areas covered by State and local government jurisdiction to measures appropriate to the Federal system, maintaining the current allocation of authority between the Federal Government and the 50 States. While we have a significant network of Federal disability laws, some treaty articles would be primarily implemented under State laws, such as Article 12, which addresses guardianship, and Article 14, which addresses civil commitment. In most cases, State and local laws and practices meet or exceed the requirements of Federal law and thus the Convention. In instances governed primarily by State law where some State and local protections may be less robust than the Convention would require, such as regarding Article 12(4), which addresses safeguards in determinations of legal capacity, the federalism reservation would preserve the existing balance of authority between the Federal Government and the States. As we have observed, led by the advances at the Federal level, the dominant trend in State and local disability rights laws has been toward improvement and modernization. Thus, while the adoption of a federalism reservation will allow us to adopt the Disabilities Convention without any new legislation, it in no way will impede us from continuing forward progress in disability rights protection.

I would also like to underscore the recommended reservation on private conduct. Similar to a reservation taken in treaties already ratified, such as the ICCPR and CERD, the private-conduct reservation is intended to ensure that regulation of the conduct of private parties under the Convention, including businesses and nongovernmental organizations, is coextensive with such regulation under existing domestic law. United States law extensively governs significant areas of nongovernmental activity, such as disability discrimination by public accommodations, transport carriers, communications networks, and employers. At the same time, the U.S. Constitution and laws recognize a zone of private activity that is not extensively governed by Federal or State government, and, in some cases, expressly enjoys constitutional protection. This important reservation, therefore, would limit the treaty obligations undertaken by the United States respecting regulation of private conduct to be coextensive with such regulation under the Constitution and domestic laws of the United States. As the EEOC has

separately confirmed to the committee, with the proposed RUD package, the United States will rely on existing law to fully comply with the Disabilities Convention. …

Third, I also would like to address the proposed non-self-executing Declaration which would make it clear that the Convention could not be directly enforced by U.S. courts and would not give rise to individually enforceable rights. This is consistent with our treaty practice under the ICCPR, CERD, and the Convention Against Torture. With this Declaration and the other Reservations and Understandings, the United States would be able to implement its obligations under the Disabilities Convention using the existing network of laws and Federal enforcement machinery that afford protection and guarantees of nondiscrimination to persons with disabilities. As such, no new legislation would be required to ratify and implement the Convention.

With the ratification of the Disabilities Convention, we will greatly enhance our capacity to influence other countries to move toward the vigorous, effective standards we have set at home. In turn, as other countries move forward, American veterans, business people, retirees, students, tourists, Active-Duty military, and others will be able to enjoy the same kinds of accessibility and nondiscrimination overseas that they currently enjoy in the United States. Thus, with the ratification of the Disabilities Convention, we will level the playing field for American businesses that are already complying with accessibility standards and provide new opportunities for the export of accessible technology.

Protection of the rights of persons with disabilities has historically been grounded in bipartisan support and the principles anchoring the Convention find clear expression in our own domestic law. We therefore urge that this committee give prompt and favorable consideration to this Convention, and that the full Senate give its advice and consent to its ratification, subject to the administration's proposed reservations, understandings, and declaration.

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The Senate Committee Report also includes responses by Ms. Heumann and Ms. Hill to the numerous questions submitted by members of the committee. A few of those questions and responses appear below. The complete responses are available in Annex 3 to the Report, beginning at page 129.

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RESPONSES OF JUDITH HEUMANN TO QUESTIONS SUBMITTED BY SENATOR JOHN F. KERRY

Question. Article 46, paragraph 1 of the Convention states that ''[r]eservations incompatible with the object and purpose of the present Convention shall not be permitted.'' Does the administration believe that the three reservations it has proposed are compatible with the object and purpose of the Disabilities Convention?

Answer. Yes. The United States has a comprehensive network of existing Federal and State disability laws and enforcement mechanisms. In the majority of cases, existing Federal and State law meet or exceed the requirements of the Convention. The proposed reservations make it clear that, in the narrow circumstances that federalism or private conduct concerns are

implicated, the United States has limited its obligations on the international plane to those that can be implemented under existing law appropriate to our Federal structure.

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RESPONSES OF EVE HILL TO QUESTIONS SUBMITTED BY SENATOR JOHN F. KERRY

Question. In his written testimony submitted to the Committee, Dr. Michael Farris asserts that if the United States were to become party to the Disabilities Convention, it would ''require [ ] radical changes to American law.'' Does the administration agree with this assertion?

Answer. No. With the proposed reservations, understandings, and declaration, the United States would be able to implement its obligations under the Disabilities Convention using the existing laws, regulations, and Federal enforcement mechanisms that afford protection and guarantees of nondiscrimination to persons with disabilities. Therefore, no new legislation, regulation, or enforcement mechanisms would be required to ratify and implement the Disabilities Convention.

Question. In his written testimony submitted to the Committee, Dr. Michael Farris asserts that, ''[t]oday, under the IDEA parents get to decide what they think is best for their child—including the right to walk away from government services and provide private or home education. Under the UNCRPD, that right is supplanted with the rule announced by Professor van Buren. Government officials have the authority to substitute their views for the views of parents as well as the views of the child as to what is best. If the parents think that private schools are best for their child, the UNCRPD gives the government the authority and the legal duty to override that judgment and keep the child in the government-approved program that the officials think is best for the child.'' Does the administration agree with this interpretation of the Convention?

Answer. No. In light of the federalism and private conduct reservations and the nondiscrimination understanding, no changes to Federal, State or local law regarding the ability of parents in the United States to make decisions about how to raise and educate their children would be required as a result of ratification. Furthermore, the recommended understanding on economic, social, and cultural rights makes clear that in the context of the education of a disabled child, the obligation of the United States under the Convention with regard to consideration of the principle of ''best interests'' is limited to nondiscrimination.

Question. In his written testimony submitted to the Committee, Dr. Michael Farris asserts that, ''[a]ny and all parental rights provisions in state education laws will be void by the direct application of Article 7 of this treaty. Government—not parents—has the authority to decide what is best for children.'' Does the administration agree with this assertion?

Answer. No. Parental rights provisions in Federal and State education laws will not be voided by Article 7 of the Disabilities Convention. In light of the federalism and private conduct reservations and the nondiscrimination understanding, no changes to Federal, State or local law regarding the ability of parents in the United States to make decisions about how to raise and educate their children would be required as a result of ratification.

Question. In his written testimony submitted to the Committee, Dr. Michael Farris asserts that, ''[e]ven with the presumption of the non-self-executing nature of the treaty, if the Senate ratifies this treaty, Congress will have the duty to revise the IDEA to comply with the provisions of the UNCRPD. Therefore, unless we intend to breach our international legal obligations,

Congress will be required to modify the IDEA to ensure that government decisionmakers, and not parents, have the final say as to what they believe is best for a child.'' Does the administration agree with this assertion?

Answer. No. Ratification of the Disabilities Convention will not require Congress to modify existing law to provide that government decisionmakers, and not parents, have the final say regarding the best interests of a child. With the proposed package of reservations, understandings, and a declaration, ratification of the Disabilities Convention will not require any revision of the Individuals with Disabilities Education Act or any other U.S. law or regulation. In light of the federalism and private conduct reservations and the nondiscrimination understanding, no changes to Federal, State or local law regarding the ability of parents in the United States to make decisions about how to raise and educate their children would be required as a result of ratification.

In addition, the non-self-executing declaration is not a ''presumption'' but, as stated in the Secretary's Report (Treaty Doc. 112–7, pp. 3 and 82), provides that the Convention would not be directly enforceable by U.S. courts or itself give rise to individually enforceable rights. The Supreme Court treated a non-self-executing declaration as dispositive in the case of *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728, 735 (2004).

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RESPONSES AND SUPPLEMENTAL RESPONSES OF JUDITH HEUMANN AND EVE HILL TO QUESTIONS SUBMITTED BY SENATOR RICHARD G. LUGAR

Question #1. If the United States became party to the Convention, would the Convention's obligations apply to conduct of the United States that occurs outside the territory of the United States?

Answer. We do not read the Convention's obligations to apply to U.S. conduct outside the United States, except insofar as the Convention reaffirms such existing extraterritorial obligations as in Article 11. The Convention additionally envisions international cooperation measures under Article 32 (which addresses international cooperation programs intended to assist foreign governments and individuals with disabilities abroad, which the United States has already established through USAID and the State Department). U.S. ratification, moreover, would have positive effects outside the United States. For example, it would give the United States a critical tool in its bilateral and multilateral work to promote the rights of persons with disabilities around the world, and it would enable the United States to use treaty mechanisms (such as the Conference of States Parties) to exchange best practices and to guide other States Parties in their adoption of laws, policies, and practices to implement the Convention.

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Question #3. Subsection (w) of the convention's preamble states ''Realizing that the individual, having duties to other individuals and to the community to which he or she belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the International Bill of Human Rights.''

• What is the ''International Bill of Human Rights'' referred to in this subsection?

• Does the administration believe that States have a legal obligation to recognize the rights contained in the ''International Bill of Human Rights?'' If so, what is the source of this obligation?

• Does the administration interpret the convention to impose legal obligations on individuals to strive for the promotion and observance of the rights recognized in the International Bill of Human Rights?
• Does the administration interpret any other body of international law, including customary international law, to impose legal obligations on individuals to strive for the promotion and observance of the rights recognized in the International Bill of Human Rights?

Answer. The International Bill of Rights refers to the Universal Declaration of Human Rights (from which the quoted language in Question 3 is drawn in part), which is not a legally binding instrument; the International Covenant on Civil and Political Rights, to which the United States is a party; and the International Covenant on Economic, Social and Cultural Rights, which the United States has signed but not ratified. States Parties to the legally binding instruments have an obligation to recognize the rights contained in such instruments, as ratified by them. Neither the Disabilities Convention nor any other body of international law imposes legal obligations on individuals to strive for the promotion and observance of the rights recognized in the International Bill of Human Rights.

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Question #5. Article 4 provides that ''States parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability.'' What are the particular ''human rights and fundamental freedoms'' to which the obligations in this article apply?

Answer. Article 4 imposes an obligation of nondiscrimination on the basis of disability with respect to the human rights and fundamental freedoms set out in human rights treaties ratified by the United States. These include the International Covenant on Civil and Political Rights, the Convention for the Elimination of All Forms of Racial Discrimination, and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

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On December 4, 2012, the Senate voted 61 in favor and 38 against the resolution of advice and consent to ratification of the Disabilities Convention, falling short of the two-thirds majority needed for ratification of a treaty. 158 Cong. Rec. S7379.

b. Human Rights Council

On March 1, 2012, at the 19th Session of the Human Rights Council, the United States submitted a statement for the record in response to the release of a report by the Office of the High Commissioner for Human Rights ("OHCHR") on participation in political and public life by persons with disabilities. The U.S. statement, available at *http://geneva.usmission.gov/2012/03/01/u-s-committed-to-ensuring-full-participation-of-persons-with-disabilities-in-public-life/*, expressed the U.S. commitment to ensuring full participation of persons with disabilities in public life and is excerpted below.

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The United States welcomes the submission of the thematic study by the Office of the High Commissioner for Human Rights, which highlights important issues affecting participation in political and public life by persons with disabilities. The United States is committed to ensuring that persons with disabilities have equal opportunities to participate in political and public affairs, and has a robust legislative framework to support full enjoyment of these rights.

Multiple U.S. laws protect the rights to political participation for persons with disabilities.

From the Voting Accessibility for the Elderly and Handicapped Act of 1984, through the National Voter Registration Act of 1993 (known as the "Motor Voter Act"), the Help America Vote Act ("HAVA") of 2002, and the foundational antidiscrimination protections offered by Title II of the Americans with Disabilities Act and the Rehabilitation Act of 1973, the U.S. has adopted a comprehensive approach to making political participation accessible.

The U.S. government provides technical assistance to and monitors local governments to ensure the full realization of political rights of persons with disabilities and takes strong enforcement actions when individuals are denied their rights. The federal government also works collaboratively with civil society to provide training and tools so that consumers and advocates can monitor local governmental actions and contribute to ensuring that local governmental entities fully recognize the rights of persons with disabilities.

U.S. laws require the physical accessibility of all venues for civic participation, including polling places. The process of casting ballots also must be accessible.

Our laws require that public entities afford all persons effective communication, so that persons with disabilities can fully participate in public affairs without barriers. U.S. laws further mandate that election officials and other governmental workers should be trained in the electoral process and the rights of persons with disabilities so that they can assist individuals with all types of disabilities, including psycho-social, sensory, developmental, and physical, to participate in the electoral process.

Since 1999, the Justice Department's Project Civic Access has signed agreements with 193 local governments throughout the country to ensure full access to civic life for over 4 million persons with disabilities.

These agreements, which were pursued after problems with compliance were raised, recognize that non-discriminatory access to public programs and facilities is a civil right, and that individuals with disabilities must have the opportunity to participate in local government programs, services and activities on an equal basis with others.

In conclusion, the United States remains deeply committed to ensuring that all individuals with disabilities have the opportunity for effective and full participation in all aspects of political and public life. We welcome the opportunity to discuss how the international community can better collaborate to assist States in fulfilling their obligations to promote, protect and ensure the rights of persons with disabilities in the arena of political and public life.

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C. CHILDREN

1. Optional Protocols to the Convention on the Rights of the Child

In December 2012, the United States responded to the Committee on the Rights of the Child's List of issues in advance of the January 2013 appearance by the United States before the Committee to discuss its second periodic reports on the Optional Protocols which were submitted to the Committee in January 2010. The written replies of the United States to the Committee relating to the Optional Protocol on the Involvement of Children in Armed Conflict and to the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography are available at *www.state.gov/j/drl/rls/201652.htm* and *www.state.gov/j/drl/rls/201651.htm*, respectively.

2. Children and Armed Conflict

a. Security Council

On September 19, 2012, Ambassador DeLaurentis addressed the Security Council during a debate on children and armed conflict. His remarks, excerpted below and available at *http://usun.state.gov/briefing/statements/197944.htm*, respond to the Secretary General's latest report on the subject of children in armed conflict.

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In 2011, the SRSG [Special Representative of the Secretary General] signed three Action plans with the Government of Chad and two armed groups in the Central African Republic. Thus far in 2012, the United Nations has signed four Action Plans, including with South Sudan, Burma, and two in Somalia. And the Democratic Republic of the Congo has submitted a draft Action Plan on child soldiering, which is being reviewed by the SRSG's office. These Action Plans are a proven tool for promoting child protection and rehabilitation.

There were other signs of progress as well. The Maoist party in Nepal was delisted from the Secretary-General's report after it ended the recruitment and use of child soldiers and completed its Action Plan commitments to suspend payments, cease providing housing, and encourage disqualified minors to register for reintegration programs. The delisting of the Inya Bharathi faction was a major step in resolving the last elements of child soldiering in Sri Lanka, although more remains to be done. Discussions on Action Plans with armed groups also made progress. In Afghanistan, the Ministries of Interior and Defense undertook initiatives to prevent the recruitment and exploitation of children. These are real and tangible results, and we commend the SRSG's office for its success in significantly improving the situation of children in these countries.

And yet, much of the Secretary-General's report documents many and continuing instances of appalling abuses against children. The Lord's Resistance Army, for example, continued its barbaric operations in several African countries, abducting 101 children in the

Central African Republic and carrying out 211 attacks in the Democratic Republic of the Congo. Many of these attacks used child soldiers, and they resulted in abduction of 124 children in a portion of the DRC's Orientale Province alone. The report documented almost a thousand cases of child recruitment in Somalia, mainly by Al-Shabaab, and noted the registration of 7,800 child casualties of conflict in the three main hospitals in Mogadishu.

The carnage committed by Assad and the clique around him is particularly distressing. As the report states, "Children as young as nine years of age were victims of killing and maiming, arbitrary arrest, detention, torture and ill-treatment, including sexual violence, and use as human shields. Schools have been regularly raided and used as military bases and detention centers." These atrocities, including the torturing of young children, continue with alarming frequency and serve as further evidence that this Council should do more to support humanitarian assistance and political transition in Syria.

As we look to the future of the CAAC process, we should reflect on what more we can do to better protect children in areas of armed conflict. We agree with the Secretary General that we must find a better way to affect the conduct of "persistent perpetrators." Since most government forces have signed Action Plans or given indications that they will do so, our main concern should be with non-state armed groups.

In addressing these armed groups, we must consider two issues. First, because national governments have the primary responsibility to protect children in their territory, the United Nations must work with armed groups only in close cooperation with national authorities. The resolution we adopted a few minutes ago correctly reaffirms this position, which the Council emphasized in its Resolution 1998 last year.

Second, the United States strongly believes that the Security Council should consider a broader range of options to increase pressure on persistent perpetrators of violations and abuses committed against children in situations of armed conflict. At this time, a free-standing CAAC sanctions regime would not seem to address the need for better tools to deal with persistent perpetrators. As the Secretary-General documents, four country-specific sanctions committees with designation criteria on violations and abuses against children already exist. However, we encourage the SRSG to provide a report to the Working Group evaluating the range of possibilities in this area, with a view to facilitating a report by the Working Group to the Council. A thoughtful analysis of different proposals on how to promote accountability would help bring an end to the cycle of violence that plagues children living in conflict-affected areas where persistent perpetrators operate.

Our work to date to remove children from the scourge of armed conflict has seen great progress through the implementation of Action Plans and focused work to educate armed groups. But we must still summon the resolve to hold accountable the most recalcitrant perpetrators and redouble our commitment to end impunity.

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b. Human Rights Council

On September 10, 2012, at the 21st session of the Human Rights Council, Ambassador Donahoe delivered a statement for the U.S. delegation to an interactive dialogue with the UN Secretary General's special representative on children and armed conflict. The statement, excerpted below and available at *http://geneva.usmission.gov/2012/09/11/successes-of-*

children-and-armed-conflict-process-include-the-freeing-of-over-10000-child-soldiers/ emphasized the successes in addressing the issue of child soldiers.

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The United States thanks Special Representative Zerrougi for her comments and also wishes to recognize former Special Representative Coomaraswamy for her excellent report and her tireless efforts to protect children from the devastating effects of armed conflict. The United States is deeply committed to protecting children from violence, exploitation, abuse, and the terrible suffering caused by armed conflict.

We greatly appreciate the success achieved by the Children and Armed Conflict process over the last six years under former Special Representative Coomaraswamy, including the signing of numerous Action Plans, the freeing of over 10,000 child soldiers and the abolition of child soldiering by almost all national authorities, and the strengthening and expansion of monitoring and reporting mechanisms.

The SRSG's report notes that the Governments of Afghanistan, Chad, Somalia and South Sudan have now made child protection commitments to stop unlawful recruitment of children and to secure the release of those already unlawfully recruited into their armed forces. We are pleased that the Government of Burma has also signed an action plan to end the recruitment of children into its armed forces. We call on parties that have not signed an action plan to do so as soon as possible.

The United States is concerned about deeply disturbing information the Special Representative has presented regarding the use of explosive weapons by governments and non-state actors, which leads to unlawful killing and maiming of non-combatants and other civilians not directly participating in hostilities. It is also cowardly and unacceptable to use improvised explosive devices attacks on schools and hospitals in situations of armed conflict.

The March judgment of the International Criminal Court convicting Thomas Lubanga of the war crimes of conscripting and enlisting children under the age of 15 into the Congolese Forces and using them to participate actively in hostilities highlighted this issue of paramount international concern. The conviction puts perpetrators and would-be perpetrators of unlawful child soldier recruitment on notice that their crimes will not go unpunished. More, however, needs to be done.

The United States would like to engage with incoming Special Representative Zerrougi and ask for her perspective on how we can improve the situation of children in armed conflict. We would like to solicit her views on how best to seek action against persistent perpetrators of offenses and abuses against children in armed conflict. Ambassador de La Sablière, the former French Permanent Representative, noted in his report on the Children and Armed Conflict process that this is the next important issue for those working in this area. We look forward to working with SRSG Zerrougi and all who are committed to this process to address the issue more effectively.

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c. Child Soldiers Prevention Act

Consistent with the Child Soldiers Prevention Act of 2008 ("CSPA"), Title IV of Public Law 110-457, the State Department's 2012 Trafficking in Persons report listed the foreign governments that have violated the standards under the CSPA, *i.e.* governments of countries that have been "clearly identified" during the previous year as "having governmental armed forces or government-supported armed groups, including paramilitaries, militias, or civil defense forces, that recruit and use child soldiers," as defined in the CSPA. Those so identified in the 2012 report are the governments of Burma, Libya, Democratic Republic of the Congo, Somalia, South Sudan, Sudan, and Yemen. The full text of the TIP report is available at *www.state.gov/j/tip/rls/tiprpt/2012/*. For additional discussion of the TIP report and related issues, see Chapter 3.B.3.

Absent further action by the President, the foreign governments designated in accordance with the CSPA are subject to restrictions applicable to certain security assistance and licenses for direct commercial sales of military equipment. In a memorandum for the Secretary of State dated September 28, 2012, President Obama determined, "that it is in the national interest of the United States to waive the application of the prohibition in section 404(a) of the CSPA with respect to Libya, South Sudan, and Yemen," and that, with respect to the Democratic Republic of the Congo, it is in the national interest that the prohibition should be waived in part, "to allow for continued provision of International Military Education and Training and non-lethal Excess Defense Articles, and issuance of licenses for direct commercial sales of military equipment." 77 Fed. Reg. 61,509 (Oct. 10, 2012).

3. Resolutions on Rights of the Child

a. Human Rights Council

On March 23, 2012, at the 19th session of the HRC, the United States joined consensus on the resolution on the rights of the child. U.N. Doc. A/HRC/RES/19/37. The U.S. explanation of position appears below.

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The United States is extremely pleased to join consensus on the Rights of the Child resolution today. We are committed to advance the well-being and the protection of all children around the world, including through foreign assistance programs. This omnibus resolution highlights the important issue of respecting and protecting children in almost every aspect of life, and calls on States to ensure that a child's human rights are safeguarded, including children with disabilities, migrant children, and children affected by armed conflict. We note with regard to children in armed conflict the importance of the Optional Protocol to the Convention on the Rights of the Child on the subject. While some States have endorsed the non-binding Paris Principles regarding children affected by armed conflict, we note that this set of principles does not

necessarily reflect consensus and is not a UN document. Respecting the child who is abducted, we believe that it is in the child's best interest to be safely returned to the country that was his or her habitual residence prior to the abduction.

We would like to state that we join consensus on this resolution today with the express understanding that it does not imply that States must become parties to instruments to which they are not a party or implement obligations under human rights instruments to which they are not a party, and we do not recognize any change in the current state of treaty or customary international law. Further we understand the resolution's reaffirmation of prior documents to apply to those who affirmed them initially. Further, the resolution also calls upon States to ensure that life imprisonment without the possibility of release is not imposed on individuals under the age of 18. This requirement is not an obligation that customary international law imposes on states; rather, it reflects treaty obligations that the United States has not undertaken.

The United States looks forward to continued engagement and discussion with the co-sponsors and other delegations this year.

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b. General Assembly

On October 18, 2012, the United States participated in a UN Third Committee discussion on the rights of the child. Kelly L. Razzouk, U.S. Advisor to the UN, delivered remarks, excerpted below, and available at *http://usun.state.gov/briefing/statements/199336.htm*.

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…All children around the world deserve to grow up in an environment where their dignity and human rights are respected. We thank the many UN bodies and independent experts who contribute to the promotion of the rights of the child. Yet despite these efforts, all over the world, children still face serious threats to their human rights. Though we have made some gains, still in 2012, children need protection from violence, abuse, and exploitation.

Our thoughts go out today to 14-year-old Malala Yousufzai, who spoke out for the right of all Pakistanis, especially girls, to an education. In response to her bravery in standing up for the rights of herself and others, she was brutally shot by extremist thugs who believe girls do not have the right to an education. This violent attack reminds us of the challenges that girls are confronted with every day, ranging from lack of opportunities for an education, to lack of basic health care, food, and, nutrition, to discrimination and violence—all solely due to their gender.

Girls also need protection from child marriage, and we believe that equal access to education is one part of the solution. Experience shows us that elevating the status of girls is critical to achieving prosperity, stability, and security. Doing so is not only the right thing to do—it is the smart thing to do. An estimated 10 million girls are married every year before they reach the age of 18, many at ages even younger. Early marriage threatens girls' health and education, and robs them of the opportunity to reach their full potential. We are concerned, for example, by findings of the Special Rapporteur on Iran documenting marriages of Iranian girls as young as nine years old. One of the best ways to tackle the practice of early marriage is to enroll

and keep adolescent girls in school. And yet, far too many girls in the developing world fail to make the transition from primary to secondary education.

The United States is committed to addressing and preventing early or forced marriage, and we will intensify our diplomacy and development efforts to end this practice, including by promoting girls' education.

A week ago, on October 11, Secretary Clinton joined in celebrating the first-ever United Nations International Day of the Girl Child. There, she announced a new U.S. initiative to address this threat to girls and global development. The State Department will work with the private sector to launch new programs to promote girls education and will also now report on child marriage in its annual country reports on human rights practices. The UN and private foundations are stepping forward in meaningful and powerful ways—The UN Population Fund and the Ford, MasterCard, and MacArthur Foundations have pledged a total of $94 million to the cause of girls' education and to addressing and preventing child marriage. We urge our international colleagues here today to make a similar commitment.

This year's rights of the child resolution has a special focus on indigenous children. The United States is home to over two million Native Americans, and we would like to thank the Secretary General for his report that addresses indigenous children. We are committed to working with tribes, individuals, and communities to address the many challenges indigenous children face, including in education, health, protection from violence and discrimination, and preservation of their cultural heritage. The United States firmly believes that a strong cultural identity provides indigenous children with a source of stability and strength.

The United States commends the Secretary General's Special Representative on Violence against Children for her tremendous work and the goals she has set for the future. We strongly agree with the Special Representative that reducing violence against children is crucial to supporting economic development. We appreciate the work of the Special Representative in addressing issues across the full life cycle of children, starting with early childhood care and leading to fulfillment of a quality education. We will continue to invest in the protection of vulnerable children in order allow them to achieve their full potential.

Finally, we are compelled to address the tragic situation of the innocent children in Syria. Daily, Syrian children are the victims of killing and maiming, arbitrary arrest, detention, torture and ill-treatment, including sexual violence, and some have even been used as human shields. The increasing frequency of these atrocities over the past 18 months is particularly alarming, and is further evidence that the international community must do more to support humanitarian assistance and political transition in Syria.

The United States has a deep, unwavering commitment to promoting and protecting the rights of children in our own country and around the world. We will continue to work with the international community to ensure that human rights are a reality for all of our children.

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D. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

1. Health and Education

On June 19, 2012, at the UN Human Rights Council's 20th Session, the United States delivered a statement as part of a clustered interactive dialogue with the special rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the special rapporteur on the right to education. Margaret Wang delivered the statement for the U.S. delegation, which is excerpted below and available at *http://geneva.usmission.gov/2012/06/19/interactive-dialogue-on-the-right-to-physical-and-mental-health-and-education/*.

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The United States welcomes the focus on occupational health in the latest report from the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health. While we may disagree with some recommendations and numerous references to human rights law in this report, we fully agree with the Special Rapporteur on the importance of occupational health. Since 1970, when our Congress enacted the Occupational Health and Safety Act, we have fought for the ability of workers to return home to their families, safe and unharmed, each day.

The primary focus when protecting employees' health and safety should be prevention. We believe that it is the responsibility of employers to find and correct safety and health problems in their facilities. Additionally, they should try to eliminate or reduce hazards by making feasible changes in working conditions such as switching to safer chemicals, enclosing processes to trap harmful fumes, and using ventilation systems to clean the air. When risks remain, employers should provide personal protective equipment such as masks, gloves, or earplugs to their employees free of cost.

When employees are faced with unsafe or harmful working conditions, they should be able to seek assistance from their government without fear of retribution and with the expectation that their claims will be investigated in a timely and transparent manner. When governments confirm that unsafe conditions exist they should take appropriate action in response. Such actions may include issuing citations, levying fines, and ultimately closing habitual offenders.

These ideas have worldwide relevance. Every government can—and should—protect its citizens, including in the workplace.

The United States also welcomes the report of the Special Rapporteur on the Right to Education, which highlights the importance of quality when discussing the right to education and its ability to create a better world.

Today, more than ever, a world-class education is a prerequisite for success. We recognize how important it is that every student graduate from school well-prepared for college and a career. A world-class education is also a moral imperative—the key to securing a more equal, fair, and just society.

A cornerstone of a quality education is literacy. In the United States, we have a saying: reading is fundamental. An individual's opportunity to master reading skills impacts their enjoyment of their human rights – from petitioning their government to reading blogs on the Internet, from understanding the side-effects of a pharmaceutical drug, to taking on a contract for work. Human rights education begins with literacy, and we will not remain true to our highest ideals unless we do a far better job of educating each one of our sons and daughters.

We as governments and the international community must reaffirm our commitment to provide quality education to all of our citizens—regardless of socio-economic background, race, religion, physical or mental ability, and gender. As we strive to meet the Millennium Development Goal of universal enrollment in primary education, we must remember that the ultimate goal is not merely attendance but the attainment of knowledge.

We appreciate the report's praise for the United States as one of the first countries to emphasize quality education. In this context, we wish to clarify that our 2001 law, the No Child Left Behind Act, which the report mentions, does not set national standards or assessments. Rather, No Child Left Behind operates consistently with our federalism, where many decisions concerning education are made at the state and local levels.

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2. Food

a. UN Convention on Food Assistance

See discussion in Chapter 11.G.3.

b. Human Rights Council resolution

At the 19th session of the Human Rights Council, the United States joined consensus on a resolution on the right to food while expressing concerns about some aspects of the resolution, including its language regarding trade and references to a continuing world food crisis. U.N. Doc. A/HRC/RES/19/7. Excerpts of the U.S. explanation of position on the resolution appear below and the full explanation of position is available at *http://geneva.usmission.gov/2012/03/22/us-joins-consensus-on-hrc-resolution-on-the-right-to-food/*.

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Improving global food security is a key foreign policy objective of the Obama Administration. The U.S. Government has launched the Feed the Future initiative, and has pledged at least $3.5 billion over three years to help our partner countries improve the entire agriculture value chain—from fields to markets to homes. And that is the central pillar of our commitment to sustainable solutions to hunger.

The United States is committed to accelerating progress towards the Millennium Development Goals, including by investing in country plans to boost agricultural development as a means for achieving the hunger and poverty-related MDG—reducing by half the proportion of people who suffer from hunger and who live in extreme poverty by 2015.

With respect to this resolution's statements regarding trade and trade negotiations, the United States reiterates that trade negotiations are beyond both the subject-matter and the expertise of the Human Rights Council and, hence, that such statements are inappropriate for the Council. The United States is committed to international trade liberalization and to achieving an ambitious and balanced conclusion to the World Trade Organization's (WTO) Doha Round negotiations. By joining consensus on this resolution, we highlight that opening markets through international trade agreements and attaining the goal of the Doha Round to establish a market-oriented trading system, which is also noted in the FAO's Voluntary Right to Food GUIDELINE 19, can play a major role in the promotion of economic development, and the alleviation of poverty and improving food security at the national level. At the same time, we wish to clarify that this resolution will in no way undermine or modify the commitments of the United States or any other government to existing trade agreements or the mandates of on-going trade negotiations.

Similarly, the United States wishes to reiterate its view that the implementation of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) supports comprehensive approaches to food security by encouraging policies that will enable countries to use tools and incentives, including biotechnology, that increase agricultural productivity. By joining consensus on this resolution, we support countries' continued implementation of the TRIPS Agreement, which provides for patent and plant variety protection systems that generate many benefits for researchers, producers, consumers, and society, in the drive to promote global food security.

This resolution reiterates previous language on a continuing world food crisis. Whereas we are experiencing a period of food and commodity price volatility in some parts of the world, we, along with many other members of the world community, do not believe we are currently in a world food crisis. This has been reinforced by such UN bodies as the Food and Agricultural Organization (FAO), which have issued warnings about high food prices and price volatility but have made clear that the current situation is not a world food crisis. Furthermore, while the resolution as drafted identifies a number of factors that contribute to food insecurity, it omits the very significant and undisputed role of conflict and lack of governance in causing regional food insecurity.

We support the right of everyone to an adequate standard of living, including food, as recognized in the Universal Declaration of Human Rights. The United States is not a party to the International Covenant on Economic, Social and Cultural Rights, and joining consensus on this resolution does not recognize any change in the current state of conventional or customary international law regarding rights related to food. It is our objective to achieve a world where everyone has adequate access to food, but we do not treat the right to food as an enforceable obligation. We interpret this resolution's references to the right to food, with respect to States Parties to the aforementioned Covenant, in light of its Article 2(1), in which they undertake to take steps with a view to achieving progressively the full realization of economic, social, and cultural rights. We interpret this resolution's references to member States' obligations regarding the right to food as applicable to the extent they have assumed such obligations.

Furthermore, while we take note of the work of the Advisory Committee, including its work on the human rights of urban poor people, we believe that its work is duplicative and wasteful of other UN entities. Instead, we should be taking into account relevant authoritative UN outcome documents, such as the FAO's State of Food and Agriculture and State of Food Insecurity reports, and the Comprehensive Framework for Action of the Secretary General's High Level Task Force.

And while the United States has for the last decade been the world's largest food aid donor, we do not concur with any reading of this resolution that would suggest that states have particular extraterritorial obligations arising from a right to food. While we join this resolution's welcoming the work of the Committee on Economic, Social and Cultural Rights, including its General Comment No. 12, we note significant disagreements with some portions of its work and that General Comment. We interpret this resolution's reaffirmation of previous documents as applicable to the extent countries affirmed those documents in the first place.

We also reiterate our concern about unattributed statements of a technical or scientific nature in this resolution. The United States does not necessarily agree with such unattributed statements.

With all of these concerns in mind, the United States will not block consensus, given our support and leading role on the broader goal of food security worldwide.

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3. Water and Sanitation

a. Human Rights Council resolution

The United States joined consensus on the UN Human Rights Council resolution on "the human right to safe drinking water and sanitation" on September 27, 2012. U.N. Doc. A/HRC/RES/21/2. The U.S. explanation of position is excerpted below and available at *http://geneva.usmission.gov/2012/09/27/explanation-of-position-water-and-sanitation/*.

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The United States is pleased to join consensus today on the resolution, "The human right to safe drinking water and sanitation." We thank the co-sponsors for working with us to reach agreed language.

This resolution highlights the important global issue of ensuring access to safe drinking water and sanitation on a non-discriminatory basis. The United States takes domestic and international water and sanitation issues seriously, and strongly supports the goal of universal access to both of these resources. We likewise recognize the importance of meeting basic water needs to support physical and mental health, economic development, and peace and security.

The United States has a long standing commitment to international development and has put substantial resources behind that commitment. In a March 2012 speech on World Water Day, Secretary Clinton announced the implementation of the U.S. Water Partnership, which aims to improve water security around the world by utilizing U.S.-based knowledge, expertise, and resources. She noted that, "We believe this Water Partnership will help map out our route to a

more water secure world: a world where no one dies from water-related diseases; where water does not impede social or economic development; and where no war is ever fought over water."

We would like to state that we join consensus on this resolution today and read this resolution's references to the right to safe drinking water and sanitation in accordance with our July 27, 2011 statement in New York at the UNGA plenary meeting and our September 29, 2011 and September 30, 2010 statements here in Geneva on safe drinking water and sanitation. Overall, while OP 11 calls on states to promote various laudable goals, the drafting of some parts of this paragraph remain too specific, while others too broad.

The United States believes this resolution should be read to provide the greatest possible flexibility to governments as they try to address the critical challenges involved in providing safe drinking water and sanitation to their citizens and attempt to implement the progressive realization of this right.

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b. Secretary Clinton's remarks on World Water Day

On March 22, 2012, Secretary Clinton delivered remarks at the State Department in honor of World Water Day. Her remarks, excerpted below and available at *www.state.gov/secretary/rm/2012/03/186640.htm*, highlight various efforts the U.S. has undertaken to ensure a safe water supply for people around the world, including new initiatives such as the U.S. Water Partnership ("USWP") and the U.S. Intelligence Community Assessment on Global Water Security.

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We are all here because we know ensuring that everyone has the clean water they need to live and thrive has to be a high priority for all of us. When I spoke on World Water Day two years ago, I talked about how water is clearly integral to many of our foreign policy goals. When nearly 2 million people die each year from preventable waterborne disease, clean water is critical if we're going to be talking about achieving our global health goals. Something as simple as better access to water and sanitation can improve the quality of life and reduce the disease burden for billions of people. When women and girls don't have to spend 200 million hours a day…seeking water, maybe they can go to school, maybe they can have more opportunities to help bring income in to the family. Reliable access to water is essential for feeding the hungry, running the industries that promote jobs, generating the energy that fuels national growth, and certainly, it is central when we think about how climate change will affect future generations.

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Since I signed our government-wide agreement with the World Bank last year, we have identified 30 activities where various U.S. agencies can work more closely with the World Bank and with each other to improve our individual efforts on water security. USAID and NASA are working together using earth science and satellite technology to analyze water security and other

water-related challenges in the Middle East, North Africa, and South Asia. We're working with the international community on the Sanitation and Water for All Partnership, which is designed to help countries where access to water remains a critical barrier to growth, to build political commitment and capacity to begin solving their own problems.

And USAID recently launched …the WASH for Life partnership with the Gates Foundation. It's a very fitting acronym – Water, Sanitation and Hygiene, or WASH. This project will identify, test, and scale up evidence-based approaches for delivering these services to people in some of the poorest regions of the world.

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…Last week, the UN announced that we met the Millennium Development Goal to cut in half the proportion of people living without access to safe drinking water, and we reached it almost four years ahead of schedule. There aren't many of the MDG's that we've actually achieved, so the fact that we've achieved this one is, I think, not only good in and of itself, but should serve as a spur on others as well. We know it not only translates into better lives, but it proves the international community, when focused and working together, can actually achieve goals that are set.

But with the news of this accomplishment, we're reminded about how much more we have yet to do. At this rate, nearly 700 million people will lack access to safe drinking water in 2015. And many countries still are not making enough progress reaching their most vulnerable populations, and those conditions will only deteriorate as populations grow and crowd into already overcrowded cities without adequate infrastructure.

Last year, I called on the intelligence community to conduct a global assessment of the impact water could have and was having on our national security. Today, the National Intelligence Council released the unclassified version of its report on Global Water Security. You can go online, read it for yourself, see how imperative clean water and access to water is to future peace, security, and prosperity, globally. I think it's fair to say the intelligence community's findings are sobering.

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Well, today, we are launching a new public-private partnership to help answer that call for leadership and to expand the impact of America's work on water. The U.S. Water Partnership exemplifies the unity of effort and expertise we will need to address these challenges over the coming years, and it advances our work in three critical ways.

First, it brings together a diverse range of partners from the private sector, the philanthropic community, the NGOs, academics, experts, and government. This approach will help catalyze new opportunities for cooperation. …

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Now, of course, while water is a global problem, solutions happen at the local level. So the second goal of the U.S. Water Partnership is to make all this American knowledge and expertise accessible. The U.S. Water Web Portal will provide a single entry point to our data, best practices, and training to help empower people taking on these problems in their own

communities. And it will help build international support for American approaches, technologies, companies, government agencies, our whole universe of experts standing ready to assist.

Finally, because this is a public-private venture, the U.S. Water Partnership will not depend on any one government agency or any one private organization to keep it going. The State Department is proud to be a founding partner, but we also hope that the partnership will spawn many new projects that may or may not involve us. The Water Partnership has built-in flexibility to address the world's changing water needs and to continue our work to find sustainable solutions.

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4. Housing

The United States provided an explanation of position at the 19th Session of the HRC on a resolution on adequate housing as a component of the right to an adequate standard of living in the context of disaster settings. The U.S. explanation of position is excerpted below and available at *http://geneva.usmission.gov/2012/03/22/housing/*.

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The United States is pleased to join consensus on this resolution that addresses housing in the context of disaster settings.

We welcome the focus on adequate housing in the context of disasters, and note that this is a challenge that affects all countries, including the United States. As Secretary of Housing and Urban Development Shaun Donovan said in May 2011 in New Orleans, "the storm may have been a natural disaster — but these disasters were very much man-made, depriving countless families of housing choices that… the law recognizes are the right of every American."

The United States has also responded to shelter needs generated by crises and disasters worldwide for nearly 50 years. During this period, millions of people around the world have received shelter from the U.S. Government as part of multi-sectoral humanitarian assistance programs. Increasingly, these programs have included initiatives to reduce disaster risk, reaffirm housing and land tenure rights, and accelerate the transition to recovery and reconstruction.

We join consensus on this resolution with the express understanding that it does not imply that States must become party to or implement obligations under human rights instruments that they are not party to. We interpret this resolution's reaffirmation of previous documents as applicable to the extent countries affirmed those documents in the first place. We consider the resolution's phrase "the right to adequate housing" to be synonymous with the longer phrase in its title, and with similar language in Article 25 of the Universal Declaration of Human Rights.

In the spirit of our shared policy objective, to ensure that adequate housing is available to all of our people, we are pleased to join consensus on this resolution today.

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E. OTHER ECONOMIC, SOCIAL, AND CULTURAL ISSUES

1. Hazardous waste

The United States provided an explanation of position on the resolution on the "Mandate of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and waste," on September 28, 2012. The explanation of the U.S. position, disassociating from consensus, is excerpted below and available in full at *http://geneva.usmission.gov/2012/09/28/u-s-explanation-of-position-hazardous-wastes/*.

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The United States recognizes the serious effects that improper management and disposal of hazardous substances and wastes may have on the effective enjoyment of human rights. We are committed to the proper management of such hazardous substances and wastes. However, a number of concerns arose during this negotiation that have not been satisfactorily addressed. We are disassociating from consensus on this resolution for the following reason.

We believe these critical issues are comprehensively addressed in other relevant conventions, bodies, and positions within the United Nations.

We are concerned particularly with some language in the resolution that implies an increase in the general scope of the mandate, already treated as broad. We reaffirm that, notwithstanding the unclear text, the mandate is strictly limited to the human rights implications that may be involved in the management and disposal of hazardous waste, which is the intent of the Human Rights Council, and we would stress the importance of avoiding overlap with the competence of expert, non-human rights instruments and entities. For example, one of the possible topics the resolution suggests the Special Rapporteur may report on—the possibility of ambiguities in international instruments and gaps in effectiveness of international regulatory mechanisms—goes beyond the Special Rapporteur's mandate, which should focus solely on human rights issues.

Finally, we continue to question this resolution's substantial budgetary implications. This resolution imposes significant costs that we believe merit careful review and scrutiny given the large demands already placed on OHCHR, and the limited ability of member states to provide increasing amounts of resources to enable OHCHR to perform the substantial amount of work that we have given it. For this reason, we request OHCHR and the relevant offices to conduct a review of the costs associated this mandate at the earliest opportunity and before next year in any event. We also would like to consult with others about the appropriate level of resources needed to support this mandate.

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2. Development

a. Human Rights Council

On September 28, 2012, at the 21st session of the Human Rights Council, the United States provided an explanation of its vote against the right to development resolution, which was adopted by the Council. U.N. Doc. A/HRC/RES/21/32. The U.S. explanation of vote is excerpted below and available at *http://geneva.usmission.gov/2012/09/28/u-s-explanation-of-vote-right-to-development-resolution/*.

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The United States' commitment to international development as a mainstay of our foreign policy is clear. Nevertheless, we have long-standing questions regarding the right to development. The United States was pleased to engage actively with the Working Group on the Right to Development at its thirteenth session in an effort to foster better implementation of development goals and to harmonize the various interpretations of the right to development. Unfortunately, the divisive resolution before us seeks to add additional meeting time to upcoming and potentially ongoing expert and governmental sessions—without any effort to reach agreement on how to make progress in those discussions. We therefore request a vote and will vote NO.

First, as we said in the Working Group, it will be important to consider not only the criteria and sub-criteria, but also the indicators elaborated by the High Level Task Force. Only when we are able to evaluate and understand the criteria in light of the sub-criteria and indicators, and vice versa, will we be able to assess and consider revisions to the work of the Task Force. In the thirteenth session of the Working Group, there was broad agreement that indicators could be discussed, although there were differing views on exactly how that might occur. We are therefore disappointed that the proponents of this resolution have consistently refused to consider proposals to incorporate discussion of indicators.

Second, discussion of the right to development needs to focus on aspects of development that relate to human rights, universal rights that are held and enjoyed by individuals. These include civil and political rights as well as economic, social, and cultural rights. Further, the focus should be on the obligations States owe to their citizens in this regard, not the asserted obligations of institutions. We are therefore also disappointed at the continued focus on institutions in this text. In addition, we are concerned that the resolution dictates how the UN's specialized agencies, and funds and programs should incorporate the topic of the right to development in their activities. It also inappropriately singles out the World Trade Organization, which is not even a development organization, for negative treatment.

Third, we are also concerned about the additional costs associated with the two-day seminar the resolution establishes. The sponsors have worked to negotiate down from a PBI which was initially some 1.5 million dollars, but the costs are still too high. The United States and other major contributors to OHCHR have said that they cannot support additional increases in the regular budget this year or next. Therefore, the United States must express concern about the availability of resources needed to implement the provisions of the resolution.

Lastly, as previously noted, we are not prepared to join consensus on the possibility of negotiating a binding international agreement on this topic.

While we would like to engage constructively in the next session of the Working Group and any intersessional meeting, our overall concern is that this resolution seeks to press forward at all speed while disregarding the need for States to discuss and agree on how to take the work forward in an objective and constructive fashion.

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b. General Assembly

On November 28, 2012, U.S. Deputy Representative to ECOSOC Teri Robl provided the U.S. explanation of its "no" vote on the resolution on "The Right to Development" in the Third Committee of the General Assembly. That explanation of vote is excerpted below and available in full at *http://usun.state.gov/briefing/statements/201739.htm*. The UN General Assembly adopted the resolution on the right to development on December 20, 2012 by a vote of 128 in favor, 54 against, with 4 abstentions. U.N. Doc. A/RES/67/171.

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Fostering development continues to be a cornerstone of U.S. international engagement, and we are the largest bilateral donor of overseas development assistance. The United States strongly supports achievement of the [Millennial Development Goals or] MDGs and has adopted and is implementing a U.S. Global Development Policy that guides our overall development efforts.

That policy, which places a premium on broad-based economic growth, democratic governance, game-changing innovations, and enduring systems for meeting basic human needs, recognizes that development is a long-term proposition, and progress depends importantly on the choices of political leaders and the quality of institutions in developing countries. Where leaders govern responsibly, set in place good policies, and make investments conducive to development, positive outcomes can be achieved. Where those conditions are absent, it is difficult to engineer sustained progress, no matter how good our intentions or the extent of our engagement.

Achievement of development goals will be fostered by the promotion and protection of the human rights set out in the Universal Declaration of Human Rights. The United States agrees that economic development goals and objectives must be pursued in such a way that the development and environmental needs of present and future generations are taken into account.

These objectives align closely with the broader thrust of this resolution on the right to development. My delegation requested a vote and will vote no, because we do not believe the current text of the resolution reflects consensus on the best way to achieve these goals.

We have noted that discussions and resolutions on the right to development should not include unrelated material on controversial topics, particularly topics that are being addressed elsewhere.

We have stated very clearly that we are not prepared to join consensus on the possibility of negotiating a binding international agreement on this topic. We therefore cannot accept language in this resolution that contemplates an international legal standard of a binding nature.

As we have repeatedly stated, discussion of the right to development needs to focus on aspects of development that relate to human rights, universal rights that are held and enjoyed by individuals, and which every individual may demand from his or her own government. These

include civil and political rights as well as economic, social, and cultural rights. These fundamental concerns have not been adequately addressed in this resolution.

In addition, as we said in the Working Group and reiterated during discussions at the HRC, it will be important to consider not only the criteria and sub-criteria, but also the indicators elaborated by the High Level Task Force. Only when we are able to evaluate and understand the criteria in light of the sub-criteria and indicators will we be able to assess and consider revisions to the work of the Task Force.

For all these reasons, this resolution did not address our core concerns. Nonetheless, we will engage constructively with the Open-Ended Working Group on the Right to Development in an effort to move forward on this important topic.

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F. INDIGENOUS ISSUES

1. UN Permanent Forum on Indigenous Issues ("PFII")

On January 18, 2012, Tricia A. Tingle of the U.S. Department of the Interior delivered the U.S. Statement to the UN Permanent Forum on Indigenous Issues ("PFII"). Excerpts from the statement appear below. The full text is available at *www.un.org/esa/socdev/unpfii/documents/EGM12_US_statement.pdf*.

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With particular regard to Theme 4, Issues of Jurisdiction and Policing, and Theme 5, Anti-Violence Strategies in the U.S. legal system, the Department of Justice has a unique responsibility to pursue justice against those who perpetrate violence in tribal communities. Likewise, the Department of the Interior is tasked with assisting tribes, either by providing direct assistance or funding to the tribal communities and technical assistance to the tribes, in the pursuit of justice against those who perpetrate domestic violence in tribal lands in the United States.

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The United States is proud of our efforts to improve the federal response to crimes of violence against women in tribal communities, but we recognize that tribal governments —tribal police, tribal prosecutors, and tribal courts —are essential parts of the response to these crimes and key to the success. They often lack the authority and resources to address them.

As previously noted, the United States has consulted extensively with tribal officials about these issues. The consensus that emerged from these consultations is the need for greater tribal jurisdiction over domestic-violence cases. The Executive Branch of our government continues to work with the U.S. Congress to address these jurisdictional limitations and strengthen the ability of tribal authorities to confront violence against indigenous women.

Tribal leaders have noted a tremendous need for additional resources at the tribal level. Justice has streamlined the process for tribes to access grants for public safety, awarding nearly $120 million to tribes over the past two years; set up a national clearinghouse for training and

technical assistance concerning sexual assault of Native American women; and is funding a project to collect and preserve sexual assault evidence in geographically isolated tribal communities. Interior has provided one time funding to help tribes hire domestic violence prosecutors, and is enlarging its Victim Witness Program to assist victims in many new places. Department of the Interior will work with HHS, specifically the Indian Health Service to coordinate the sexual assault protocol with law enforcement throughout tribal U.S. lands.

With regard to Theme 2, Contextualizing Violence: the Economic Survival of Women and Girls, we believe that advancements in Indian education will off-set some of the negative social factors that contribute to violence and will give rise to community environments where tribal economies will not only survive, but flourish. President Obama's Executive Order 13592 of December 2, 2011, on "Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities," marks an important milestone in the effort.

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2. UN World Conference on Indigenous Peoples

In September 2012, the United States participated in planning for the UN General Assembly's World Conference on Indigenous Peoples to be held in September 2014. On September 17, 2012, Terri L. Robl, U.S. Minister Counselor for ECOSOC, delivered the U.S. explanation of position on the resolution setting plans for the conference. U.N. Doc. A/RES/66/296. The U.S. explanation of position is excerpted below and available at *http://usun.state.gov/briefing/statements/197956.htm*.

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There are more than 370 million indigenous peoples who live in some 90 countries around the world. We honor their immeasurable contributions to society, and call upon all States to work together with indigenous communities to meet our common challenges.

Throughout negotiations on this document, we have underscored the important role indigenous peoples and civil society organizations should play through their participation in this Conference. The process of admission for civil society organizations, including non-governmental organizations, to participate in this Conference must be completely transparent.

Operative paragraph 3(h) states that indigenous peoples' organizations and institutions "should be invited to submit applications to the Secretariat through an open and transparent accreditation procedure, in accordance with established practice," but we are not aware of a set practice in this regard. The procedures of the Permanent Forum on Indigenous Issues and the Expert Mechanism on Indigenous Peoples differ from each other. This resolution does not define a process by which indigenous groups will be accredited to the high-level meeting and therefore, this issue will require further consideration by Member States, in consultation with indigenous people and other stakeholders.

We understand operative paragraph 3(j) to mean that the list of NGOs and other potential participants will be sent to the General Assembly for its consideration, where Member States will evaluate any possible objections made by other States.

Operative paragraph 9 concerns the World Conference outcome document. As the World Conference is a high-level meeting of the General Assembly, Member States have the responsibility to negotiate the outcome document and consider it for adoption. However, Indigenous peoples' input from the preparatory process and the World Conference itself will be taken into account during the negotiations. These concepts are contained in operative paragraph 9, which refers to "an inclusive and open informal process of consultations … in order to provide input for sufficient consideration by Member States and agreement by the General Assembly prior to formal action at the high-level meeting."

We are also concerned with operative paragraph 12, which "requests the President of the General Assembly in consultation with Member States, as well as representatives of Indigenous Peoples, to finalize the organizational arrangements of the World Conference." All decisions about the World Conference that are not delegated in this paragraph should remain with the Member States.

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Also on September 18, 2012, Eric N. Richardson of the Office of the Legal Adviser delivered the statement for the U.S. delegation at a clustered interactive dialogue with Special Rapporteur James Anaya and the Chair of the Expert Mechanism on the Rights of Indigenous Peoples ("EMRIP") during the 21st session of the HRC. Mr. Richardson's statement on the World Conference on Indigenous Peoples at the dialogue is excerpted below and available at *http://geneva.usmission.gov/2012/09/18/u-s-hopes-to-see-an-action-oriented-outcome-from-the-world-conference-on-indigenous-peoples/*.

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The United States has spoken in support of broad and meaningful participation in the World Conference for indigenous peoples' representatives, and there are ample opportunities for that. Firstly, indigenous peoples will be involved in the preparatory process, for which there are several options. One option is to have preparatory commissions in the five UN regions, with the regional economic commissions holding meetings. Another option is to hold prepcoms in the seven indigenous regions—Africa, Arctic, Asia, Latin America, North America, Pacific, and Russian-speaking—so that indigenous representatives can caucus with each other, and exchange views with Member State governments, in those locations. A third option is to hold prepcoms in Geneva or New York. The modalities resolution adopted yesterday in New York requests the President of the General Assembly to organize, no later than June 2014, an informal interactive hearing during which indigenous peoples' representatives would provide input to the preparatory process. In addition, other regional coordination meetings will take place before 2014.

Secondly, the United States supports inclusive input to the World Conference, both before and during the meeting, from stakeholders who cannot be present in person. A mechanism for gathering input—either in written, electronic, pre-recorded, telephonic, or other format from indigenous peoples and others—would be useful, as some indigenous representatives may not be able to afford traveling to New York.

Thirdly, we support concurrent roundtables at the World Conference, with indigenous representatives sitting at the table alongside member state representatives. Roundtable themes

need not be limited to the Declaration. Possible topics include Tribal self-determination and governance; Lands, resources, the environment, and economic development; Cultures of indigenous peoples, including education; Consultation with and participation from indigenous peoples on issues affecting them; and Business and its impacts on indigenous peoples. All roundtables should include a discussion of current best practices.

The United States thinks there could be two documents that come of out of this Conference. The first would be a concise, action-oriented outcome document containing targeted, concrete proposals on protecting the collective rights of indigenous peoples and human rights of indigenous individuals. As the World Conference is a high-level meeting, and the outcome document is one that ministers will agreed to, it is the role of member states to negotiate and adopt the outcome document. The negotiations, however, would take into consideration the indigenous peoples' input from the preparatory process and the World conference itself; the written and electronic input; and the roundtables. The second document would consist of the summaries of the roundtable and panel discussions presented at the closing plenary session. The presentations of representatives of indigenous groups will be included in those summaries.

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3. U.S. Statements on Indigenous Peoples at HRC 21

On September 28, 2012, the United States made a general comment on human rights and indigenous peoples at the 21st session of the HRC where it co-sponsored a resolution on the subject. U.N. Doc. A/HRC/21/24. The U.S. comment is excerpted below and available at *http://geneva.usmission.gov/2012/10/10/u-s-general-comment-human-rights-and-indigenous-peoples/*.

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The United States is pleased to co-sponsor the Resolution on Human Rights and Indigenous Peoples. Indigenous peoples around the world face grave challenges, and the United States is committed to addressing these challenges both at home and abroad. During Special Rapporteur Anaya's April-May 2012 visit to the United States, we discussed the wide range of U.S. programs, policies, and legislation devoted to improving the lives of indigenous peoples.

The resolution welcomes the fifth anniversary of the UN Declaration on the Rights of Indigenous Peoples [UN DRIP], and encourages states that have not done so to respond to EMRIP's survey on best practices regarding possible appropriate measures and implementation strategies in order to attain the goals of the UN DRIP. The United States has responded to this survey, and looks forward to EMRIP's final summary of responses.

The United States also echoes the resolution's commendation of the efforts of the Special Rapporteur on the Rights of Indigenous Peoples and the Expert Mechanism on the Rights of Indigenous Peoples [EMRIP].

In order to further improve the situation of indigenous peoples, the United States believes that we must focus on the promotion and protection of both the human rights of indigenous individuals and the collective rights of indigenous peoples and is pleased the resolution covers both of these topics in various ways. For example, operative paragraph 12 highlights the role of

treaty bodies in promoting human rights. In this regard, we commend the resolution for highlighting the importance of protecting the human rights of indigenous women and children, and indigenous persons with disabilities.

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Also at the 21st session of the HRC, the United States participated in a panel on indigenous peoples and access to justice. A/HRC/RES/18/8. The U.S. statement, delivered by Sarah M. Brooks on September 18, 2012 is excerpted below and available at *http://geneva.usmission.gov/2012/09/18/u-s-statement-at-panel-on-indigenous-peoples-and-access-to-justice/*.

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The United States appreciates the opportunity to discuss access to justice, which we agree is an important topic. Under the U.S. Constitution, indigenous individuals enjoy the same rights to due process and equal protection under the laws as other individuals against actions of the federal, state, and local governments. Pursuant to the Indian Civil Rights Act, they also enjoy nearly identical statutory protections against actions of tribal governments to those they enjoy against actions of federal, state, and local governments.

The United States has pursued initiatives concerning access to justice. We hope the concrete details we will provide today about the U.S. experience will be of interest, including with regard to the ability and authority of tribes to enforce the law.

First, President Obama signed the Tribal Law and Order Act into law in July 2010. The Act gives tribes greater sentencing authority in criminal trials; strengthens defendants' rights; establishes new guidelines and training for officers handling domestic violence and sex crimes; improves services to victims. It also helps combat alcohol and drug abuse; assists at-risk youth; expands recruitment and retention of Bureau of Indian Affairs and tribal officers; and gives tribes improved access to criminal databases. The scope of interagency coordination in implementing this Act is quite broad.

Second, the U.S. government has settled many significant and longstanding Native American legal claims against the United States. These include cases involving access to U.S. Department of Agriculture loan programs; the government's trust management and accounting of individual American Indian trust accounts; and four water settlements benefitting seven tribes in Arizona, Montana, and New Mexico.

Third, we work to obtain justice for Native American women and girls who have survived violence, which we agree is a pressing issue. First, we ensure that the federal government enforces the law and promotes public safety where there is federal criminal jurisdiction. Second, we support the efforts of tribal governments and communities to prevent and respond to violence against women. To build on the Tribal Law and Order Act, in July 2011 the Department of Justice proposed legislation to the United States Congress that would recognize certain tribes' power to exercise concurrent criminal authority over domestic-violence cases, whether or not the defendant is Indian.

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4. Response to report of Special Rapporteur Anaya

At the 21st session of the HRC, the United States delivered a statement in response to the report of the special rapporteur on indigenous peoples, James Anaya. The U.S. statement, delivered on September 18, 2012 is excerpted below and available at *http://geneva.usmission.gov/2012/09/18/u-s-country-response-to-the-report-of-the-special-rapporteur-on-indigenous-peoples/*.

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Thank you, Madame President. The United States was pleased to welcome Special Rapporteur Anaya for an April-May 2012 visit, during which he consulted many key Administration and indigenous representatives. We appreciate that the report outlining the findings of his visit contains positive assessments of the U.S. programs, policies, and legislation devoted to improving the lives of indigenous peoples. We would like to comment today on the challenges facing indigenous communities that the report highlights.

Native Americans in the United States experience high rates of poverty, illness, substance abuse, suicide, and incarceration, as well as relatively low levels of education. The United States is taking steps to alleviate these problems. President Obama's proposed fiscal year 2013 budget allocates $19.4 billion for programs benefitting indigenous communities in education, transportation, and access to justice. The request represents a three percent increase from the amount requested for fiscal year 2012.

The 2009 American Recovery and Reinvestment Act provided over $3 billion to help tribal communities renovate schools on reservations; encourage job creation; improve housing and energy efficiency; and support health facilities and policing services. This appropriation included $510 million allocated to the Department of Housing and Urban Development for the Native American Housing Block Grant program.

Next, the Affordable Care Act includes permanent authorization of the Indian Health Care Improvement Act, which is the cornerstone legal authority for the provision of health care to American Indians and Native Americans. The Affordable Care Act also enhances the quality of health care and makes it more affordable for all Americans, including American Indians and Alaska Natives. The Act permanently authorizes new and expanded programs and services available to those who rely upon the Indian Health Service (IHS). If funded, that would amount to a nearly 29 percent increase to IHS budgets since 2009.

Another important action was the passage in June 2010 of the Tribal Law and Order Act. This Act gives tribes greater sentencing authority in criminal trials; strengthens criminal defendants' rights; establishes new guidelines and training for officers handling domestic violence and sex crimes; improves services to victims; helps combat alcohol and drug abuse; and helps at-risk youth. It also expands recruitment and retention of Bureau of Indian Affairs and tribal officers and gives them better access to criminal databases.

Indigenous women suffer disproportionate rates of violence, and the U.S. government is working with tribes to address this. The Department of Justice has streamlined the process for tribes to apply for grants for public safety, awarding nearly $120 million to tribes over the past two years. It has set up a national clearinghouse for training and technical assistance concerning

sexual assault of Native American women. And it is funding a project to collect and preserve sexual assault evidence in geographically isolated tribal communities. The Indian Health Service (IHS) of the Department of Health and Human Services has recently promulgated its first sexual assault policy and protocol for use in its U.S. health facilities, and the Department of the Interior is working with IHS to coordinate this protocol with law enforcement throughout Indian country in the United States.

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G. PROTECTION OF INTERNALLY DISPLACED PERSONS

On March 6, 2012, the United States participated in a clustered interactive dialogue at the 19th session of the Human Rights Council on the human rights of internally displaced persons ("IDPs") and the working group on arbitrary detentions. Excerpted below is the section of the statement of the U.S. delegation, delivered by Jyl Kuczynski, responding to the report of the special rapporteur on the human rights of IDPs. The remainder of the U.S. statement, relating to arbitrary detentions, is excerpted in section I.3., *infra*. The statement in its entirety is available at *http://geneva.usmission.gov/2012/03/07/addressing-the-human-rights-of-idps-is-both-a-humanitarian-and-a-development-imperative/*.

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The United States Government would like to thank the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani, for his report. We support the Special Rapporteur's efforts to advance the Guiding Principles on Internal Displacement and his work on mainstreaming the human rights of internally displaced persons (IDPs).

As the world continues to experience rapid urbanization, there are increasingly more IDPs living in cities. While some IDPs who live among the urban poor have similar needs, many IDPs also face specific protection problems related to their status as displaced persons and require interventions specifically targeted to address their needs.

We further agree that an IDP protection and assistance approach that considers the needs of host families and communities will help lay the groundwork for longer term peace and reconciliation efforts. One important way to minimize conflict between these groups is to ensure that IDPs have access to existing services to reduce the need for parallel assistance programs.

Finally, we agree that humanitarian and development actors need to engage with one another more systematically to pursue long-term solutions to internal displacement. Addressing the human rights of IDPs is both a humanitarian and a development imperative.

The United States encourages the Special Rapporteur to work closely with the United Nations High Commissioner for Refugees, which recently released a policy on refugee protection and solutions in urban areas. We would welcome the Special Rapporteur's views on where incorporating IDP protection strategies into development programs has worked well and how donors can better support these initiatives.

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H. TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT

The United States co-sponsored and joined consensus on the resolution on torture and other cruel, inhuman, or degrading treatment adopted by the UN General Assembly at its 67th session. U.N. Doc. A/RES/67/161.

I. JUDICIAL PROCEDURE, PENALTIES, AND RELATED ISSUES

1. Death Penalty

At the UN General Assembly's 67th session, Special Rapporteur Juan Mendez presented an interim report on torture and other cruel, inhuman or degrading treatment or punishment which focused on the death penalty. U.N. Doc. A/67/279. The United States delivered a statement on the special rapporteur's report, which follows.

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The United States thanks Special Rapporteur Mendez for his interim report which furthers discussion of issues of importance within and among governments. As the Special Rapporteur recognizes, "[u]nder international law, the death penalty can only be carried out pursuant to a final judgment of a competent court and only applied to the most serious crimes."

In the United States, the judicial system, at both the federal and state levels, provides an exhaustive system of protections to ensure that implementation of the death penalty is undertaken with procedural safeguards, after multiple layers of judicial review, for only the most serious crimes, in conformity with U.S. constitutional guarantees and U.S. obligations under the ICCPR.

As the Special Rapporteur also notes, taken together, Article 6 of the ICCPR and article 1 of the Convention Against Torture mean that the death penalty cannot be considered per se a violation of the prohibition of torture and cruel, inhuman or degrading treatment or punishment.

The Special Rapporteur does, however, take the position that a number of practices associated with the exercise of the death penalty may constitute torture or cruel, inhuman or degrading treatment. The United States does not agree with his assessment on a number of practices, including lethal injection and solitary confinement.

The Special Rapporteur's report includes a number of recommendations directed to retentionist states. Some of these pertain to compliance with those states' obligations under international law, whereas others do not reflect what is required under international law.

We strongly disagree, for example, with his formulation of the obligation under article 3 of the Convention against Torture as set forth in his last recommendation.

We recognize that there is intense public discussion and debate on the issue of the death penalty both within and among nations and we respect the views shared by persons who seek to abolish capital punishment.

We do not share the Special Rapporteur's views regarding the emergence of a customary norm prohibiting the use of the death penalty under all circumstances and urge that more

attention be focused on addressing and preventing existing human rights violations that result from the improper imposition and application of capital punishment.

Thank you, Special Rapporteur Mendez.

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2. Extrajudicial, Summary or Arbitrary Executions

On June 19, 2012, the United States provided a statement on the report of the special rapporteur on extrajudicial, summary or arbitrary executions at the 20th session of the Human Rights Council. The statement is excerpted below and available at *http://geneva.usmission.gov/2012/06/19/statement-on-the-report-of-special-rapporteur-on-extrajudicial-summary-or-arbitrary-executions/*.

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The United States thanks Special Rapporteur Christof Heyns for his work as the Extrajudicial, Summary or Arbitrary Executions mandate holder. We appreciate efforts by the Special Rapporteur and his predecessor to follow up on country visits, and recommend that other mandate holders also consider this practice.

In May 2011, the United States submitted a detailed response addressing the issues and recommendations contained in the Special Rapporteur's country visit report. That submission provided a number of updates on the status of U.S. policy in those subject areas. …

While broader than the issues in the purview of this Council, questions about the U.S. legal and policy framework for use of force against al-Qaeda and associated forces have been addressed by senior U.S. officials in a number of recent public statements. These include the recent remarks by Assistant to the President John O. Brennan at Harvard Law School on September 16, 2011 and at the Woodrow Wilson International Center for Scholars on April 30, 2012; by Attorney General Eric Holder at Northwestern University School of Law on March 5, 2012; and by Department of Defense General Counsel Jeh Johnson at Yale Law School on February 22, 2012. These public statements reflect the unequivocal U.S. commitment to conducting such operations with extraordinary care and in accordance with all applicable law, including the law of war. They also reflect our continuing commitment to greater transparency and a sincere effort to address some of the important questions that have been raised.

Since our Nation's founding, we have committed ourselves to pursuing the highest standards of justice and due process to protect the inalienable rights of all people as reflected in the U.S. Constitution, other U.S. law, and our international legal obligations. We continue to work hard to ensure that our policies and our actions meet those standards and abide by all applicable domestic and international law.

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On November 20, 2012, Ambassador Cousens presented the explanation of vote on the

U.S. abstention from the UN General Assembly's resolution on extrajudicial, summary, and arbitrary executions. Ambassador Cousens' statement, excerpted below and available at *http://usun.state.gov/briefing/statements/200947.htm*, explained U.S. concerns that the resolution did not adequately account for both of the governing bodies of international law in the area, humanitarian law and human rights law.

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We wish to join the co-sponsors of this resolution in condemning extrajudicial, summary or arbitrary executions against all persons, irrespective of their status. We agree that all States have obligations to protect human rights and fundamental freedoms and should take effective action to combat all extrajudicial killings and punish the perpetrators. We agree that countries such as ours, which have capital punishment, should abide by their international obligations, including those related to due process, fair trial, and use of such punishment for only the most serious of crimes. We strongly agree with the language condemning extrajudicial killing that targets vulnerable groups, particularly those targeted on account of their sexual orientation or gender identity. Indeed, we agree with much of the text of this resolution.

We nonetheless have concerns about the language of the resolution in a few areas and, therefore, abstain on the resolution. Much as we deeply agree with the goals and sponsors of the resolution, we are not in a position to vote for a text that obscures that there are not one, but two bodies of law that regulate unlawful killings of individuals by governments—international human rights law and international humanitarian law. These two bodies of law are complementary and mutually reinforce one other. We also recognize that determining what international law rules apply to any particular government action during an armed conflict is highly fact-specific. However, the applicable rules for the protection of individuals and conduct of hostilities in armed conflict are primarily found in international humanitarian law.

The resolution as worded contributes to legal uncertainty about how these two important bodies of law apply to an array of factual circumstances.

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3. Arbitrary Detentions

On March 6, 2012, the United States participated in a clustered interactive dialogue at the 19th session of the Human Rights Council on the human rights of internally displaced persons ("IDPs") and the working group on arbitrary detentions. Excerpted below is the section of the statement of the U.S. delegation relating to arbitrary detentions. The portion relating to IDPs is excerpted in section G, *supra*. The statement in its entirety is available at *http://geneva.usmission.gov/2012/03/07/addressing-the-human-rights-of-idps-is-both-a-humanitarian-and-a-development-imperative/*.

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The United States thanks the Working Group on Arbitrary Detentions for your report. We commend your efforts in conducting country visits and highlighting cases within your mandate and appreciate the success you have had when focusing on specific cases.

The United States respectfully disagrees with the Working Group's proposed summary of ICCPR Article 9(3), which deviates from the language agreed by States parties, in particular by suggesting the view that "any detention must be exceptional and of short duration" or would otherwise be considered arbitrary or unjustified. Article 9(3) is expressly limited to those detained on criminal charges. The second sentence of Article 9(3) strikes a more nuanced and neutral balance between detention and other alternatives to guarantee appearance at trial. Article 9(3) must be understood by reading both sentences together.

The need for an abridged summary of Article 9(3) is unclear, and the United States is concerned that widespread adoption of such a summary would be problematic. The United States encourages the Working Group to use the clear language of Article 9(3) in its work. The United States agrees that anyone held in criminal detention has a right to prompt judicial review of their detention. However, we respectfully disagree with the Working Group's conclusion that the absence of a remedy of habeas corpus would per se result in denial of protection from arbitrary detention.

Moreover, in many respects, the minimum requirements concerning habeas corpus that the Working Group has articulated go beyond what human rights law requires. The United States encourages the Working Group to concentrate on specific cases and circumstances of arbitrary detention rather than on attempting to summarize or restate the related legal obligations of States.

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J. PROMOTION OF TRUTH, JUSTICE, REPARATION

In 2011, the Human Rights Council establishing the first-ever special rapporteur "on the promotion of truth, justice, reparation and guarantees of non-recurrence." *Digest 2011* at 220. On September 11, 2012, at the 21st session of the Human Rights Council, the United States participated in a clustered interactive dialogue on the report of the special rapporteur on truth, justice, reparation, and non-recurrence, along with the report of the working group on the use of mercenaries. The statement of the U.S. delegation relating to transitional justice, delivered by Arsalan Suleman, is excerpted below. See the discussion in section M, *infra*, relating to U.S. cooperation with the efforts of the working group on mercenaries. The statement of the U.S. delegation is available in full at *http://geneva.usmission.gov/2012/09/11/hrc-mandate-on-transitional-justice-sends-strong-signal-that-victims-have-rights/*.

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The United States welcomes the report of the Special Rapporteur on the promotion of truth, justice, reparation and non-recurrence. The decision of the Human Rights Council to adopt a special mandate on transitional justice sends a strong signal that impunity for serious human rights violations will not be tolerated and that victims have rights. This imperative is all the more timely given events in Syria and elsewhere.

We support the SR's integrated and comprehensive approach to the four elements of his mandate, incorporating the full range of judicial and non-judicial measures including prosecutions; truth-seeking; reparations; lustration (or barring former officials from office), memorialization; and institutional reform.

We support his recognition of the distinctive characteristics of some recent transitions and the need for a comprehensive process of national consultation, particularly with those most affected by human rights abuses and violations in contributing to a holistic transitional justice strategy. We also agree with his proposed focus on the linkage between these four elements and broader issues such as development, security, and the rule of law, and appreciate his commitment to integrating a gender perspective that takes account of the different needs and opportunities of men, women, and children.

In light of these conclusions, we call upon the members, the international community, and regional organizations to assist countries in implementing a holistic transitional justice program, to ensure the promotion and protection of human rights, and to incorporate best practices into the development and implementation of transitional justice mechanisms. We look forward to learning more from the work of the Special Rapporteur.

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K. RULE OF LAW AND DEMOCRACY PROMOTION

1. U.S. Pledges at UN General Assembly High-Level Event on Rule of Law

The UN General Assembly convened a High-Level Meeting on the Rule of Law on September 24, 2012 in accordance with a resolution passed in 2011. U.N. Doc. A/RES/66/102. The United States pledged its commitment to the principles of the rule of law, including, inter alia: its support for UN efforts on the international level; its domestic efforts to improve women's access to justice and access to legal aid; and its support for other Member States' rule of law programs. The U.S. submission containing its pledges is available at *www.state.gov/s/l/c8183.htm*. U.S. Attorney General Eric Holder represented the United States at the High-Level Meeting. His September 24, 2012 statement, available at *www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1209242.html*, is excerpted below.

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History has proven that the establishment and enforcement of the rule of law is essential—in protecting the security and civil liberties of our citizens; in combating violent crime, public corruption, and terrorist threats; and in strengthening civil society. In recent days, we have been reminded—in the most painful and tragic of ways—of just how vital the rule of law is to ensuring freedom, opportunity, justice, and peace.

I am here not only to pledge the United States' commitment to these principles—but also our support for the United Nations' robust efforts to strengthen the rule of law worldwide. And

I want to assure each of you that my colleagues and I are determined to stand with any nation that strives to ensure integrity, foster innovation, and create opportunities for prosperity and progress. We will also stand with those governments that cherish the benefits of a free, fair, and open society; and that seek to eradicate the corrupt and abusive activities that can weaken political institutions, threaten the democratic process, undermine the strength and promise of civil society, and diminish the quality of life for countless individuals, families, and communities. We must all truly serve the people we are privileged to represent.

From our national systems, to the UN's work in advancing the goals of international peace and security; of human rights for all people—including women, LGBT individuals, and persons with disabilities—and of economic development and job creation—we've seen, time and again, that there is a strong link between fostering democratic values and supporting the rule of law. Particularly in recent years, our commitment to the rule of law has helped to inform, augment, and re-energize our work in confronting a range of challenges—from fighting crime, corruption, and terrorism, to promoting global security, good governance, and ensuring equality and fair opportunity for all. Today's meeting underscores the fact that this work must remain at the center of how our nations approach development, especially in conflict-affected or fragile states. And it reaffirms—as the World Bank's recent Global Development Report highlighted—that, in today's world, the greatest threat to development and recovery is a weak rule of law.

That's why the promise we've gathered to fulfill—and the pledges we're here to make—are, and must continue to be, a top priority. It's also why, at the international level, I am proud to say that the United States will continue to support UN-led efforts to expand access to legal aid, to more effectively combat drug trafficking and organized crime alongside our international partners, and to build on UN initiatives in the rule of law sector that are focused on conflict and post-conflict situations.

Within our own borders—particularly as we approach the 50th anniversary of the United States Supreme Court decision guaranteeing the right to counsel for indigent criminal defendants—the United States also pledges to take steps to improve access to justice for those who cannot afford representation. Additionally, we are focused on launching a new domestic violence prevention initiative, strengthening safety net programs that help increase the availability of legal aid, and enhancing our focus on protecting the essential rights of women and girls.

In these and our other efforts to strengthen the rule of law and encourage cooperation on an international scale—from our work together under the landmark UN conventions against crime, terrorism and corruption; to our capacity-building, prosecutorial training, and regional assistance efforts—the Department that I am privileged to lead, and the nation that I am honored to serve, are proud to stand with the leaders in this room. Like you, we approach the challenges before us with resolve, humility, and an eagerness to reinforce old friendships and forge new ones. And we are eager to join with you- as true and equal partners—in driving this critical work into the future.

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2. Transparency and Accountability

On March 9, 2012, Ambassador Donahoe addressed the 19th session of the Human Rights Council on the demand of people around the world for greater transparency, accountability, and participation in governance. She delivered a statement on behalf of the United States

and the other founders of the Open Government Partnership ("OGP"): Brazil, Indonesia, Mexico, Norway, South Africa, and the United Kingdom. That statement appears below and is also available *at http://geneva.usmission.gov/2012/03/09/donahoe-people-around-the-globe-are-demanding-more-transparency-accountability-and-participation-in-governance/*. For background on the founding of the OGP, see *Digest 2011* at 223-25.

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The United States and the above mentioned countries are extraordinarily proud to have joined together with civil society groups, in September 2011 in founding the OGP, which is an unprecedented global initiative bringing together more than 50 countries and international civil society organizations. In joining the OGP, participating governments commit to four core principles elaborated in the OGP declaration: transparency, civic participation, professional integrity, and technology and innovation. OGP countries further commit to developing an action plan to put these principles into practice. More than 40 countries from all regions are working to finalize action plans drawn from their open government priorities. The upcoming April OGP High Level Conference, in Brasilia, Brazil, will serve as the forum for the exchange of best practices as countries present these action plans.

We are convinced that the application of these principles to all aspects of governance will directly contribute to a greater enjoyment of the entire spectrum of civil and political and economic, social and cultural rights that this Council addresses. This is because open government is about combating corruption, improving public services, strengthening government transparency, promoting economic development and giving people the information tools they need to hold governments accountable and to improve their lives. It is also about harnessing new technology and innovations to improve governance, and spurring enterprise and creative problem-solving by our societies.

Already during this Council session, ongoing discussions on issues such as freedoms of expression, association and assembly on the Internet, the rights of the child, freedom of religion and belief, food, and adequate housing have underscored the importance of the continued need for governments to pay attention to the practical application of the principles laid out in the OGP declaration, as well as the need for us to learn from one another.

Moreover and equally important, recent events around the globe, most vividly demonstrated by those that continue to unfold in the Arab world, illustrate that as people everywhere strive to fully exercise their human rights, they are also demanding from their governments more transparency, accountability, and increased participation in governance. Indeed, as the Open Government Declaration, which was endorsed by OGP founding governments in September 2011, makes clear, "public engagement, including the full participation of women, increases the effectiveness of governments, which benefit from people's knowledge, ideas and ability to provide oversight." Civil society actors are using modern communications tools, even as some governments attempt to impose undue restrictions upon them, in order to expand networks, share information, muster support, and generally enhance their efficiency and effectiveness in advocating for protection of their human rights and holding governments accountable when they fail their people.

We are optimistic about the potential for the Open Government Partnership to reinforce the work of the Human Rights Council in practical and concrete ways. OGP participants have

already committed to focus on particular issues such as improved public services, better management of public resources and foreign assistance, and creating safer communities.

As participants implement their country action plans, we are confident that the OGP will generate significant additional expertise and examples of best practices that the international community can draw on as we all look for ways to improve human rights conditions.

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3. Open Government Partnership

In April 2012, the OGP held its first annual high level meeting in Brasilia, Brazil. A State Department fact sheet about the meeting explained the development of the OGP in the intervening months since its launch and its first high level meeting: "Through concrete commitments announced via OGP action plans, over fifty governments are taking important steps towards greater transparency, accountability and participation that will ultimately improve the lives of people around the world." April 17, 2012 fact sheet, available at *www.state.gov/r/pa/prs/ps/2012/04/187989.htm*. Representatives from more than 60 countries and over 200 civil society organizations participated in the Brasilia meeting. Secretary Clinton delivered remarks at the opening session of the Brasilia meeting on April 17, 2012, available at *www.state.gov/secretary/rm/2012/04/188008.htm*. For more information on OGP, see *www.opengovpartnership.org*.

4. Civil Society

At the 19th session of the Human Rights Council, the United States delegation provided a general statement, delivered by Charles O. Blaha, on the crucial role of civil society in protecting democracy and human rights around the globe. The U.S. statement delivered on March 20, 2012, excerpted below, is available at *http://geneva.usmission.gov/2012/03/19/item8/*.

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The Vienna Declaration and Program of Action states, "Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives."

The United States believes that an essential way to support democracies is to support civil society. I want to focus my remarks today on emerging threats to civil society around the world and the need for all of us to address them.

Civil society is crucial to the protection and promotion of democracy and human rights around the globe. It gives voice to those segments of the population that might otherwise be marginalized, ignored, or violated.

And it illustrates the need for pluralism—that no single leader, government entity, or state can fully understand and resolve all of the problems that a country faces, particularly in this complex world.

This is certainly true for the United States. As Secretary Clinton stated in Krakow in 2010, "We were a people before we were a nation. And civil society not only helped create our nation, it helped sustain and power our nation into the future. It has also played an essential role in identifying and eradicating the injustices that have, throughout our history, separated our nation from the principles on which it was founded."

Civil society's "essential role," however, is under threat around the world. We see governments trying to silence the voices of civil society by making it harder for these groups to register and operate within their country. Others make it more difficult for these groups to get funding. Worse still, some governments use intimidation, persecution, and even violence to try to bully these groups into submission.

We call upon all governments to protect their civil society organizations from attacks, and to uphold their commitments to promote and protect the human rights of their citizens, including the rights enshrined in the Universal Declaration of Human Rights: the right to life, liberty and security of person, freedoms of expression, association and peaceful assembly, and protection against torture and arbitrary arrest or detention.

The United States joined this body in order to address urgent and pivotal human rights situations, including continued attacks on civil society. We urge the Human Rights Council to uphold the principles enshrined in the rights to Freedom of Peaceful Assembly and of Association Resolution that this body passed in 2010 and the general principles governing this Council by responding to these attacks and supporting our civil society colleagues.

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At the 21st session of the Human Rights Council, the United States delegation again provided a statement on the crucial role of civil society in advancing human rights, focusing on the role of activists, human rights defenders, and media. The U.S. statement delivered by Ambassador Donahoe on September 14, 2012, excerpted below, is available at *http://geneva.usmission.gov/2012/09/14/civil-society-activists-human-rights-defenders-and-media-play-crucial-role-in-advancing-human-rights/*.

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During this session the United States is working together with the Czech Republic, Indonesia, Lithuania, Maldives, Mexico, and Nigeria to highlight the importance of the rights to freedom of peaceful assembly and of association for civil society. These freedoms provide a basis for civil society organizations to play an essential role in the lives of many. Civil society groups can support the work of our governments by filling gaps in education, health, and provision of many public services. They provide for interreligious dialogue, academic and cultural exchanges; they promote economic development and strengthen access for the most vulnerable and least empowered people; and they work to keep our governments on track by pushing us to remain transparent and accountable. As Secretary Clinton says, "Societies move forward when the citizens that make up these groups are empowered to transform common interests into common actions that serve the common good." But in order for civil society to serve the common good—to accelerate social, cultural, economic and political development—governments must respect and uphold the freedoms of peaceful assembly and of association.

As yesterday's panel and the Secretary General's report on the issues of intimidation and reprisals against human rights defenders and others cooperating with UN human rights mechanisms highlighted "it is the responsibility of States to protect civil society." Civil society activists, human rights defenders and journalists all play a crucial role on behalf of others in society to advance human rights. While their rights are no more or less important than the rights of other individuals, the fact that they work on behalf of others means that intimidation and reprisals against them has a multiplier effect. When their rights are not protected, it is to the detriment of the society at large. Secretary Clinton underscored this point at the 2012 Civil Society Summit: "Each time a reporter is silenced, or an activist is threatened, it doesn't strengthen a government, it weakens a nation." Members of civil society, human rights defenders and journalists are less effective in conveying information and representing the interests of the common good in a climate of fear. We support the Secretary General's call for States to prevent acts of intimidation and reprisals, and when this is not possible, to ensure there is no impunity for perpetrators. It is also essential that the international community support States in these efforts.

To conclude, we appeal to all States to recognize the important role that civil society plays, and to do their utmost to promote and protect the rights of members of civil society—be they human rights activists, organizations, congregations, or journalists—who are working through peaceful means to improve situations in their countries.

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L. FREEDOM OF EXPRESSION

1. Media Freedom

On June 19, 2012, at the 20th session of the Human Rights Council, the United States participated in the clustered dialogue with the special rapporteur on freedom of opinion and the special rapporteur on extrajudicial, summary, or arbitrary executions. Ambassador Donahue delivered the statement of the United States emphasizing the important role of a free press in creating sustainable democracies and prosperous societies. Ambassador Donahoe's statement is excerpted below and is available at *http://geneva.usmission.gov/2012/06/19/donahoe-u-s-honors-the-role-of-a-free-press-in-creating-sustainable-democracies-prosperous-societies/*.

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We agree with Special Rapporteur Heyns that unlawful attacks on journalists represent an assault on all human rights. That is why our response to such injustices must be clear, unequivocal, and uncompromising. Impunity for purposeful attacks on journalists and media freedom must be brought to an end. To this end, we agree with Special Rapporteur La Rue that the rule of law must be strengthened, and domestic legal frameworks and institutions must protect the right to freedom of expression and allow for the development of free and independent media.

Both Special Rapporteurs correctly observe that there are no gaps in international law on this issue—the challenge lies in implementation.

We applaud Special Rapporteur La Rue for focusing specifically on the perils of criminal defamation laws. In recent years, we have seen an increase in prosecutions under such laws. Journalists, bloggers, artists, activists, ordinary citizens—people of all backgrounds and opinions who peacefully exercised their right to freedom of expression—have been unjustly caught up in criminal defamation cases.

Special Rapporteur La Rue aptly described in his report the chilling effect on the right to freedom of expression such laws create, noting further that "criminal prosecution for defamation inevitably becomes a mechanism of political censorship, which contradicts freedom of expression and of the press." Such laws can also undermine national stability and security, driving a wedge between social groups and creating an environment of fear and distrust. The U.S. government strongly believes that the decriminalization of defamation is good policy and urges all States to work toward the complete decriminalization of defamation.

Over the past year and half, we have witnessed the promise that media freedom holds for promoting freedom and democracy. As Secretary Clinton has noted, "A free media is essential to democracy and it fosters transparency and accountability, both of which are prerequisites for sustained economic development." The free flow of information and ideas is a powerful force for progress—we must meet our obligations to protect that freedom.

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On September 27, 2012, at the 21st session of the Human Rights Council, the United States provided an explanation of its support for a resolution on the protection of journalists. U.N. Doc. A/HRC/RES/21/12. The resolution was adopted without a vote. The U.S. explanation of vote is excerpted below and available at *http://geneva.usmission.gov/2012/09/27/explanation-of-vote-protection-of-journalists/*.

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We thank the Austrian government for taking the lead on authoring this resolution, which is emblematic of its continued efforts to ensure freedom of expression and the safety of journalists worldwide.

The free flow of information, including news, helps build productive economies and dynamic societies and provides vital information that citizens can use to hold their governments accountable. However, a broad range of threats confront the media, and journalists' safety is often in danger in many parts of the world. These include the misuse of terrorism laws to prosecute journalists; the closure of websites and social media sites that criticize governments; physical attacks on, assassinations of, and disappearances of reporters; and the inability or unwillingness of governments to take appropriate steps to protect reporters or prosecute those responsible for attacks on journalists.

These and many other cases underscore the urgent need for today's resolution. We are especially appreciative that the resolution recognizes the importance of bringing to justice perpetrators of violence against journalists. Its call for accountability articulates this important goal of the international community. We also appreciate that the resolution recognizes that journalists are far too often the victims of violence due to their work and, in particular, that the

resolution condemns both violations of the right to free expression by governments and impairment of the enjoyment of that right by non-state actors of all kinds.

In regard to OP6, we note that under the doctrine of lex specialis, the applicable rules for the protection of individuals, including journalists, and conduct of hostilities in armed conflict are typically found in international humanitarian law. Although complex issues arise with respect to the relevant body of law that determines whether a State's actions in the actual conduct of an armed conflict comport with international law, in this context, it is important to bear in mind that international human rights law and the law of armed conflict contain many similar protections and are in many respects complementary and mutually reinforcing. Determining the international law rule that applies to a particular action taken by a government in the context of an armed conflict is necessarily a fact-specific determination and cannot easily be generalized.

The United States recognizes the vital role of a free press to an open and just society, and will continue to urge all governments to take the steps necessary to ensure that journalists have the freedom to operate independently and without fear.

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2. Internet Freedom

On July 5, 2012, the Human Rights Council adopted by consensus a resolution on the promotion, protection, and enjoyment of human rights on the internet. U.N. Doc. A/HRC/RES/20/8. Secretary Clinton's press statement on the resolution appears below and is available at *www.state.gov/secretary/rm/2012/07/194610.htm*. Ambassador Donahoe also addressed representatives of the press on the resolution. Her comments are available at *http://geneva.usmission.gov/2012/07/05/resolution-on-human-rights-on-the-internet-a-momentous-outcome-at-the-hrc/*.

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Today, the UN Human Rights Council adopted by consensus a resolution with the message that there can be no division or double standard regarding human rights online. The landmark resolution makes clear that all individuals are entitled to the same human rights and fundamental freedoms online as they are offline, and all governments must protect those rights regardless of the medium.

The free flow of news and information is under threat in countries around the world. We are witnessing an alarming surge in the number of cases involving government censorship and persecution of individuals for their actions online—sometimes for just a single tweet or text message.

This resolution is a welcome addition in the fight for the promotion and protection of human rights and fundamental freedoms online, in particular the freedom of expression, as well as the freedoms of religion or belief, assembly and association, and the right to be free of arbitrary interference with privacy.

The United States was proud to work with the main sponsor, Sweden, and over 80 co-sponsors, including Brazil, Turkey, Nigeria, and Tunisia, to help pass this resolution. We will

continue to stand with our partners to address challenges to online freedom, and to ensure that human rights are protected in the public square of the 21st century.

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At the 19th session of the Human Rights Council, on February 29, 2012, Ambassador Donahoe delivered the U.S. statement at a panel on freedom of expression on the internet. Her statement, excerpted below, is available in full at *http://geneva.usmission.gov/2012/02/29/internet-panel-statement/*.

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We are here to affirm the very simple and uncontroversial proposition that the fundamental freedoms of expression, assembly and association are the birthright of every person. These rights apply to persons and their activity on the Internet and mobile technologies just as they do to persons and their activity offline. We believe very deeply that the sharing and exchange of information and ideas online and offline strengthens societies and empowers individuals.

As Special Rapporteur LaRue and others have noted, we do not need to reinvent international human rights law, or our enduring principles, to account for the Internet. These fundamental rights, and the narrow set of permissible limitations on them, are well established. They do not need further elaboration or updating. No deed is more noble—or more evil—when it is committed online rather than offline.

Governments that are confident in their popular support do not feel threatened by what people say or the opinions they express. Rather than focusing on so-called "abuses" of freedom of expression, we believe this body should focus urgently on protecting the ability of individuals to exercise their right to freedom of expression.

The United States is concerned that some States are using filtering and blocking to unduly limit freedom of expression. Some States conduct illicit monitoring of their citizens' online activity in order to suppress political dissent. Others are attempting to redefine their "security" in ways that would legitimize suppression of human rights.

We are also concerned about an emerging trend in which some governments attempt to suppress dissent online by requiring private Internet companies to block political content deemed "subversive," and by requiring Internet service providers and other companies to track or monitor online activities of their citizens in order to target or punish them for political or other dissent.

We encourage governments to uphold the strong protections for freedom of expression that are embodied in international human rights instruments, including when they seek to address security concerns and we encourage them not to require private companies to become complicit in suppressing dissent. As governments, we must protect the fundamental freedoms of our citizens online so that information technologies support progress instead of facilitate repression.

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3. Religion

a. Freedom of religion

(1) Designations under the International Religious Freedom Act

On March 30, 2012, Secretary Clinton redesignated Burma, China, Eritrea, Iran, North Korea, Saudi Arabia, Sudan, and Uzbekistan, respectively, as countries "of particular concern" under § 402(b) of the International Religious Freedom Act of 1998 (Pub. L. No. 105–292), as amended. The eight states were so designated "for having engaged in or tolerated particularly severe violations of religious freedom." 77 Fed. Reg. 20,687 (Apr. 5, 2012). The presidential actions designated for each of those countries by the Secretary are listed in the Federal Register notice.

(2) Annual Report on International Religious Freedom

On July 30, 2012, the Department of State released and transmitted to Congress the 2011 Report on International Religious Freedom pursuant to § 102(b) of the International Religious Freedom Act of 1998 (Pub. L. No. 105-292), as amended, 22 U.S.C. § 6412(b). The report is available at *www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm*. The State Department updated the format and online user interface for the 2011 report. See July 30, 2012 media note, available at *www.state.gov/r/pa/prs/ps/2012/07/195762.htm*. Secretary Clinton's remarks at the Carnegie Endowment for International Peace in Washington, D.C. on the release of the report are available at *www.state.gov/secretary/rm/2012/07/195782.htm*.

(3) U.S. Statement at the Human Rights Council

On March 6, 2012, the United States delegation provided a statement during a dialogue with the working group on disappearances and the special rapporteur on freedom of religion or belief during the 19th session of the Human Rights Council. The statement, delivered by Charles O. Blaha, emphasized that freedom of religion is the birthright of all people. The statement is excerpted below and available in full at *http://geneva.usmission.gov/2012/03/06/right-to-freedom-of-religion-or-belief-is-the-birthright-of-all-people/*.

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The right to freedom of religion or belief is the birthright of all people, regardless of their faith or lack thereof. It includes the right to profess, practice, and teach one's beliefs. This right must be respected and protected by all governments. Societies that do are more stable, secure, and prosperous than those that do not. The United States is committed to promoting and protecting

this fundamental freedom at home and abroad, and we continue to work with the international community toward that goal.

We would also like to take this opportunity to express our regret for the unintentional mishandling of religious texts at Bagram Airbase. These actions do not represent the views of the United States. We honor and respect the religious practices of the Afghan people.

We will collaborate with Afghan authorities and carefully examine the facts and circumstances of this unfortunate incident. While we understand the deep emotions such an incident can cause, we appreciate the efforts of the Afghan government, including President Karzai, in appealing for calm while allowing peaceful protests to occur. We also note with appreciation the statement by OIC Secretary General Ihsanoglu calling for calm and restraint.

We thank the Special Rapporteur for his most recent report, which discusses recognition, registration, and personality status issues. We share the Special Rapporteur's deep concern that some States make certain rights dependent on affiliation with particular religions and place limitations on access to official documents like identity cards.

Also, cumbersome registration requirements are being used to restrict the freedom of religion of members of various groups, especially minority faith groups. States must relinquish these pernicious practices.

The United States appreciates the Special Rapporteur's engagement on a number of other issues, including the freedom to profess one's religion or belief. We thank the Special Rapporteur for his recent participation in the first Istanbul process meeting to implement HRC Resolution 16/18. It is critical that we continue to focus on implementation of positive, action-oriented measures to combat religious discrimination and intolerance rather than legal restrictions that are counter to human rights.

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b. Combating discrimination based on religion

On March 23, 2012, one year after the Human Rights Council adopted by consensus its landmark resolution 16/18 on combatting religious intolerance and discrimination, the Council adopted another resolution on the subject. U.N. Doc. A/RES/HRC/RES/19/25. Set forth below is the United States' explanation of position on resolution 19/25, delivered by Ambassador Donahoe, and available at *http://geneva.usmission.gov/2012/03/23/combatting-intolerance/*.

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The United States welcomes the consensus adoption of the resolution on combating intolerance, discrimination, and violence against persons based upon religion or belief. This marks the one-year anniversary of this resolution, which represents a significant step forward in the global dialogue on this pressing issue. We appreciate the spirit of collaboration shown by the sponsors of this resolution.

The United States strongly supports today's resolution, which like its predecessor rejects broad prohibitions on speech, and supports actions that do not limit freedom of expression or

infringe on the freedom of religion. This resolution demonstrates a desire to move the debate on shared challenges in a constructive and affirmative direction to ensure that all individuals enjoy their human rights and fundamental freedoms.

Adoption of this resolution must be followed by sustained commitment. At a time when violence and discrimination against members of religious minorities is all too common, we urge the international community to take action and implement the steps called for in this resolution. We note the productive experts meeting held last December in Washington, DC on the topic of implementation, and we look forward to continuing to work with all interested parties on this important endeavor.

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On September 24, 2012, Ambassador Donahoe delivered the statement of the U.S. delegation at a discussion at the 21st session of the Human Rights Council on freedom of expression and freedom of religion. Her statement appears below and is available at *http://geneva.usmission.gov/2012/09/24/freedom-of-expression-and-freedom-of-religion-are-inseparable/*.

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Sometimes it is useful to step back from our daily work and remember what the human rights we are charged to defend actually mean for societies in practice. The inseparable freedoms of expression and religion are important not for abstract reasons. When they are allowed to flourish, we see religious harmony, economic prosperity, societal innovation and progress, and citizens who feel their dignity is respected. When these freedoms are restricted, we see violence, poverty, stagnation, and feelings of frustration and even humiliation. These are not mere assertions but demonstrable facts.

A recent Pew research poll shows that social hostilities involving religion were lowest among countries where governments do not harass or intimidate religious groups, and national laws and policies protect religious freedom. This poll is available on our Mission website. *http://www.pewforum.org/Government/Rising-Tide-of-Restrictions-on-Religion-findings.aspx*

The poll results track with our own experience as a nation. The US had blasphemy laws we inherited from our colonial past and we had laws that prohibited criticism of high officials and of the institution of slavery. These laws did not bring harmony or prosperity to our society; they impeded our progress until we ceased to apply them.

Free expression is instrumental in allowing us to manifest our religious beliefs as we see fit, even when our beliefs may be disagreeable or offensive to others. It allows us to wear religious clothing in public places and to display religious symbols. Our religious dignity comes from how we conduct ourselves and how we profess our faiths, not from the approval of government or others.

This same freedom is instrumental in allowing us to press political views that may not be popular and thus could change the nature of our governance. It allows us to publish scientific findings that challenge established beliefs or challenge established economic models or entrenched interests.

Some of this expression may indeed offend others. Those who criticize a political leader or a social tradition or an economic model will offend those who believe in them. But the potential unlawful reaction of an offended listener should not get a veto over the right of the speaker to express his or her beliefs. This is not because we are insensitive to the feelings of the listener, but because we know from experience that the price of restricting expression is too high. We believe that offensive ideas will fall of their own weight when countered by other arguments in a vibrant marketplace of ideas.

The Human Rights Council found the right formula for combating discrimination and intolerance while upholding the freedoms of religion and expression in Resolution 16/18. By implementing the measures laid out in Resolution 16/18, we bring harmony, peace, prosperity and dignity to our citizens and our societies. We look forward to intensifying that effort in the months ahead.

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4. Expressions of Racism

a. U.S. submission to the Committee for the Elimination of Racial Discrimination

On August 20, 2012, the United States submitted comments to the Committee for the Elimination of Racial Discrimination ("CERD") for consideration in connection with the Committee's August 28 thematic discussion on racist hate speech. The U.S. comments are excerpted below and are available in full at *http://geneva.usmission.gov/2012/08/27/curtailing-freedom-of-expression-is-not-the-way-to-combat-hateful-speech/*.

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…The United States of America is a State Party to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and is profoundly committed to combating racial discrimination. The United States has struggled to eliminate racial discrimination throughout our history, from abolition of slavery to our civil rights movement. We are not at the end of the road toward equal justice but our nation is a far better and fairer place than it was in the past. The progress we have made, we have accomplished without banning speech or restricting freedom of expression. In light of this framework, the United States has long made clear its concerns over resorting to restrictions on freedom of expression, association, and assembly in order to promote tolerance and respect. This concern includes the restrictions contained in Article 4 of the CERD to the extent that they might be interpreted as allowing or requiring restrictions on forms of expression that do not constitute incitement to imminent violence or acts of intimidation. Indeed, these concerns were so fundamental that the United States took a reservation, when it became a Party to the CERD, noting it would not accept

any obligation that could limit the extensive protections for such fundamental freedoms guaranteed in the U.S. Constitution.[2]

Banning and punishing offensive and hateful speech is neither an effective approach to combating such intolerance, nor an appropriate role for government in seeking to promote respect for diversity. As President Obama stated in a speech delivered in Cairo, Egypt in June 2009, suppressing ideas never succeeds in making them go away. In fact to do so can be counterproductive and even raise the profile of such ideas. We believe the best antidote to offensive and hateful speech is constructive dialogue that counters and responds to such speech by refuting it through principled arguments, causing the hateful speech to fall under its own weight. In addition, we believe government should speak out against such offensive speech, and employ tools to address intolerance that include a combination of robust legal protections against discrimination and hate crimes, proactive government outreach, education, and the vigorous defense of human rights and fundamental freedoms, including freedom of expression. Accordingly, the United States has a strong interest in the subject of this hearing and shares the following views in the hopes that they will help shed light on the need to promote respect for broad protections for freedoms of expression in the ongoing global struggle to combat racial discrimination.

Historical and Legal Framework Regarding Hate Speech within the United States

Our own history has taught us that curtailing freedom of expression by banning offensive and hateful speech is both a misguided and dangerous enterprise. …Shortly after the birth of our nation, the United States Congress passed the Sedition Act, which made it a crime to publish "false, scandalous, and malicious writing" against the government with the intent to "excite against them … the hatred" of the people. The Sedition Act was used as a political tool to prosecute Americans for speaking out against their government. The Act quickly became

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[2] Other governments also have noted their concern about the protection of freedom of expression in the CERD. Some States Parties took explicit reservations while others have relied on the "due regard" provision of Article 4 and its reference to rights enshrined in the UN Declaration of Human Rights and in Article 5(d), including the rights to freedom of opinion and expression and the right to freedom of peaceful assembly and association, in order to protect broad protections for such fundamental freedoms. For example, the French reservation states: "With regard to article 4, France wishes to make it clear that it interprets the reference made therein to the principles of the Universal Declaration of Human Rights and to the rights set forth in article 5 of the Convention as releasing the States Parties from the obligation to enact anti-discrimination legislation which is incompatible with the freedoms of opinion and expression and of peaceful assembly and association guaranteed by those texts." The reservation by the Bahamas, Fiji, and other states notes that they interpret Article 4 as requiring a party to the Convention to adopt further legislative measures in the fields covered by subparagraphs (a), (b), and (c) of that article only in so far as it may consider *with due regard* to the principles embodied in the Universal Declaration set out in Article 5 of the Convention (in particular to freedom of opinion and expression and the right of freedom of peaceful assembly and association). Some 20 States Parties have taken similar reservations to the CERD which address protection of rights to freedom of expression. Available at *http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en#21*.

unpopular and eventually expired, as we recognized that our young democracy needed dissent, not dictates, in order to survive.

In the first half of the nineteenth century, many states within the United States passed laws that made it illegal to criticize slavery. Those who spoke out against slavery in public or in their writing were punished as criminals, often severely. It was only through the efforts of abolitionists who courageously spread their message—and a bloody civil war—that we ended the horror of American slavery. In so doing, we reaffirmed our commitment to freedom of expression and the right to speak out against injustice. In the past 100 years, our Supreme Court has debated and adopted the notion that competition in ideas is a more appropriate way to address hateful speech than is government action to restrict expression. In 1974, the Court summarized this history, holding that "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[3]

Following in this vein, U.S. courts have upheld the rights of Neo-Nazis, Holocaust deniers, and members of white supremacist groups to march in public, distribute literature, and attempt to rally others to their cause. …We protect freedom of expression not only because it is enshrined in our Constitution as the law of the land, but also because our democracy depends on the free exchange of ideas and the ability to dissent. And we protect freedom of expression because the cost of stripping away individual rights is far greater than the cost of tolerating hateful words. We also have grave concerns about empowering governments to ban offensive speech and how such power could easily be misused to undermine democratic principles.

Alternatives to Restricting Freedom of Expression

In addressing the problems posed by hate speech, the United States believes that robust implementation of obligations to combat racial discrimination, while simultaneously protecting freedom of expression is essential. The CERD contains a number of fundamental and far-reaching obligations—particularly under Articles 2, 3, 5 and 6—which, if fully implemented, serve as effective tools to comprehensively root out racial discrimination and promote tolerance. For example, Article 2 requires States Parties to "undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races." Article 3 requires States Parties to "prevent, prohibit and eradicate" racial segregation and apartheid and other practices of that nature. Article 5 requires States to guarantee equality before the law with respect to a broad range of civil, political, economic, social, and cultural rights. Article 6 requires the provision of effective protection and remedies. By contrast, restricting freedom of expression uniformly fails to achieve these goals. Given the consensus that surrounds such provisions in combating racial discrimination and their proven effectiveness, we would encourage the Committee to focus squarely on how rigorous implementation by States Parties of these non-controversial core obligations can effectively combat racist hate speech without resorting to inherently ineffective restrictions on freedom of expression.

In the United States, we believe the best way to combat intolerance and discrimination is to have a strong legal regime to deal with acts of discrimination and hate crimes, to proactively engage in outreach to affected communities, to speak out against intolerance, and to promote broad protections for freedom of expression. Our network of civil rights laws—forged through our own painful civil rights struggle—deters and punishes those who would undermine the

[3] U.S. Supreme Court opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

ability of others to live free from discrimination and violence. Several federal statutes punish acts of violence or hostile acts motivated by racial, ethnic, or other hatred and intended to interfere with the participation of individuals in certain activities such as employment, housing, public accommodation, and use of public facilities. The U.S. Supreme Court has determined that bias-inspired criminal conduct may be singled out for especially severe punishment. The prosecution of hate crimes is only one element in a broader effort of community engagement and empowerment. The United States Government works with state and local entities to educate our young people through anti-bullying curricula and other educational programs aimed to eliminate hate among our nation's youth. Through these kinds of actions, the United States encourages communities and schools to address bigotry before it becomes fuel for violence. We also have active outreach programs in our communities, where federal, state, and local law enforcement officers work to build trust among different ethnic and racial groups, to understand sensitivities and break down stereotypes, and to increase dialogue. Finally, political leaders from the President down to state and local officials speak out about intolerance and condemn such acts when they do occur. Discrimination, bigotry, and hate have no place in our nation in 2012. We are committed not only to combating these problems, but also to working with communities to prevent them from occurring in the first place.

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The Committee's Focus Should Be on Effective Measures

We question whether it is the best use of this Committee's resources to embark on an in-depth process for addressing the topic of racist hate speech. We would encourage the Committee to consider focusing its efforts and sharing its expertise on effective measures States can take to combat and redress racial discrimination under the CERD rather than resorting to counterproductive restrictions on fundamental freedoms. …Moreover, we would encourage the Committee to avoid directing scarce resources to commencing a new debate on this issue when other bodies are actively seized of these same issues. For example, in Human Rights Council Resolution 16/18 (which has been endorsed by the UN General Assembly), UN Member States have decided to explore better ways to implement a large number of measures for addressing and combating intolerance and hate speech that do not involve broad bans on fundamental freedoms. Member States are meeting even outside of the UN system to pursue this dialogue and are reporting back the results to the Office of the High Commissioner for Human Rights (OHCHR). This approach should be given a chance to develop before the CERD Committee places more of its focus on the topic of hate speech. In addition, the OHCHR has conducted regional conferences on Article 20 of the International Covenant on Civil and Political Rights. The CERD Committee should allow that process to reach completion and for States to react to it before moving forward on more work relating to hate speech. An extensive CERD process in this area could be duplicative of other work at the UN and should be avoided.

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b. Third Committee resolution

On November 27, 2012, U.S. Deputy Representative to ECOSOC Teri Robl delivered the U.S. explanation of vote on a draft resolution presented in the Third Committee of the UN

General Assembly on "Glorification of Nazism: Inadmissibility of certain practices that contribute to fueling contemporary forms of racism, xenophobia." The United States was one of three members to vote against the resolution; 120 voted in favor and 59 abstained. The resolution was subsequently adopted by the General Assembly by a vote of 129 in favor to three opposed, with 54 abstaining. U.N. Doc. A/RES/67/154. The U.S. explanation of vote in the Third Committee is excerpted below and available in full at *http://usun.state.gov/briefing/statements/201100.htm*.

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The United States supports many elements of this resolution. We join other members of the Third Committee in expressing revulsion at any attempt to glorify or otherwise promote Nazi ideology. The United States has a deep commitment to honoring the memory of the millions of lives lost in the Holocaust, and has been a strong supporter of the UN's efforts to remember the Holocaust. We also condemn without reservation all forms of religious intolerance or hatred.

The United States shares the concern expressed in this resolution regarding the frequency of racist views expressed in any medium or forum, including on the Internet. We remain concerned, however, as in previous years, that the resolution fails to distinguish between offensive expression, which should be protected, and actions, such as discrimination and violence motivated by bias, which should always be prohibited.

We do not consider curtailing expression to be an appropriate or effective means of combating racism and related intolerance. Rather, it is our firm conviction, as reflected in the U.S. Constitution and laws of the United States, that individual freedoms of expression and association should be robustly protected, even when the ideas represented by such expression are offensive or hateful. We encourage States to refrain from invoking Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 20 of the ICCPR to limit freedom of expression or as an excuse for failing to take effective measures to combat racism or intolerance. In a free society, hateful ideas will fail due to their own intrinsic lack of merit. The best antidote to intolerance is not criminalizing offensive speech, but rather a combination of robust legal protections against discrimination and hate crimes, proactive government outreach to minority religious groups, and the vigorous defense of both freedom of religion and freedom of expression.

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M. PROMOTION OF HUMAN RIGHTS IN THE CONTEXT OF PRIVATE MILITARY AND SECURITY COMPANIES ("PMSCs")[*]

In 2010, the Human Rights Council established an open-ended intergovernmental working group on the activities of private military and security companies. Although the United

[*] Editor's note: The United States uses the term "PMSCs" because the HRC uses that term. However, as discussed in the statements excerpted *infra*, the United States has conveyed the view that private security contractors ("PSCs") need to be distinguished from private military companies ("PMCs").

States voted against the resolution establishing the working group due to its stated purpose of elaborating a legally binding international instrument (see *Digest 2010* at 738-40 for the U.S. explanation of vote), it has cooperated with and participated in the working group since its founding. The United States has also cooperated with the work of a separate working group on the use of mercenaries.

1. U.S. Submissions to the Working Group on the Use of Mercenaries

a. Legal status and accountability of PSCs

In 2012, the United States provided responses to questions from Ms. Faiza Patel, the chair-rapporteur of the working group on the use of mercenaries, regarding the legal status and accountability of U.S. private security contractors ("PSCs") in Iraq and elsewhere. The letter from Ambassador Donahoe to Ms. Patel, dated June 1, 2012, is excerpted below and available in full at *https://spdb.ohchr.org/hrdb/21st/USA_01.06.12_(22.2011).pdf*.

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The Civilian Extraterritorial Jurisdiction Act (CEJA) was introduced in the Senate this year as Senate Bill 1145 and is currently pending. The Bill has been reported by the Senate Judiciary Committee and placed on the Senate Legislative Calendar where it awaits further action by Congress.

The U.S. Government is fully committed to ensuring that U.S. contractors who are accused of committing serious crimes abroad are investigated and, when warranted, fully prosecuted. The Administration strongly supports swift passage of CEJA to expand and clarify extraterritorial jurisdiction over U.S. Government contractors, and is working on an ongoing basis with Congress to encourage passage of the Bill.

Though CEJA does contain a limited carve-out for certain intelligence activities of the United States, the carve-out, as it appears in the Bill, applies only to activities authorized in a manner consistent with applicable U.S. law. Moreover, pre-existing bases for extraterritorial jurisdiction will continue to exist, including 18 U.S.C. paragraph 3261 (Military Extraterritorial Jurisdiction Act), 18 U.S.C. paragraph 2441 (war crimes), 18 U.S.C. paragraph 2340A (torture), 18 U.S.C. paragraph 1596 (trafficking in persons), 10 U.SC. paragraph 802 (application of the Uniform Code of Military Justice to contractors that serve with or accompany an armed force in the field during declared war or a contingency operation), and 18 U.S.C. paragraph 7 (crimes committed in the special maritime and territorial jurisdiction of the United States).

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The U.S. Government is fully committed to ensuring that PSCs respect international law and are held accountable when they engage in misconduct. This commitment is evidenced by many of the steps laid out in this response.

The United States Government also has taken a number of steps to improve contractor oversight. E.g., National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, para 841, 122 Stat. 230 (establishing independent "Commission on Wartime Contracting" to study contracting in Iraq and Afghanistan); reports and hearing documents available at the wartime contracting website (*http://www.wartimecontracting.gov*); Congressional Research Service, DoD Contractors in Afghanistan & Iraq: Background & Analysis 18-19 (Mar. 29, 2011) (noting steps DoD has taken to improve management of contractors in Iraq and Afghanistan). Significantly, moreover, Congress has now expressly barred civilian contractors from performing interrogation functions, and has required private translators involved in interrogation operations to undergo substantial training and to be subject to substantial oversight. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, para 1038, 123 Stat. 2451; 75 Fed. Reg. 67,632 (2010).

The U.S. Government is working toward expanding and clarifying extraterritorial criminal jurisdiction by encouraging Congress to pass CEJA. In the meantime, the U.S. Government continues to pursue criminal prosecutions involving PSC misconduct, including the prosecution of several individuals involved in the Nissour Square incident in 2007. The earlier dismissal of that case was reversed on appeal, and the prosecution remains active.

The U.S. Government is also working to promote appropriate remedies for victims of misconduct. We have filed briefs in the course of litigation to influence the development of the law in a manner that recognizes that one of the government's interests is providing an appropriate remedy to victims. … In addition, through participation in the ICoC [International Code of Conduct] initiative, we are pursuing innovative means of facilitating dispute resolution under circumstances where traditional legal processes may be difficult to access.

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b. National laws and regulations relating to PMCs and PSCs

In 2012, the United States also cooperated with the working group on the use of mercenaries in its efforts to collect information about national laws and regulations relating to private military companies and private security companies. Excerpted below is the July 2, 2012 letter from Ambassador Donahoe to Ms. Patel, identifying U.S. laws and regulations applicable to PMSCs. The letter is also available at *www.ohchr.org/Documents/Issues/Mercenaries/WG/Law/USA/CoverLetter.pdf*.

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Thank you for your letter dated May 9, 2012 regarding national regulatory frameworks relevant to private military companies and private security companies. In response to your request, we have provided copies of the following statutes and regulations.

Laws and Regulations Specifically Tailored to the Provision of Private Security Services

- Public Law (Pub. L.) 110-181, § 861, 862, 864 (National Defense Authorization Act (NDAA) 2008, Contracts in Iraq and Afghanistan), amended by:
    - Pub. L. 110-417, § 853-854 (NDAA 2009, Contracts in Iraq and Afghanistan)

    - Pub. L. 111-84, § 813 (NDAA 2010, Contracts in Iraq and Afghanistan)
    - Pub. L. 111-383, § 831-832 (NDAA 2011, Contracts in Iraq and Afghanistan)
- Pub. L. 111-84, § 1038 (NDAA 2010, Contractor Interrogations)
- Pub. L. 111-117, § 7006 (Local Guard Contracts – Department of State)
- Pub. L. 111-383, § 833 (NDAA 2011, Standards and Certification for Private Security Contractors)
- 32 C.F.R. § 159 (Private Security Contractors Operating in Contingency Operations)
- Defense Federal Acquisition Regulation Supplement (DFARS) 225.370 (Contractors Performing Private Security Functions)
    - DFARS 252.225-7038 (contract provision)
- Department of Defense Instruction (DODI) 3020.50 (Private Security Contractors Operating in Contingency Operations, Humanitarian or Peace Operations, or Other Military Operations or Exercises)

Generally Applicable Laws and Regulations with Implications for Private Security Companies and their Employees

- 10 U.SC. § 802 (Application of the Uniform Code of Military Justice to Contractors)
- 15 U.S.C. § 78dd-1, et seq. (Foreign Corrupt Practices Act)
- 18 U.S.C. § 7 (Special Maritime and Territorial Jurisdiction)
- 18 U.S.C. Chapter 50A (Genocide)
- 18 U.S.C. Chapter 77 (Trafficking in Persons)
- 18 U.S.C. Chapter 113C (Torture)
- 18 U.S.C. § 2441 (War Crimes)
- 18 U.S.C. § 2442 (Child Soldiers)
- 18 U.S.C. § 3261-3267 (Military Extraterritorial Jurisdiction Act)
- 22 U.S.C. Chapter 39 (Arms Export Control Act)
- 28 U.S.C. § 1350 (Alien Tort Statute)
- 28 U.S.C. § 1350 *note* (Torture Victim Protection Act)
- 31 U.S.C. § 3729-3733 (False Claims Act)
- 42 U.S.C. § 1651-654 (Defense Base Act)
- 22 C.F.R. § 120-130 (International Traffic in Arms Regulations)
- Federal Acquisition Regulation (FAR) 7.5 (Inherently Governmental Functions)
- FAR 22.17 (Combating Trafficking in Persons)
    - FAR 52.222-50 (contract provision)
- FAR 25.3 (Contracts Performed Outside of the United States)
    - FAR 52.225-19 (contract provision)
- 76 Fed. Reg. 56,227 (Office of Management and Budget Policy Letter – Performance of Inherently Governmental and Critical Functions)
- Department of Defense Directive (DODD) 5210.56 (Carrying Firearms and the Use of Force by Department of Defense Personnel Engaged in Security, Law and Order, or Counterintelligence Activities)
- DODI 3020.41 (Operational Contract Support)

We hope you find this information helpful in your work.

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2. Second Session of the Working Group on PMSCs

The United States also actively participated in the second session of the open-ended intergovernmental working group on private military and security companies held in Geneva from August 13 to 17, 2012. Excerpted below is the opening statement of the U.S. delegation. The full statement is available at *http://geneva.usmission.gov/2012/08/31/pmscs-iqwg-%E2%80%93-u-s-opening-statement/*. The opening statement reiterates U.S. support for the Montreux Document and the International Code of Conduct, discussed in *Digest 2010* at 740-42.

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United States policy with regard to private security companies and private military companies is informed by two critical objectives: (1) to promote accountability, transparency and respect for human rights, and (2) to ensure governments and other non-state clients are able to continue to utilize private companies in areas where they are necessary for important operations, including those related to stabilization, humanitarian assistance, diplomacy, and development.

The United States takes very seriously that first objective and recognizes legitimate concerns that have been expressed about the operations of PSCs and PMCs; and we firmly support both international and domestic efforts to ensure accountability for human rights related abuses committed by PSCs or PMCs—as well to establish and strengthen policies that can help prevent misconduct before it occurs.

At the international level, as I expect we will discuss in more detail tomorrow, we have supported both the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies During Armed Conflict and the International Code of Conduct for Private Security Service Providers. We believe that these efforts are complementary and can be used to support efforts by states to craft appropriate legal and regulatory approaches to these industries. Recognizing that the relationship with and impact of these industries varies from state-to-state, it is our view that national-level regulation, based on informed consideration and open deliberation, is the most appropriate and effective way to ensure respect by these industries for human rights.

At the national level, we have taken steps both (1) to mitigate the potentially negative human rights related impact of PSC and PMC activities and (2) to ensure accountability for any misconduct that occurs. With regard to the former, U.S. Government contracts have incorporated robust standards of conduct, training requirements, and specifications for the selection and vetting of personnel. Furthermore, many activities of PSCs and PMCs are subject to licensing requirements under U.S. law. The export of defense articles or defense services, for instance, is regulated under the Arms Export Control Act.

We have also established procedures for reporting and investigating instances of alleged misconduct by private security contractors operating in connection with contingency operations. And we have supported passage of the Civilian Extraterritorial Jurisdiction Act (CEJA), which would expand and clarify extraterritorial jurisdiction over U.S. Government contractors who are not already covered by the Military Extraterritorial Jurisdiction Act (MEJA), the Special Maritime and Territorial Jurisdiction Act (SMTJ), or the Uniform Code of Military Justice (UCMJ).

With this update in mind, and recognizing we'll have an opportunity to speak more about the U.S. experience in subsequent sessions, we'd like to briefly set out three principles that we think we should all bear in mind this week.

We should seek consensus on this issue. As you know, the United States voted against the resolution establishing this Working Group and continues to believe that pursuit of a legally-binding instrument is not an appropriate or useful goal for this body. We nevertheless engaged at the first session of this Working Group and hope at this session that we can reach consensus on possible recommendations to present to the Human Rights Council. An approach that divides us is unlikely to bear fruit. Consider, for instance, the limitations of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries. But an approach that brings together host states, territorial states, and contracting states to make progress in step-by-step fashion on promoting and protecting human rights in the context of activities of PSCs and PMCs would be well worth pursuing. The United States very much supports measures that can reduce the risk of, and ensure accountability for, any misconduct by PSCs and PMCs; and we hope we can reach common ground on how to take the next step in achieving those goals.

A consensus approach should recognize and distinguish between the national and international dimensions to this issue. As we have said before, much of what is needed in this area is better implementation of existing international law, as well as improvements in law, regulation and policy at the national level. Indeed, it bears reiterating that a domestic focus is appropriate since, when operating outside of armed conflict, PSCs and PMCs are primarily regulated by domestic law, which may or may not adequately reflect human rights concerns. That said, we remain open to considering the international element as well—and in particular how we as states can draw on each other's experiences to help each other address human rights related impacts of PSC and PMC activities.

To make progress at the international level, we should have a focused discussion of what the problems are and what strategies are working to address them. In this regard, we welcome the study on national legislation that the Working Group on Mercenaries is undertaking. We also look forward to hearing the presentations on Thursday from states with national legislation on how they have addressed issues arising from PSC and PMC activity. It would be valuable to use these discussions to identify possible topics for further discussion among states—such as the best approaches different states have taken to licensing and export, and any challenges they have faced, or approaches different states have taken to accountability, including whether they have pursued civil, criminal, or administrative remedies.

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The U.S. delegation provided several significant statements at the working group's August 2012 session. Excerpted below is the U.S. statement on the definition and scope of the PMSC industry, emphasizing the important distinctions between private security companies, private military companies, and mercenaries and the correspondingly different standards that should apply to these groups. The full statement is available at *http://geneva.usmission.gov/2012/08/31/pmscs-igwg-%E2%80%93-u-s-statement-on-definitions/*.

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From the U.S. delegation's perspective, it is important to distinguish three terms—Private Security Companies (PSCs), Private Military Companies (PMCs), and mercenaries. PSCs perform functions such guarding personnel, facilities, designated sites, or property; this can include operations in complex emergencies and similar environments as well as operations with which we are all probably more familiar, such as guarding hotels in stable environments. PMCs, by contrast, perform functions in support of the military such as logistical support unique to armed forces, maintenance and operation of weapons systems, or military training. Another distinct category that further complicates this field is that of mercenaries, which are defined in Article 47 of Additional Protocol I. While some legal regimes have taken a prohibitory approach to mercenaries, IHL [international humanitarian law] has long recognized the legitimate role of civilians, like PMCs and PSCs, authorized to accompany armed forces.

It is also important to distinguish between situations of armed conflict—to which IHL applies—other situations where violence and/or instability have led to the use of commercial security providers, and other environments.

The reason these distinctions are important is because the same rules plainly are not appropriate for an individual guarding a hotel in a state with robust and effective domestic laws, an individual guarding a consular or diplomatic post in a high-risk environment, a contractor who trains a police force, and someone taking direct part in hostilities for hire.

This diversity is one of the reasons why we oppose a convention. Different elements of the PSC and PMC industry present different challenges. Attempting to negotiate a one-size-fits-all legally binding instrument is not a recipe for success.

We also think it is important to recognize what is described on the programme of work as "challenges with regard to the extraterritorial activities of PMSCs." One such challenge is that although territorial states typically have laws on the books regarding PSC activities, their ability to enforce the law may be limited, both by capacity and by the fact that the PSC may be operating in a remote or high-threat location. (In fact, the reasons why clients often need to contract with PSCs is because the rule of law has been undermined in their area of operations). This is an issue we very much support addressing—whether through domestic legislation, such as our own effort to broaden the scope of extraterritorial jurisdiction, or through international measures such as law enforcement cooperation or capacity building.

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In its engagement with the working group, the United States has consistently explained its opposition to the drafting of a legally binding international instrument. The statement of the U.S. delegation to the August session of the working group on the issue of elaborating a legally binding instrument is excerpted below and is available in full at *http://geneva.usmission.gov/2012/08/31/pmscs-iqwg-%E2%80%93-u-s-statement-on-the-option-of-a-legally-binding-instrument/*.

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…[W]e are open to "consider[ing] the possibility of elaborating an international regulatory framework"—and, indeed, through the Montreux Document and the Code are working in this line. But we are not prepared to support "the option of elaborating a legally binding instrument."

First, the case has not been made that we need a convention. There has been far too little discussion of the scope and nature of the problems states need to address for us to leap to conclude that a convention is the only way to address them. We have not had sufficient opportunity to discuss the various and constantly evolving facets of and activities undertaken by PSC and PMCs. Nor have we had informed discussions about the approaches states have already taken to licensing, or vetting of PSCs or PMCs before contracting with them or supervision of or accountability for their activities under contracts concluded with them. We believe that those conversations are the most effective way to help inform and guide state approaches to regulation.

Second and relatedly, it is premature to consider a possible convention. The groundwork has not been laid. We need more time to see how initiatives such as the Code and various performance standards translate in practice and how national legal regimes develop to address these varied concerns. Hastily drafting a convention can only result in an instrument that fails to attract a significant number of ratifications, which would result in the same patchwork approach that convention advocates point to as the reason why a convention is needed in the first place. Worse, it would also divert attention and resources from other possible efforts to help prevent human rights related abuses by employees of PSCs and PMCs and ensure accountability for such abuses if they occur. There is much that can and should be done to promote best-practices and coordination among states, and between states and other stakeholders, if we can focus on issues that we all agree require further attention.

Finally and most fundamentally, a one-size-fits-all approach is not appropriate. We would ask—Do states really all have the same concerns? Are the concerns the same with each sector of the industry? Does it matter whether what is contemplated is connected to an ongoing armed conflict or not?

As we have seen with the earlier draft convention prepared by the Working Group on Mercenaries, there could be unintended consequences to an unnuanced approach. For instance, to give just two examples, the draft convention proposed by the Working Group would have burdened a range of actors who do not need international regulation, such as private security guards at hotels and cybersecurity consultants. The draft convention would also have seriously threatened assistance programs—not only military assistance programs, including to UN peacekeeping operations, but also humanitarian and health programs staffed by contractors—as the draft convention would have prohibited private companies from participating in "knowledge transfer" with military, security or police application. These sorts of overbreadth problems not only characterize the existing draft convention, but would also likely characterize other possible binding instruments. While we agree with the Working Group on Mercenaries that there is room for further discussion and clarification related to when, where, how, and what states can do to ensure better regulation and accountability with regard to these industries, we remain convinced that any attempt to craft rigid answers to these questions and cram them all together in a single, uniform instrument will not succeed.

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In the excerpt below from the U.S. statement on existing initiatives, the United States repeated its support for the Montreux Document and the International Code of Conduct

("ICoC"). The full statement is available at *http://geneva.usmission.gov/2012/08/31/pmscs-iqwg-u-s-statement-on-existing-initiatives/*.

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We are pleased that the Montreux Document continues to attract support. Our hope is that states will use this Document to help ensure compliance with their international law obligations, and in particular IHL. The good practices—while not constituting a checklist against which states will be judged—do provide helpful and practical guidance to States that contract with private security companies, to States on whose soil they operate, and to States in which they are based or incorporated.

Likewise, we are supportive of the Code and the follow-up processes now underway. Indeed, the Code not only reflects the important substantive commitments of companies that sign up to it, but also calls for the establishment of (1) industry standards that can be measured and verified by external auditors, and (2) an oversight and governance mechanism that will manage the Code and ensure that companies are implementing their commitments effectively. The first quality management system for PSC operations was approved by the American National Standards Institute in April of this year. This standard provides measurable and auditable criteria to implement the recommendations of the Montreux Document and the principles of the ICoC in both company operations and enforceable contract provisions. Conformance with this standard is now required in all U.S. Defense Department contracts for private security functions. The standard is the product of subject matter experts from 24 nations, with assistance from UN DSS [Department of Safety and Security] and the ICRC. It is moving towards international approval and is under review by national standards bodies from several other nations and the European Union. In the coming months, ANSI will submit the standard to ISO for international recognition. With regard to the oversight mechanism, the temporary steering committee is continuing to engage in an open and transparent effort to revise the draft Charter for the mechanism. Earlier this year, extensive comments were received on the functions and governance of an oversight mechanism, and we appreciate the time and effort that went into preparing those comment. Additional outreach to and deliberation with interested stakeholders will take place at meetings to be held in September and October to consider and work toward consensus on remaining issues associated with drafting the Charter. This will include resolving exactly how the main functions of the oversight mechanism will operate, including certification of company policies, monitoring of company practices, and mechanisms for receiving complaints.

Once the standard and oversight mechanism are in place, we will be in a better position to assess the effectiveness of the Code; but we think the Code has real potential to improve performance across the industry and limit the risk of human rights related abuses.

Although work is ongoing on the mechanisms that will ultimately determine the success of the ICoC initiative, I would like to respond to some of the comments we often hear.

At the outset, it is important to emphasize that the ICoC is not designed to be a substitute for state regulation. We strongly believe that national regulation of PSCs and PMCs in accordance with the Montreux Document is critical for promoting good practices and ensuring accountability in cases of misconduct. The ICoC is designed to complement state regulation by encouraging PSCs to adopt practices which support State regulation and by improving oversight

and promoting accountability in places where traditional legal regimes face challenges. With that in mind, here are some of the comments we have heard expressed.

First, we sometimes hear that the Code is voluntary and therefore ineffective. This criticism discounts the role that market pressure can play. The PSC and PMC industry grew because there was a market for these services. By the same token, market pressure will give companies an incentive to alter their practices—to sign up to the Code and to ensure that they are deemed compliant by the oversight mechanism—as clients, states, media, and the public in general will be handed an effective tool for distinguishing between companies.

Another criticism is that the Code is non-binding or not effectively enforceable. While the Code is voluntary, it is important to note that the Code contemplates the existence of an oversight mechanism, which is currently being designed, that will help ensure compliance on the part of those companies who choose to sign-up to the Code. This criticism also ignores the ability of states and other clients to enforce the Code. The standards derived from the Code can be integrated into contracts and clients can then use contractual remedies to ensure compliance. In other circumstances, a company's agreement to the Code could be a condition of eligibility for a license to operate. For commercial clients of PSC services, certification by the oversight mechanism could be made a pre-condition for submitting a bid or contract award.

Indeed, given some of the challenges posed by extraterritorial activities of PSCs, leveraging a state's power as client, and the power of the market to influence decisions by private parties, may be one of the most effective ways of making an impact on the ground.

All this said, we are not arguing that the Montreux Document and the Code are the only initiatives we can discuss. Again, the Code may help complement State regulation, but we fully recognize that it is not and cannot be a substitute for effective accountability under the law. The Montreux Document is a very good starting point for improving national regulation, but we recognize that, here too, there is more work to be done.

Indeed, we think there remains room to discuss additional measures that could be taken to reduce the risk of, or ensure accountability for, human rights related impacts of PSC or PMC activity, including under the auspices of the Human Rights Council. But any such discussion should complement the Montreux Document and the Code. It should also focus on human rights, rather than IHL, consistent with the mandate of the Council. And any such discussion should take account of the careful way in which the Montreux Document and the Code were elaborated, listening to all viewpoints and developing best practices upon which states can draw—as this has been a critical part of the success of the Montreux Document and the Code. A hasty, take-it-or-leave-it approach simply will not work.

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The excerpt below is from the U.S. statement on accountability for human rights violations or abuses by PMSCs under U.S. domestic law and regulation. The full statement is available at *http://geneva.usmission.gov/2012/08/31/pmscs-iqwg-u-s-statement-on-domestic-legislation/*. As discussed in section M.1., *supra*, the United States also provided a list and copies of relevant U.S. laws and regulations to the rapporteur for the working group on mercenaries to aid its study of national legislation.

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…I'd like to provide a brief overview of some of the relevant U.S. laws and regulations. Like many other governments and international organizations, we have expanded our use of contract personnel in recent years. And we have learned important lessons as a result.

The U.S. does not have a single law respecting PSCs and PMCs—rather, we have a web of interlocking provisions that address different issues related to this industry.

One category of measures is those regarding procurement and export of PSC or PMC services, where the United States may be either or both a contracting or home state. In our capacity as contracting state, extensive requirements have been incorporated into U.S. Government contracts regarding selection and vetting of personnel, training, and standards of conduct. For example, the Worldwide Protective Services contract used to protect U.S. diplomats in high threat environments includes mandatory country-specific cultural awareness training for all security contractors prior to deployment. The Worldwide Protective Services contract also offers an example of improved oversight of security contractor personnel. State Department employees are embedded with contractors to provide direct operational oversight of all protective motorcades, and video recording systems and tracking systems are installed in vehicles to enhance oversight and contractor accountability. Furthermore, U.S. law prohibits the government from contracting for the performance of inherently governmental functions, and our Office of Management and Budget has recently published guidance establishing government-wide policy addressing this issue. It identifies examples of inherently governmental functions, including the circumstances under which security functions are considered to be inherently governmental. In our capacity as home state, under the Arms Export Control Act (AECA) and the International Traffic in Arms Regulations (ITAR) the United States controls the export of defense articles and defense services by PSCs and PMCs by requiring that companies obtain a license or other authorization before exporting such defense articles or defense services. These terms cover a range of activities, such as military training of foreign units and forces.

A second category of measures relates to accountability. Here, the United States can and has itself taken a range of actions, from criminal prosecution to contract measures, and it is also possible for private parties to bring suit under certain circumstances. It is important to note that while there have been circumstances where immunity from the jurisdiction of the host government has been granted for the activities of PSCs working for the United States government abroad, those have been the exception rather than the rule and have been tailored in coordination and with the approval of those governments in whose territory the contractors are operating. On the criminal side, the United States has exercised jurisdiction under the Military Extraterritorial Jurisdiction Act (MEJA) and the Uniform Code of Military Justice (UCMJ) to hold contractors accountable for violations of our laws. In addition, we support broadening and clarifying the scope of extraterritorial criminal jurisdiction. The Civilian Extraterritorial Jurisdiction Act (CEJA), for instance, was introduced in the Senate last year as Senate Bill 1145 and is currently pending. On the contract side, familiar contract mechanisms exist under U.S. law for holding accountable contractors that fail to meet contractual requirements. They include performance-based deductions, non-extension of option contracts, negative performance evaluations, termination for default, and suspension/debarment. The False Claims Act also provides a mechanism for whistleblowers to hold accountable contractors that engage in fraud on a U.S. Government contract. Finally, private parties may bring suit under state common law or under federal statutes. In briefs the United States has filed in such suits, we have made clear that accountability is one of several interests that must be taken into account.

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Further information, including documents, relating to the second session of the working group on PMSCs, held in Geneva in August 2012, is available at *www.ohchr.org/EN/HRBodies/HRC/WGMilitary/Pages/OEIWGMilitarySession2.aspx*. The closing statement of the U.S. delegation is available at *http://geneva.usmission.gov/2012/08/31/pmscs-iqwg-%E2%80%93-u-s-closing-statement/*.

N. FREEDOM OF ASSEMBLY AND ASSOCIATION

In September 2012, at the 21st session of the Human Rights Council, the United States introduced a resolution on the rights to freedom of peaceful assembly and association. The resolution was adopted by consensus on September 27, 2012. U.N. Doc. A/HRC/RES/21/16. Ambassador Donahoe delivered a statement for the United States, excerpted below and available at *http://geneva.usmission.gov/2012/09/27/resolution-on-freedom-of-peacable-assembly-and-association-adopted-by-consensus/*, in which she introduced the resolution. The United States also delivered a statement at the 20th session of the HRC in response to the report of the special rapporteur on freedom of peaceful assembly and of association (not excerpted herein), available at *http://geneva.usmission.gov/2012/06/21/rights-to-freedom-of-peaceful-assembly-and-association-are-essential-components-of-democracy/*.

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The United States is pleased to introduce a resolution on "The rights to freedom of peaceful assembly and of association" for consideration and approval by this Council. We want to thank our fellow Core Group members—the Czech Republic, Indonesia, Lithuania, the Maldives, Mexico, and Nigeria—for their leadership and unflagging effort to advance this important and timely resolution. We present this text today on behalf of 62 cosponsors. We have made oral revisions to the tabled version—copies of these changes have been distributed in the room.

Two years ago we joined Council colleagues in supporting the landmark decision to appoint the first-ever Special Rapporteur on the rights to freedom of peaceful assembly and of association to highlight the growing threats to peaceful assembly and association , while developing best practices for the protections of those rights. This important mandate makes the Council more effective in defending human rights on the ground throughout the world.

The rights to freedom of peaceful assembly and of association are essential components of democracy and pillars of a thriving society. While there is no single recipe for improving the human rights situation worldwide, a common ingredient in bringing about positive change in every region of the world is the strong role of civil society. Around the world, civil society—either as individuals or in groups—supports the work of our governments by filling gaps in education, health, and provision of many public services. They provide for interreligious dialogue, academic and cultural exchanges; they promote economic development and strengthen access for the most vulnerable and least empowered people; and they work to keep our

governments on track by pushing us to remain transparent and accountable. Civil society has been at the forefront of promoting and protecting civil, political, economic, social and cultural rights. But in order to fully enable civil society to serve the common good, governments must respect and uphold the freedoms of peaceful assembly and of association. Regrettably, since the 2010 resolution was passed, the threats to civil society have increased, and thus it remains even more critical for the Council to address the issue today

It is in this context, that we bring this resolution before the Council: to reaffirm the importance of the protection of these important rights and to encourage other countries around the world to engage with the rapporteur in his important work in this area. This resolution also encourages the rapporteur in his next report to examine more deeply the role of civil society in relation to these rights and the realization of economic, social and cultural rights.

We look forward to working with other Council members in the upcoming year on the freedoms of peaceful assembly and of association and thank the plenary for considering this important resolution.

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O. U.S. CONCERNS OVER PUTATIVE RIGHT TO PEACE

In February 2012, the open-ended intergovernmental working group on a draft UN Declaration on the "Right to Peace" held its first session in Geneva. The United States opposed the formation of the working group, but cooperated with its work. Excerpts that follow immediately below are from the U.S. opening statement, delivered on February 18, 2013, which is available in full at *http://geneva.usmission.gov/2013/03/04/working-group-on-a-draft-un-declaration-on-the-right-to-peace-opening-statement/*.

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We appreciate this opportunity to provide further views both on the establishment and work of this Inter-Governmental Working Group and on its subject, the possibility of elaborating a Declaration on a "right to peace." As most of you know, the United States voted against the establishment of this working group. I'd like to explain several of the reasons why:

First, we do not recognize the existence of a "right" to peace. The United States is deeply concerned whenever conflict erupts. We work assiduously in our diplomacy at the Security Council and bilaterally to resolve conflicts or prevent them before they can erupt, and we believe human rights and peace are closely related. Indeed, in the words of the UDHR, "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." But the proposed "right" is neither recognized nor defined.

Second, our concern isn't solely that the "right" to peace is unrecognized right now. Our concern is also with efforts to create such a right. We are worried that such efforts not only would be unproductive, but could do serious damage. As we will explain in more detail over the coming days, in many cases, the issues that the draft Declaration purports to address are already addressed in other, more appropriate forums, some under the Human Rights Council, and some not. By way of example of issues that are addressed outside the Council, arms control issues are,

for instance, already being addressed at the Conference on Disarmament and in the Arms Trade Treaty talks. Peacekeeping is more appropriately addressed at the Security Council. "Peace education" is already addressed by UNESCO. And with respect to issues already under discussion in the Council, we would point out, for instance, that the draft Declaration has a provision on the right to development, which is the subject of its own HRC Working Group. We see a real risk that discussions on a "right" to peace could duplicate if not undermine these different existing processes.

Third, we have a fundamental concern with some of the ideas that have long been connected with discussions on the "right to peace." Among them, the draft Declaration asserts that the right to peace is held by "peoples," when the UDHR and other foundational documents accord human rights to individuals, not groups or nations. Further the draft Declaration sometimes appears to suggest that the "right to peace" includes and subsumes a range of existing human rights, some of which are universally recognized and are not subsets of the right to peace and others of which do not exist and add little value to the civil, political, economic, social, and cultural rights that are foundational to the humanity and dignity of each person By way of example, the draft Declaration includes the "right to live in a world free of weapons of mass destruction," Article 3(3), "the right to have the resources freed by disarmament allocated to … the fair redistribution of natural wealth," Article 3(5), the "the right to the elimination of obstacles to the realization of the right to development such as the servicing of unjust or unsustainable foreign debt burden and their conditionalities, or the maintenance of an unfair international economic order," Article 9(3). While some of these may be important national objectives, defining them as rights—which an individual may assert against a State and for which he or she may seek a remedy for violations—wholly inconsistent with and may risk eroding the international framework of universal human rights guaranteed to individuals.

Additionally the Declaration appears to envision roles for different UN entities that may be inconsistent with the arrangements set out in the UN Charter.

We would also like to take the opportunity to say a word about this Working Group. While we are participating in the Working Group to explain our views on this issue, and appreciate the Chairperson's efforts to bring everyone to the table and willingness to listen to all perspectives, our presence here should not be mistaken for agreement to negotiate a Declaration on the Right to Peace. We have listened with interest to what the Chairperson has said on this subject and are pleased that he does not wish the next three days to be a negotiation, either. Indeed, I want to be clear that we are not prepared to engage in such negotiations.

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…[W]e do agree with those delegations that argue that the promotion and protection of existing human rights can make a profound contribution to peace. For instance, protecting the right to freedom of expression can make a society more stable. As former Secretary of State Clinton has said, "[e]ach time a reporter is silenced, or an activist is threatened, it doesn't strengthen a government, it weakens a nation." But we don't think the right answer here is to draft a new Declaration that seeks to convert peace from a fundamental objective of our country and of the UN into a new human right. Rather, recognizing the links between the promotion and protection of human rights, on the one hand, and peace, on the other, we should instead all strive to ensure our own respect for our human rights obligations and seek to learn from each other on how to strengthen that link between respecting those obligations and peace.

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The United States presented several specific issue papers during the first session of the open-ended working group, each of which elaborated on the ways in which the particular issue is already being addressed in other fora and therefore need not be part of a separate declaration or working group. The U.S. paper on development, poverty, and the environment is available at *http://geneva.usmission.gov/2013/02/21/declaration-on-the-right-to-peace-issue-paper-on-development-poverty-and-the-environment/*. The U.S. paper on private security and private military companies is available at *http://geneva.usmission.gov/2013/02/20/declaration-on-the-right-to-peace-issue-paper-on-private-security-and-private-military-companies/*. The U.S. paper on disarmament is available at *http://geneva.usmission.gov/2013/02/20/declaration-on-the-right-to-peace-issue-paper-on-disarmament-and-other-issues/*. The U.S. paper on refugees and migrants is available at *http://geneva.usmission.gov/2013/03/04/declaration-on-the-right-to-peace-issue-paper-on-refugees-and-migrants/*. Excerpts below come from the U.S. closing statement delivered on February 20, 2013, which is available in full at *http://geneva.usmission.gov/2013/02/21/declaration-on-the-right-to-peace-closing-statement/*.

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…We would like to reiterate, to avoid any possible doubt or confusion, our view that this meeting was to exchange views, not to negotiate the declaration, although of course delegations were free to make textual proposals, as some delegations did; as well as our position that we are not prepared to negotiate a draft Declaration on the right to peace.

Despite our having voted against the establishment of this working group, we have participated constructively and in good faith in this meeting, for the opportunity to exchange views with other states, as well as civil society. Over the last few days, we explained our opinions regarding a few groups of topics that the draft Declaration addresses. These groups of topics include: first, disarmament, peacekeeping, use of force and weapons of mass destruction; second, private military companies and private security companies; third, development, poverty, and the environment; and, fourth, refugees and migration. We have noted that these topics are not appropriately addressed by this working group—and that each of them is already adequately addressed elsewhere. While we have pointed to problems with the draft's treatment of these topics, our identification of certain issues does not mean that we accept other aspects of the draft that we did not mention.

In closing, we have three observations, based on what we have heard this week.

First, a number of delegations have stated that this initiative should only go forward on the basis of consensus. We agree with them. Further, a great number of delegations have asked to exclude from this draft any concepts that do not enjoy universal consensus. One delegation phrased this idea as, "We cannot accept terms not supported by consensus of the entire international community." We simply note that the concept of a right to peace, itself, does not enjoy consensus.

Second, we have heard much discussion about the essential nature of the putative "right to peace." There remains a lack of agreement over that fundamental issue, including who is the holder of any such "right," in particular, whether such a "right" governs international relations between states, or is a right of "peoples," or is a right of individuals, or is something else. To the extent that colleagues wish to discuss matters such as the resort to force or disarmament, those issues of relations between and among States do not belong in this Working Group or even in the Human Rights Council. And to the extent that colleagues wish to discuss a right that is held by individuals, or even by groups of individuals, and which might allow remedies from states, we have yet to hear any explanation of the content of this right. These conceptual gaps seem to us insurmountable.

Finally, many colleagues have stated the relationship between peace and human rights. That relationship is a close and important one. However, that relationship has been described in different ways, for example in consensus General Assembly resolutions on a Culture of Peace. We disagree with the proposition that some stated, that peace is a prerequisite to the exercise of human rights. This suggests, in the context of this discussion, an unacceptable hierarchy of rights; further, the lack of peace cannot be an excuse for a government not to comply with its human rights obligations. But others have stated the relationship in a way with which we strongly agree: that the promotion and protection of human rights is conducive to peace. In fact, we think that is the issue we should be discussing, not the creation of a new right—and we would welcome that discussion.

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At the 20th session of the Human Rights Council in June 2012, the United States called for a vote and voted against a resolution on promotion of the right to peace. U.N. Doc. A/HRC/RES/20/15. The U.S. explanation of vote, delivered on June 29, 2012, is available at *http://geneva.usmission.gov/2012/07/05/20538/* and is excerpted below.

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Like all peace-loving nations, the United States is deeply concerned whenever conflict erupts and human rights are violated. We also know that any peace is unstable where citizens are denied the right to speak freely or worship as they please, choose their own leaders or assemble without fear.

In this vein, we will continue our work on many of the underlying issues that the supporters of this resolution have argued the creation of a 'right to peace' would advance, such as women's rights, disarmament, and development. We will address each of these issues in the appropriate UN body, utilizing deep reservoirs of subject matter expertise and building on years of diligent and robust efforts.

We appreciate the leadership of several members of this Council to build bridges and focus on issues where there is space for productive engagement. However, the inter-governmental Working Group created by this resolution takes as its basic premise drafting a declaration that would cover many issues that are, at best, unrelated to the cause of peace and, at worst, divisive and detrimental to efforts to achieve peace. Rather than building on the existing consensus-based paths that have been developed over the years in the UN on a variety of topics

related to peace-building, this resolution seeks to sow division and embroil the Council in contentious negotiations.

Regardless of how it has been promoted, studied or framed, past efforts to move forward with a 'right to peace' have always ended in endorsements for new concepts on controversial thematic issues, often unrelated to human rights. The result has inevitably been to try and circumvent ongoing dialogue in the Council and across the UN system by using the broad support for the cause of peace to advance other agendas.

This Council can make the greatest contribution to promoting peace by focusing on the implementation of human rights obligations and commitments. Human rights are universal and are held and exercised by individuals. We do not agree with attempts to develop a collective 'right to peace' or to position it as an 'enabling right' that would in any way modify or stifle the exercise of existing human rights.

No country wants to be cast as 'voting against peace'. However, this resolution and its Working Group will not contribute to the cause of peace or human rights. A vote against this resolution is not a vote against peace, but rather a vote against continuing an exercise fraught with divisions that makes no meaningful contribution to the protection of human rights on the ground.

We therefore must call a vote and vote against this resolution, and we ask that other countries vote against the establishment of this divisive, time and resource intensive Working Group.

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Cross References

Nationality, **Chapter 1.A.**
Temporary Protected Status, **Chapter 1.D.**
Extradition of fugitives alleging fear of torture, **Chapter 3.A.4 and 3.A.5.**
Trafficking in persons, **Chapter 3.B.3.**
Corruption, **Chapter 3.B.7.**
International, hybrid, and other tribunals, **Chapter 3.C.**
Rights of U.S. citizens in Puerto Rico under the ICCPR, **Chapter 4.B.3**
Constitutionality of state laws concerning immigration, **Chapter 5.A.**
Alien Tort Statute and Torture Victim Protection Act, **Chapter 5.B.**
UN Women, **Chapter 7.A.4.**
Inter-American Commission on Human Rights, **Chapter 7.E.1.b.**
Unlawful detention, **Chapter 8.C.2.**
Status of Syrian opposition, **Chapter 9.B.1.**
Food Assistance Convention, **Chapter 11.G.3.**
Voluntary Principles on Security and Human Rights, **Chapter 11.G.4.**
Dodd-Frank rules relating to conflict minerals and extraction industry, **Chapter 11.F.2.**
Climate change, **Chapter 13.A.1.**
U.S. sanctions targeting human rights abusers in Iran and Syria, **Chapter 16.A.1.**
U.S. sanctions concerning threats to democratic processes, **Chapter 16.A.6.**
Israeli-Palestinian conflict, **Chapter 17.A.**

Conflict in Syria, **Chapter 17.B.1.**
Conflict in Mali, **Chapter 17.B.5.**
Atrocities prevention, **Chapter 17.C.1.**
Responsibility to protect, **Chapter 17.C.2.**
National Action Plan on Women, Peace, and Security, **Chapter 17.C.3.**
International humanitarian law, **Chapter 18.A.1.c.**
Detainees at Guantanamo and in Afghanistan, **Chapter 18.A.3.**

Chapter 7

International Organizations

A. UNITED NATIONS

1. UN Reform

a. Security Council

On April 16, 2012, in remarks in Brasilia, Brazil with Brazilian Foreign Minister Antonio de Aguiar Patriota, U.S. Secretary of State Hillary Rodham Clinton expressed U.S. support for expansion of the Security Council's permanent membership to include Brazil. Secretary Clinton's comments relating to reforming the Security Council appear below and are also available at *www.state.gov/secretary/rm/2012/04/187986.htm*.

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Well, first, let me say that the United States absolutely admires Brazil's growing leadership and its aspiration to join the United Nations Security Council as a permanent member. We believe that the long-term viability of the United Nations Security Council depends upon updating it to the 21st century to recognizing that it has to reflect the world that exists today, not the world that existed when it was formed. So for that reason, we are committed to serious, deliberate reform efforts in the UN, not only on the Security Council, but frankly, in a number of areas of UN process and functioning.

And in fact, I think we believe that the United States has shown a greater commitment to real UN reform than many of our counterparts on the Security Council. But we also have learned that until other countries are committed to UN reform, we're not going to make the progress that we need, and I think it would be very hard to imagine a future UN Security Council that wouldn't include a country like Brazil with all of its progress and the great model it represents of a democracy that is progressing and providing opportunity for its people.

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b. Overall reform

On January 20, 2012, U.S. Ambassador for UN Management and Reform Joseph Torsella addressed the Council on Foreign Relations on the subject of UN reform. On the same day, the U.S. Mission to the UN issued a press release summarizing the agenda of the administration of President Barack Obama for reform at the UN, including achievements to date. The U.S. Mission's press release and Ambassador Torsella's remarks covered the same four key pillars of the U.S. agenda for reform at the UN: economy, accountability, integrity,

and excellence. Both the release and Ambassador Torsella's remarks also noted that the U.S. had led the effort to achieve a 5% reduction in the size of the UN regular budget for 2012-13, only the second budget reduction in 50 years. The press release is available at *http://usun.state.gov/briefing/statements/182296.htm*. Ambassador Torsella's remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/182321.htm*.

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At the most visible political level, the way member states too often align themselves in the General Assembly—with the Non-Aligned Movement (NAM) or the "Group of 77" on one side, and the Western countries on the other—reflects an era that no longer exists. In today's real world, countries from North and South, East and West, bridge regional and traditional divides, build strong bilateral ties, and forge flexible coalitions to promote common interests, particularly in the economic realm. Inter-regional and issues-based groups are the wave of the future, yet the political divides among member states inside the UN is a reflection of the past.

In the UN political bodies, regional rotation schemes, designed initially to give smaller countries an opportunity for leadership in the postwar system, are now one of the biggest blocks to dynamic change. Moreover, when a rotation results—as it did a few months ago—in North Korea assuming the chairmanship of the Disarmament Conference, bringing the inevitable and appropriate public reaction of "you've got to be kidding," we know we have work to do.

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Finally, the institution needs greater, transparency. The UN Secretariat's lead auditing body, OIOS, recently announced—to the UN's great credit—that, come 2012, it would post all their office's audits and reports on the internet for universal public access. The US government has itself been posting all OIOS audits on our own websites for four years, and the sky has not fallen.

But as recently as last month, a small group of member states in New York was still trying to prevent OIOS from carrying out this promise. …

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Here, today, we're outlining a broad-based reform agenda for the UN with four pillars: economy, accountability, integrity, and excellence. … In the months ahead, we'll continue to push hard for a United Nations that is leaner, cleaner, respected, and effective.

Our first priority is thrift: getting the UN to adjust to tough times exactly as families and governments in American and around the world have had to—by learning to do more with less.

Until very recently, the UN budget has been disconnected from global financial realities. The UN's regular budget, though a small piece of the whole puzzle, is the system's epicenter and illustrates some big trends. In 2000-2001 the regular, two-year budget—not counting special political missions, such as those in Iraq and Afghanistan—was $2.4 billion. In 2010-2011, it was $4.2 billion. That is a 75 percent increase, over a period that included a major post-9/11 economic contraction and a global recession.

Some of that increase comes from UN initiatives the U.S. strongly supported, like new counter-terrorism efforts. And as the GAO and others have shown, smart investments in the UN can actually save us money. But the good spending doesn't excuse the bad. Too much of the growth in spending has happened on a kind of autopilot.

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The first is personnel costs, where there's been too little attempt to comprehensively manage—instead of administer—those costs. …

So we're calling for a comprehensive study comparing UN salaries and benefits to US civil-service scales. We're pressing for a pay freeze for UN employees to fix the anachronisms in the International Civil Service System. And we're calling for the UN to take a new look at how it provides everything from employee health care to annual leave to pensions, to give UN employees the benefits they deserve at a price we can afford.

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…There are literally thousands of executives in the world, north and south, who have already solved the management problems burdening the UN: the UN should invite them in. We're calling on the UN to make an intense, systematic effort to adopt the best practices of the best-run firms, NGOs and entrepreneurial governments.

We're also promoting comprehensive reform of the UN's broken budget process, a process that emphasizes micromanagement over accountability, and gives us mountains of information but very little useful data.

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Finally, we're urging rationalization of redundancies that have resulted from the topsy-turvy growth of a fragmented system in the last sixty years. One telling example: I've seen one internal study that says the UN could save $40 million annually just by consolidating its auto purchasing power, now spread among 40 different purchasing entities. Eliminating that kind of redundancy could add up to big savings and better service.

The second task in our reform agenda is to promote greater public accountability at the UN, as befits what is now a global public institution.

First, the UN needs more external watchdogs. There are many NGOs and journalists who monitor the policy side of the UN's work. There are too few who monitor the mechanics. We need reinforcements, from all political perspectives and from many capitals. We need to create a kind of global accountability community that would be the equivalent of a national civil society, monitoring the UN and its delegations.

Within the UN, we have made important progress on accountability. But we still need to nail down those gains by getting OIOS, the UN's internal oversight office, fully staffed, fully resourced, and fully protected from interference. We also need to fend off efforts to prevent OIOS from exercising its authority to audit and evaluate most UN bodies outside the Secretariat unless "invited" and funded to do so by the entity to be investigated.

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In the months ahead, we're going further. We're going to urge UN funds and programs to post audits on the web, as UNICEF and UNDP recently pledged to do. Websites like the US Government's *recovery.gov*, the UK's *dfid.gov*, and Kentucky's *opendoor.gov* make unprecedented amounts of information—about salaries, contracts, and budgets—easily available to the public. We're going to ask the UN system to do the same. And we will lead by example, making it much simpler for Americans who visit the USUN website to see what their money is being spent on at the UN.

Our third reform priority is the UN's reputation and integrity: preventing, where we can, misguided efforts by member-states and the self-inflicted wounds that too often make headlines and damage public support for the UN.

When I tell people my job is UN reform, they almost never ask what we're doing about, say, logistics management. But they do ask about the relentless and unfair targeting of Israel by many member states in UN bodies. Or, the number one question, how on Earth can the General Assembly elect a country like Cuba to the UN's Human Rights Council?

For three years now, the Obama administration has been working overtime to keep the worst offenders off UN bodies. We led the successful efforts to keep Iran off the board of UN Women, and Syria off the Human Rights Council.

We'll continue these efforts. But the time has come to go further and to chip away at the outmoded idea that uncontested slates and strict regional rotations are more important than the UN's credibility and effectiveness. Full disclosure: the U.S. hasn't always practiced what we're preaching. But our reform leadership at the UN, like our international leadership throughout our history, is stronger when we hold ourselves to the same standards we urge on others.

In the case of membership on the Human Rights Council, the U.S. will work to forge a new coalition at the UN in New York, a kind of "credibility caucus" to promote truly competitive elections, rigorous application of membership criteria, and other reforms aimed at keeping the worst offenders on the sidelines. It is time for all UN member states committed to human rights to come together to do themselves what the General Assembly as a whole failed to do in its review: hold Human Rights Council members to the same standard of truly "free and fair" elections that the UN promotes around the world, and insist on the highest standards of integrity for the Council and all its members.

More broadly, we're going to assert a common-sense principle across the UN: if a member state is under Security Council sanction for weapons proliferation or massive human-rights abuses, it should be barred, plain and simple, from leadership roles like chairmanships in UN bodies. Abusers of international law or norms should not be the public face of the UN.

With these and other reforms, we are fighting, quite simply, to ensure that member states' actions at the UN match up to the UN's founding principles and values.

Finally, it's not enough to ask the UN to spend wisely, disclose publicly, and lead with integrity. The UN should be a pacesetter. So the fourth and final pillar of our reform plan is an agenda for excellence.

That means, above all, shifting the UN's focus from outputs to outcomes. That means moving to much more aggressively unify service delivery at the country level. It means an overhaul of the human resource system to give the UN the flexibility to get rid of underperformers while better rewarding high achievers. It means deploying the right staff sooner to humanitarian or security crises and reforming and diversifying the Resident Coordinator system. And it means more rigorous evaluation of program effectiveness and a focus on real world outcomes.

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2. Accountability of UN Experts on Missions

On October 10, 2012, Ted Dintersmith, Public Delegate-Designate for the U.S. Mission to the UN, addressed the General Assembly's Sixth Committee (Legal) on criminal accountability of UN officials and experts on missions. Mr. Dintersmith's remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/198916.htm*. See *Digest 2010* at 327-38 for an earlier U.S. statement on the same topic.

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The United States believes it is important for the General Assembly to remain seized of this issue. It is absolutely critical that UN officials and experts on mission should be held accountable if they commit crimes. While we appreciate the progress made in this regard, we look forward to working with Member States and the United Nations to continue to build on those efforts.

In this regard, we welcome the Secretary-General's report on Criminal Accountability of United Nations officials and experts on mission, which is especially useful in two ways. First, it includes information provided by some governments on the extent to which they have domestic jurisdiction over crimes of a serious nature committed by their nationals while serving as UN officials or experts on mission. Second, it includes information submitted by certain governments concerning their cooperation with the United Nations in the exchange of information and the facilitation of investigations and prosecutions of such individuals, as well as the information provided concerning activities within the Secretariat in relation to General Assembly resolutions on this topic.

We acknowledge the UN's efforts to refer credible allegations against UN officials to the State of the alleged offender's nationality during the July 1, 2011 to June 30, 2012 reporting period. We note that there were seventeen referrals during this period; an increase from the six reported last year. This suggests that the UN's efforts to take practical measures to strengthen existing training on United Nations standards of conduct, including through pre-deployment and in-mission training, may be having an effect in increasing awareness of, and the need to report, violations.

But it is the actions of Member States that are the key to curbing abuses by their nationals serving in a UN peacekeeping or other capacity. All UN Member States stand to benefit from the culture of accountability to which the Secretariat's reporting on efforts taken by States to investigate and prosecute referred cases contributes. We therefore urge Member States to take appropriate action with regard to those individuals and report to the United Nations on the disposition of the cases.

This year, the Sixth Committee will be considering the report of the Group of Legal Experts, which recommended a multilateral convention as a way of addressing this issue. We are not convinced that such a convention would present the most efficient or effective means through which to ensure accountability, particularly when it is unclear whether lack of jurisdiction over crimes is the principal reason for any current difficulties that may exist in carrying out prosecutions. A convention that merely closes theoretical gaps in jurisdiction would not make a

significant contribution to ensuring the prosecution of these crimes if impediments to accountability lie elsewhere. Examples of other potential impediments include lack of political will, resources, or expertise to prosecute cases effectively and local laws that do not address the age of consent adequately. One possibility this Committee might consider is asking the Secretary-General to examine and report on what obstacles may have blocked effective prosecutions in the past.

Finally, we urge States to redouble their efforts to develop practical ways to address the need for accountability. Ultimately, the burden is on States to act. And this is a responsibility States must take seriously. We would support efforts to provide Member States with assistance to close any gaps in their laws or legal systems relating to accountability.

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3. Charter Committee

On October 12, 2012, Steven Hill, Counselor for the U.S. Mission to the UN, addressed the UN General Assembly's Sixth Committee concerning the most recent report on the work of the UN Charter Committee. Mr. Hill's statement, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/199101.htm*.

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We believe the report reflects some positive movement in the work of the Charter Committee.

First, a good part of the Committee's time during its last session was spent discussing a worthy proposal on which a wide range of delegations seriously engaged—that of the Philippines aimed at commemorating the thirtieth anniversary of the Manila Declaration that deals with the peaceful settlement of disputes. The U.S. joined other delegations in supporting the draft resolution ultimately arrived at, including its recommendation that it be considered by the General Assembly with a view to its adoption in connection with the November 15, 2012 anniversary date.

Second, there were positive developments in the areas of Special Committee efficiency and working methods.

A key aspect of Committee efficiency is the fact that the Charter Committee has a number of longstanding proposals before it. We believe—as we have stated many times before—that many of the issues these proposals consider have been taken up and addressed elsewhere in the United Nations. There is also a considerable degree of overlap in these proposals. These are reasons why the Committee has shown little enthusiasm for acting on or discussing these proposals in depth.

During the 2012 Charter Committee session, two such longstanding proposals were withdrawn or set aside by their sponsors on the grounds that they were, in fact, outdated and had been overtaken by events elsewhere in the Organization. This was a welcome step toward the much-needed rationalization of the work of the Special Committee.

Another welcome step was the Special Committee's decision to delete from its annual report a section on "Recommendations" that had come to contain rote, rollover provisions that had little connection to the current work of the Special Committee, or were redundant.

These developments—in terms of both what was discussed in the Committee's meeting, *i.e.*, the Manila Declaration commemoration, and what was not—were, in our view, quite healthy for the Special Committee as it goes forward. We urge that the Committee continue to remain focused on ways to improve its efficiency and productivity throughout its session, including by giving serious consideration to such steps as biennial meetings and/or shortened sessions.

With regard to items on the Committee's agenda concerning international peace and security, the United States continues to believe that the Committee should not pursue activities in this area that would be duplicative or inconsistent with the roles of the principal organs of the United Nations as set forth in the Charter. This includes consideration of a further revised working paper calling for a new, open-ended working group "to study the proper implementation of the Charter…with respect to the functional relationship of its organs." It also includes consideration of another revised, longstanding working paper that similarly calls inter alia for a Charter Committee legal study of General Assembly functions and powers.

In the area of sanctions, we note that positive developments have occurred elsewhere in the United Nations that are designed to ensure that the UN system of targeted sanctions remains a robust tool for combating threats to international peace and security. With respect to the matter of third States affected by the application of sanctions, as stated in the Secretary-General's report A/67/190, "…the need to explore practical and effective measures of assistance to affected third States has been reduced considerably because the shift from comprehensive to targeted sanctions has led to significant reductions in unintended adverse impacts on non-targeted countries. In fact, no official appeals by third States have been conveyed to the Department of Economic and Social Affairs to monitor or evaluate since June 2003."

Such being the case, we believe that this is another prime example of an issue that the Special Committee—with an eye both on the current reality of the situation and the need to stay current in terms of the matters it considers—should decide no longer merits discussion in the Committee. We join others who have urged that course.

On the question of requesting an opinion from the International Court of Justice, we have consistently stated that the United States does not support the proposal that the General Assembly request an advisory opinion on the use of force.

With respect to proposals regarding new subjects that might warrant consideration by the Special Committee, we continue to be cautious about adding new items to the Committee's agenda. While the United States is not opposed in principle to exploring new items, it is our position that they should be practical, non-political, and not duplicate efforts elsewhere in the UN system. The Committee's past consideration of work in the area of dispute prevention and settlement mechanisms comes to mind.

Finally, we welcome the Secretary-General's report A/67/189, regarding the Repertory of Practice of United Nations Organs and the Repertoire of the Practice of the Security Council. We commend the Secretary-General's ongoing efforts to reduce the backlog in preparing these works. Both publications provide a useful resource on the practice of United Nations organs, and we much appreciate the Secretariat's hard work on them.

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4. UN Women

On May 29, 2012, Paula Schriefer, U.S. Deputy Assistant Secretary of State for International Organization Affairs and member of the UN Women Executive Board, addressed a session of the Board on the work of UN Women, which was established in 2010. See *Digest 2010* at 323-24. Ms. Schriefer's remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/191583.htm*.

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The United States endorses UN Women's major goals, in particular UN Women's commitment to promoting women's economic and political empowerment. Speaking before the UN General Assembly last fall, President Obama challenged UN member states to "announce the steps we are taking to break down economic and political barriers that stand in the way of women in girls." To meet this challenge, we are working to identify new steps the United States will take both domestically and internationally.

UN Women's report on the implementation of its strategic plan in 2011 highlights measurable achievements in several key areas. UN Women has significantly exceeded its targets in several indicators relating to women's leadership and political participation and ending violence against women and girls, and we applaud this success. We encourage UN Women to continue to ensure that its policies and programs are designed to protect women who are targeted with violence, and we particularly encourage UN Women to include those who are targeted because of their sexual orientation and/or gender identity. Further, the growing problem of so-called corrective rape is an issue that demands attention and UN Women could make a significant difference by including a focus on this problem in its work on gender-based violence. We also welcome UN Women's progress in the area of women, peace, and security and its deepened focus on women's economic empowerment.

Going forward, we encourage UN Women to continue to build its capacity to coordinate the UN system's efforts on behalf of women and girls. UN Women's efforts to leverage the synergies between normative and operational issues are crucial in this context. The 30 new memoranda of understanding UN Women has negotiated with UN agencies are a positive step, and working effectively within the UN Country Teams and with the Resident and Humanitarian Coordinators will be critical to UN Women's success. As UN Women moves forward with its Regional Architecture reforms, we would like to see priority placed on putting strong leaders in the field who are willing and able to coordinate well with UN and other relevant actors.

We note that progress against the Strategic Plan targets varies widely, although we are also mindful that predicting results, especially at this stage, will not be an exact science. To have the greatest impact, we encourage UN Women to adjust its strategies, as needed, to take into account unexpected developments on the ground and the experience UN Women gains through its programs and other activities.

As the report illustrates, UN Women is taking important steps to ensure it is a well-managed and effective organization. We appreciate UN Women's proposed amendments to its financial rules and regulations to implement the international financial standards (IPSAS). We look forward to the Board's consideration of the proposed regulatory amendments this week. Transparency and accountability across the UN system remain top priorities for the United States. We encourage UN Women to follow the example of other UN entities, including the United Nations Development Programme and UNICEF, which are the leaders among UN agencies in striving for greater transparency and accountability. We appreciate the leadership UNICEF and UNDP senior management has provided to their organizations on the disclosure of their internal audit reports to member states and the public and, in particular, their commitment to achieve this goal by the end of 2012. We hope the Board will adopt a decision at its next meeting to simplify member states' access to internal audit reports, as well as to provide similar access to key partners.

U.S. support for UN Women remains strong. We expect to increase our contribution to UN Women's core budget this year. Last November in Busan, Secretary Clinton announced a new data-collection initiative called EDGE, or Evidence and Data for Gender Equality, to improve the availability and use of statistics that capture gender gaps in economic activity. The United States is pleased to be supporting EDGE, along with Canada and Australia, which UN Women and the UN Statistics Division are managing in close cooperation with international organizations and government statistical agencies. In the area of women's leadership and political participation, the United States, through USAID, is supporting UN Women's work with civil society organizations in Egypt to promote women's leadership and political participation.

Mr. President, I would like to conclude by reaffirming the United States' commitment to working with the other members of the Board and UN Women on efforts to advance women's economic and political empowerment worldwide, and improve their protection from violence. The United States looks forward to contributing to a successful Board session.

5. WIPO Assistance to Countries Subject to UN Sanctions

On September 11, 2012, the World Intellectual Property Organization ("WIPO") released an independent, external report it had commissioned after it became publicly known that WIPO had provided technical assistance (including information technology hardware such as computers) to countries sanctioned by the United Nations, particularly Iran and the Democratic People's Republic of Korea ("DPRK"), without the specific knowledge of WIPO member states. The report, available at *www.wipo.int/about-wipo/en/oversight/pdf/wipo_external_review_2012.pdf*, deferred to the UN sanctions committees for a determination of whether the provision of technical assistance to the DPRK and Iran violated UN sanctions. While acknowledging important reforms at WIPO in response to the controversy, the report made further recommendations.

On the same day WIPO released the report on WIPO assistance to countries subject to UN sanctions, U.S. Deputy Permanent Representative to the UN in Geneva Peter Mulrean addressed the WIPO Program and Budget Committee and provided U.S. views on the issue, set forth below. Mr. Mulrean's statement is available in full at *http://geneva.usmission.gov/2012/09/12/statement-by-peter-mulrean-u-s-deputy-permanent-representative-to-the-united-nations-in-geneva-at-the-wipo-program-and-budget-committee/*.

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The challenges of protecting intellectual property require a strong partnership with international organizations whose comparative advantages lie in their global reach and inclusiveness. That is why the United States wants to ensure that WIPO remains a viable organization that continues to promote the protection of intellectual property throughout the world, not only for U.S. companies and U.S. individuals, but for all those whose creativity produces intellectual property of one kind or another.

But part of remaining a viable partner is ensuring that the resources provided by Member States and fees collected from the businesses, institutions, and individuals of Member States have an appropriate level of oversight, accountability, and transparency.

This is why the U.S. is very concerned that WIPO conducted technical assistance projects and transferred U.S.-developed technology to countries subject to UN Security Council sanctions without the knowledge of the United States, other Member States, or the appropriate UN Security Council sanctions committees. The United States is primarily concerned with three questions: what happened, how to correct it, and how to prevent it in the future.

We believe that WIPO and Member States need to consider very seriously ways to improve oversight, transparency and accountability mechanisms, and to put in place safeguards that ensure Member States and the relevant UN Security Council sanction committees are properly consulted in the future before projects in countries subject to UN Security Council sanctions are approved.

The United States welcomes that WIPO has made available on line the recently completed Independent External Review Report on Technical Assistance Provided to Countries Subject to United Nations Sanctions. We are studying the report and its recommendations. We look forward to hearing how the organization plans to implement the recommendations in a timely and meaningful manner, as well as any other steps it plans to address the serious issues raised in the report.

In our own review of the situation, we believe that WIPO needs to put in place new comprehensive and durable safeguards that:

- Require the WIPO Internal Audit and Oversight Division to conduct a monthly review of projects or other assistance intended for States subject to Security Council sanctions, and the External Auditors Office follow up with a quarterly review and an annual report to all Member States at the WIPO Assembly.
- Follow through with the commitment to verify the end-use of the equipment already shipped to certain countries subject to U.N. Security Council resolutions.

This issue has also made apparent the importance of sound whistleblower protection policies. The U.S. position has been very clear across all UN organizations. Whistleblowers should be able to report in good faith concerning suspected fraud and/or corruption without fear of reprisal. When reprisals are taken or threatened, whistleblowers should have an effective recourse mechanism. The United States would like to commend the Secretariat on the work done so far on the new Whistleblower Protection Policy, and we look forward to its approval and implementation at the October meeting of the Coordination Committee. However, in the meantime, it is vitally important for the Director General to provide assurances, in writing, to all

WIPO employees that they may discuss these transfers now being reviewed without fear of reprisal of any kind.

The U.S. is committed to working directly with the Director General and Secretariat to ensure that the Organization is transparent and accountable, responsive to Member States, and abides by established international rules and regulations, particularly when there are questionable transactions involving countries subject to UN Security Council sanctions.

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The UN 1718 (DPRK) and 1737 (Iran) sanctions committees on September 20 and 21, 2012, respectively, determined that the transfers did not violate UN sanctions but encouraged WIPO to provide information on a regular basis about its activities in these countries. See committees' reports, available at *www.wipo.int/export/sites/www/about-wipo/en/oversight/pdf/sanctions_committee_dprk.pdf*; and *www.wipo.int/export/sites/www/about-wipo/en/oversight/pdf/sanctions_committee_iran.pdf*.

On October 1, 2012, in the U.S. opening statement at the WIPO General Assembly, U.S. Ambassador to the UN in Geneva Betty King repeated the U.S. recommendations that WIPO implement whistleblower protections and improve oversight so that transfers to sanctioned countries receive advance scrutiny. Her remarks are excerpted below and available in full at *http://geneva.usmission.gov/2012/10/01/u-s-opening-statement-at-the-wipo-general-assembly/*.

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Mr. Chairman, the United States position on whistleblower protection is well known throughout the UN system. Whistleblowers at any organization, including WIPO, should be able to report fraud, corruption, and misconduct without fear of reprisal. When reprisals are taken or threatened, whistleblowers should have an effective recourse mechanism.

The United States calls upon WIPO to implement comprehensive whistleblower protections without further delay and make a concerted effort to create a culture for reporting misconduct or cooperating with an audit or investigation without fear of reprisal

The JIU [the UN's Joint Inspection Unit] guidelines are a helpful starting point, but at a minimum, a comprehensive whistleblower policy must:

- Cover all individuals working for the organization.
- Clearly affirm the duty of these individuals to report misconduct and malfeasance and to cooperate with audits and investigations.
- Allow reporting of retaliation at any time.
- Grant interim relief to anyone who has claimed protection from retaliation through reassignment, suspension of the adverse action, or leave without pay pending the outcome of the case.

Mr. Chairman, I also want to address the issue of technical assistance projects in countries subject to UN Security Council sanctions.

For almost 6 months now, the United States has continually expressed its concern about WIPO conducting technical assistance projects and transferring U.S.-developed technology to countries subject to UN Security Council sanctions without the knowledge of Member States or the appropriate UN Security Council sanctions committees.

While the United States notes that both the Independent External Review and the relevant UN Security Council sanctions committees, as well as our own internal review, have concluded that WIPO did not violate UN Security Council sanctions, the fact is that no one knew that before or during the process of approval and implementation. It has only been after the fact that we have been able to make that determination, and there are still many questions that have not been answered, including whether various Member States' domestic export control laws were violated.

This is obviously contrary to the ideals of transparency and Member State oversight that ought to be the hallmarks of international organizations. The United States believes that WIPO and Member States need to seriously consider ways to improve oversight, transparency and accountability mechanisms, and to put in place safeguards that ensure Member States and the relevant UN Security Council sanction committees are properly consulted in the future before projects in countries subject to UN Security Council sanctions are approved.

We appreciate the work that the Director General and Secretariat have taken to address these issues, but based on the report of Independent External Review, our own review, and the fact that many questions still remain unanswered, we believe that WIPO should take the following steps to ensure that this failure of oversight and accountability does not happen again:

- In particular, we would like to see an analysis of the role of contractors in these projects, and whether or not they violated Member States' export control laws, and how they bypassed UNDP safeguards put in place in 2007 to prevent exactly this type of situation. This analysis should be part of a follow-on independent, external review that is charged primarily with identifying how these projects have been approved and implemented without the knowledge of Members States. The follow-on review should work independently, have unfettered access to WIPO documents and employees, and report directly to this Assembly at its next session.
- The Director General should provide a report to Member States on the steps being taken to address the concerns and recommendations raised by the external review and various Member States. Particularly, the report should address how Member States will be notified of projects in countries subject to UN Security Council sanctions before they are approved.

Mr. Chairman, the United States will continue to work with the Secretariat and other Member States to create a better functioning, more transparent and effective World Intellectual Property Organization to ensure that respect for IPR continues to be the major emphasis of the Organization.

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6. UN's Relationship with Regional Organizations (African Union)

Ambassador Rice addressed the Security Council's open debate on UN-AU cooperation on January 12, 2012, describing the U.S. view of the relationship between the UN and the

regional organization. Ambassador Rice's remarks are excerpted below and available at *http://usun.state.gov/briefing/statements/180554.htm*.

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… [T]he relationship between the United Nations and the African Union is important to both bodies and as the AU approaches its 10th anniversary, the time is ripe for considering what we have learned, where we are going, and what needs to be improved.

Collective African efforts at advancing peace and security on the continent have indeed come a long way since the OAU was founded in 1963. Since 2002, in particular, when the African Union succeeded the OAU, African governments have shown that, acting together, they can prevent conflict. The AU marked a new beginning with its doctrine of "non-indifference." The AU Charter recognizes that it might be necessary to intervene in the affairs of a member state, "in respect of grave circumstances, namely war crimes, genocide and crimes against humanity." Those are brave and worthy words. The African Union's first major mission was in Burundi, with initial deployment in April 2003. The African Union then acted responsibly in Darfur when other international actors were still hesitant, and the AU Mission in Sudan, AMIS, was operational in August 2004, before any other force. The AU was also active early on in pressing for peace between Sudan and South Sudan. President Mbeki's efforts continue to be valuable, and South Africa deserves praise for its leadership and dedication to peace in both Sudan and Burundi. Above all, the African Union has taken on a very tough mission in Somalia, where it has deployed troops to advance peace since 2007. AMISOM and the UN Political Office for Somalia have come a long way in developing their relationship and improving coordination.

All of these missions were undertaken with the collaboration of the international community, notably this Council, and sometimes with subregional organizations such as IGAD. Recognizing the importance of the international community's engagement with the AU, the United States Mission to the African Union was established in 2006 and has been significantly strengthened since 2009. This is consistent with the Obama administration's overall policy of intensified engagement with regional organizations, including the OSCE, ASEAN and the Organization of American States. The United Nations has likewise strengthened its ties to regional organizations, notably after the General Assembly established the United Nations Office to the African Union in 2010. Precisely because the relationship between the United Nations and the AU—and between the Security Council and the African Union's Peace and Security Council—is so important, we must confront the challenges facing this relationship forthrightly and honestly, if we are to make progress. The UN needs a strong African Union, and the African Union needs a strong United Nations. Yet, African Union member states have sometimes indicated that they feel ignored or disregarded by this Council. At the same time, some Security Council members feel African Union member states have not always provided unified or consistent views on key issues and that the African Union has on occasion been slow to act on urgent matters.

But beneath these perceptions and frustrations is a deeper issue, and that is: who is on first? Under the Charter, the Security Council has a unique, universal and primary mandate to maintain international peace and security. The Security Council is not subordinate to other bodies, nor to the schedules or capacities of regional or subregional groups. Nonetheless, the

Security Council wants and needs to cooperate closely with regional organizations, as demonstrated by our growing collaboration with the African Union over nearly a decade. But such collaboration needs to be based upon the exigencies of the issue at hand. And this cooperation cannot be on the basis that the regional organization independently decides the policy and United Nations member states simply bless it and pay for it. There can be no blank check, politically or financially.

The Security Council should and will take into account the views of regional and subregional institutions, while recognizing that sometimes there is disagreement among them. For example, the positions of organizations such as ECOWAS or IGAD on an issue in their sub-region might not be exactly the same as the consensus view of the 54 member states of the African Union.

The United States urges the Security Council to seize this opportunity to define our relations with the African Union more precisely, so that we can move forward together in better meeting the urgent challenges that confront us all. In that vein, let's be candid: the periodic African Union-UN Security Council consultations have not thus far been altogether productive or satisfactory. If they cannot be improved, they risk being jettisoned by one side or the other as not useful or worse. To make the UN-AU relationship more effective, we must do more than consider formalizing African Union-UN Security Council meetings. The meetings must prove their worth. The meetings must have set agendas and concrete priorities that lead to tangible improvements—not only in how we work together, but in how our work helps people in Africa and around the world.

Nonetheless, the opportunities for us to seize together are considerable. The European Union has set an example in its work to strengthen the AU's peace and security architecture. In peacekeeping, the African Standby Force is being improved and shows promise. Bilaterally, the United States continues to train and equip African militaries for deployment in multilateral peacekeeping operations. The UN-AU Joint Task Force on Peace and Security is a valuable forum that can greatly contribute to better UN-AU cooperation on peace and security. The UN could assist further by standardizing training of peacekeepers. It could go further still in offering DPKO guidance to the AU, including through peacekeeping programs that give instruction on the rule of law, sexual and gender-based violence, and the protection of civilians in armed conflict. We would also welcome sustained collaboration on lessons learned and best practices.

It's also time for a formal lessons-learned exercise concerning UN-AU joint operations so far, including UNAMID and AMISOM. One lesson the United States and others learned in Bosnia is that joint command-and-control operations, or so-called "dual keys," do not typically work well. Hybrid missions are very challenging at best. We need to analyze our experience in the field, discuss it, and agree on optimal mission structures linked to the objectives of the situation at hand. Recent UN-AU coordination in fighting the Lord's Resistance Army provides one positive example to consider.

The United Nations, for its part, could be more effective in Addis Ababa. The creation of UNOAU is a positive step, but the annual review of the UN agencies supporting the AU needs to improve. At present, no single UN office is in charge of UN efforts to assist the AU. This leads to unnecessary duplication. UN officials on the ground need stronger backing to streamline their own structures to better aid the African Union. This is definitely, however, a two-way street. For its part, the African Union should improve its internal management in the areas of administration, accounting, financial management and human resources. Improvements in these areas would help foster a more productive relationship on the ground in Addis Ababa and would

energize progress on the UN-AU 10-Year Capacity Building Program. Key to this, as the AU Chairperson suggested in his report, is for the African Union to identify priorities. And the UN should be responsive to this. Since the program was established in 2006, far too little progress has been achieved through UN Delivering as One in its engagement with the African Union and Regional Economic Communities. The African Union and the United Nations have already agreed on a range of actions to strengthen their operational relationship. More must be done to galvanize improvements at the programmatic and administrative levels.

Mr. President, South Africa has rightly emphasized conflict prevention and mediation in envisioning the future of AU peace and security policies. An atrocity prevention framework should also be developed and African Union mediation efforts should be expanded. The role of women in conflict mediation has not advanced nearly enough, and the African Union should consider developing a regional action plan on women, peace and security.

As we approach the African Union's tenth anniversary, we should seize this milestone to take stock and consider where we're going. We all hope that the peace and security challenges in Africa will continue to lessen over time. Improved cooperation between the Security Council and the African Union is critical to that goal. I urge colleagues not only to laud progress but to acknowledge frankly the challenges to this cooperation and to devise concrete ways to match reality to our shared aspirations. …

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B. PALESTINIAN MEMBERSHIP EFFORTS IN THE UN SYSTEM

As discussed in *Digest 2011* at 254-55, "Palestine" was admitted as a member of UNESCO in 2011, despite the opposition of the United States. On June 29, 2012, the U.S. Ambassador to UNESCO, David Killion, delivered a statement, available at *http://unesco.usmission.gov/statement-nativity.html*, reacting to the decision of the World Heritage Committee to take emergency action proposed by the Palestinians:

> The United States is profoundly disappointed by the decision of the World Heritage Committee to take immediate emergency action as proposed by the Palestinians to inscribe the "Birthplace of Jesus: the Church of the Nativity and the Pilgrimage Route, Bethlehem" as a World Heritage site against the official recommendation of the International Council on Monuments and Sites, the expert advisory body that evaluated the site.
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> The site is sacred to all Christians; it clearly has tremendous religious and historical significance. However, the emergency procedure used in this instance is reserved only for extreme cases, specifically when a site is under imminent threat of destruction. In the 40 years of the World Heritage Convention's existence, the emergency procedure has been used only four times and only in the most extreme cases, and always consistent with the recommendation of the advisory bodies. This body should not be politicized.

On November 29, 2012, the UN General Assembly passed a resolution on Palestinian status in the UN by a vote of 138 in favor, 9 against, with 41 abstentions. U.N. Doc.

A/RES/67/19. The resolution granted "Palestine" non-member observer state status. The resolution also expressed the hope that the Security Council would "consider favourably" the application submitted in September 2011 by Palestine for full UN membership. See *Digest 2011* at 256.* The United States voted against the resolution. Ambassador Rice delivered the U.S. explanation of vote, excerpted below and available at *http://usun.state.gov/briefing/statements/201226.htm*.

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For decades, the United States has worked to help achieve a comprehensive end to the long and tragic Arab-Israeli conflict. We have always been clear that only through direct negotiations between the parties can the Palestinians and Israelis achieve the peace that both deserve: two states for two peoples, with a sovereign, viable and independent Palestine living side by side in peace and security with a Jewish and democratic Israel.

That remains our goal, and we therefore measure any proposed action against that clear yardstick: will it bring the parties closer to peace or push them further apart? Will it help Israelis and Palestinians return to negotiations or hinder their efforts to reach a mutually acceptable agreement? Today's unfortunate and counterproductive resolution places further obstacles in the path to peace. That is why the United States voted against it.

The backers of today's resolution say they seek a functioning, independent Palestinian state at peace with Israel. So do we.

But we have long been clear that the only way to establish such a Palestinian state and resolve all permanent-status issues is through the crucial, if painful, work of direct negotiations between the parties. This is not just a bedrock commitment of the United States. Israel and the Palestinians have repeatedly affirmed their own obligations under existing agreements to resolve all issues through direct negotiations, which have been endorsed frequently by the international community. The United States agrees—strongly.

Today's grand pronouncements will soon fade. And the Palestinian people will wake up tomorrow and find that little about their lives has changed, save that the prospects of a durable peace have only receded.

The United States therefore calls upon both the parties to resume direct talks without preconditions on all the issues that divide them. And we pledge that the United States will be there to support the parties vigorously in such efforts.

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* Editor's note: On January 23, 2012, Ambassador Rice provided this explanation of the Security Council's consideration of the Palestinians' application to the UN in September 2011: "…the Security Council went through the traditional process of considering that application in the membership committee. We went through … an exhaustive legal discussion, debate, analysis. And once that was completed and the committee's report was forwarded to the Security Council, … it's essentially stayed there for the time being. I presume that is because the Palestinians decided that given the voting—likely outcome in the Council, it wasn't timely to push it to a vote." Remarks at a meeting with the American Jewish Committee National Board of Governors, available at *http://usun.state.gov/briefing/statements/182371.htm*.

The United States will continue to urge all parties to avoid any further provocative actions—in the region, in New York, or elsewhere.

We will continue to oppose firmly any and all unilateral actions in international bodies or treaties that circumvent or prejudge the very outcomes that can only be negotiated, including Palestinian statehood. And, we will continue to stand up to every effort that seeks to delegitimize Israel or undermine its security.

Progress toward a just and lasting two-state solution cannot be made by pressing a green voting button here in this hall. Nor does passing any resolution create a state where none indeed exists or change the reality on the ground.

For this reason, today's vote should not be misconstrued by any as constituting eligibility for U.N. membership. It does not. This resolution does not establish that Palestine is a state.

The United States believes the current resolution should not and cannot be read as establishing terms of reference. In many respects, the resolution prejudges the very issues it says are to be resolved through negotiation, particularly with respect to territory. At the same time, it virtually ignores other core questions such as security, which must be solved for any viable agreement to be achieved.

President Obama has been clear in stating what the United States believes is a realistic basis for successful negotiations, and we will continue to base our efforts on that approach.

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C. INTERNATIONAL COURT OF JUSTICE

On November 6, 2012, the United States responded to the report of the International Court of Justice to the UN General Assembly's Sixth Committee (Legal). Joan Prince, Public Delegate for the U.S. Mission to the UN, delivered the U.S. response. The U.S. statement, excerpted below, and available at *http://usun.state.gov/briefing/statements/200300.htm*, praised the Court for clearing its backlog while increasing its caseload in recent years.

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We would like to thank President Tomka for his leadership as President of the International Court of Justice, and for his report last Thursday on its activities, including on the very important cases in which the Court has rendered decisions during the last year.

The International Court of Justice is the principal judicial organ of the United Nations. The preamble of the Charter underscores the determination of its drafters "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." This goal lies at the core of the Charter system, and in particular at the role of the Court.

The General Assembly itself, in its Declaration on the Rule of Law on September 24, underscored the positive contribution of the International Court of Justice, including in adjudicating disputes among States, and the value of its work for the promotion of the rule of law. In addition, the Security Council, in its Presidential Statement on the rule of law issued earlier this year, similarly emphasized the key role of the Court and the value of its work.

It is against this backdrop that we can see the real importance of the renewed willingness over the last two decades of states to turn to the ICJ to resolve their disputes peacefully. As President Tomka has noted, the Court has more than doubled its rate of decisions just since 1990. This increasing caseload demonstrates the appreciation that States—and the international community more broadly—have for the value of the Court's work.

And it is against this backdrop that we can see the real importance of the fact that, under President Tomka's leadership, the Court has been able to clear its backlog of cases, and of the effort by the Court to ensure that States, as soon as they complete their written exchanges, will be able to move promptly to the oral stage. Such efforts contribute immeasurably to the confidence states can have in bringing cases to the Court and, in turn, to the ability of the Court to fulfill its mandate in helping to ensure the peaceful resolution of disputes.

For its part, the United States applauds such efforts. It takes this opportunity to express its pleasure with the successes of the Court in fulfilling its key role in the UN system, together with the other Charter organs, in the peaceful resolution of disputes between States, and is pleased to add its voice to the many today in the emphasis it places on the success of the Court's work.

D. INTERNATIONAL LAW COMMISSION

On November 5, 2012, U.S. Department of State Assistant Legal Adviser for UN Affairs Todd Buchwald delivered a statement in response to the report of the International Law Commission ("ILC") on the work of its 64th session at the UN General Assembly's Sixth Committee. Mr. Buchwald's remarks, excerpted below and available in full at *http://usun.state.gov/briefing/statements/200301.htm*, provided U.S. comments on the topics presented by the ILC's report.

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Immunity of State Officials from foreign criminal jurisdiction

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The reports prepared so far engage questions of considerable importance. The United States stands ready to engage on this topic and remains committed to striking the right balance between immunity and accountability. We must keep in mind these twin goals in order that state officials performing their official duties overseas are adequately protected and those guilty of gross crimes do not go unpunished.

The Commission's report poses two questions to states regarding their national law and practice with respect to this topic: "(a) Does the distinction between immunity *ratione materiae* and immunity *ratione personae* result in different legal consequences and, if so, how are they treated differently? (b) What criteria are used in identifying the persons covered by immunity *ratione materiae*?" We understand the Commission not to be seeking information on the provision of immunities to diplomats, consular officials, officials of international organizations, or persons on special missions, and our answers are limited to foreign officials who do not fall into any of these categories.

As a general matter, the bulk of U.S. practice centers on civil suits and the issue arises rarely in the criminal context. To the extent U.S. practice in civil cases could be relevant to our handling of criminal cases, we offer the following.

The United States government analyzes cases that raise questions of immunity *ratione materiae* and those that raise questions of immunity *ratione personae* differently. Immunity *ratione materiae* is a conduct-based immunity such that an individual who has immunity *ratione materiae* enjoys immunity only for acts taken in an official capacity. For this reason, in cases that necessitate determining whether an official enjoys immunity *ratione materiae*, the United States analyzes whether the acts at issue were taken in his official capacity.

This can be contrasted with cases that raise questions of immunity *ratione personae*, a status-based immunity. Under United States practice, a foreign official who enjoys immunity *ratione personae* must occupy a particular governmental office. An individual's status as the current occupant of that office generally results in broad immunity but only while in office. Thus, cases that raise questions of immunity *ratione personae* do not necessitate an analysis of whether the acts at issue were taken in an official capacity and were official acts. Instead, the analysis required is only whether the official currently occupies an office to which immunity *ratione personae* generally attaches. If the official enjoys immunity *ratione personae*, the official is usually immune for all acts while he occupies the relevant office, *i.e.*, in general, he is immune for acts taken both before he took office as well as those taken while in office, and he is immune for acts taken in both his official and his private capacities and official and private acts.

In the United States, our practice has been that only the troika—heads of state, heads of government and foreign ministers—are covered by what is often referred to as "head of state immunity" and thus generally enjoy immunity *ratione personae*. The United States would be happy to provide examples of U.S. domestic courts recognizing such immunity in the civil context. However, the United States has never experienced a criminal case directed against a foreign head of state, head of government or foreign minister.

Provisional application of treaties

… In our view, provisional application means that states agree to apply a treaty, or certain provisions, as legally binding prior to its entry into force, the key distinction being that the obligation to apply the treaty—or provisions—in the period of provisional application can be more easily terminated than is the case after entry into force. We hope that the result of this work includes a clear statement to this effect. With regard to the issue of whether States should give notice prior to terminating provisional application, the United States urges caution in putting forward any proposed rule that could create tension with the clear language in Article 25 of the Vienna Convention on the Law of Treaties, which has no such restriction regarding a State's ability to terminate provisional application of a treaty. Finally, we think a decision on the final form that this project should take is best left to a later date.

Formation and evidence of customary international law

…[T]he United States welcomes the Commission's decision to add this topic to its program of work. … In response to the Commission's request for input from States, we are reviewing United States practice with respect to the formation and development of customary international law with a view to providing materials that may be useful to the Commission.

Obligation to Extradite or Prosecute

…[W]e look forward to the working paper to be prepared, by the Chairman of the Working Group, Kriangsak Kittichaisaree, for the sixty-fifth session "reviewing the various

perspectives in relation to the topic in light of the judgment" of the International Court on July 20, 2012 in Questions Relating to the Obligation to Prosecute or Extradite.

The United States is a party to a number of international conventions that contain an obligation to extradite or submit a matter for prosecution. We consider such provisions to be an integral and vital aspect of our collective efforts of denying terrorists a safe haven and fighting impunity for such crimes as genocide, war crimes and torture. The United States continues to believe, however, that its practice, as well as the practice of other States, reinforces the view that there is no norm of customary international law obliging a State to extradite or prosecute. States only undertake such obligations by joining binding international legal instruments that contain detailed provisions that identify a specific offense and then apply a specific form of the extradite or prosecute obligation in that particular context. The obligation to extradite or prosecute is not uniform across these treaty regimes, as is clear from the Commission's own work on this topic to date. Further, while many of these treaty regimes are widely-adhered to, they are not universally adhered to, and they contain various important exceptions specific to the regime. The State practice reported to date in the Commission's reports is largely confined to State implementation of treaty-based obligations, which has been recognized by the Special Rapporteur as varying widely in scope, content, and formulation. As such, it is not possible to extract a customary norm from the existing treaty regimes or associated practice.

Treaties over time

… [W]e extend our compliments to Professor Nolte on his selection as Special Rapporteur for the topic, "Subsequent agreements and subsequent practice in relation to the interpretation of treaties." The United States continues to believe that there is a great deal of useful work to be done on this subject, and thus welcomes the more specific focus that this topic has taken on.

In reviewing the most recent report submitted to the Study Group, the United States welcomes in particular its emphasis that subsequent agreements or subsequent practice must, for purposes of Article 31 of the Vienna Convention, reflect agreement among, or practice by, parties to a given treaty in their application of that treaty. One important consideration as the work on this topic is carried forward involves the importance of striking the right balance when deriving general conclusions from particular treaties; in particular, we feel that caution is important when extrapolating such conclusions from limited precedent.

Finally, we are also curious to learn more about how other States address the domestic legal questions raised by shifting interpretations of international agreements on the basis of subsequent practice after ratification, if the legislative branch is involved in approving such agreements prior to ratification.

Most-Favored-Nation clause

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We support the Study Group's decision not to prepare new draft articles or to revise the 1978 draft articles. MFN provisions are a product of specific treaty formation and tend to differ considerably in their structure, scope and language. They also are dependent on other provisions in the specific agreements in which they are located, and thus resist a uniform approach. Given the nature of MFN provisions, we agree with the Study Group that interpretive tools or revised draft articles are not appropriate outcomes. We continue to encourage the Study Group in its endeavors to study and describe current jurisprudence on questions related to the scope of MFN clauses in the context of dispute resolution. This research can serve as a useful resource for

governments and practitioners who have an interest in this area, and we are interested to learn more about what areas beyond trade and investment the Study Group intends to explore.

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E. OTHER ORGANIZATIONS

1. OAS

a. General Assembly Resolution on the ICC

On June 4, 2012, the United States joined consensus on a resolution of the General Assembly of the Organization of American States on "Promotion of the International Criminal Court." AG/RES. 2728 (XLII-O/12), available at *www.oas.org/en/sla/docs/AG05796E04.pdf*. Among other things, the resolution calls on member states to consider ratifying or acceding to the Rome Statute of the ICC and emphasizes the importance of support for and cooperation with the ICC. The United States supplied a footnote to the resolution clarifying that, "The United States understands that any OAS support rendered to the International Criminal Court will be drawn from specific fund contributions rather than the OAS regular budget." The United States has supplied a similar footnote to resolutions on promotion of the ICC in 2010 and 2011.

b. U.S. Comments on Efforts to Reform the Inter-American Commission on Human Rights

On October 5, 2012, Ambassador Carmen Lomellin, U.S. Permanent Representative to the OAS, submitted U.S. comments on efforts to reform the Inter-American Commission on Human Rights to the Commission's president, José de Jesús Orozco Henríquez. That submission appears below and is also available at *www.state.gov/s/l/c8183.htm*.

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The United States commends the Inter-American Commission on Human Rights for commencing a process to improve and strengthen its procedures and practices for carrying out the mandate granted by the OAS Charter, which is "to promote the observance and defense of human rights and to serve as a consultative organ" of the OAS. In response to the Commission's call for comments on the documents it has circulated related to this initiative, and in light of the report adopted by the OAS Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights with a view to Strengthening the Inter-American Human Rights System, the Government of the United States is pleased to submit a number of observations for consideration by the Commission.

In presenting these observations the United States stresses its full support for the mandate and role of the Commission, acknowledges the Commission's historic success in identifying and promoting remedies for gross violations of human rights, and underlines the crucial role that the protection of human rights continues to play in the hemisphere. The independence and autonomy

of the Commission, acting within the bounds of its mandate, are fundamental. By improving the ability to carry out its work, the Commission can sustain its role as one of indispensable pillars of the Inter-American human rights system.

The United States offers comments on specific areas where the Commission can improve its practices and procedures and thereby strengthen the overall effectiveness of its work. In particular, these comments suggest ways to decrease backlog and delay; improve transparency, including the clear application of applicable law and fact; and prioritize the core human rights concerns for which the Commission is best suited.

I. Individual Petition System (including friendly settlement)

The United States commends the Commission for efforts it has made to address the backlog of pending petitions. We believe it is crucial to continue these efforts and to implement additional procedures to speed up intake and routine processing of petitions. Because "justice delayed is justice denied," the delay in processing applications fundamentally threatens the Commission's ability to function effectively.

We believe it is important that the Commission be prepared to make changes in how it applies its rules, organizes its work, and carries out its procedures to eliminate these delays. While we understand inadequate resources are a factor, we believe that steps can be taken to achieve this goal within a limited budget. First, there is a great deal of information available about mass claims processing by domestic and international bodies that the Commission should draw on to make its procedures as efficient and cost-effective as possible. Second, the United States believes the Commission should undertake a review of its priorities for addressing petitions, as well as the balance between handling petitions and other parts of its mandate, to ensure that its available resources are focused as effectively as possible on its priorities. Third, the Commission should consider the kinds of petitions it is best positioned to address: as a body with limited resources that complements the national and provincial justice systems in the countries of the region, the Commission should not attempt to take action in every situation brought to its attention where individuals and communities are at risk. Rather it should take up those cases where applicable international human rights obligations are specifically implicated, the requirements for admissibility are met, and where the Commission's intervention is necessary.

Strict adherence to procedural rules is important for the Commission both to address the backlog and to enhance its credibility. As a body with a quasi-judicial role that is often called on to review the consistency of domestic legal proceedings with international standards, it is important for the Commission to ensure that its own handling of petitions is carried out in compliance with applicable procedures and with full transparency. In order to provide maximum transparency to petitioners and States in cases where petitions are granted or denied, Commission communications should set forth clearly and specifically how it applies standards of admissibility, including the requirement that domestic remedies be exhausted.

When addressing the merits of a petition the Commission should state the specific provisions of relevant international instruments or treaties at issue, as well as the relevant facts, and analyze their applicability to the petition at hand.

In many cases—particularly where similar facts and allegations are raised in multiple petitions—processing can be made more efficient through the use of template communications and checklists. The United States encourages the Commission to speed up the transition to full online access to petitions, reports, and recommendations.

The Commission is encouraged to improve the use and effectiveness of friendly settlements, but should seek specific additional funding and staff for these efforts, which can be quite demanding of personnel resources.

II. Precautionary Measures

The United States believes that the Commission should carefully review, particularly in light of Article 25.2 of its Rules, its practices for requesting States to take precautionary measures. Such recommendations should be rare because they may be made only in the most serious cases involving the likelihood of imminent and irreparable harm to persons, and according to the factors spelled out in Article 25.4 of its Rules. If the Commission applies effectively the standards outlined in the Rules for determining that precautionary measures are warranted, the legal basis for such measures will be better understood and accepted. By contrast, a lack of rigor in applying the standards may increase the likelihood that precautionary measures will not be carried out. Requests to States to seek precautionary measures cannot be justified, for example, only on the potential harm to the persons for whom they are sought. Decisions should be made in a written determination that explains why, in light of the standards and other factors set out in the Rules, they are called for, with reference to the specific provisions of applicable international instruments or treaties and to the relevant facts at issue.

By their nature precautionary measures—as opposed to decisions on the merits of a petition—are only temporary, and this should also be plainly stated in the Commission's requests to States to take precautionary measures. In cases where permanent or indefinite—as opposed to temporary—measures are appropriate, the case should be processed as a petition. Finally, in a case where the Commission believes a State has not effectively responded to the Commission's requests to take precautionary measures, it should consider bringing the matter to the Court, where applicable.

III. Monitoring Country Situations

A core feature of the Commission's mandate as a consultative organ of the OAS is its monitoring and reporting function. For several decades the Commission has been justly praised for the substantial assistance it has provided under this part of its mandate to individuals who have suffered gross violations of their human rights and in guiding Member States of the OAS in addressing systematic human rights violations. This role has never been easy or comfortable either for the Commission or for the OAS Member States. It requires the Commission to determine that its intervention is necessary, to investigate and raise criticisms of States' laws and practices, and to assist and consult with States on how to improve the protection of human rights. The Commission should exercise this mandate by addressing the most pressing, systemic violations. It would undermine the effectiveness of the Commission if it would attempt to address simultaneously the situation of human rights in all States of the OAS.

In creating the Commission the OAS Member States had the wisdom and the courage to realize that it was only through ensuring the autonomy, independence, and expertise of the Commission to address the most pressing human rights concerns that they would further their central goal of promoting the observance and protection of human rights in the region. In carrying out this part of its mandate, therefore, the Commission should continue to apply independently and objectively the five criteria established for determining that it should monitor individual country conditions.

IV. Promotion, Universality and Transparency

Promoting the protection of human rights in all the OAS Member States and serving as a consultative organ for the OAS are core parts of the Commission's mandate and should not be

threatened by unaddressed backlogs in petitions and precautionary measures. The Commission should continually look for ways to balance and prioritize its work as circumstances change. Promotion is a function that can be carried out universally and at many levels, and is well suited to attracting voluntary funding and cooperative partners. The Commission should actively pursue such assistance for this part of its mandate.

Transparency should be a core value and a consistent feature of the Commission's work. Efforts should be made to complete a transition to wholly electronic processes that can be more easily used for individuals, groups, defenders, petitioners, and States to consult the Commission's current and historic work and to stay abreast of pending matters. With regard to the operations and function of the Commission, its Strategic Plan is a model for the OAS in making clear, comprehensive information on the IACHR available to Member States and the public.

Conclusion

The United States offers these observations and recommendations in the spirit in which they were solicited by the Commission—in order to promote the strengthening of the Commission's procedures and practices and ensure that the Commission can carry out its entire mandate in the most efficient and effective way. We understand that this is the beginning of a continuing process of interaction between the Commission, the Member States, and civil society to achieve the best system possible to advance human rights in the hemisphere.

The United States welcomes the Commission undertaking this process of review and reform. Under the Inter-American human rights system, the initiative is with the Commission to make recommendations and changes in procedures. At the same time, as a consultative body of the OAS we are confident that the Commission will take the Member States' views seriously and consider them carefully.

The United States looks forward to further consultations with the Commission, Member States of the OAS, and members of civil society aimed at strengthening the work of the Commission.

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2. U.S. Observer Status at SICA

On May 18, 2012, the United States signed a memorandum of understanding with the Central American Integration System ("SICA") granting the United States observer status with SICA. See U.S. Department of State media note, available at *www.state.gov/r/pa/prs/ps/2012/05/190327.htm*. The State Department media note provides this background information on SICA and U.S. involvement in the organization:

> Established in1991, SICA is the institutional framework for regional integration in Central America. Member states include Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama. The Dominican Republic participates as an Associated State. Countries holding observer status are Chile, Germany, Italy, Japan, Mexico, and Spain.
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> At the June 22, 2011, SICA International Conference of Support in Guatemala City, Secretary of State Hillary Rodham Clinton announced the United States would seek

observer status with SICA. On December 16, 2011, the SICA Heads of State or Government instructed the SICA General Secretariat to proceed with the necessary steps to formalize the admission of the United States as a Regional Observer to SICA as soon as possible. The Memorandum of Understanding is nonbinding and lays out the privileges of a SICA observer state.

3. U.S. Membership in the Multilateral Organization Performance Assessment Network ("MOPAN")

On November 2, 2012, U.S. Assistant Secretary of State for International Organization Affairs Esther Brimmer announced that the United States had joined the Multilateral Organization Performance Assessment Network ("MOPAN"). See Department of State media note, available at *www.state.gov/r/pa/prs/ps/2012/11/200088.htm*. The United States became the 17th country to join MOPAN since it was founded in 2002 to assess the organizational effectiveness of multilateral organizations. The Department media note described U.S. support for MOPAN's mission:

> The United States is strongly committed to an effective multilateral system and supports MOPAN's work as a vital contribution to international efforts to review and improve the efficiency and effectiveness of international organizations.
>
> By joining forces with other donor countries, the United States will minimize the cost and duplication of our own bilateral reviews of international organizations and substantively advance our push for greater accountability in those institutions under review. MOPAN's emphasis on improving organizational effectiveness also increases the positive impact of international organization efforts around the world, including through strengthened cooperation with host governments and regional organizations.

Cross References

Human Rights Council, **Chapter 6.A.3.**
Immunities of international organizations, **Chapter 10.E.**
EU Emissions Trading Scheme and ICAO, **Chapter 11.A.2.**
World Radiocommunication Conference (ITU), **Chapter 11.F.2.**
World Conference on International Telecommunications, **Chapter 11.F.3.**
Outer space, **Chapter 12.B.**
Climate and Clean Air Coalition, **Chapter 13.A.1.a.**
Mid-east peace process, **Chapter 17.A.**
Peacekeeping, **Chapter 17.B.**
Responsibility to Protect, **Chapter 17.C.2.**

Chapter 8

International Claims and State Responsibility

A. INTERNATIONAL LAW COMMISSION

See Chapter 7.C.

B. IRAN-U.S. CLAIMS TRIBUNAL

1. *Case B/1*

On June 1, 2012, the United States filed its Brief and Evidence on the 130 Foreign Military Sales ("FMS") cases in Case B/1 (Claims 2 and 3). This submission comprised a general issues brief, evidentiary annex, exhibits, and 130 individual case briefs and evidence, in 442 volumes totaling over 57,000 pages per copy.

2. *Case A/15(IV)*

In Case A/15(IV) before the Iran-U.S. Claims Tribunal, Iran alleges that the United States failed to terminate litigation in U.S. courts in violation of General Principle B of the Algiers Accords. On December 28, 1998, the Tribunal issued a partial award in the case finding that the United States had breached obligations under the Algiers Accords regarding certain litigation in U.S. courts (but did not assess U.S. liability in those cases), and ordered further proceedings to address breach and liability regarding other U.S. litigation and to address all remaining issues in the case. A hearing in the case was held September 24 – 27, 2012, and post-hearing submissions were filed in October 2012.

C. LIBYA CLAIMS PROGRAM

In 2012, the Foreign Claims Settlement Commission ("Commission") worked actively to conclude its adjudication of claims of U.S. nationals against Libya that were referred to it by the Secretary of State in December 2008 and January 2009. For background on the claims settlement agreement concluded with Libya in 2008, see *Digest 2008* at 399-410. For information on the referral of certain of these claims to the Commission, see *Digest 2009* at 273-74. A summary of the decisions issued by the Commission, the value of the awards, and decisions of the Commission in individual cases are available on the Commission's website, *www.justice.gov/fcsc*. A few noteworthy decisions of the Commission rendered in 2012 are discussed below.

1. *Nationality*

In many of the claims brought before it, the Commission had to determine whether claimants held continuous U.S. nationality. The excerpt below, from the Commission's decision in *Claim of INTERLEASE, Inc.*, Claim No. LIB-II-023, Decision No. LIB-II-163 (2012) (footnotes omitted), is one example of the Commission's analysis of the nationality of corporations. Interlease's claim was for losses arising from the destruction of a 1973 McDonnell Douglas DC-10-30 aircraft by the mid-air bombing of Union de Transports Ariens ("UTA") Flight 772 over the Sahara Desert in Niger on September 19, 1989.

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In *Claim of* [redacted] Claim No LIB-I-001, Decision No LIB-I-001(2009), the Commission held, consistent with its past jurisprudence and generally accepted principles of international law, that to meet the nationality requirement, the claimant must have been a national of the United States, as that term is defined in the Commission's authorizing statute, continuously from the date the claim arose until the date of the Claims Settlement Agreement. In the case of a claim filed by a corporation or other legal entity, the claimant qualifies as a U.S. national if it is incorporated in a state or territory of the United States or the District of Columbia and at least 50% of its stock is owned at all pertinent times by natural persons who are citizens of the United States.

The Commission finds that the claimant has submitted evidence sufficient to establish that: (1) on the date this claim arose, September 19, 1989, the claim was owned by Interlease, Inc.—a U.S. corporation incorporated in the State of Georgia in 1988—(hereinafter ILG); (2) on October 4, 1989, LRA—a French corporation and insurer of the aircraft—paid $34 million to ILG pursuant to its hull insurance contract, for which it received a subrogated interest in this claim; (3) on May 14, 1990, ILG assigned to its sole shareholder, Douglas G. Matthews, a U.S. national since birth, individually, "all of [its] right, title and interest in and to any claim to or action against any parties that may ultimately be determined as responsible for the suspected act of terrorism that resulted in the loss of the Aircraft;" (4) on May 16, 1990, ILG merged into Intercredit Corporation (a Florida corporation, hereinafter ICC), with ICC as the surviving corporation, which was then administratively dissolved in 1997; (5) on March 27, 2002, Interlease, Inc. (hereinafter ILG II) was "re-incorporated" under the laws of the State of Georgia, effective April 1, 2002, which, at all times relevant hereto, had as its sole shareholder Douglas G. Matthews; (6) on April 5, 2002, Mr. Matthews assigned to ILG II all rights assigned to him pursuant to the May 14, 1990 assignment referenced above; (7) on November 2, 2007, INTERLEASE, INC., the claimant herein, was incorporated under the laws of the State of Florida, which, at all times relevant hereto, had as its sole shareholder Mr. Matthews; and (8) on November 29, 2007, ILG II merged into claimant.

Based on this and other evidence in the record, the Commission finds that LRA became subrogated to ILG's interest in this claim to the extent of the $34 million payment it made under its contract of insurance. Accordingly, the Commission determines that because, as noted above, LRA is not a national of the United States, the portion of this claim corresponding to its interest

must be and is hereby denied. The Commission also finds that, to the extent that any portion of the present claim was not previously compensated by LRA, such portion has been held by U.S. nationals continuously since the date of loss.

* * * *

In another claim, brought by New York Marine and General Insurance Company ("NYMG") based upon its reinsurance of an EgyptAir airplane that was hijacked by Libyan-sponsored terrorists on November 23, 1985, the Commission determined that continuous nationality was lacking. Claim No. LIB-II-170, Decision No. LIB-II-165 (2012) (Proposed Decision). As explained in the following excerpt from the Commission's Proposed Decision, in cases involving insurers, the Commission has consistently required U.S. nationality on the part of every party in the chain of insurance.

* * * *

… In *Claim of* [redacted] Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), the Commission held that in order for a claim to be compensable, the claim must have been held by a "national of the United States" from the date it arose until the date of the Claims Settlement Agreement. In this program, the Commission noted in a later case that the continuous nationality requirement is a "long-standing principle of international law consistently applied and advocated by the United States to the present day. Consequently, any departure from these principles would have been clearly articulated [in the Libya Claims Program authorizing documents] and not merely implied." *Claim of* [redacted] Claim No. LIB-I-049, Decision No. LIB-I-019 (2011), FD at 6. In [redacted] the Commission discussed in detail the basis of its determination that the continuous nationality requirement applies to the Libya Claims Program and its conclusions apply equally here:

> As a general matter, the United States continues to recognize the continuous nationality rule as customary international law. For example, the United States' 2006 comments on the International Law Commission's Draft Articles on Diplomatic Protection clearly convey the United States' position that the continuous nationality requirement—that nationality "be maintained continuously from the date of injury through the date of Resolution"—reflects customary international law.[4]
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> * * * *
>
> Given the fact that the continuous nationality rule is recognized by the United States as customary international law, and that this rule has been applied by both this Commission and its predecessors, a derogation from this rule will not be assumed by the Commission from the absence of language in any of the operative documents that inform and define this program. Any derogation must be clearly expressed, and there has

[4] See *International Law Commission, Comments and observations received from Governments, Diplomatic protection*, at page 19, U.N. Doc. A/CN.4/561 (2006).

> been no such express derogation in this program. Consequently, the Commission adheres to its earlier finding that in order for a claim to be compensable in this program, it must have been owned by a U.S. national continuously from the date of injury to the date of the Claims Settlement Agreement.

[redacted] FD at 6-8.

Especially relevant here is the Commission's decision in *Claim of OCEAN-AIR CARGO*, Claim Nos. IR-1102, IR-1429, Decision No. IR-0961 (1994). There, the claimant insurer (Ocean-Air) provided evidence that both it and the original purchaser of the goods were at all relevant times U.S. nationals. Nonetheless, the Commission denied its claim for lack of continuous U.S. nationality because Ocean-Air was not the direct insurer, but was instead acting as an agent for French companies that initially paid the purchaser:

> The evidence establishes that upon payment of the claims by the French insurance companies, those companies became subrogated to the claims of the original cargo owners and not the claimant. As such, they became the owners of the claims. . . . In light of the foregoing, the Commission determines that these claims were not continuously owned by United States nationals and are, therefore, not claims of United States nationals as defined by the Settlement Agreement and Algiers Accords, and thus are outside the jurisdiction of the Commission as established by those agreements.

Id. at 4-5.

Indeed, the Commission has consistently required U.S. nationality for all of the relevant parties in the chain of insurance: the party that suffered the loss, the insurance company that directly insured the loss, and the reinsurer that paid the insurer. See, *e.g.*, *Claim of FORTRESS RE, INC.*, Claim No. IR-0893. Decision No. IR-2210 (1994): see also *Claim of TALBOT, BIRD & COMPANY. INC.*, Claim No. IR-0342. Decision No. IR-1722 (1993) (denying claim of the agent of an insurance company for. among other reasons, failing to meet its burden of demonstrating that it, its principal, and its principal's subrogor were U.S. nationals); *Claim of COMMERCIAL UNION INSURANCE COMPAN*, Claim No. IR-0759. Decision No. IR-2280 (1994) (denying claim for lack of jurisdiction where claimant did not meet burden of proof of continuous U.S. nationality for itself and its subrogor): *Claim of ROYAL GLOBE INSURANCE COMPANY*, Claim No. IR-2730, Decision No. IR-0519 (1992) (denying claim for lack of jurisdiction where claimant insurance company failed to meet its burden of proof of demonstrating continuous U.S. nationality through the "chain of ownership" of the claim, including the "various subrogors"); and *Claim of NEW HAMPSHIRE INSURANCE COMPANY*, Claim No. IR-2731, Decision No. IR-0518 (1992) (same).…

This precedent applies equally here. As discussed above, the present claim arises from a commercial loss that was first suffered by an Egyptian entity, EgyptAir. Through its insurance contract, this loss was then passed on to MISR, another Egyptian company. MISR, in turn, passed part of the loss, through an English broker, Leslie & Godwin, to a syndicate of underwriters at an English entity, Lloyd's, which included the claimant. The loss began with an Egyptian company, was passed to another Egyptian company, and only then was a portion of the loss passed along to the claimant.

Given these facts, the Commission concludes that the claim was not held by a U.S. national continuously from the date the claim arose through the date of the Claims Settlement

Agreement, and thus is not within the jurisdiction conferred upon it by the ICSA and the January Referral Letter.

* * * *

2. *Hostage taking and unlawful detention*

In several other cases, the Commission had to determine the proper standard for hostage taking and unlawful detention and apply that standard to the facts before it. For instance, in the excerpt below from Claim No. LIB-II-011, Decision No. LIB-II-105 (2012) (footnotes omitted), the Commission considered whether a member of an airplane flight crew, who was able to exit the aircraft approximately 20 minutes after it was boarded by hijackers, met the international law definition of a hostage. The Commission's decision in Claim No. LIB-II-006, Decision No. LIB-II-104 (2012), brought by another member of the same flight crew, is virtually identical in concluding that those members of the flight crew who remained on the aircraft long enough to execute their duty to disable it from flight were unlawfully detained.

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* * * *

Claimant argues that international law recognizes a broad understanding of the term "hostages," and that both international and domestic tribunals have found hostage-taking or unlawful detention to exist under circumstances similar to those of the Pan Am 73 flight crew. In particular, claimant cites various decisions of international criminal tribunals, the European Court of Human Rights, and the Commission's own precedent under the War Claims Act.

As claimant has observed, international law generally advocates a broad understanding of the term "hostage." See 4 *Int'l Comm. of the Red Cross, Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 230 (1958) [hereinafter *ICRC Commentary*] ("In accordance with the spirit of the Convention, the word 'hostages' must be understood in the widest possible sense."). In this claims program, such an interpretation is particularly appropriate given the explicit humanitarian purpose of the Claims Settlement Agreement.

As the Commission also noted in its Proposed Decision, the authorities cited by claimant in his brief "are largely consistent with the Commission's findings [discussed in its decision]; indeed, they reinforce the principle that being 'held' as a hostage or unlawful detainee requires, at a minimum, the elements of control or compulsion of the person." The key question in this claim, therefore, is whether the gunmen who boarded Pan Am Flight 73 exercised a level of control or compulsion over claimant that rises to the level of hostage-taking or unlawful detention under international law, thereby satisfying the first element of the Commission's standard for Category A claims.

During the oral hearing, claimant cited two cases in particular in support of his claim. In *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, ¶ 187 (Mar. 3, 2000), the International Criminal Tribunal for the Former Yugoslavia ("ICTY") found that certain villagers were kept in a "detention camp" by virtue of the fact that—despite the defense's argument that "their freedom

of movement in the village . . . was not limited"—they "were prevented from leaving the village, especially because they were being watched by snipers positioned in the hills around the village." *Id*. ¶¶ 684, 691. Claimant also cited a decision from one of the Commission's predecessor agencies, the War Claims Commission, in which the claimant, who was a resident of the Philippines during the Japanese occupation in the 1940s, was subjected to "constant surveillance" while operating her restaurant (where guards were stationed at both doors), was required to "report daily to certain guards and the premises searched repeatedly[,]" was twice "taken into actual custody[,]" and was ultimately forced by the Japanese to move to a location "where she was instructed to care for certain civilian American internees . . . ." *Claim of GLADYS SLAUGHTER SAVARY*, Claim No. 87087, Precedent Opinion No. 23, at 1-2 (War Claims Comm'n 1951). The Commission concluded that claimant "was by force of the Japanese Army restrained in her movements and activities," and was therefore considered to be "captured and held by the Imperial Japanese government." *Id*. at 5.

As in its Proposed Decision in this claim, the Commission concludes that, contrary to the claimant's assertions, and as noted above, these cases are consistent with the Commission's findings regarding the principles applicable to hostage-taking and unlawful detention under international law, which require, in particular, elements of control or custody of the person. In this objection, therefore, there appears to be no difference of opinion on the law; rather, it is in the application of the unique facts of this case to the law where claimant's disagreement lies.

In its Proposed Decision, the Commission found, in light of the applicable legal principles derived from relevant authorities, that "from the particular facts of this claim, the Commission cannot find that the claimant was under the control of the hijackers for even a moment in time." During his objection hearing, the claimant and counsel spent a significant amount of time focusing on the claimant's actions during the 20 minutes from when word first reached the cockpit of armed men having entered the plane, to the claimant's escape via the cockpit hatch. With the aid of the additional facts adduced during the hearing, the Commission renews here its focus on the key issue of whether or not the claimant was held illegally against his will on board Pan Am flight 73 on September 6, 1986.

The Specific Intent of the Hijackers

Claimant argues, in part, that the act of hostage-taking connotes a specific *mens rea*, and that this subjective element of the offense is satisfied in the instant claim. Specifically, claimant asserts that the hijackers, as evidenced by their conduct, "had the specific intent to hold everyone on board the plane hostage, including perhaps most especially the two pilots and cockpit crew, because only they could fly the plane and carry out the hijackers' ultimate goal…."

With regard to the *mens rea* of the hijackers, the Commission notes that a distinction needs to be drawn between the offenses of hostage-taking and unlawful detention under international law. The crime of hostage-taking entails the "seizure or detention" by the perpetrator of another person "in order to compel a third party[.]" *International Convention Against the Taking of Hostages*, art. 1, Dec. 18, 1979, T.I.A.S. 11,081, 1316 U.N.T.S. 205. Unlawful detention, for its part, does not include the element of coercion of a third party, although it does share with hostage-taking the element of seizure or detention, *i.e.*, the compulsion of the person. In other words, unlawful detention is essentially a lesser included offense within hostage-taking in which the specific intent and actions of the perpetrator distinguish one offense from the other. This idea was recently articulated by the ICTY, which concluded that "unlawful detention is indeed an element of the offense of hostage-taking."

Prosecutor v. Karadzic, Case No. IT-95-5/18-PT, Decision on Six Preliminary Motions Challenging Jurisdiction, ¶ 65 (Apr. 28, 2009).

Against this analytical backdrop, the Commission examines the issue of the hijackers' specific intent in relation to Pan Am Flight 73 on September 5, 1986. In this regard, the abundant evidence before the Commission of the 16-hour ordeal endured by the passengers on board that flight, which included negotiations on the part of the hijackers that were audible to those passengers, as well as the evidence adduced in the United States District Court case against the hijackers, provided ample evidence of the hijackers' specific intent, and of the passengers' recognition that they were being forcibly held against their will in order to secure the demands of the hijackers.

Nevertheless, while claimant is correct in observing that the crime of hostage-taking requires the existence of a particular *mens rea*—which, as noted above, the evidence clearly supports in this claim—in order to establish liability under international law, *see Prosecutor v. Sesay*, Case No. SCSL-04-15-A, Judgment, 581, 583 (Oct. 26, 2009), it is equally true that the crimes of hostage-taking and illegal detention require a particular *actus reus*, separate and apart from the hijackers' intentions. *Id*. Indeed, it is this convergence of *mens rea* and *actus reus* that results in the crimes of hostage-taking and unlawful detention. Absent either element, one cannot be "held illegally against his or her will" under the Commission's standard for Category A claims.

Assuming, then, that the hijackers possessed the requisite *mens rea*, the question thus remains whether the *actus reus* of hostage-taking or unlawful detention has been established vis-a-vis claimant and the other members of the flight crew. This aspect of the claim underlies claimant's other arguments and is addressed in the discussion which follows.

Actus Reus of Hostage-taking or Unlawful Detention

It is clear from the evidence in the record that the objective of taking scores of passengers hostage on board a large jet airplane necessarily comprises a series of actions that are not accomplished instantaneously. It is a process that unfolds over time. In the case of the illegal seizure of Pan Am Flight 73 in Karachi on September 5, 1986, the evidence clearly reveals that during the initial minutes of confusion and uncertainty, the hijackers revealed themselves to be hostile terrorists, rather than the security personnel they were disguised to be. The evidence further reveals the hijackers' efforts to secure the entry level of the plane, by closing the rear door, and shooting rounds of bullets out of the front loading doorway (the "L-1" door). At around this time, the hijackers showed themselves to the outside world to be holding one of the members of the flight crew at gunpoint in that doorway. It is also clear from the evidence that, in these initial minutes, the passengers and crew on the upper level of the plane (which included a section of First Class seating, a galley, and the cockpit) were unaware first-hand of the violent events that were unfolding below, and only became aware of them through communications originating from the flight crew on the lower level. Indeed, the evidence demonstrates that the flight crew never actually knew precisely what was happening until after they had exited the plane.

Implicit in the elements of the crime of hostage taking or unlawful detention, and consistent with the fact that a hostage-taking does not happen instantaneously, but rather unfolds over time, is that there must be some awareness on the part of the victim that he or she is being held "against his or her will," as required by the Commission's standard. It is therefore relevant at this point in the analysis of the claim to consider claimant's apprehension of the hijackers' actions upon boarding the plane. More specifically, in light of the relatively short period of time

that the claimant spent on board that flight (short certainly in comparison to that of the passengers), the issue of his awareness of what was transpiring in those minutes is a critical element to the question of whether he may properly be considered to have been a hostage, or illegally detained, for even that period of time.

Considering all of the evidence in the claim, it is clear that the situation developed sufficiently quickly to convince the claimant that the airplane was being attacked by armed gunmen while he was still in the cockpit. This is established by: the information that was received by the claimant from his flight engineer and his First Officer, in the initial minutes of the hijacking, concerning armed gunmen on board the plane; his communications to the operations center in the airport where he was trying to convey to the authorities that the gunmen had boarded and taken over the plane; his instructions to his First Officer to begin disabling the plane; the actions he took in successfully disabling the plane; and finally by the extraordinary measures he took to escape the plane via the cockpit hatch.

Having concluded that the claimant has established to the Commission's satisfaction that he was aware that the gunmen intended to hold the persons on the plane hostage, and were in the process of doing so, the Commission now moves to consider the question of whether the claimant was, in fact, "held" during those early minutes of the hostage crisis on board Pan Am Flight 73 for purposes of satisfying the elements established by the Commission for a hostage-taking or unlawful detention.

Counsel for the claimant argued, during the oral hearing, that as a general principle, detention occurs "at the point where a reasonable person would believe that they have no freedom, full freedom of movement without threat of death." Applying this principle to the instant claim, counsel asserted that use of the cockpit escape hatch posed an imminent threat of death to the claimant; therefore, the fact that its use was required for him to escape evidenced his detention by the hijackers.

While counsel's characterization of the terrifying situation faced by the flight crew may be accurate, under the authorities discussed by the Commission and cited by counsel in her brief, this does not fully address the requirements for being "held" as a hostage or unlawful detainee in violation of international law. The question is not the escape, or manner of escape, per se, but, as noted above, whether the hostage was illegally held against his will *prior* to executing his escape.

To an ordinary person examining the actions of the claimant *post facto*, it may seem as if the claimant weighed various options and exercised personal discretion in deciding whether to remain in the cockpit to disable the aircraft. However, based on claimant's testimony and that of his First Officer, it is clear that remaining on board to disable the flight systems was not an option in any reasonable sense of the word—it was a moral and professional obligation from which they felt they were not free to deviate. Indeed, it is clear that, given the uncertain situation that was unfolding in the cabin below, and the imminent threat faced by him, the claimant's natural reaction would have been to flee to safety; however, the fact that he remained in place is a direct result of the hijackers' actions: he felt no option but to discharge his duties.

Put another way, under these clearly extraordinary circumstances—in particular, the evidence of claimant's knowledge of the extreme danger posed to the plane and its passengers—and given his responsibilities, the fact that the claimant remained in the cockpit to disable the plane can hardly be understood as a course of action that he freely chose. He stayed because he felt compelled to stay, and he felt compelled to stay because the hijackers' actions required him to discharge his professional and moral obligations to disable the plane to increase the likelihood

of a safe outcome for the passengers. This conclusion does not change because the claimant recognized, after he had discharged his obligations to the passengers according to his training, that he still had an opportunity to escape, and because he successfully made that escape. The fact of an escape does not vitiate the finding of an illegal detention in the time preceding the escape, so long as the elements of an illegal detention are present, as they are here. On the basis of the evidence presented, including claimant's oral testimony during the objection hearing, the Commission concludes that claimant has satisfied its standard for unlawful detention under Category A.

The claimant has not, however, satisfied the Commission that the elements necessary for a finding that the claimant was held hostage are present. As explained above, while it is clear that the hijackers had the goal of holding the passengers and flight crew hostage for the purpose of coercing a third party, it is also clear that, with respect to the flight crew, the claimant has failed to establish that the hijackers had perfected that criminal act before the members of the flight crew were able to exit the airplane.

* * * *

In Claim No. LIB-II-007, Decision No. LIB-II-047 (2012), brought by another Pan Am 73 flight crew member, the Commission found that the international law standard for hostage-taking or unlawful detention was not satisfied. Excerpts from the Commission's decision in that case follow (with footnotes omitted).

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* * * *

There is no question that, based on the evidence presented, claimant was forced to take evasive action in order to avoid being captured or killed by the hijackers. But it is this very fact—the very fact that he was able to move unnoticed to freedom within the minutes while the hostage situation was yet unfolding—that precludes a finding of the requisite control or compulsion. However, in light of the Commission's standard for Category A claims, the relevant question in this case, given its particular facts, is whether claimant was *prevented* from taking evasive action by virtue of his being under the control or compulsion of the hijackers. In this regard, claimant's experience differs in a very fundamental way from that of his fellow crew members. Unlike the Captain or First Officer, claimant remained in constant motion from the time the hijackers boarded the aircraft until he exited the cockpit via the escape hatch. Although there may have been a few moments, after returning to the cockpit, during which claimant discussed the situation unfolding onboard the aircraft with the Captain and First Officer, he appears to have remained in the cockpit just long enough to decide on a course of action, which he then pursued. Whereas the actions of the Captain and First Officer evidenced the control of the hijackers over them, that is, they were compelled under the circumstances to remain inside the cockpit—a "particular area" in which they most certainly did not wish to remain—claimant executed his plan to exit the aircraft without delay. These facts, viewed under a broad interpretation of the Commission's standard, do not implicate the level of control or compulsion—actual or constructive—over the person required for Category A claims.

As noted above, claimant argues that his "complete freedom of action" was limited in that "he could not exit through the door or enter other parts of the aircraft." According to

claimant, this inability to move about the cabin freely or exit via the main cabin door satisfies the requirement under the Commission's standard that he be "held" against his will. In support of this argument, claimant cites *SAVARY*, *supra*, where the WCC found that the claimant qualified for detention benefits even though she was not physically detained by her captors during the time period in question.

Claimant's reliance on *SAVARY* for this argument is misplaced, both as to law and to fact. With regard to the law, claimant's characterization of the WCC's regulation omits an important modifier: that a person be "restricted in his movements ... *so as not to be a free person*. ..." WCC Internal Regulation No. 13 (A)(l) (emphasis added). The test applied by the WCC, therefore, was not whether complete freedom of action was precluded, or whether the claimant was restricted in his movements to any degree whatsoever; rather, the question, more accurately described, was whether the claimant's freedom of action was sufficiently restricted such that he or she was not a "free person." Thus, while this standard does not require direct physical control, it still entails a level of "control or compulsion of the person," and is therefore consistent with the Commission's interpretation of its standard for hostage-taking and unlawful detention in this claim.

Even comparing the facts of this claim and *SAVARY*, the two cases differ significantly. In *SAVARY*, the claimant's movements were controlled almost entirely by her captors. Although she was permitted for some time to operate her restaurant, this was only with the permission of the Japanese occupation forces. *Id*. Moreover, "she was under constant surveillance by the Japanese, who maintained a guard at both doors to the restaurant." *Id*. In addition, "she was required to report daily to certain guards" and, at some point, was sent by the occupation forces to another location and "instructed to care for certain civilian American internees…." *Id*. Thus, it is clear that, in that claim, the claimant was entirely under the control of her alleged captors, despite the fact that she enjoyed some degree of movement and activity within a carefully defined physical area.

By contrast, the claimant here did not answer to the hijackers during the brief time he spent on the plane. They had no control over him as he entered the main cabin to investigate, or apparently when he rushed back upstairs and used the escape reel to exit the cockpit. Under these circumstances, it cannot be said that claimant was "held" by the hijackers against his will.

Further, freedom of action is not precluded because one is unable to use a particular method of egress. If it were otherwise, any person fleeing the scene of a terrorist attack would be considered a hostage or detainee. Such an interpretation of the Commission's standard would render Category A largely meaningless, as it would, in effect, require only that a particular claimant be present at the scene of a given attack. This could not have been the intent of the January Referral, and in any event, the evidence before the Commission does not indicate that claimant was under the hijackers' control at any point during the ordeal.

Claimant also argues that his use of the escape hatch by itself provides evidence of his having been held hostage or unlawfully detained. According to claimant, the use of this term "demonstrates [claimant's] entrapment: 'Escape' suggests the need to use extraordinary procedures in order to remove oneself from danger." The Commission recognizes that use of the escape hatch may be an "extraordinary" method of egress; however, the use of an "escape hatch" does not necessarily mean that claimant was detained prior to his escape because it presupposes that claimant was under the hijacker's control prior to using it. As noted above, one who is fleeing danger is not necessarily held hostage or unlawfully detained. Therefore, the Commission must consider all the circumstances surrounding the incident, and particularly how and why

claimant availed himself of the escape hatch, to determine whether its use is evidence of a hostage-taking or unlawful detention.

Finally, the Commission addresses claimant's argument that he was "held illegally against his or her will" between the time when he escaped the cockpit via the escape hatch through the time he spent hiding inside the Pan Am Operations office. As the Commission has previously held, a claimant under Category A must prove, among other things, that the party accused of either hostage-taking or unlawful detention intended to seize or detain the claimant. …While the evidence clearly establishes that the hijackers intended to seize the airplane, its passengers, and the flight crew, there is no indication by that they intended to detain any person outside the confines of the aircraft. Because this is a necessary requirement for a successful claim of hostage-taking or unlawful detention, and because the second element of the Commission's standard requires that the claimant be held "in a particular area," this argument must fail.

* * * *

D. IRAQ CLAIMS PROGRAM

As discussed in *Digest 2011* at 269-70, the Claims Settlement Agreement between the United States and Iraq ("CSA"), which was signed in 2010, entered into force in 2011. On November 14, 2012, U.S. Department of State Legal Adviser Harold H. Koh referred to the Foreign Claims Settlement Commission ("Commission") for adjudication a category of claims within the scope of the CSA. The Commission will commence adjudication of these claims in 2013. The website of the Commission provides the following description of the Iraq claims program, available at *www.justice.gov/fcsc/current-prog.html*:

> The category of claims referred to the Commission consists of claims of U.S. nationals for compensation for serious personal injuries knowingly inflicted upon them by Iraq in addition to amounts already recovered under the CSA for claims of hostage-taking, provided that
>
> 1. The claimant has already received compensation under the CSA from the Department of State for his or her claim of hostage-taking, and such compensation did not include economic loss based on a judgment against Iraq, and
> 2. The Commission determines that the severity of the serious personal injury suffered is a special circumstance warranting additional compensation.
>
> Under the referral, "serious personal injury" may include instances of serious physical, mental, or emotional injury arising from sexual assault, coercive interrogation, mock execution, or aggravated physical assault.

Cross References

Alien Tort Claims Act litigation, **Chapter 5.B.**
McKesson v. Iran, **Chapter 5.C.1. and Chapter 10.1.a.(2)**
International Law Commission, **Chapter 7.D.**
Foreign Sovereign Immunities Act, **Chapter 10.A.**
NAFTA dispute settlement, **Chapter 11.B.1.**
Dispute settlement under CAFTA-DR Agreement, **Chapter 11.B.2.**
Arbitration under Ecuador BIT, **Chapter 11.B.3.**
WTO dispute settlement, **Chapter 11.C.**
Arbitration under the Softwood Lumber Agreement, **Chapter 11.E.2.**

Chapter 9

Diplomatic Relations, Succession, Continuity of States, and Other Statehood Issues

A. DIPLOMATIC RELATIONS

After the United States suspended operations of its embassy in Damascus, the Republic of Poland agreed in February 2012 to represent the United States in Syria and protect United States citizens and interests in accordance with the Vienna Convention on Diplomatic Relations. In August 2012, the Czech Republic took on those responsibilities from the Republic of Poland. See *Digest 2011* at 271 for a discussion of the protecting power in Libya and a listing of other governments that have served as protecting power for the United States.

B. STATUS ISSUES

1. Syria

The U.S. Department of State announced at the Friends of the Syrian People meeting in December 2012 that the United States was recognizing the Syrian Opposition Coalition ("SOC") as the legitimate representative of the Syrian people. The United States does not recognize the SOC as the government of Syria. At the same meeting, the United States announced further humanitarian assistance for Syria. See Chapter 17 for a discussion of UN action in response to the crisis in Syria. See also Chapter 6 for discussion of action at the Human Rights Council regarding Syria. And see Chapter 16 for a discussion of U.S. sanctions imposed relating to Syria. Excerpted below is the statement provided by Deputy Secretary of State William J. Burns at the December 12, 2012 meeting of the Friends of the Syrian People. His remarks are available in full at *www.state.gov/s/d/2012/201948.htm*. The State Department spokesperson also answered questions about the political recognition of the Syrian Opposition Council at the December 12, 2012 daily press briefing, transcript available at *www.state.gov/r/pa/prs/dpb/2012/12/201930.htm#SYRIA*.

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* * * *

… We thank Morocco for hosting the Friends of the Syrian People today. All of us are frustrated that Syria's bloody conflict drags on. But with every day that passes, the regime's hold on power weakens, territory slips from its grasp, the opposition becomes more unified and organized; in a growing number of towns and villages, a new Syria is being born. Syrians are taking back their dignity.

Today, the United States has taken an important step forward. We now recognize the Syrian Opposition Council as the legitimate representative of the Syrian people. We have extended an invitation to Muaz al-Khatib and the coalition leadership to visit Washington at their earliest opportunity. We have been intensively engaged with Special Envoy Brahimi, our Russian counterparts, and other partners to assist him in his efforts to bring about a real political transition, as outlined in the Geneva communiqué, the core element of which is a transitional governing body formed on the basis of mutual consent which would exercise full executive authority.

Transition is coming one way or the other, and we continue to maintain that the only way forward is for Assad to step aside and give way to an effective transitional governing body and ultimately to an inclusive, democratic, post-Assad Syria. At the same time, we are also increasing international pressure on the Assad regime. We're tightening sanctions and working to hold perpetrators of human rights abuses accountable for their crimes, and we have sent a stark warning regarding chemical weapons and joined NATO in defending our ally, Turkey, with Patriot missile batteries.

As the violence continues, Syrians are suffering and winter is coming. We've announced today an additional $14 million to get emergency care to those who need it most. This includes essential medicines, nutritional supplements for over 200,000 children, and blankets and boots for thousands of families.

Even as we deal with the immediate challenges, all of us have work to do to be ready for the transition ahead. The Syrian Opposition Coalition's new leadership role comes with real responsibilities. We look to the coalition to continue creating more formal structures within the opposition and to accelerate planning for a democratic political transition that protects the rights, the dignity, and the aspirations of all Syrians and all communities. That means taking concrete steps to include women and minorities, engage with religious leaders and civil society, and discourage reprisals and intercommunal violence.

One of the most important tests for all of us will be to stand firm against extremists who would hijack the revolution for their own ends or sow division among Syria's communities. Toward that end, the United States designated the extremist group al-Nusrah Front this week as a terrorist organization.

* * * *

The step that we took with regard to recognition today is important politically and it's also important practically in terms of offering opportunities for increased assistance, working through the Assistance Coordination Unit that the coalition leadership has set up to try to ensure that increased American assistance and assistance from the international community gets to local councils, especially in areas of Syria that have been freed from regime control so that basic services can be restored. And in our view, both the political and practical significance of recognition is that it both helps to accelerate change in Syria, change which is coming, and to prepare for it.

* * * *

2. Kosovo and Serbia

Secretary Clinton welcomed two announcements about the status of Serbia and Kosovo in Europe in a March 2, 2012 press statement, available at *www.state.gov/secretary/rm/2012/03/185104.htm* and set forth below.

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* * * *

The March 1 announcement by the European Council that Serbia has been granted European Union candidate country status is an important step forward for Serbia's future. I want to congratulate the leadership and the people of Serbia for their hard work, commitment and determination toward this goal.

I also welcome the announcement by the European Union that it will launch a Feasibility Study for Kosovo's Stabilization and Association Agreement (SAA), which builds on the European Council's conclusions on Kosovo from December. This is important for Kosovo's European orientation and a key sign of Europe's commitment to Kosovo.

Greater European integration is beneficial for Serbia, Kosovo and the entire region. I commend the leaders of Kosovo and Serbia for their courage and commitment in making the tough political decisions necessary to reach these milestones. I encourage the leaders of both countries to continue making progress in the EU-led dialogue, and to fully implement the decisions already agreed upon. The United States shares strong and enduring friendships with Kosovo and Serbia, and we will continue to work closely with both countries in support of a peaceful and prosperous European future.

* * * *

C. EXECUTIVE BRANCH AUTHORITY OVER FOREIGN STATE RECOGNITION AND PASSPORT ISSUANCE

On March 26, 2012, the Supreme Court issued its decision in *Zivotofsky v. Secretary of State*, No. 10-699, a case challenging the denial by the State Department of a request that "Israel" be listed as the place of birth in the passport of a U.S. citizen child born in Jerusalem. The Court held that the case does not present a nonjusticiable, political question and could properly be decided by the lower courts. Accordingly, the Supreme Court remanded the case to the Court of Appeals for the District of Columbia Circuit for a determination of the constitutionality of § 214(d) of the FY2003 Foreign Relations Authorization Act, Pub. L. No. 107-228, 116 Stat. 1350, which directs that "Israel" appear as the place of birth for a U.S. citizen born in Jerusalem, when the citizen so requests. The Department of State has not implemented the provision based on longstanding U.S. government policy of recognizing no

state as having sovereignty over Jerusalem and on the ground that the provision unconstitutionally infringes on the executive branch's authority over the recognition of other countries and the territories over which they claim sovereignty.

On remand, the United States submitted its brief in the Court of Appeals on October 10, 2012. Excerpts from the U.S. brief appear below (with footnotes omitted). The brief in its entirety is available at *www.state.gov/s/l/c8183.htm*. The case was still pending in the D.C. Circuit in early 2013. For prior developments in the case, see *Digest 2006* at 530-47, *Digest 2007* at 437-43, *Digest 2008* at 447-54, *Digest 2009* at 303-10, and *Digest 2011* at 278-82.

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* * * *

The Supreme Court has long acknowledged that the Constitution grants the President plenary authority to recognize foreign sovereigns and their territorial boundaries. See, *e.g.*, *United States v. Belmont*, 301 U.S. 324, 330 (1937); *National City Bank v. Republic of China*, 348 U.S. 356, 358 (1955). This authority is derived from the President's constitutional power to "receive Ambassadors and other public Ministers." U.S. Const. Art. II, § 3. Determining which ambassadors to receive requires a decision as to which countries with which we should establish diplomatic relations. See, *e.g.*, *Sabbatino*, 376 U.S. at 410; *Pink*, 315 U.S. at 229. This power necessarily includes the power to determine boundaries of a sovereign state, *Williams v. Suffolk Ins. Co*., 38 U.S. 415, 420 (1839), and other questions of U.S. policy regarding the state, *Pink*, 315 U.S. at 229.

The President's exclusive recognition is confirmed by long-standing historic practice. From the Washington administration to the present, Presidents have consistently exercised sole recognition authority. Similarly, prior to the enactment of legislation regarding Jerusalem, Congress consistently acknowledged the President's exclusive recognition power. *See Mistretta v. United States*, 488 U.S. 361, 401 (1989) ("[T]raditional ways of conducting government give meaning to the Constitution.") (internal marks omitted).

Plaintiff cites to Congress's authority to regulate passports in furtherance of its enumerated powers. That power to regulate form and content, more generally, does not allow Congress to infringe upon or usurp the Executive's recognition power. And that is what is at issue here. Congress is seeking to force the President to recognize sovereignty of Israel over Jerusalem in all "official government document[s]." § 214(c). Section 214(d) purports to require the Secretary of State to adopt an official policy on the status and boundaries of Jerusalem in conflict with the constitutional allocation of authority in this area of foreign policy. It is thus an unconstitutional encroachment on the President's sole authority to recognize foreign sovereigns.

Plaintiff further argues that the President's signing statement regarding § 214(d) was unconstitutional, but the validity of the President's signing statement is not before this Court.

* * * *

In this case, Congress, through § 214, sought to force the President to change longstanding U.S. policy and decide the borders of Israel and Jerusalem in a particular way. It has long been understood, however, that "under the recognition power, the President has the sole authority to make determinations regarding the sovereignty of disputed territories." *Zivotofsky*,

571 F.3d at 1240 (Edwards, J., concurring) (citing Williams, 38 U.S. at 420 and Baker, 369 U.S. at 212); see also Henkin 43; 1 Digest of Int'l Law § 66, at 446-447 (Green Haywood Hackworth ed., 1940) (Hackworth). The effective exercise of the recognition power and the power to conduct diplomacy requires the authority to determine the parameters of foreign states.

* * * *

Long historical practice further demonstrates a consistent common understanding that the President's recognition authority is exclusive. United States Presidents from the earliest days of our nation have exercised their constitutional authority to decide whether and how to recognize another sovereign. As the Supreme Court and the Executive Branch have often recognized, this longstanding governmental practice can play a significant role in establishing the contours of the constitutional separation of powers. See *Mistretta*, 488 U.S. at 401.

Notably, in 1793, following the French revolution, President Washington had to decide whether to receive an ambassador from the new government of France. This decision was significant, in part, because officially receiving a diplomat amounts to recognition of the sending state or government. 1 Moore Intl. L. Dig. § 27 at 73 (Recognition "may be implied, as when a state . . . receives [diplomatic] agents officially."). President Washington and his cabinet unanimously decided that the President could do so without first consulting Congress. George Washington to the Cabinet, in 25 *The Papers of Thomas Jefferson* 568-569 (John Catanzariti ed. 1992); Thomas Jefferson, Notes on Washington's Questions on Neutrality and the Alliance with France, in *id*. 665-666.

* * * *

Since then, the Executive Branch has routinely, consistently, and unilaterally recognized foreign states and governments along with their sovereign boundaries. For instance, in 1824, after consulting with his cabinet, President Monroe determined that "no message to Congress would be necessary" before the President recognized Brazil, because "the power of recognizing foreign Governments was necessarily implied in that of receiving Ambassadors and public Ministers." 6 *Memoirs of John Quincy Adams* 329, 348, 358-359 (Charles Francis Adams ed. 1875) (*Memoirs*); James Monroe to the Members of the Cabinet (October 15, 1817), in 6 *The Writings of James Monroe* 31 (Hamilton ed. 1902). In 1948, President Truman recognized the creation of the State of Israel and its provisional government minutes after Israel declared independence. See Statement by the President Announcing Recognition of the State of Israel, 1948 Pub. Papers 258 (May 14, 1948). And in July 2011, Secretary of State Clinton announced that "until an interim authority is in place, the United States will recognize the [Transitional National Council] as the legitimate governing authority for Libya." Hillary Clinton, Remarks on Libya and Syria (July 15, 2011), http://www.state.gov/secretary/rm/2011/07/168656.htm. There are myriad other examples throughout our history. …

* * * *

…The fact that the recognition power resides exclusively with the Executive had been long acknowledged by Congress prior to the enactment of Section 214. For example, the Immigration and Naturalization Act provides that if the Secretary of State recognizes a "change in the territorial limits of foreign states," she shall "issue appropriate instructions." 8 U.S.C.

§ 1152(d). Likewise, the Federal Reserve Act provides that the determination of the Secretary of State regarding whether an individual is authorized to withdraw state property from a Federal Reserve bank is conclusive. 12 U.S.C. § 632(1)-(3). Both the House and Senate reports on the Federal Reserve Act explained that "[a]ny question as to which is the government of a foreign country recognized by our Government and who is entitled to act for such government is a question for determination by the State Department." S. Rep. No. 77-133 at 2; H.R. Rep. No. 77-349 at 2.

"Congress has exhibited little inclination to contest the prerogative" of the President to recognize foreign states "solely on his own responsibility." 1 Hackworth § 31, at 162; see Hale Memorandum, 29 Cong. Rec. at 672 ("The number of instances in which the Executive has recognized a new foreign power without consulting Congress . . . has been very great. No objection has been made by Congress in any of these instances. The legislative power has thus for one hundred years impliedly confirmed the view that the right to recognize a new foreign government belonged to the Executive."). And to our knowledge, apart from § 214, Congress has never enacted any binding legislation usurping the Executive's exclusive constitutional power to determine boundaries of a foreign sovereign.…

Cross References

TPS status for Syria and Somalia, **Chapter 1.D.**
Passports, **Chapter 1.B.**
Human Rights Council action relating to Syria, **Chapter 6.A.3.c.**
Syria sanctions, **Chapter 16.A.1.**
Middle East peace process, **Chapter 17.A.**
Peacekeeping, **Chapter 17.B.**

Chapter 10

Privileges and Immunities

A. FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602–1611, governs immunity from suits for foreign states in U.S. courts. The FSIA's various statutory exceptions, set forth at 28 U.S.C. §§ 1605(a)(1)–(6) and 1605A, have been subject to significant judicial interpretation in cases brought by private entities or persons against foreign states. Accordingly, much of U.S. practice in the field of sovereign immunity is developed by U.S. courts in litigation to which the U.S. government is not a party and in which it does not participate. The following section discusses a selection of the significant proceedings that occurred during 2012 in which the United States filed a statement of interest or participated as *amicus curiae*.

1. Exceptions to immunity

a. Commercial activity

Section 1605(a)(2) of the FSIA provides that a foreign state is not immune from suit in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

(1) Requirement of establishing jurisdiction under the FSIA prior to ordering asset discovery

On June 21, 2012, the United States filed a brief as *amicus curiae* in the U.S. Court of Appeals for the Eleventh Circuit in support of rehearing the appeals court's order denying appellate review. *Rodriguez Licea v. Curacao et al.*, Nos. 11-15909, 11-15910, 11-15944 (11th Cir. 2012). A default judgment had been entered in2008 in a case brought (not under the FSIA) by former forced laborers against a ship-repair company based in Curacao. Plaintiffs alleged for the first time in the enforcement proceeding that the company was the "alter ego" of the country of Curacao, and the Kingdom of the Netherlands. The district court ordered asset discovery against Curacao and the Netherlands without first making a determination that it had jurisdiction under the FSIA. The court of appeals denied the motion for rehearing. A related case remains pending before the Eleventh Circuit. Excerpts

below from the U.S. *amicus* brief (with footnotes and citations to the record omitted) discuss the error of the district court in ordering asset discovery against the foreign states without first making a determination as to jurisdiction under the commercial activity exception of the FSIA. The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*.

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* * * *

This Court should grant the petition and vacate its order dismissing the appeal. The district court mistakenly believed that it was not required to determine whether it could assert jurisdiction over the Foreign States under Section 1605 of the FSIA, and instead proceeded to order asset discovery against the Foreign States without making that threshold jurisdictional determination. The district court's order thus effectively denied the Foreign States' sovereign immunity from jurisdiction, a denial subject to immediate review under the collateral order doctrine. This Court's dismissal order is in direct conflict with *Butler v. Sukhoi Co.*, 579 F.3d 1307, 1311 (11th Cir. 2009), and with the principles of immunity codified in the FSIA.

A. 1. Plaintiffs moved to implead the Foreign States on the theory that Drydock was their alter ego and that they therefore should be liable for the judgment against Drydock. As plaintiffs recognized, the district court could not adjudicate the merits of their impleader claims unless the court determined that one of the FSIA's exceptions to jurisdictional immunity applied. *Cf. Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 439 (1989) (holding that the FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in federal court"). To that end, plaintiffs argued that they could establish jurisdiction under the "direct effect" prong of the FSIA's commercial-activity exception, 28 U.S.C. § 1605(a)(2).

The district court concluded, however, that it need not determine whether the plaintiffs had satisfied that exception to jurisdictional immunity or whether the Foreign States were bound by the judgment against Drydock. Instead, the court believed that it could proceed directly to the question whether any of the Foreign States' assets were subject to execution under 28 U.S.C. § 1610(a). But a foreign state's property is not amenable to execution unless, among other requirements, the foreign state is liable under a "judgment entered by a court of the United States or of a State." 28 U.S.C. § 1610(a). In proceeding directly to the Section 1610 inquiry, the court overlooked the fact that the Foreign States have not yet been held liable to plaintiffs, whether under an alter-ego theory or otherwise. The court could not properly determine whether the Foreign States' assets are subject to execution before first determining whether they are liable to plaintiffs at all. And the court could not determine liability without establishing subject matter jurisdiction under Section 1605.

The court evidently regarded Section 1610 as a grant of subject matter jurisdiction that applied in lieu of Section 1605. ….

The district court's understanding of the FSIA was mistaken. Section 1610 does not provide an alternative source of jurisdiction to enter or enforce a judgment against a foreign state. Rather, Section 1610 establishes limited exceptions to the rule that sovereign property is immune from attachment and execution. *See* 28 U.S.C. § 1609 (creating rule of immunity from execution); *id.* §§ 1610-1611 (identifying exceptions). These execution-related provisions operate as an independent barrier to the seizure of a foreign state's property wholly apart from the question of jurisdiction. *See Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d

280, 286-89 (2d Cir. 2011) (describing relationship between jurisdictional immunity and execution immunity). In other words, a plaintiff must prove an exception to *both* jurisdictional immunity (before a judgment is entered) *and* execution immunity (after a judgment is entered) before a plaintiff may execute upon a foreign state's assets.

2. "It is well-settled that a court of appeals has jurisdiction over interlocutory orders denying claims of immunity under the FSIA." *Butler*, 579 F.3d at 1311; *accord World Holdings, LLC v. Federal Republic of Germany*, 613 F.3d 1310, 1314 n.6 (11th Cir. 2010); *S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1297 (11th Cir. 2000); *Honduras Aircraft Registry, Ltd. v. Gov't of Honduras*, 129 F.3d 543, 545 (11th Cir. 1997).

It is also settled that an order that improperly authorizes discovery against a foreign sovereign is a denial of immunity subject to immediate appeal. *See Butler*, 579 F.3d at 1313-15; *see also id.* at 1311 (recognizing that the FSIA's immunity provisions not only shield foreign sovereigns from liability, but also protect against "'the costs, in time and expense, and other disruptions attendant to litigation'").

Before the district court could authorize asset discovery against the Foreign States, it was first required to determine whether it had jurisdiction to resolve the merits of plaintiffs' claims. Only if it determined that it had jurisdiction under Section 1605 could the court adjudicate the merits. And only if it then found the Foreign States liable could it proceed to consider whether discovery in aid of execution might be appropriate. By ordering asset discovery without first determining its jurisdiction and the Foreign States' liability, the court effectively denied their claims of immunity. As this Court's precedents make clear, that ruling is subject to immediate appeal.

B. In their jurisdictional letter brief, the plaintiffs mistakenly urged that the district court's orders did not have the effect of denying the Foreign States' immunity because they merely permitted "jurisdictional discovery." …. But jurisdictional discovery is authorized only when a plaintiff makes factual allegations that, if true, would establish subject matter jurisdiction under the FSIA's provisions governing jurisdictional immunity. *See, e.g.*, *Butler*, 579 F.3d at 1313-15; *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992).

The discovery ordered by the district court bears no relationship to the jurisdictional exception relied upon by plaintiffs, which requires them to show that their "action is based upon … an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). Instead, the district court ordered "discovery . . . concerning assets which the Governments used to facilitate the Drydock's commercial operations." …

Discovery into the Foreign States' assets is not calculated to assist the court in determining whether the "act[s]" of forced labor that form the basis of plaintiffs' claims caused a "direct effect" in the United States. Nor does this asset discovery shed any light on the plaintiffs' claim that Drydock is an alter ego of the Foreign States such that its "act[s]" may be considered those of the Foreign States themselves.

In contrast, the jurisdictional discovery at issue in *Hansen v. PT Bank Negara Indonesia (Persero), TBK*, 601 F.3d 1059 (10th Cir. 2010), cited in the Court's dismissal order, bore directly on the question of subject matter jurisdiction. The plaintiffs in that case made a *prima facie* showing of jurisdiction under the FSIA, and the foreign sovereign did not contest the legal sufficiency of the jurisdictional allegations. *See id.* at 1064 (noting that sovereign's "claim of immunity turns solely on the factual question" whether it was "actually involved in the

commercial activity alleged by [plaintiffs]"). Moreover, the limited discovery ordered by the district court was tailored to verifying the truth of those allegations. *Ibid.* An order permitting discovery of that type is not subject to immediate appeal as of right. *Cf. Garrett v. Stratman*, 254 F.3d 946, 953 (10th Cir. 2001) (same rule in qualified-immunity context). In this case, unlike in *Hansen*, the Foreign States challenge the legal sufficiency of the plaintiffs' allegations, not merely their factual veracity. And, as discussed above, the discovery ordered by the district court in this case is not calculated to determine jurisdiction under Section 1605(a)(2).

C. Review of the district court's order would be appropriate even if the court had established jurisdiction under Section 1605(a)(2) and even if the Foreign States had been held liable under the theory that Drydock is their alter ego. Section 1610(a)(2), the execution provision relied upon by plaintiffs, provides that "[t]he property *in the United States* of a foreign state . . . used for a commercial activity in the United States, shall not be immune . . . from execution" if "the property *is or was used for the commercial activity upon which the claim is based*." 28 U.S.C. § 1610(a)(2) (emphasis added). The discovery ordered by the district court was not tailored to identifying property "in the United States" that "is or was used for the commercial activity upon which" plaintiffs' claims of forced labor are based. Where a district court orders asset discovery that is inconsistent with the FSIA's presumptive grant of immunity to foreign state-owned property, appellate jurisdiction lies over the discovery order under the collateral order doctrine. *See Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 789-90 (7th Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3240 (U.S. Oct. 6, 2011) (No. 11-431).

D. Finally, even if this Court did not have appellate jurisdiction under the collateral order doctrine, it could appropriately have exercised its mandamus authority to review a discovery order that unduly impinges upon a foreign state's sovereign immunity. *See In re Papandreou*, 139 F.3d 247, 250-56 (D.C. Cir. 1998) (granting writ of mandamus and reversing district court order compelling discovery against foreign state and its officials); *see also Kensington Int'l Ltd. v. Republic of Congo*, 461 F.3d 238, 242-45 (2d Cir. 2006) (construing foreign state's appeal as petition for mandamus, but denying writ); *Beecham v. Socialist People's Libyan Arab Jamahiriya*, 424 F.3d 1109, 1111, 1112 (D.C. Cir. 2005) (recognizing availability of mandamus review in FSIA context).

* * * *

(2) McKesson v. Iran*: whether the commercial activity exception creates a cause of action*

As discussed in Chapter 5, on February 28, 2012, the court of appeals issued its decision in *McKesson Corp. v. Islamic Republic of Iran*. 672 F.3d. 1066 (D.C. Cir. 2012). On the FSIA issue in the case, the court agreed with the argument, presented in the U.S. *amicus* brief submitted in 2011, that the FSIA does not create a cause of action for an alleged violation of customary international law. See *Digest 2011* at 292-96. Excerpts below from the court's opinion discuss the viability of a cause of action under customary international law. The court did find that the plaintiff had a cause of action under Iranian law.

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In *McKesson 1997*, the district court noted that customary international law "is a part of the law of the United States, and must be ascertained and enforced by federal courts." *McKesson 1997*, 1997 WL 361177, at *15. Relying heavily on the Restatement (Third) of Foreign Relations Law, the court held that Iran is liable under customary international law because "its actions, aimed at McKesson, a foreign national, were clearly discriminatory" and "Iran neither offered nor provided any compensation to McKesson for its interest in Pak Dairy." *Id*. In *McKesson V*, we asked the district court to consider whether the Supreme Court's intervening decision in *Sosa v. Alvarez–Machain*, 542 U.S. 692, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004), affected the viability of McKesson's cause of action under customary international law. See *McKesson V*, 539 F.3d at 491. Sosa involved a claim brought under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, a jurisdictional statute originally passed as part of the Judiciary Act of 1789. The Supreme Court held that the ATS, although by its terms purely jurisdictional, can support common law causes of action under customary international law, but only if the norms allegedly violated are sufficiently specific, universal, and obligatory. See *Sosa*, 542 U.S. at 732–33. On remand, the district court found that, like the ATS, the commercial activities exception to the FSIA is "more than a jurisdictional statute," because in enacting it, Congress "demonstrated its intention that courts hear causes of action involving customary international law violations." *McKesson 2009*, 2009 WL 4250767, at *3. We disagree.

The FSIA established a broad grant of immunity for foreign sovereigns that can only be abrogated by one of the statute's narrowly drawn exceptions. 28 U.S.C. § 1330(a); *World Wide Minerals*, 296 F.3d at 1161. Jurisdiction in this case is based on the commercial activities exception, which provides that a foreign state shall not be immune from federal jurisdiction in any case in which the action is based upon, as pertinent here, "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

The FSIA is purely jurisdictional in nature, and creates no cause of action. *Republic of Austria v. Altmann*, 541 U.S. 677, 695 n. 15, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004); *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1026 (9th Cir.2010) (en banc); *Cicippio–Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1033–34 (D.C.Cir.2004). The Supreme Court has explained that "[t]he language and the history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality." *First Nat'l City Bank v. Banco Para El Comercio*, 462 U.S. 611, 620, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983). The FSIA simply codified the "restrictive theory" of sovereign immunity, under which the immunity of a sovereign is recognized with regard to sovereign or public acts, but not with respect to private acts. *Altmann*, 541 U.S. at 690–91. The language of § 1605(a)(2) thus refers to commercial activity of foreign governments as a reason why the defense of foreign sovereign immunity is unavailable. It makes no mention, however, of either a private cause of action or customary international law.

Nonetheless, the district court found that "in enacting the commercial activities exception, Congress, in essence, demonstrated its intention that courts hear causes of action involving customary international law violations." *McKesson 2009*, 2009 WL 4250767, at *3. Yet we find no evidence—textual or otherwise—suggesting that Congress enacted the commercial activities exception on the understanding that courts would use it to create causes of action based on customary international law. Moreover, Congress enacted the FSIA in 1976, just one year after the Supreme Court signaled its reluctance to imply causes of action when faced with statutory silence. See *Cort v. Ash*, 422 U.S. 66, 78–80, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975).

Assuming, as we must, that Congress was aware of all pertinent legal developments when it drafted the FSIA, Congress' decision not to include an express private right of action in any provision of the FSIA reveals that its enactors intended it to be purely jurisdictional. See *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998).

While the Supreme Court's holding in *Sosa* is not binding here, the Court's extensive and careful scrutiny of the Alien Tort Statute illustrates the unusual circumstances necessary to find that a jurisdictional statute authorizes federal courts to derive new causes of action from customary international law. See *Sosa*, 542 U.S. at 712–31. For example, the Court noted that the particular "anxieties of the pre-constitutional period," particularly the Continental Congress's inability to deal with cases involving offenses committed against foreign ambassadors, counseled against interpreting the ATS in a way that would strip it of any practical effect. *Id*. at 715–19. The Court also explained that, at the time the ATS was passed, a certain small set of actions was universally understood to be within the common law. *Id*. at 720. By contrast, nothing in the legislative history of the FSIA suggests that Congress intended courts to use the commercial activities exception as a vehicle to create new causes of action.

Also instructive is the Supreme Court's admonition to the lower courts to use caution when considering customary international law claims. To be sure, the Court did so in the context of the Alien Tort Statute, which it understood to contemplate a "narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs." *Sosa*, 542 U.S. at 715. The broader principles the Court expressed, however, are still relevant to this case, in which the Court is also being asked to fashion a federal common law cause of action out of the ambiguous principles of customary international law.

The Court first noted that because common law principles are now regarded as "made" rather than "discovered," a judge deciding on reliance on a perceived international norm "will find a substantial element of discretionary judgment in the decision." *Id*. at 726. The invocation of such judicial discretion—indeed, judicial lawmaking power—would be particularly dangerous in cases such as this one, in which jurisdiction is being asserted over a foreign sovereign.

The Court then noted that the "significant re-thinking of the role of federal courts in making [common law]" caused by *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), spawned a general practice of seeking legislative guidance "before exercising innovative authority over substantive law." *Id*. No such guidance exists here, as the text and legislative history of the FSIA merely establish the conditions in which a court may assert jurisdiction over a foreign sovereign. They do not reveal an intent to encourage—or even allow—courts to infer new common law causes of action.

The Court also emphasized the decision to create a private right of action is better left to legislative judgment—a particularly apt admonition in a case like this one, as creation of a right of action against a foreign government would certainly "raise[ ] issues beyond the mere consideration whether underlying primary conduct should be allowed or not[.]" *Id*. at 727. Collateral consequences can themselves be a bar, the Court recognized, particularly when the cause of action has "potential implications for the foreign relations of the United States." *Id*. The Court cautioned that because "many attempts by federal courts to craft remedies for violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution." *Id*. at 727–28. In sum, we find that the language and history of the FSIA, particularly when viewed in light of the principles enunciated

in *Sosa*, do not support the creation of a private right of action for expropriation based on customary international law.

* * * *

The district court found that the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2), evinced congressional intent that courts hear causes of action for expropriation under customary international law. *McKesson 2009*, 2009 WL 4250767, at *4. McKesson picks up that refrain, adding that the Amendment embodies a sufficiently specific congressional authorization for federal courts to adjudicate expropriation claims against foreign states to constitute an independent cause of action. Appellee's Br. at 31. We disagree. The Second Hickenlooper Amendment is not a grant of jurisdiction and it does not purport to enact or codify any cause of action. Its sole purpose was to counter the Supreme Court's decision in *Sabbatino* by limiting the act of state doctrine to certain claims of expropriation. It is completely silent regarding the right to bring such claims in the first instance. As the Supreme Court has "sworn off" implied rights of action, *Alexander v. Sandoval*, 532 U.S. 275, 287, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001), absent the compelling and unusual circumstances that animated the Court's analysis in *Sosa*, we decline to imply causes of action in the face of congressional silence.

* * * *

b. Acts of terrorism

See section 2, *infra*, for a discussion of cases involving efforts to execute on judgments related to acts of terrorism.

On December 17, 2012, the United States filed a statement of interest and suggestion of immunity in the U.S. District Court for the Eastern District of New York in response to the court's request. *Rosenberg et al. v. Lashkar-e-Taiba et al.*, Nos. 10-05381, 10-05382, 10-05448, 11-03893 (E.D. N.Y. 2012). The U.S. brief asserts that Pakistan's Inter-Services Intelligence Directorate ("ISI") and its former directors general are immune under the FSIA in a suit filed under the ATS and the Antiterrorism Act ("ATA") by relatives of the victims of terrorist attacks in Mumbai in 2008. Plaintiffs allege that the ISI controlled and coordinated the Mumbai attacks and that it was a rogue entity not under the control of the government of Pakistan and thus not entitled to immunity under the FSIA. The section of the U.S. brief that appears below (with footnotes omitted) includes discussion of the status of the ISI as part of the government of Pakistan and the inapplicability in this case of any exception to immunity. See section B.5, *infra* for additional excerpts from the U.S. brief. The full text of the brief is available at *www.state.gov/s/l/c8183.htm*.

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Congress largely codified the restrictive theory of foreign sovereign immunity by enacting the FSIA, 28 U.S.C. §§ 1330, 1602 et seq., in 1976. The FSIA thus "supersede[d] the common-law regime for claims against foreign states." *Samantar*, 130 S. Ct. at 2292. With respect to claims against "a foreign state or its political subdivisions, agencies, or instrumentalities," the FSIA "transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004) (quotation marks omitted). Under the FSIA, "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States," unless the suit comes within one of the statutory exceptions to immunity. 28 U.S.C. § 1604. "Thus, if a defendant is a 'foreign state' within the meaning of the Act, then the defendant is immune from jurisdiction unless one of the exceptions in the Act applies." *Samantar*, 130 S. Ct. at 2285-86; *see also* 28 U.S.C. §§ 1605–1607 (enumerating exceptions).

Under the FSIA, the ISI is immune from suit for the simple reason that it is a fundamental part of the Pakistani government. Under the FSIA, the ISI must be treated as a "foreign state" for purposes of the FSIA and there is no applicable exception to immunity. There can be no serious question regarding the ISI's status as a "foreign state" within the meaning of the FSIA. As the Government of Pakistan states, the ISI is part of its government, organized under the Ministry of Defence. Moreover, although plaintiffs contend that the ISI is not governed or authorized by Pakistani law and is not under the control of the Pakistani government, the United States executive and legislative branches have consistently treated the ISI as part of the Government of Pakistan. The executive branch holds official meetings with representatives of the ISI, issues them diplomatic visas consistent with their status as Pakistani government employees, and in all respects recognizes the ISI as part of the Government of Pakistan. Congress likewise has specifically recognized that the ISI is part of the Pakistani government. See 22 U.S.C. § 8401(10) ("The term 'security forces of Pakistan' means the military and intelligence services of the Government of Pakistan, including the Armed Forces, Inter-Services Intelligence Directorate, Intelligence Bureau, police forces, levies, Frontier Corps, and Frontier Constabulary."). It would be inappropriate for the Court to second-guess the conclusion that the political branches and Pakistan itself have reached. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964). The United States is not aware of any case in which a court has concluded that a component of a foreign state lacks immunity because the foreign state allegedly does not control its actions. Plaintiffs' theory is particularly unusual in the context of an intelligence agency, which, like a foreign ministry or defense ministry, serves a quintessentially sovereign purpose.

Indeed, in other cases under the FSIA, courts have held that a nation's armed forces, intelligence agencies, and foreign ministries are parts of the foreign state. See, *e.g.*, *Transaero v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 153 (D.C. Cir. 1994) (armed forces); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234 (D.C. Cir. 2003) ("A nation's armed forces are clearly on the governmental side. . . . For similar reasons, the Ministry of Foreign Affairs must be treated as the state of Iran itself."); *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 556 U.S. 366, 370 (2009) ("We shall refer to the Ministry, for present purposes an inseparable part of the Iranian State, as 'Iran.'"); *Wultz v. Islamic Republic of Iran*, 864 F. Supp. 2d 24, 32 (D.D.C. May 14, 2012) ("Thus, defendants MOIS, Syrian Ministry of Defense, Syrian Military Intelligence, and Syrian Air Force Intelligence Directorate are foreign states for purposes of these proceedings."); *Fain v. Islamic Republic of Iran*, 856 F. Supp. 2d 109, 119 (D.D.C. Apr. 20, 2012) (finding that the Iranian Ministry of Information and Security is "a foreign state for purposes of these proceedings."); *Doe I v. State of Israel*, 400 F. Supp. 2d 86,

101 (D.D.C. 2005) (the Israeli Defense Forces is a foreign state). These cases remove any doubt that the ISI is part of the Government of Pakistan.

None of the FSIA's specified exceptions to foreign sovereign immunity apply here. Plaintiffs cite 28 U.S.C. § 1605A for the proposition that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which money damages are sought . . . for personal injury or death that was caused by an act of torture [or] extrajudicial killing." But Section 1605A's exception applies only if "the foreign state was designated as a state sponsor of terrorism at the time the act . . . occurred, or was so designated as a result of such act." *Id.* § 1605A(a)(2)(A)(i)(I). Because Pakistan is not designated as a state sponsor of terrorism (and was not so designated at the time of the acts alleged here), this exception is inapplicable. Moreover, none of the exceptions in 28 U.S.C. § 1605(a) apply: Pakistan has not waived its immunity (*id.* § 1605(a)(1)), and this action is not based upon any alleged commercial activity or rights in property (*id.* § 1605(a)(2)-(4)). And because plaintiffs' allegations involve events that took place entirely outside the United States, the noncommercial tort exception in 28 U.S.C. § 1605(a)(5) also does not apply.

The ISI is accordingly immune from this Court's jurisdiction because it is a foreign state within the meaning of the FSIA and no exception to immunity applies. *Id.* § 1603.

* * * *

2. Execution of judgments and other post-judgment actions

a. Attachment under the Terrorism Risk Insurance Act

In multiple filings in U.S. courts in 2012, the United States addressed the issue of whether a party seeking to satisfy a judgment pursuant to the Terrorism Risk Insurance Act ("TRIA"), Pub. L. No. 107-297, 116 Stat. 2322 (2002), 28 U.S.C. § 1610 note, must demonstrate that the terrorist party has an ownership interest in the assets, and not merely that the assets have been blocked pursuant to a U.S. sanctions program targeting that terrorist party. The U.S. position, articulated in these filings, is that a party seeking attachment pursuant to TRIA must demonstrate that the terrorist party or its agency or instrumentality has an ownership in the assets. These U.S. filings are discussed below.

(1) Rubin v. Iran

On June 7, 2012, the United States submitted a brief as *amicus* in the U.S. Court of Appeals for the First Circuit in *Rubin v. Iran*, No. 11-2144. The plaintiffs in the case sought to attach artifacts held in several museums in Massachusetts to satisfy a judgment obtained against Iran awarding compensation for injuries from a 1997 terrorist attack by Hamas—an attack carried out with Iranian material support. For discussion of other attachment efforts by the same plaintiff, see *Digest 2011* at 318-21 and section A.2.c.2, *infra*. Excerpts below from the U.S. *amicus* brief (with footnotes omitted) argue that the assets in question are not subject to attachment under TRIA if Iran merely has an interest in them but does not own them,

even though assets in which Iran has any interest whatsoever may be blocked. The brief in its entirety is available at *www.state.gov/s/l/c8183.htm*.

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I. TRIA Authorizes The Attachment Of Only Those Assets Owned By The Relevant Terrorist Party

1. TRIA provides that "[n]otwithstanding any other provision of law," a victim of terrorism who has obtained a judgment against a terrorist party may attach "the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)." TRIA § 201(a). Thus, under TRIA, if plaintiffs could demonstrate that the artifacts in the Museums' possession are the assets "of Iran," and if those assets were considered "blocked" under an IEEPA sanctions program, plaintiffs would be able to attach the assets notwithstanding provisions of the Foreign Sovereign Immunities Act that would otherwise preclude the attachment.

The district court found that Iran does not, in fact, own the assets in question. The United States takes no position on the question of ownership. If this Court affirms the district court's holding, however, that ruling will also preclude attachment of the assets under TRIA.

TRIA does not, as plaintiffs contend, permit them to attach the artifacts possessed by the Museums if those assets are not owned by Iran. It would not be sufficient, as plaintiffs argue, to show that the assets might have been subject to the 1979 OFAC regulation that blocked all property in which Iran has "any interest of any nature whatsoever," 31 C.F.R. § 535.201. *See* Plaintiffs' Br. 16-19, 23-24; *see also id*. at 28 (arguing that Iran either has "a direct ownership interest" in excavated artifacts, or "a right to control and supervise" them, such as through export controls).

The language of TRIA § 201(a) does not extend as broadly as the language of OFAC's blocking regulation. TRIA states that a victim of terrorism who has obtained a judgment against a terrorist party may attach "the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)." TRIA § 201(a) (emphases added). TRIA does not employ the more expansive terms used not only in the 1979 blocking regulation, but in many other OFAC regulations as well. … Congress was presumably aware of the language used in such regulations, and there is no sound basis for amending the statute to supply the language that Congress omitted.

Indeed, assets "of" Iran are a narrower category than assets in which Iran has "any interest of any nature whatsoever." The Supreme Court has repeatedly observed that the "'use of the word 'of' denotes ownership.'" *Bd. of Trustees of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc*., 131 S. Ct. 2188, 2196 (2011) (quoting *Poe v. Seaborn*, 282 U.S. 101, 109 (1930)); *see also Stanford*, 131 S. Ct. at 2196 (describing *Flores–Figueroa v. United States*, 556 U.S. 646, 648, 657 (2009), as treating the phrase "identification [papers] of another person" as meaning such items belonging to another person (internal quotation marks omitted)*); Ellis v. United States*, 206 U.S. 246, 259 (1907) (interpreting the phrase "works of the United States" to mean "works belonging to the United States" (internal quotation marks omitted)). Applying that understanding in interpreting a disputed provision of patent law, the Court in *Stanford* concluded that "invention owned by the contractor" or "invention belonging to the contractor" are natural readings of the phrase "'invention of the contractor.'" 131 S. Ct. at 2196. In contrast, in *United*

States v. Rodgers, 461 U.S. 677 (1983), the Court held that the IRS could execute against property in which a tax delinquent had only a partial interest when the relevant statute permitted execution with respect to "any property, of whatever nature, *of* the delinquent, *or in which* he has any right, title, or interest." (emphases added)). 26 U.S.C. § 7403(a); *see also Rodgers*, 461 U.S. at 692-94. The Court found it important that the statute explicitly applied not only to the property "of the delinquent," but also specifically referred to property in which the delinquent "has any right title or interest." *See Rodgers*, 461 U.S. at 692. TRIA omits that additional phrase; the statute only applies to the blocked assets "of" a terrorist party. *See* TRIA § 201(a).

Plaintiffs' proposed reading would also expand the statute well beyond common law principles regarding execution of a judgment against property in the possession of a third party. As both the majority and the dissent recognized in *Rodgers*, it "is basic in the common law that a lienholder enjoys rights in property no greater than those of the debtor himself; . . . the lienholder does no more than step into the debtor's shoes." *Rodgers*, 461 U.S. at 713 (Blackmun, J., concurring in part and dissenting in part); *see also id.* at 702 (majority op.) (implicitly agreeing with this description of the traditional common law rule); 50 C.J.S. Judgments § 787 (2012). Congress enacted TRIA against the background of these principles, and the legislation should be interpreted consistent with those common-law precepts. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-10 (1991); *see also Sony BMG Music Entmt. v. Tenenbaum*, 660 F.3d 487, 515 n.27 (1st Cir. 2011) ("Congress is presumed to legislate incorporating background principles of common law rules unless it indicates to the contrary."), *cert. denied*, 2012 WL 526017 (May 21, 2012). The plaintiffs' interpretation runs against these principles because it would let a judgment creditor attach an entire asset, and not just the judgment debtor's interest.

Finally, plaintiffs' broad reading does little to advance TRIA's aim of punishing terrorist entities or deterring future terrorism. Allowing the victims of terrorism to satisfy judgments against the property of a terrorist party "impose[s] a heavy cost on those" who aid and abet terrorists. 148 Cong. Rec. S11527 (daily ed. Nov. 19, 2002) (statement of Sen. Harkin). As Senator Harkin also observed, "making the state sponsors [of terrorism] actually lose" money will be a particularly effective deterrent against future terrorist acts. *Id.* Yet paying judgments from assets that are *not* owned by the terrorist party does not impose a similar cost on the terrorist party. It does, however, impose a heavy cost on innocent property owners.

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II. An Asset Cannot Be "Contested" For Purposes Of 31 C.F.R. § 535.333 Unless Iran Itself Claims A Property Interest In The Asset

Although the district court eventually ruled for the Museums, at an earlier stage the court rejected their motions to dissolve the attachment. *Rubin*, 456 F. Supp. 2d at 234-35. And as part of that ruling, the court concluded that the assets in question were "contested" for purposes of one of OFAC's regulations, 31 C.F.R. § 535.333, since the plaintiffs and the Museums did not agree on Iran's relationship to those assets. If this Court reaches the issue, it should reject the district court's interpretation of the regulation.

As noted above, when the United States entered into the Algiers Accords in 1981, it pledged (among other things) that it would arrange "for the transfer to Iran of all Iranian properties which are located in the United States" and which were not otherwise addressed by

other parts of the agreement. *See* Algiers Accords, 20 I.L.M. at 227. The Transfer Directive (Executive Order 12281) effectuated that promise, and that directive was in turn implemented by an OFAC regulation that compelled the transfer of certain previously blocked properties "as directed after [January 18, 1981] by the Government of Iran." 31 C.F.R. § 535.215(a); *see also* 46 Fed. Reg. at 7923.

Elsewhere, however, OFAC limited the broad language of the regulation: property was only subject to the Transfer Directive if Iran's interest was "uncontested and non-contingent." 31 C.F.R. § 535.333(a). And as the United States later explained in proceedings before the Iran-U.S. Claims Tribunal, the purpose of this language was to clarify that "Iran was not entitled to possession of properties owned by others or if it had only a partial or contingent interest in such property." *Islamic Republic of Iran v. United States*, 28 Iran-U.S. Cl. Trib. Rep. 112, 127 (1992). To the extent disputes arose between Iran and a U.S. property holder, those disputes could be resolved either in the Tribunal, or in other litigation with Iran if not within the Tribunal's jurisdiction. *See* Algiers Accords, 20 I.L.M. at 230-32 (giving the Tribunal jurisdiction over claims by U.S. nationals against Iran if such claims "were outstanding on [January 19, 1981], whether or not filed in any court, and arise out of debts, contracts . . ., expropriations or other measures affecting property rights"); 31 C.F.R. § 535.504 (authorizing certain judicial proceedings with respect to properties in which Iran has an interest, when such disputes are not within the Tribunal's jurisdiction).

Judged against this backdrop, it is plain that the only contest contemplated by OFAC's regulations is a contest between Iran and the property-holder. In the absence of any claim from Iran that it had an interest in the property at issue, there would have been no reason for the holder to transfer the property to Iran in 1981, and hence no need to exempt the property from the Transfer Directive.

The text of the Executive Order and the regulation support this reading. Under both, transfer directly to Iran is not automatic. Instead, the transfer must occur "as directed . . . by the Government of Iran." 46 Fed. Reg. at 7923; 31 C.F.R. § 535.215(a). As a result, the regulation plainly contemplated that the onus was on Iran to assert a claim, since the absence of any direction from Iran meant that no transfer to Iran was compelled at all. It was only after Iran asserted such a claim that the holder would have a need to either acquiesce to the transfer, or contest Iran's interest.

The district court acknowledged that OFAC's regulations had never contemplated the possibility of a third-party entering the picture to assert the existence of an Iranian interest. *See Rubin*, 541 F. Supp. 2d at 419 ("In the binary case envisioned by the executive order and regulations, the contest would arise when both Iran and the holder asserted ownership of the property at issue."). Nonetheless, the court apparently thought that its view of the regulations could be justified as an accommodation with TRIA. *See id.* at 419-20. But the relevant regulations were last amended in 2001—a year *before* TRIA was enacted. *See* 66 Fed. Reg. 38553 (July 25, 2001). Looking to the later-enacted TRIA should thus have no bearing on the meaning of OFAC's regulations.

Nor can the district court's conclusion rest on the theory that the Museums were obligated to obtain an opinion of counsel if they wanted to withhold the artifacts from Iran. *See* 31 C.F.R. § 535.333(c) (explaining that an asset can only be "contested" after October 23, 2001 if the holder has a written attorney's opinion stating that Iran does not hold title to the asset); *Rubin*, 541 F. Supp. 2d at 420-21 (appealing to the equitable principle that "a party cannot profit

from its own failure to perform a duty"). As explained above, a property holder can only be obligated to transfer property to Iran if Iran itself had made such a request. In the absence of an Iranian request, the Museums had no obligation to transfer the property to Iran, and hence no need to obtain an opinion of counsel to exempt themselves from that transfer.

In issuing its ruling, the district court did not have the benefit of OFAC's views. As this brief explains, OFAC's position is that assets can only be "contested" for purposes of 31 C.F.R. § 535.333 if Iran itself is claiming an interest in the asset. As the agency responsible for promulgating and enforcing the regulation, OFAC's interpretation is entitled to deference unless it "is plainly erroneous or inconsistent with the regulation." *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011) (internal quotation marks omitted). As we have shown, OFAC's interpretation is consistent with both the text and purpose of the regulation.

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(2) Hausler

The United States filed an *amicus* brief in the U.S. Court of Appeals for the Second Circuit on July 9, 2012 in a case involving the same issue as *Rubin*, discussed above, namely, whether, under TRIA, a judgment creditor may attach any blocked assets or only those owned by the terrorist party. The U.S. *amicus* brief is excerpted below (with footnotes and citations to the record omitted) and available in full at *www.state.gov/s/l/c8183.htm*. In *Hausler*, relatives of Otis Fuller, an American citizen killed in Cuba by the Castro regime in 1960, sought to collect on a default judgment for $400 million in damages by attaching assets held by banks in New York as electronic funds transfers ("EFTs").

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TRIA provides that "[n]otwithstanding any other provision of law," a victim of terrorism who has obtained a judgment against a terrorist party may attach "the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)." TRIA § 201(a) (28 U.S.C. § 1610 note). Thus, under TRIA, if plaintiffs could demonstrate that the blocked EFTs at issue are the assets "of " Cuba, and if those assets are "blocked" under a [U.S.] sanctions program, plaintiffs would be able to attach the assets notwithstanding provisions of the FSIA that would otherwise preclude the attachment. The district court, however, declined to require any demonstration of Cuban ownership of the EFTs in question, instead deeming TRIA to apply to *all* assets blocked under the [Cuban Assets Control Regulations or] CACR. ….

Contrary to plaintiffs' contentions and the district court's ruling below, TRIA does not permit attachment of the EFTs at issue if Cuba or one of its agencies or instrumentalities does not have an ownership interest in those assets. It is not sufficient that the assets might have been subject to the relevant OFAC blocking regulation, which blocks all property in which Cuba or any Cuban national has "any interest of any nature whatsoever." 31 C.F.R. § 515.201.

This is so because the language of TRIA section 201(a) does not extend as broadly as the language of OFAC's blocking regulation, which existed before Congress enacted TRIA. TRIA states that a victim of terrorism who has obtained a judgment against a terrorist party may attach "the blocked assets *of* that terrorist party (including the blocked assets *of* any agency or instrumentality of that terrorist party)." TRIA § 201(a) (emphases added). TRIA does not employ the more expansive terms used not only in the Cuban asset blocking regulation, but in many other OFAC regulations as well. *See, e.g.*, 31 C.F.R. § 515.201 (CACR, which apply to property in which Cuba or a Cuban national has had "any interest of any nature whatsoever")…. When it enacted TRIA, Congress was presumably aware of the more expansive language used in such regulations, *see, e.g.*, *Townsend v. Benjamin Enterprises, Inc.*, 679 F.3d 41, 62 n.2 (2d Cir. 2012) (concurring opinion, noting that, when Congress enacted legislation, it "was surely well aware" of operation of relevant pre-existing regulations), and this Court should not effectively amend the statute to incorporate the broader language that Congress chose not to employ.

Case law in a variety of contexts supports the intuitive conclusion that assets "of " Cuba are a narrower category than assets in which Cuba has "any interest of any nature whatsoever." The Supreme Court has repeatedly observed that the "'use of the word 'of ' denotes ownership.'" *Stanford*, 131 S. Ct. at 2196 (quoting *Poe v. Seaborn*, 282 U.S. 101, 109 (1930)); *see also id.* (describing *Flores-Figueroa v. United States*, 556 U.S. 646, 648, 657 (2009), as treating the phrase "identification [papers] of another person" as meaning such items belonging to another person (internal quotation marks omitted)); *Ellis v. United States*, 206 U.S. 246, 259 (1907) (interpreting the phrase "works of the United States" to mean "works belonging to the United States" (internal quotation marks omitted))….

In contrast, in *United States v. Rodgers*, the Court held that the IRS could execute against property in which a tax delinquent had only a partial interest, but the relevant statute permitted execution with respect not only to "any property, of whatever nature, *of* the delinquent," but also to property "*in which* he has *any* right, title, or interest." 461 U.S. 677, 692-94 (1983) (quoting 26 U.S.C. § 7403(a) (emphases added)). In so holding, the Court found important that the statute at issue included this broader second clause. *Id.* TRIA, of course, omits any such additional phrase, and instead applies only to the blocked assets "of " a terrorist party. *See* TRIA § 201(a).

Plaintiffs' proposed reading would also expand the statute well beyond common law principles regarding execution of a judgment against property in the possession of a third party. As both the majority and the dissent recognized in *Rodgers*, it "is basic in the common law that a lienholder enjoys rights in property no greater than those of the debtor himself; . . . the lienholder does no more than step into the debtor's shoes." *Rodgers*, 461 U.S. at 713 (Blackmun, J., concurring in part and dissenting in part); *see also id.* at 702 (majority op.) (implicitly agreeing with this description of the traditional common law rule); 50 C.J.S. Judgments § 787 (2012) ("A judgment lien attaches only to the judgment debtor's interest . . . . Stated another way, a judgment creditor cannot acquire more property rights in a property than those already held by the judgment debtor." (citations omitted)). Congress enacted TRIA against the background of these principles, and the legislation should be interpreted to be consistent with these common-law precepts. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-10 (1991); *see also United States v. Pacheco*, 225 F.3d 148, 157 (2d Cir. 2000) ("Congress will be presumed to have legislated against the background of our traditional legal concepts. . . ." (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978))). The plaintiffs' interpretation runs against these principles because it would let a judgment creditor attach an entire asset, and not just the judgment debtor's interest.

Finally, plaintiffs' broad reading does little to advance TRIA's aim of punishing terrorist entities or deterring future terrorism. As Senator Harkin observed, "making the state sponsors [of terrorism] actually lose" money will be a particularly effective deterrent against future terrorist acts. 148 Cong. Rec. S11,527 (daily ed. Nov. 19, 2002) (statement of Sen. Harkin). Yet paying judgments from assets that are *not* owned by the terrorist party does not impose a similar cost on the terrorist party. It does, however, impose a heavy cost on non-terrorist property owners—and not a cost that Congress demonstrably chose to impose.

The district court's analysis simply cannot be squared with TRIA's language, and the recent decision from the Southern District of New York being heard in tandem with this appeal correctly rejected *Hausler*'s reasoning. *See Calderon-Cardona*, 2011 WL 6155987, at *8-14.

In its initial opinion, the *Hausler* district court provided no explanation why, if its reading of TRIA were correct, Congress had used the narrow phrase "blocked assets of that terrorist party" in section 201(a), and not the broader (and simpler) phrase "blocked assets."). In its subsequent ruling on the turnover petitions, responding to criticism of its analysis by the court in *Calderon-Cardona*, *see* 2011 WL 6155987, at *13, the *Hausler* court suggested that TRIA refers to assets "of that terrorist party" merely to clarify that a plaintiff can attach only assets that are blocked under "the particular regulation or administrative action directed at the particular . . . judgment debtor." In other words, the *Hausler* district court opined that Congress used narrower language in TRIA than in OFAC's blocking regulations so as to establish that Cuba's judgment creditors can pursue only assets blocked under a Cuban sanctions scheme and cannot pursue assets blocked under, for example, sanctions targeting Iran.

But this is a strained and unpersuasive reading of the language that Congress employed, which, as discussed above, both intrinsically and as interpreted by prior case law (in other contexts) connotes an ownership interest held by the terrorist party that the asset in question is "of." Moreover, the district court's reading also is implausible because there is no reason to believe that Congress saw any need to specify so obvious a proposition, *i.e.*, that terror victims with judgments against terrorist parties could look for relief to assets blocked by a sanctions regime but only if that regime as a whole targets the relevant terrorist nation or parties. And, even if Congress could have believed it necessary to specify that TRIA was authorizing terrorism victims to collect only from funds blocked under sanctions regulations that relate to the responsible sanctioned nation or parties, TRIA should not be so interpreted because its language serves this supposed purpose obliquely if at all, and because a far more natural reading is that TRIA applies to assets in which the judgment debtor terrorist party has an ownership interest. At bottom, the district court below impermissibly and implausibly equated assets "of that terrorist party" with assets "blocked under the sanctions regime associated with that terrorist party."

The district court's interpretation also misapprehends how sanctions regimes function. Some blocking regimes, including those relating to Cuba, apply not just to a terrorist country itself, but also to any national of that country. *See, e.g.*, 31 C.F.R. § 515.201. That assets of foreign nationals are subject to a blocking regulation directed at a particular country does not necessarily make those assets the property of that nation. Moreover, some blocking regimes are not directed at an individual terrorist entity, and are instead directed at certain categories of terrorist entities—many of which have nothing to do with each other. For instance, hundreds of different terrorist entities and individuals have their assets blocked under Executive Order 13,224, which targets terrorists across the globe. *See* 68 Fed. Reg. 34,196 (June 6, 2003); OFAC, *Terrorism: What You Need To Know About U.S. Sanctions* (hereinafter "*Terrorism*"), *http://www.treasury.gov/resource-center/sanctions/Programs/Documents/terror.pdf*, at 2-24 (last

updated June 29, 2012). Entities currently blocked under this program include such diverse groups as the FARC (a Colombian narco-terrorist organization, *see Tamara-Gomez v. Gonzales*, 447 F.3d 343, 345 (5th Cir. 2006)), the Tamil Tigers (a violent Sri Lankan rebel group, *see Don v. Gonzales*, 476 F.3d 738, 739 (9th Cir. 2007)), and Al-Qaida. *Terrorism* at 2, 54. The district court's logic would suggest that an individual with a judgment against one of these entities would be able to attach assets wholly owned by an entirely separate group, half a world away, whose only connection is that both have their assets blocked under the same broad sanctions regime. The absurdity that Congress intended such a result in enacting TRIA counsels against the district court's flawed interpretation.

While these considerations alone are dispositive, the United States notes that the *Hausler* district court further erred by mischaracterizing the relationship between OFAC sanctions regimes and existing sources of property law, and based on that overbroad understanding concluded that TRIA's reference to OFAC's sanctions had preemptive effect over concepts of state property law. While the Government takes no position here on TRIA's preemptive force, we note that neither TRIA nor OFAC's regulations attempt to define whether particular assets are "of " or "owned by" a terrorist party. Accordingly, neither the statutory text nor the regulations support the district court's assertion that TRIA somehow itself opens up attachment more broadly than to blocked assets "of " a terrorist party. Instead, while OFAC's regulations contain definitions for terms like "property" and "interest," *see, e.g.*, 31 C.F.R. §§ 515.311, 515.312; *id.* §§ 535.311, 535.312, the purpose of those definitions is to explain the kinds of assets that come within OFAC's various blocking orders—orders that extend beyond assets owned by the relevant sanctions target. *See, e.g.*, 31 C.F.R. § 515.201 (barring transactions in "property" in which Cuba or one of its nationals has had an "interest"); *id*. § 535.201 (barring transactions in "property" in which Iran has an "interest"). These provisions serve purposes unrelated to TRIA's attachment authorization, and so are not a logical source to draw upon in determining how TRIA section 201 is to operate.

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b. Attachment under the FSIA of blocked assets

Some of the cases, in which the U.S. submitted briefs in 2012 on the issue of whether attachment under TRIA is predicated on demonstrating an ownership interest by the terrorist party, also involved a similar issue of the requisite showing of ownership under sections 1610(g) and 1610(f)(1) of the FSIA. Those cases are discussed below.

(1) Calderon-Cardona v. Bank of New York *et al.*

On September 21, 2012, the United States filed an *amicus* brief in the U.S. Court of Appeals for the Second Circuit in *Calderon-Cardona v. Bank of New York* et al., No. 12-75 (2d Cir. 2012). The plaintiffs in the original case in the U.S. district court in Puerto Rico were the families and estates of Carmelo Calderon-Molina and Pablo Tirada-Ayala, two American citizens who were, respectively, killed and injured in a 1972 attack by terrorists who allegedly received material support from North Korea. Plaintiffs obtained a $378 million

judgment and brought suit in U.S. District Court in the Southern District of New York to attach proceeds from electronic funds transfers ("EFTs") that had been blocked pursuant to a U.S. sanctions program directed at North Korea. The district court in the Southern District of New York held that plaintiffs could not attach the assets because they were not owned by North Korea. The U.S. *amicus* brief argued in favor of affirming the district court. Point I of the argument section of the brief repeats arguments made in the U.S. *amicus* briefs in *Rubin* and *Hausler*, excerpted above, regarding the inability to attach property under TRIA that is not owned by the judgment debtor. Excerpts below (with footnotes and citations to the record omitted) from points II and III of the argument discuss why attachment is likewise not available under the FSIA when the assets at issue are not the property of the judgment debtor (the terrorist-supporting party). The full text of the U.S. *amicus* brief is available at *www.state.gov/s/l/c8183.htm*.

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POINT II
LIKE TRIA, SECTION 1610(g) AUTHORIZES ATTACHMENT ONLY OF PROPERTY OWNED BY A QUALIFYING FOREIGN STATE

As the district court recognized, section 1610(g) applies only to "the property *of* a foreign state" (emphasis added), much like TRIA authorizes attachment only of assets "of " the judgment debtor in question (there, a "terrorist party"); *cf.* 28 U.S.C. § 1610(a), (b) (certain property in the United States "of " a foreign state or agency or instrumentality not immune from attachment). And since the word "of " denotes ownership, *see supra* at 17-19, the statute necessarily reaches only property or interests in property that the judgment debtor owns. *See Estate of Heiser*, 2012 WL 3776705, at *11-*12. If Congress had intended the statute to more broadly reach all property in which the judgment debtor had any interest, it would have used broader language—like that in OFAC's regulations. Indeed, whereas TRIA includes a "notwithstanding" clause that petitioners (incorrectly) argue overcomes TRIA's ownership requirement, neither section 1610(g) nor the FSIA as a whole has any such provision.

Legislative history confirms this interpretation of section 1610(g). The conference committee report explained that the provision applies to "any property in which the foreign state has a beneficial *ownership*." H.R. Rep. No. 110-477, at 1001 (2007) (conf. rep.) (emphasis added); *accord id.* (the provision "is written to subject any property interest in which the foreign state enjoys a beneficial *ownership* to attachment and execution" (emphasis added)).

Petitioners respond by emphasizing statutory language subjecting to execution "interest[s] held directly or indirectly in a separate juridical entity." *See* Pet. Br. 14 (citing 28 U.S.C. § 1610(g)). But nothing in this language overrides the statute's express requirement that the property be "property of " the foreign state or agency or instrumentality. Rather, the language simply makes clear that an asset remains the foreign state's "property" even if the foreign state has chosen to own it indirectly through an intermediate entity. That the statute reaches indirectly owned property interests is consistent both with the district court's holding, namely that section 1610(g) only reaches ownership interests, and with the legislative purpose of making assets owned by terrorism-supporting foreign states available to victims of terrorism, however those states structure their ownership. But ownership remains an indispensable element. To conclude

otherwise would squarely contradict the independent statutory requirement that the asset being attached must be "property of" the relevant state.

Petitioners also rely on statutory language permitting attachment regardless of (1) the foreign government's "level of economic control" over the property; (2) whether the government receives "the profits of the property"; (3) the "degree" to which the government manages the property; (4) whether the government is the property's "sole beneficiary"; and (5) whether recognizing the separate entity "would entitle the foreign state to benefits in United States courts while avoiding its obligations." Pet. Br. 19-20 (quoting 28 U.S.C. § 1610(g)). Rather than eliminating the ownership element of section 1610(g), however, this language clearly supersedes the multi-factor test created in *First Nat'l City Bank v. Banco Para El Comerio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611 (1983), for determining when a creditor can look to the assets of a separate juridical entity to satisfy a claim against a foreign sovereign. *See Bancec*, 462 U.S. at 628-34 (in determining when to disregard separate juridical status, considering, *inter alia*, extent of foreign government control over the entity, and extent to which the foreign state was seeking benefits in U.S. courts while avoiding its burdens). Indeed, the statute's wording of these five factors—which the statute provides are irrelevant to an asset's availability for attachment—almost identically track the five so-called "*Bancec* factors" discussed in *Walter Fuller Aircraft Sales, Inc. v. Republic of Phillippines*, 965 F.2d 1375, 1380 n.7 (5th Cir. 1992); *see also Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1071 n.9 (9th Cir. 2002) (mentioning same five factors). All of these factors, however, concern whether attachment is authorized when the foreign state adopts an indirect form of ownership—not whether the statutory requirement of ownership can be dispensed with entirely.

Finally, petitioners rely on a brief footnote in *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1123 n.2 (9th Cir. 2010), characterizing section 1610(g) as reaching "any U.S. property in which" the judgment debtor "has any interests." But this statement was pure dicta—the case did not involve a section 1610(g) execution, and the court offered no supporting analysis whatsoever. This statement may lack precedential force even in the Ninth Circuit. *See, e.g., In re Magnacom Wireless, LLC*, 503 F.3d 984, 993-94 (9th Cir. 2007) ("statements made in passing, without analysis, are not binding precedent."). Because this passing unsupported statement badly misconstrues the provision's plain meaning, it should not be followed here.

POINT III

SECTION 1610(f)(1) HAS BEEN WAIVED AND IS NOT AN AVAILABLE BASIS TO ATTACH THE ASSETS AT ISSUE

The Court should reject petitioners' argument (Pet. Br. 58) that they can enforce their judgment under section 1610(f)(1)'s broader language. This argument is based on their mistaken assertion that TRIA renders the President's waiver of section 1610(f)(1) no longer effective. Section 1610(f)(3) unambiguously declares that "the President may waive any provision of paragraph (1) in the interest of national security." And the President specifically invoked that statute, the day it was enacted, to waive the entirety of section 1610(f)(1). *See Presidential Determination 2001-03*, 65 Fed. Reg. 66,483, 2000 WL 34508240 (Oct. 28, 2000) (waiver now in effect; *see also Presidential Determination 99-1*, 63 Fed. Reg. 59,201, 1998 WL 34332050 (Oct. 21, 1998) (superseded waiver of predecessor statute)).

Petitioners nonetheless contend that section 201(b)(1) of TRIA negated the President's waiver under section 1610(f)(3), by requiring that any waiver be on an asset-by-asset basis. *See* Pet. Br. 61 (quoting TRIA § 201(b)(1)). But section 201(b)(1) of TRIA is explicitly limited to the waiver of TRIA section 201(a), not other statutes. Section 201(b)(1) states: "upon determining

on an asset-by-asset basis that a waiver is necessary . . . , *the President may waive the requirements of subsection (a)*" with regard to certain property. TRIA § 201(b)(1) (emphasis added). Thus, nothing in TRIA purports to amend 28 U.S.C. § 1610(f)(3), and the President's October 2000 waiver of section 1610(f)(1) therefore remains in effect. Accordingly, petitioners may not collect under the purported authority of section 1610(f)(1).

* * * *

(2) Heiser v. Iran

The United States made submissions in proceedings in U.S. district courts in both the District of Columbia and the Southern District of New York relating to the same named plaintiffs' efforts to attach assets blocked pursuant to U.S. sanctions programs directed at Iran. *Heiser v. Iran*, 00-cv-2329 (D.D.C.) and *Heiser v. Bank of Tokyo Mitsubishi UFJ*, No. 11 Civ. 1601 (S.D.N.Y.). The U.S. statement of interest in the *Heiser* case in the District of Columbia included the same arguments the U.S. had made in previous submissions regarding the ownership requirement for attachment under both TRIA and the FSIA. That statement of interest is available at *www.state.gov/s/l/c8183.htm*. On August 31, 2012, the district court in the District of Columbia issued an opinion consistent with the U.S. position on the issue. *Heiser v. Iran*, 00-cv-2329 (D.D.C. 2012). The U.S. statement of interest in the *Heiser* case in the Southern District of New York attached as exhibits the U.S. submissions in *Heiser*, *Hausler*, and *Calderon-Cardona* (discussed *supra*), as well as the district court for the District of Columbia's decision in *Heiser*. That statement of interest is also available at *www.state.gov/s/l/c8183.htm*.

c. Discovery orders to aid in execution under the FSIA

(1) Walters v. People's Republic of China

On April 25, 2012, the United States filed a statement of interest in the U.S. District Court for the District of Columbia expressing its views on service of process issues and the breadth of a discovery order in a case seeking to execute on a default judgment against the People's Republic of China. *Walters v. People's Republic of China*, No. 1:01-mc-300 (D.D.C.). Excerpts below explain why the broad discovery order issued by the court, to provide plaintiffs with information about Chinese government assets in the United States, is inconsistent with the FSIA. The court subsequently vacated its discovery order. Excerpts from the section of the brief addressing service of process issues appear in Section D below. The full statement of interest is available at *www.state.gov/s/l/c8183.htm*. The United States also filed a short supplement to its statement of interest on November 9, 2012, in response to the court's request for its views on a recent decision by the Court of Appeals for the Second Circuit, *EM Ltd. v. Republic of Argentina*, 695 F.3d 201 (2d Cir. 2012). The supplemental brief is also available at *www.state.gov/s/l/c8183.htm*.

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The Court's discovery Order requires China to provide Plaintiffs with information on what appears to be every commercial asset owned directly or indirectly by the Chinese government that is located within the United States. This type of broad, general-asset discovery is inconsistent with the FSIA, under which "discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination." *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992).

In a typical case, a plaintiff seeking to execute on a judgment is able to invoke broad discovery procedures to aid in the process. *See* Fed. R. Civ. P. 69(a)(2) ("In aid of the judgment or execution, the judgment creditor . . . may obtain discovery from any person—including the judgment debtor—as provided in these rules[.]"). Under the FSIA, however, there is a presumption that property of a foreign state is immune from attachment and execution. *See* 28 U.S.C. § 1609. To overcome this presumption of immunity, a plaintiff must establish that one of the exceptions set forth in 28 U.S.C. § 1610 applies to a specific piece of property.

As the Seventh Circuit recently observed, broad-ranging discovery is inconsistent with the presumptive immunity afforded to foreign states' property: "Discovery orders that are broad in scope and thin in foundation unjustifiably subject foreign states to unwarranted litigation costs and intrusive inquiries about their American-based assets. One of the purposes of the immunity codified in § 1609 is to shield foreign states from these burdens." *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 796-97 (7th Cir. 2011). In addition to the Seventh Circuit, three other Courts of Appeals have indicated that post-judgment discovery against foreign states necessarily must be limited. *See Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1095-96 (9th Cir. 2007); *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 486 (2d Cir. 2007); *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 260 n.10 (5th Cir. 2002).

Here, the Court's discovery Order is broad and far-reaching. In particular, the Court's Order requires China to provide to Plaintiffs (among other items):

- "All documents identifying property, including money, in the United States currently owned by the PRC that is or at any time was used by the PRC for a commercial activity in the United States."
- "All documents identifying property, including money, of every PRC agency and instrumentality engaged in commercial activity in the United States."
- "All documents, including bank statements, identifying Bank Accounts and Financial Accounts in the United States currently directly or indirectly controlled by the PRC containing money or other property owned by the PRC for a commercial activity in the United States."
- "All documents identifying commercial activities carried on in the United States by the PRC."
- "All documents pertaining to organizations and businesses owned and/or controlled by the PRC in the United States."

…

This type of general-asset discovery is inconsistent with the narrow and circumspect discovery permitted against foreign states. Plaintiffs have not identified any specific property

alleged not to be immune; Plaintiffs are instead seeking a list of what appears to be every Chinese commercial asset located within the United States.

Such broad discovery orders, in addition to being inconsistent with the presumptive immunity accorded by the FSIA, potentially harm the United States by encouraging foreign courts to allow similarly overbroad discovery against the United States.

* * * *

(2) Rubin v. Iran

In May 2012, the United States filed a brief as *amicus curiae* in the Supreme Court of the United States, opposing a petition for certiorari to review the decision by the U.S. Court of Appeals for the Seventh Circuit in *Rubin v. Iran*. See *Digest 2011* at 318-21 for a discussion of, and excerpts from, the decision by the court of appeals. The U.S. *amicus* brief, excerpted below, addresses the question of whether the court of appeals correctly held that a broad, general discovery order requiring a foreign state to produce comprehensive information about its assets in the U.S. is inconsistent with the FSIA. On June 25, 2012, the Supreme Court denied the petition for certiorari, allowing the court of appeals' decision to stand. *Rubin v. Iran*, 133 S.Ct. 23 (2012).

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1. a. The United States has long recognized that foreign sovereigns are generally immune from suit in our courts and their property is largely immune from execution. See *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812). The FSIA codifies those principles, with some modifications, by establishing two presumptive rules of immunity. First, a foreign state is immune from suit—and from the jurisdiction of the court—unless an exception enumerated in Section 1605, 1605A, or 1607 applies. See 28 U.S.C. 1604 and 1330(a). Second, the property of a foreign state is "immune from attachment[,] arrest[,] and execution except as provided in [S]ections 1610 and 1611." 28 U.S.C. 1609.

Consistent with pre-FSIA practice, under which foreign-state property was absolutely immune from execution even if the sovereign had been held to be subject to suit, "the execution immunity afforded sovereign property is broader than the jurisdictional immunity afforded the sovereign itself." *Walters v. Industrial & Commercial Bank of China, Ltd.*, 651 F.3d 280, 289 (2d Cir. 2011). Thus, the fact that a foreign state has been held to be subject to *suit* under Sections 1605 through 1607 does not mean that the foreign state's property in the United States is subject to *execution.* See *id.* at 288-289. Rather, the property of a foreign state may be executed upon to satisfy a judgment only if the property itself is "used for a commercial activity in the United States" and certain other conditions are satisfied. 28 U.S.C. 1610(a). Under the FSIA, then, "jurisdictional immunity *** and execution immunity *** operate independently" of each other. *Walters*, 651 F.3d at 288.

Because Section 1609 provides that a foreign state's property "shall be immune" from execution unless an exception applies, 28 U.S.C. 1609, the property is presumptively immune, whether or not the foreign state appears to assert immunity. See *Peterson v. Islamic Republic of*

Iran, 627 F.3d 1117, 1127-1128 (9th Cir. 2010). A judgment creditor seeking to enforce a judgment against the property of a foreign sovereign therefore bears the burden of identifying the property to be executed against and establishing that it falls within an exception to immunity from execution. See, *e.g.*, *Walters*, 651 F.3d at 297; Pet. App. 26a.

b. When immunity from execution turns on factual issues, a judgment creditor may seek discovery from the foreign state to develop facts establishing that the property is not immune. See, *e.g.*, *Walters*, 651 F.3d at 296-297; *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1095-1096 (9th Cir. 2007). Although the FSIA does not expressly address the permissible scope of discovery for the purpose of determining whether assets of a foreign sovereign are immune from execution under Section 1609, Pet. App. 24a; see *House Report* 23, the district court must exercise its discretion consistent with the presumption of immunity established in Section 1609. Pet. App. 23a-25a.

That immunity exists not only to shield foreign state-owned property from seizure, but also to protect against "the costs, in time and expense, and other disruptions attendant to litigation." *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 486 (2d Cir.), cert. denied, 592 U.S. 818 (2007). To permit burdensome discovery into a foreign state's property without regard to whether that property might fall within an exception to immunity would vitiate the FSIA's protections. See *Butler v. Sukhoi Co.*, 579 F.3d 1307, 1314 (11th Cir. 2009); *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 260 n.10 (5th Cir. 2002), cert, denied, 544 U.S. 962 (2005). That is particularly so because Section 1610(a) establishes that immunity from execution is broader than immunity from suit. A foreign state's assets may thus be immune even though the state has already been held liable for the plaintiffs' claims.

The execution immunity codified in the FSIA also reflects comity and reciprocity concerns, see *Peterson*, 627 F.3d at 1127-1128; *cf.* *National City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 362 (1955), both of which are implicated by discovery in aid of execution. This Court has long recognized that "[t]he judicial seizure" of a foreign state's property "may be regarded as an affront to its dignity and may … affect our relations with it" at least to the same extent as subjecting a foreign state to suit. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008) (internal quotation marks omitted; brackets in original); see *Peterson*, 627 F.3d at 1127 ("These policy considerations apply more strongly in the context of immunity from execution."); *Connecticut Bank of Commerce*, 309 F.3d at 255-256. Compelling a foreign state to produce extensive material in discovery concerning its assets similarly may impose significant burdens and impugn the state's dignity, and may have implications for the United States' foreign relations.

Such discovery may also have reciprocal consequences for the treatment of the United States in foreign courts. The United States maintains extensive overseas holdings as part of its worldwide diplomatic and security missions. Because "some foreign states base their sovereign immunity decisions on reciprocity," *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984), a U.S. court's allowance of unduly sweeping discovery concerning a foreign state's assets may cause the United States to be subjected to similar treatment abroad. Cf. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (construing statute to avoid "invit[ing] retaliatory action from other nations").

2. The court of appeals therefore correctly held that when a plaintiff seeks discovery concerning the property of a foreign state, the district court should not grant unlimited discovery, but instead should permit discovery only insofar as it is consistent with the FSIA's presumption of immunity and the comity and reciprocity concerns embodied therein. Pet. App. 23a, 32a. As

the court correctly concluded, a district court should permit discovery "circumspectly and only to verify allegations of specific facts crucial to an immunity determination." *Id.* at 27a; *EM Ltd.*, 473 F.3d at 486.

Petitioners contend (Pet. 10-13) that "[o]nce the plaintiff has overcome a foreign state's jurisdictional immunity from suit, *** the foreign state no longer has any statutory protection from the inconvenience of suit," Pet. 12 (internal quotation marks omitted), and as a result, in execution proceedings a judgment creditor may "obtain discovery regarding any nonprivileged matter that is relevant," Pet. 10 (quoting Fed. R. Civ. P. 26(b)(1)). That argument overlooks the fact that the FSIA expressly provides that even when a foreign state is subject to suit (because that suit falls within an exception to immunity under Sections 1605, 1605A, or 1607), its property remains presumptively immune from attachment or execution except as specifically provided in Sections 1610 and 1611. 28 U.S.C. 1609. Congress thus provided foreign states with an independent entitlement to be free of unreasonable burdens in connection with litigation to enforce judgments, even if they are subject to the court's jurisdiction—and to sometimes extensive discovery—for purposes of adjudicating the merits of the underlying suit. See *Peterson*, 627 F.3d at 1127-1128.

The fact that immunity from execution under the FSIA is not jurisdictional, moreover, does not alter the statutory policy of protecting foreign states from undue burdens in litigating execution proceedings. Section 1609, like Section 1604, creates a presumption of immunity, thereby evidencing Congress's intent to protect foreign states from the burdens of litigation. See *NML Capital, Ltd. v. Banco Central de la Republica Argentina*, 652 F.3d 172, 193-194 (2d Cir. 2011). In addition, Section 1609 largely codified the pre-FSIA practice under which foreign-state property enjoyed absolute immunity from execution, even if the state had been held subject to suit, in recognition of the independent comity concerns raised by executing upon foreign-sovereign property. See *Peterson*, 627 F.3d at 1127-1128; *Loomis v. Rogers*, 254 F.2d 941, 943 (D.C. Cir. 1958), cert. denied, 359 U.S. 928 (1959). Given that backdrop, and the fact that discovery in aid of execution may also raise comity concerns, there is no reason to think that Congress intended Section 1609 immunity to provide foreign states no protection from the burdens of litigating execution proceedings. See *Peterson*, 627 F.3d at 1127-1128.

In arguing to the contrary, petitioners rely (Pet. 12) on Section 1606, which provides that once a plaintiff establishes that his claims fall within an exception to the foreign state's immunity from suit, the state "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1606. But that provision addresses only liability; it does not speak to the immunity from execution established in Section 1609. See Pet. App. 28a. Even when a foreign state is found liable consistent with Section 1606, in order to enforce the judgment a plaintiff must demonstrate that the foreign state's property is not immune from execution. See *Walters*, 651 F.3d at 289.

* * * *

d. Assets of foreign central banks

Section 1611(b)(1) of the FSIA provides:

> Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment from execution, if—(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver.

In May 2012, the United States filed a brief as *amicus curiae* in the U.S. Supreme Court opposing certiorari in a case in which the U.S. Court of Appeals for the Second Circuit construed § 1611 and held that funds of a foreign central bank are immune from attachment or execution without regard to whether the central bank is an alter ego of its parent government. For background on the opinion of the Second Circuit, see *Digest 2007* at 494-504. The Supreme Court denied certiorari. *EM Ltd. v. Republic of Argentina*, No. 11-604. The U.S. *amicus* brief is excerpted below (with footnotes omitted).

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* * * *

A. The court of appeals correctly held that under Section 1611(b)(1), the funds of a foreign central bank held for its own account are immune from attachment or execution without regard to whether the central bank is an alter ego of its parent government under *Bancec*. That conclusion is supported by the text, purpose, and legislative history of Section 1611(b)(1), as well as the historical context in which the provision was enacted.

1. The text of Section 1611(b)(1) does not make central bank independence a condition of immunity. … On its face, Section 1611(b)(1) renders central bank property immune whether or not the bank is independent: the provision does not mention the existence of any particular relationship between the central bank and its parent state.

Section 1611(b)(1) also makes clear that central-bank property is immune regardless of whether it could be deemed to be the property of the foreign state under an alter ego theory. The provision states that "*the property of a foreign state* shall be immune *** if *** *the property is that of a foreign central bank* or monetary authority held for its own account." Section 1611(b)(1) thus presupposes that the property "of a foreign central bank" might *also* be the property "of a foreign state"—a term that includes the parent foreign government itself, as well as the state's agencies and instrumentalities. 28 U.S.C. 1603(a). As a result, even if petitioners are correct that "alter egos share property ownership as well as legal identity" and a court could "properly regard [BCRA's] assets as [Argentina's] property," Reply Br. 6 (citation omitted), that conclusion would not suggest that the funds fall outside the immunity conferred by Section 1611(b)(1).

Section 1611(b)(1)'s application to "monetary authorit[ies]" as well as "central bank[s]" reinforces the conclusion that immunity does not depend on the independence of the central

bank. At the time of the FSIA's enactment, monetary functions were often performed by departments of the central government, rather than by independent agencies or instrumentalities. See Alex Cukierman, *Central Bank Independence and Monetary Policymaking Institutions - Past, Present and Future*, 24 Eur. J. Pol. Econ. 722, 722 (2008) (Cukierman); Pet. App. 35a. Section 1611(b)(1)'s dual focus on central banks and monetary authorities thus indicates that Congress intended for immunity to apply based on the functions performed by the entity holding the property, rather than on the independence of that entity or its precise relationship to its parent foreign state.

Section 1611(b)(1)'s application "[n]otwithstanding the provisions of section 1610" is further evidence that Section 1611(b)(1)'s application does not turn on the independence of the central bank. Section 1610 specifies the circumstances in which the property of a foreign state or that of its agencies and instrumentalities is subject to execution. The property of a foreign state may be executed upon as set forth in Section 1610(a), while the property of an agency or instrumentality is subject to execution in the circumstances set forth in Section 1610(b) in addition to those listed in Section 1610(a). Although, as petitioners contend (Pet. 17-19), the court of appeals erred to the extent it suggested that Section 1610(b) is the only subsection that governs the attachment of property of agencies and instrumentalities, Pet. App. 33a, the court's larger point stands. Congress demonstrated in Section 1610 that it is capable of distinguishing between the property of a foreign state and that of foreign instrumentalities. Had Congress intended to limit Section 1611(b)(1) to independent central banks, it would not have obscured that limitation by referring generally to the entirety of Section 1610—including its application to the property of the foreign state itself—or by referring to the property "of a foreign central bank" as the property "of a foreign state." 28 U.S.C. 1611(b)(1).

As the court of appeals recognized, Section 1611(b)(1) imposes only one prerequisite for immunity of central bank property: the property must be "held" for the central bank's "own account." Pet. App. 32a. That requirement limits immunity to funds "used or held in connection with central banking activities," rather than those "used solely to finance the commercial transactions of other entities or of foreign states." *House Report* 31. Central banks perform a number of sovereign monetary functions, including holding a foreign state's reserves, issuing currency, administering reserves in depository institutions, and setting monetary policy. See Paul L. Lee, *Central Banks and Sovereign Immunity*, 41 Colum. J. Transnat'l L. 327, 352-353 (2003). Funds used for those purposes are immune from execution under Section 1611(b)(1). Pet. App. 45a.

Petitioners argue (Pet. 15-16) that assets "held for [the central bank's] *own* account," 28 U.S.C. 1611(b)(1) (emphasis added), are limited to those over which the central bank has exclusive ownership. That argument is refuted by Congress's express statement that the property may be both that of the central bank and that of the foreign state itself. *Ibid.* And to the extent that petitioners contend that the funds must be used only to further the independent interests of the central bank, rather than the broader interests of its parent foreign government, the court of appeals correctly rejected that argument. Pet. App. 40a-42a. A central bank implements monetary policy for the benefit of the foreign state as a whole, and it is unclear what standards a court would employ to distinguish between a central bank's "own" interests and those of its parent state for these purposes. *Id.* at 42a.

2. Construing Section 1611(b)(1) to require only that the property in question be held for the central bank's own account, regardless of the central bank's degree of independence from its parent foreign state, furthers the provision's purposes. Many central banks maintain extensive

portions of their countries' reserves in the United States in dollar-denominated assets, and Congress was concerned that permitting attachment and execution against those assets could discourage "deposit of foreign funds in the United States." *House Report* 31. In addition, because foreign reserves are, in a general sense, the property of the foreign state, and because central banks and their parent states may use the property for core sovereign monetary functions, permitting execution "could cause significant foreign relations problems." *Ibid.* These concerns are implicated whenever a plaintiff attempts to execute against central-bank property used for sovereign purposes, regardless of the central bank's degree of independence from its parent government.

Petitioners' view, moreover, would undermine the certainty and predictability fostered by Section 1611(b)(1) by rendering immunity contingent on a court's *post hoc* finding that the central bank was sufficiently independent from its parent government at the relevant time. The outcome of the alter-ego analysis may be difficult for foreign central banks to predict—a concern that is aptly illustrated by this case, as the district court incorrectly viewed certain customary central banking practices as evidence that BCRA functioned as Argentina's alter ego. …Construing Section 1611(b)(1) to turn on central-bank independence could therefore prompt foreign governments to withdraw their reserves from the United States, which in turn would have an adverse impact on the United States economy and financial system.

3. The FSIA's legislative history reinforces the conclusion that Section 1611(b)(1) does not require central bank independence or distinguish between the property of the central bank and its parent government. The *House Report*, in discussing Section 1611(b)(1), explains that its purpose is to protect "funds of a foreign central bank *** deposited in the United States," because "execution against the *reserves of foreign states*" could have adverse consequences for the United States. *House Report* 31 (emphasis added). By referring to foreign reserves as both the property "of a foreign state" and the funds "of a foreign central bank," Congress confirmed its understanding that assets could be regarded as central-bank property even though they also constitute the property of the foreign state.

That understanding was shared by the State Department. In 1973, the House of Representatives considered a provision materially indistinguishable from Section 1611(b)(1) in an unenacted predecessor to the FSIA. H.R. 3493, 93d Cong., 1st Sess. § 1. State Department Acting Legal Adviser Charles Brower testified that the purpose of the provision was to prevent attachment or execution against the "*property of foreign states*, even if [the property] relate[s] to the commercial activities of a foreign state and would otherwise come within the scope of 1610." *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the H. Comm. on the Judiciary*, 93d Cong., 1st Sess. 25 (1973) (emphasis added).

Indeed, shortly before enactment of the FSIA, the State Department had recognized the immunity of foreign reserve assets that, though they were held by a central bank, were under the direction and control of the foreign state. See 1973 Dig. of U.S. Prac. Int'l Law 227-228 (describing July 24, 1973, letter from Acting Legal Adviser to Department of Justice, requesting the filing of a suggestion of immunity in *Battery Steamship Corp. v. Republic of Viet-Nam*, No. C-72-1440 (N.D. Cal.)). The State Department explained that the plaintiff sought to attach funds that were "deposited to the account" of the "central bank of Viet-Nam." *Id.* at 227. Because the funds "represent[ed] foreign exchange reserves of the Republic of Viet-Nam" and were used by the Republic to pay its debts to other governments, the State Department concluded that the funds were used "for the performance of the functions of the National Bank of Viet-Nam as a

central bank," and "[a]ccordingly" recognized "the claim of the Republic of Viet-Nam for immunity of the funds of the [central bank] of Viet-Nam *** from attachment." *Ibid.* The Acting Legal Adviser also indicated that the State Department's determination was consistent with Section 1611(b)(1)'s unenacted predecessor, which was pending before Congress at the time.

4. Finally, the "alter ego" inquiry proposed by petitioners is particularly anomalous in light of "the historical backdrop against which the FSIA was passed." Pet. App. 35a. At the time of the FSIA's enactment, "most central banks in the world functioned as departments of ministries of finance," *ibid.*— and such departments were generally not completely independent from the government itself. See *id.* at 35a-37a; Cukierman 722. When Congress passed the FSIA, therefore, "it had no reason to believe that foreign central banks and monetary authorities would be independent of their parent states." Pet. App. 35a.

B. As petitioners acknowledge (Pet. 20, 22), the court of appeals' decision does not conflict with any decision of this Court or any other court of appeals.

Petitioners contend, however, that the decision warrants further review because it will "accord unintended and unjustifiable protection to the assets of malfeasant sovereigns and *** inject enormous uncertainty into" the FSIA. Pet. 22. Petitioners are incorrect. Rather than departing from settled principles, the court of appeals confirmed the State Department's understanding that central-bank property used for central banking functions is entitled to immunity. See pp. 13-14, *supra*; see also Ernest T. Patrikis, *Foreign Central Bank Property: Immunity from Attachment in the United States*, 1982 U. Ill. L. Rev. 265, 272, 286 (1982). Indeed, petitioners have not identified any instance in which property held by a country's central bank and used for central banking functions has been subject to execution or attachment to satisfy a judgment against a foreign state. In light of this tradition of according broad immunity to central-bank property, petitioners' assertion that the court of appeals' decision will have adverse effects is wholly speculative.

II. A FOREIGN STATE'S WAIVER OF IMMUNITY FOR FOREIGN-STATE PROPERTY DOES NOT WAIVE THE IMMUNITY OF CENTRAL-BANK FUNDS UNDER SECTION 1611(b)(1)

A. The court of appeals also correctly held that a general waiver of immunity by a foreign state does not waive immunity for funds held by its central bank and used for central banking activities. Under Section 1611(b)(1), the property of a foreign central bank or monetary authority held for its own account is immune from execution or attachment "unless such bank or authority, or its parent foreign government, has explicitly waived its immunity." 28 U.S.C. 1611(b)(1). As the court of appeals recognized, although Argentina had waived its right to assert immunity "for [Argentina] or any of its revenues, assets or property," Argentina has never explicitly waived the immunity of BCRA's property. See Pet. App. 48a. Petitioners do not contend otherwise. See Pet. 24. Rather, they argue that the district court's alter-ego finding necessitates that Argentina's waiver of its immunity be imputed to BCRA's property. Pet. 24-25. Petitioners are incorrect.

Section 1611(b)(1) expressly contemplates that a "parent foreign government" may waive the immunity of its central bank's property, but the provision requires that the waiver be "explicit[]." 28 U.S.C. 1611(b)(1). That requirement distinguishes Section 1611(b)(1) from the FSIA's provisions governing waiver of immunity from jurisdiction and from post-judgment attachment and execution against sovereign property. Those provisions permit a foreign state to waive immunity *implicitly*, such as by appearing in an action without asserting immunity. See 28 U.S.C. 1605(a)(1); 28 U.S.C. 1610(a)(1); *House Report* 18. Thus, in the context of immunity under Sections 1605(a)(1) and 1610(a)(1), a foreign sovereign faces the possibility that a court

may conclude that the state's conduct should be retrospectively interpreted as an implicit waiver of immunity.

By contrast, Section 1611(b)(1)'s requirement of an explicit waiver reflects Congress's conclusion that in the context of central-bank assets used for central banking functions, uncertainty about the possibility of being held to have implicitly waived immunity could discourage foreign states from placing their reserves in the United States and result in adverse foreign relations consequences. See *House Report* 31 ("If execution could be levied on such funds without an explicit waiver, deposit of foreign funds in the United States might be discouraged."). Petitioners' argument that immunity for central-bank funds should be deemed to have been waived based on a judicial finding that the bank is not sufficiently independent is therefore inconsistent with both the textual requirement that the waiver for such funds be explicit and the congressional purpose of protecting the certainty surrounding sovereign central-bank transactions in the United States.

Petitioners argue, however, that *Bancec, supra*, requires a court to "impute a sovereign's waiver of immunity with respect to execution of judgments to its alter ego instrumentalities." Pet. 25. Petitioners rely on *Bancec*'s statement that when "a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created … *one may be held liable for the actions of the other*." Pet. 24 (quoting *Bancec*, 462 U.S. at 629) (emphasis in petition). *Bancec* has no bearing on the adequacy of a waiver under Section 1611(b)(1). In *Bancec*, this Court held that the separate juridical status of Bancec, a foreign state instrumentality that had brought an action against Citibank, should not be given effect. After filing its complaint, Bancec was dissolved, making the Republic of Cuba "the real beneficiary" of the action. 462 U.S. at 632-633. The Court held that Citibank could set off the value of assets seized by the Republic of Cuba against its claimed liability to Bancec because it would be unjust to allow the Republic of Cuba to invoke the separate juridical status of Bancec to avoid "answering for the seizure of Citibank's assets." *Id.* at 632. The *Bancec* Court's conclusion that in certain circumstances "equitable principles" may justify holding a state instrumentality *liable* for the actions taken by its parent government does not imply anything about the circumstances in which a parent government's waiver of its own immunity should be imputed to an agency or instrumentality. Nor, in particular, does *Bancec* suggest that Section 1611(b)(1)'s requirement of an explicit waiver could be satisfied by the existence of alter-ego situations.

B. The court of appeals' waiver holding does not conflict with the decision of any other court of appeals. The decisions on which petitioners rely (Pet. 24-31) do not concern Section 1611(b)(1) or a foreign central bank or monetary authority. Rather, to the extent those decisions suggest that one foreign sovereign entity's waiver may bind its alter egos, they concern waivers under Sections 1605(a)(1) or 1610(a)(1), which permit implicit waivers. They are therefore inapposite here. See, *e.g., S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1298-1301 (11th Cir. 2000) (considering whether an instrumentality had "implicitly" waived the foreign state's immunity under Section 1605(a)(1) by agreeing to arbitrate, and concluding that no waiver occurred); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1103-1105 (9th Cir. 1990) (holding that one instrumentality could not implicitly waive the immunity from suit of a "juridically separate" instrumentality, without considering whether the outcome would change if the entities were not juridically separate), abrogated on other grounds, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010); *Hercaire Int'l, Inc. v. Argentina*, 821 F.2d 559, 564 (11th Cir. 1987) (stating that the scope of a waiver of immunity for purposes of Section 1610(a)(1) and (b)(1) turned on an instrumentality's "separate juridical existence," but finding that entities were independent).

In any event, because the question whether Argentina's waiver of its own immunity is sufficient to waive the immunity of funds held by BCRA is governed by Section 1611(b)(1), this case does not present a vehicle to consider more generally when a foreign state's waiver of immunity can be imputed to its instrumentality for purposes of the FSIA's other waiver provisions. Nor does this case present an occasion to consider the situations in which commercial activity by an agency or instrumentality that has been determined to be an "alter ego" of the foreign state may be "imputed to the sovereign" itself (Pet. 28).

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e. Injunctive relief under the FSIA: NML Capital v. Argentina

In April 2012, the United States filed a brief as *amicus curiae* in the U.S. Court of Appeals for the Second Circuit in support of reversal of the district court's order enjoining Argentina from making payments on certain debt instruments without also making payments to the plaintiffs. Plaintiffs in the case are "holdout creditors" who rejected an offer to exchange their bonds for new instruments as part of Argentina's restructuring of its debt. *NML Capital Ltd. et al. v. Argentina*, No. 12-105 (2d. Cir. 2012). The section of the brief discussing the impropriety of the district court's injunction under the FSIA appears below. The brief in its entirety is available at *www.state.gov/s/l/c8183.htm.*

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The injunctive relief ordered by the district court must be considered against the backdrop of the statutory scheme established in the FSIA. The FSIA sets out the "sole, comprehensive scheme" for obtaining and enforcing a judgment against a foreign state in a civil case in the U.S. courts. *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006); *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433 (1989); Foreign Sovereign Immunities Act of 1976, House Report No. 94-1487, 5 U.S.C.A.A.N. 6604, 6610 (Sept. 9, 1976) [hereinafter H.R. 94-1487] (the FSIA "prescribes . . . [the] circumstances under which attachment and execution may be obtained against the property of foreign states to satisfy a judgment"). Under the FSIA, a foreign state is immune from jurisdiction except as immunity is removed by statute, 28 U.S.C. § 1604, and foreign state-owned property is "immune from attachment arrest and execution except as provided in" 28 U.S.C. §§ 1610 and 1611, 28 U.S.C. § 1609. Accordingly, the FSIA does not provide for plenary enforcement of the orders of U.S. courts, but instead cabins courts' enforcement authority to those mechanisms set forth in the statute. *Id.*§§ 1609-1611.

The FSIA's presumption of enforcement immunity contains exceptions for foreign state property located "in the United States" that is "used for a commercial activity in the United States" and that meets one of seven other requirements, 28 U.S.C. § 1610(a). Sovereign property located outside of the United States plainly falls outside the court's enforcement authority. *See, e.g.*, *Walters v. Industrial and Comm. Bank of China, Ltd.*, 651 F.3d 280, 288-89 (2d Cir. 2011) (noting that "special protection [is] afforded to the property of a foreign sovereign" under the

FSIA because the judicial seizure of sovereign property is viewed as a greater affront to sovereignty than the exercise of jurisdiction over a state by itself); *Walters v. People's Republic of China*, 672 F. Supp. 2d 573, 574 (S.D.N.Y. 2009) (citing cases). "The FSIA did not purport to authorize execution against a foreign state's property . . . wherever that property is located around the world." *Autotech*, 499 F.3d at 750.

The FSIA's carefully circumscribed limits on the judiciary's exercise of jurisdiction over sovereigns and foreign state property reflect a deliberate policy choice on the part of Congress. As Congress recognized at the time it enacted the FSIA, "enforcement [of] judgments against foreign state property remains a somewhat controversial subject in international law." H.R. 94-1487, 5 U.S.C.A.A.N. at 6626. The judicial seizure of the property of a foreign state may well "be regarded as 'an affront to its dignity and may . . . affect our relations with it.' " *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180, 2190 (2008). Accordingly, the provisions of the FSIA allowing execution against foreign state property impose limits on the extraterritorial exercise of jurisdiction by U.S. courts. *See, e.g., Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1088-89 (9th Cir. 2007).

According to Argentina, "the Republic makes its payments on the restructured debt *outside the United States* when it transfers the necessary funds to a trustee." Arg. Br. at 50. If plaintiffs were to reduce their claims to money judgment, they would be prevented from seeking to attach the funds utilized to pay the exchange bonds under the FSIA's strictures on enforcement of judgments, as the funds at issue are located outside the United States. Presumably in an effort to avoid these restrictions, plaintiffs-appellees chose instead to move for equitable relief that purports to constrain Argentina's use of such property.

A court may issue an injunction against a sovereign only if it is "clearly appropriate." H.R. 94-1487, 5 U.S.C.A.A.N. at 6621. An injunction restraining a sovereign's use of property that the FSIA expressly provides is immune from execution is inconsistent with the structure of the FSIA and thus not "clearly appropriate."

Although the injunctions at issue here do not formally effectuate a transfer of property interests, the February 23 Orders have the practical effect of requiring Argentina to transfer funds amounting to the balance of principal and interest owed to plaintiffs-appellees on the next occasion that it makes a payment on the exchange bonds. Courts are not permitted to achieve by injunction what they are prohibited from doing in the exercise of their limited execution authority under the FSIA. *See S&S Machinery Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1983).

In *S&S Machinery Co.*, this Court considered the propriety of an injunction that restrained the use of assets that were immune from attachment under the FSIA. The Court squarely rejected the notion that a district court's jurisdiction over a foreign state permitted it to restrain the use of sovereign property that was not itself subject to the court's jurisdiction:

> [S]uch [an injunction] could only have resulted in the disingenuous flouting of the FSIA ban on prejudgment attachment of assets belonging to a 'foreign state'. . . . The FSIA would become meaningless if courts could eviscerate its protections merely by denominating their restraints as injunctions against the negotiation or use of property rather than as attachments of that property. We hold that courts in this context may not grant, by injunction, relief which they may not provide by attachment.

Id. at 418; *see also Weston Compagnie de Finance et D'Investissement, S.A. v. Republic del Ecuador*, 823 F. Supp. 1106, 1115-16 (S.D.N.Y. 1993) (denying injunction that directed sovereign to return funds that had passed through New York but were now located abroad).

Courts have repeatedly resisted creditors' attempts to evade the restrictions on enforcement set forth in the FSIA, even if creditors frame the collection method as an exercise of jurisdiction over the sovereign, rather than the sovereign's property. For example, in *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117 (9th Cir. 2010), the Ninth Circuit rejected a creditor's argument that the court's exercise of *in personam* jurisdiction over a sovereign provided it with authority to enter an order requiring the sovereign to assign foreign state assets located outside the United States, and hence immune from execution under the FSIA, to the creditor. *Id.* at 1130-32 ("The FSIA does not provide methods for the enforcement of judgments against foreign states, only that those judgments may not be enforced by resort to immune property."); *see also Philippine Export and Foreign Loan Guarantee Corp. v. Chuidian*, 218 Cal. App. 3d 1058, 1094, 1099-100 (Cal. Ct. App. 1990) (rejecting argument that assignment order applying to assets worldwide would be "a valid exercise of the court's personal jurisdiction" over state instrumentality, because such an order would "ignore a longstanding immunity under international law and under the FSIA," and give the creditor what he could not achieve "through ordinary creditors' remedies, namely, execution upon foreign property"); *cf. Walters*, 651 F.3d at 288-89 ("[T]he FSIA's provisions governing jurisdictional immunity, on the one hand, and execution immunity, on the other, operate independently.").

To the extent that plaintiffs-appellees rely upon section 1606 as the basis for the district court's authority to enter the injunctions, this argument is unavailing. Section 1606 establishes that, with respect to a claim for which a state is not entitled to immunity, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Yet section 1606 concerns "the scope of *liability*, [not] the scope of *execution*. Although [a state] may be found liable in the same manner as any other private defendant, the options for executing a judgment remain limited." *Rubin v. Islamic Republic of Iran*, 637 F.3d 783 (7th Cir. 2011) (rejecting argument that section 1606 provides authority to subject sovereign to broad discovery orders in aid of execution of judgment). Accordingly, section 1606 does not expand upon the enforcement remedies that are available against a sovereign defendant. *See Mangattu v. M/V Ibn Hayyan*, 35 F.3d 205, 209 (5th Cir. 1994). Nor is it even clear that a U.S. court would have the authority to issue such a broad injunction—which also purports to bind nonparties in Argentina—against a private party.

In sum, parties cannot avoid the limitations deliberately imposed by Congress on judicial execution authority and expand the scope of remedies available to them in an action against a sovereign simply by refraining from asking the court to reduce their claims to judgment. There is no indication in the statutory text or history that Congress intended for litigants to be able to sidestep sections 1609-1611 by seeking an injunction that restrains the sovereign's use of immune assets until a judgment is satisfied, rather than an order of execution against those same assets.

* * * *

On October 26, 2012, the court of appeals issued its decision, affirming the decision of the district court. Argentina then filed a motion for rehearing *en banc* and the United States filed a brief in support of rehearing on December 28, 2012. The portion of the U.S. brief in support of rehearing discussing the FSIA appears below, with footnotes omitted.

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* * * *

The panel further erred in affirming the extraordinary injunctive relief entered by the district court. That relief contravenes the FSIA, which sets out the exclusive means of obtaining jurisdiction over a foreign state and enforcing judgments against it in U.S. courts. *Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428, 434-35 (1989). Even when a court has jurisdiction to enter a judgment against a foreign state, injunctive relief can be enforced only if consistent with the FSIA provisions governing immunity from attachment, execution, or arrest, 28 U.S.C. §§ 1609-1611. *S&S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1983). Here, although the district court has properly exercised jurisdiction over Argentina, the injunction affirmed by the panel constrains Argentina's use and disposition of sovereign property that is immune from execution. That result improperly circumvents the careful limits on execution established by Congress. *See Letelier v. Republic of Chile*, 748 F.2d 790, 798-99 (2d Cir. 1984).

This ruling conflicts with *S&S*, 706 F.2d at 418, which held that courts may not grant, "by injunction, relief which they may not provide by attachment" under the FSIA. The panel reasoned that the injunction did not implicate § 1609 because it did not "transfer . . . dominion or control over sovereign property to the court." Slip op. 25. But that formalistic interpretation would permit courts to "eviscerate [the FSIA's] protections merely by denominating their restraints as injunctions against the . . . use of property rather than as attachments of that property." *S&S*, 706 F.2d at 418. "[T]he principle behind the prohibition against attachments should apply broadly," *Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1230 (2d Cir. 1996), particularly as Congress enacted the FSIA against a background practice in which sovereign property was absolutely immune, *Letelier*, 748 F.2d at 799. When judicial action constrains a foreign state's use of its property, § 1609's protections apply. *See Af-Cap Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080 (9th Cir. 2007) (garnishment action); *Walker Int'l Holdings Ltd. v. Republic of Congo*, 395 F.3d 229 (5th Cir. 2004) (same); *Af-Cap Inc. v. Republic of Congo*, 383 F.3d 361 (5th Cir. 2004) (same).

That Argentina's dominion over its property was constrained is demonstrated by the panel's own logic. The Court stated that Argentina could comply with the injunction by paying "all amounts owed to its exchange bondholders" and all to the holdouts, or by making partial payments to both, slip op. 25; but in each case Argentina would be compelled to use sovereign funds in a particular way. Similarly, if Argentina decides not to pay the holdouts, it is constrained in its use of funds with which it would pay the exchange bondholders. Either way, Argentina is compelled to do something in particular with its immune property.

Finally, U.S. foreign relations may be harmed by a holding constraining a foreign state's use of its property outside the United States, particularly such property inside the foreign state's territory. As explained more fully in the government's prior *amicus* brief, such an order could have adverse consequences for the treatment of U.S. property under principles of reciprocity.

The laws of many foreign nations do not permit a court to enter an injunction against a foreign state; those foreign states may expect the United States to extend them the same consideration. Although the United States' position regarding foreign policy implications of particular exercises of jurisdiction should be accorded deference by the courts, *see, e.g.*, *Whiteman v. Dorotheum GmbH & Co*., 431 F.3d 57, 69-74 (2d Cir. 2005); *Af-Cap Inc. v. Republic of Congo*, 462 F.3d 417, 428 n.8 (5th Cir. 2006), especially with respect to the extraordinary equitable relief of an injunction against a foreign sovereign, the panel here did not even address the government's position.

* * * *

3. Availability of contempt sanctions

On August 29, 2012, the United States filed an additional statement of interest in *Chabad v. Russian Federation*, No. 1:05-cv-01548-RCL (D.D.C.). The United States had previously filed a statement of interest in the case in 2011 pertaining to the applicability of the Immunity from Seizure Act, 22 U.S.C. § 2459. See *Digest 2011* at 445-47. The U.S. statement of interest filed in 2012, at the request of the court, opposes the plaintiff's motion for contempt sanctions against the Russian Federation for its failure to comply with the court's order to surrender a collection of religious books, manuscripts and other materials. Excerpts below (with footnotes and citations to the record omitted) discuss the impropriety of contempt sanctions, both under the FSIA and based on U.S. foreign policy interests. The statement of interest is available in full at *www.state.gov/s/l/c8183.htm*.

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* * * *

I. The Imposition of Civil Contempt Sanctions for Failure to Comply with an Order to Transfer Tangible Property in the Possession of a Foreign State within that State's Own Territory Would Be Inconsistent with the Foreign Sovereign Immunities Act

This Court's default judgment finding an expropriation of Chabad's property in violation of international law included an order directing Russia to surrender tangible property that is in Russia's possession and that is located within Russia's own borders. Chabad now seeks the imposition of continuing monetary contempt sanctions for Russia's failure to implement that order. The Foreign Sovereign Immunities Act does not authorize the Court to award relief in this form. This Court, like the D.C. Circuit, has held that, pursuant to 28 U.S.C. § 1605(a)(3), Russia is not immune from this suit. (*see Chabad*, 528 F.3d at 943-48.) It does not necessarily follow, however, that the FSIA permits the Court to provide the enforcement remedy that Chabad has requested. "The FSIA sets forth 'the sole and exclusive standards to be used' to resolve all sovereign immunity issues raised in federal and state courts." *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 532 (5th Cir. 1992) (quoting H.R. Rep. No. 94-1487, 94th Cong. 2d Sess. 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610). Moreover, "the FSIA's provisions governing jurisdictional immunity, on the one hand, and execution immunity, on the other, operate independently." *Walters v. Indus. & Comm'l Bank of China*, 651 F.3d 280, 288 (2nd Cir.

2011). In other words, "a waiver of immunity from suit does not imply a waiver of immunity from attachment of property, and a waiver of immunity from attachment of property does not imply a waiver of immunity from suit." *Id.* (internal quotation omitted).

The FSIA affords execution immunity for property held by a sovereign that sweeps more broadly than the jurisdictional immunity that the Act affords to the sovereign on the underlying claim itself. This is the result of a deliberate policy choice on the part of Congress. Congress recognized that, "at the time the FSIA was passed, the international community viewed execution against a foreign state's property as a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action." *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 255-56 (5th Cir. 2002). "Prior to the enactment of the FSIA, the United States gave absolute immunity to foreign sovereigns from the execution of judgments. This rule required plaintiffs who successfully obtained a judgment against a foreign sovereign to rely on voluntary repayment by that State." *Autotech Technologies LP v. Integral Res. & Dev. Corp.*, 499 F.3d 737, 749 (7th Cir. 2007); *see also De Letelier v. Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984) (noting that pre-FSIA practice "left the availability of execution totally up to the debtor state"). The FSIA "codified this practice by establishing a general principle of immunity for foreign sovereigns from execution of judgments,'' subject to certain limited exceptions. *Autotech*, 499 F.3d at 749. The result is a statute "that explicitly contemplates that a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment unless the foreign state holds certain kinds of property subject to execution." *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011).

The FSIA's exceptions from execution immunity apply only to a foreign state's "property in the United States," and even that property is subject to execution only in carefully circumscribed and extremely limited circumstances. 28 U.S.C. § 1610(a). Accordingly, "the FSIA did not purport to authorize execution against a foreign sovereign's property, or that of its instrumentality, wherever that property is located around the world. We would need some hint from Congress before we felt justified in adopting such a breathtaking assertion of extraterritorial jurisdiction." *Autotech*, 499 F.3d at 750. *See also Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1130 (9th Cir. 2010); *Walker Int'l Holdings Ltd. v. Republic of Congo*, 395 F.3d 229, 234 (5th Cir. 2004).

The relief that Chabad has requested would require the Court to assert just such extraterritorial jurisdiction over tangible property possessed by Russia in Russian territory. Rather than following the carefully crafted enforcement scheme set forth in the FSIA, *see* 28 U.S.C. §§ 1609-1611, Chabad is urging an alternative framework in which the Court would first issue a specific performance order for property overseas and then enforce that order through contempt proceedings. Such an approach is not consistent with the limited provisions for execution on property set forth in the FSIA. Congress took great care in the drafting of these provisions, recognizing that "enforcement [of] judgments against foreign state property remains a somewhat controversial subject in international law," H.R. Rep. No. 94-1487, at 27, and that the judicial seizure of the property of a foreign state may well "be regarded as an affront to its dignity and may affect our relations with it." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008) (internal quotation and ellipses omitted).

The FSIA, thus, does not authorize this Court to enforce an expropriation finding through an order threatening sanctions against Russia for failure to surrender property that Russia holds on its own territory. To be sure, neither this Court's order directing the entry of a default judgment nor the proposed order for contempt sanctions is denominated as an order of

attachment or execution on property. But the substance of the order, not its form, controls here. Under the FSIA, courts "may not grant, by injunction, relief which they may not provide by attachment," for the obvious reason that "[t]he FSIA would become meaningless" if the denomination of an order controlled over its substance. *S&S Machinery Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1983). In substance, the relief that Chabad seeks would have the Court direct Russia, under penalty of contempt sanctions, to surrender to Chabad property that Russia holds on its own territory. Other courts faced with similar efforts to evade the FSIA's carefully delineated enforcement scheme have declined to do so. *See Peterson*, 627 F.3d at 1130-32 (9th Cir. 2010) (finding foreign sovereign's assets held abroad to be immune from execution, despite creditor's argument that *in personam* jurisdiction over the sovereign provided the court authority to order sovereign to assign its assets abroad to the creditor); *Philippine Export & Foreign L. Guar. Corp.v. Chuidian*, 218 Cal. App. 3d 1058, 1094, 1099 (Cal. Ct. App. 1990) (rejecting argument that assignment order applying to assets worldwide would be "a valid exercise of the court's personal jurisdiction" over state instrumentality, because it would "ignore a long-standing immunity of international law and under the FSIA"). This Court, likewise, should decline the invitation to depart from the FSIA's scheme for attachment immunity specified in Sections 1609 through 1611.

The United States acknowledges that this Court's task has been made more difficult as a result of Russia's withdrawal from this litigation, as well as Russia's failure to respond to this Court's show cause order. However, a foreign sovereign does not waive the legal protections for its property under the FSIA by failing to appear in litigation at the enforcement stage, whether or not it has participated with respect to issue of jurisdiction. As noted above, the exceptions to immunity for attachment of foreign state property operate independently of the exceptions to jurisdictional immunity. *See, e.g.*, *Mangattu v M/V Ibn Hayyan*, 35 F.3d 205, 209 (5th Cir. 1994).

Consistent with the foregoing, the FSIA specifies that property in the possession of a foreign sovereign "*shall* be immune" from execution absent an exception to immunity specified in the Act itself. 28 U.S.C. § 1609 (emphasis added). "It follows from this language that the immunity does not depend on the foreign state's appearance in the case. The immunity inheres in the property itself, and the court must address it regardless of whether the foreign state appears and asserts it." *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 799 (7th Cir. 2011). This result is confirmed by 28 U.S.C. § 1610(c), which requires that a defaulting foreign state be provided adequate notice before an attachment order under either Section 1610(a) or (b) may take effect. "This provision makes it clear that even when the foreign state fails to appear in the execution proceeding, the court must determine that the property sought to be attached is excepted from immunity under § 1610(a) or (b) before it can order attachment or execution." *Rubin*, 637 F.3d at 800. Moreover, 28 U.S.C. § 1610(a)(1) describes the circumstances in which a foreign sovereign may waive the immunity from execution of its "property in the United States"; the statute, however, "does not recognize a sovereign's failure to appear as a waiver of sovereign immunity." *Walters*, 651 F.3d at 292. Even where a foreign sovereign completely waives its immunity from execution, moreover, a United States court still may only execute against property of the foreign sovereign that is in the United States. *See Conn. Bank of Commerce*, 309 F.3d at 247.

The FSIA, then, does not authorize this Court to issue contempt sanctions for a foreign sovereign's failure to comply with an order to surrender tangible property that the sovereign holds in its own territory. The D.C. Circuit's decision in *FG Hemisphere Associates* does not

counsel otherwise. To be sure, the D.C. Circuit held in that case that a district court has the authority under the FSIA to issue a contempt sanction against a foreign sovereign. *See FG Hemisphere Assocs.*, 637 F.3d at 379. That case dealt with non-compliance with a discovery order, and did not hold that contempt sanctions are mandatory, or permissible, in every case arising under the FSIA. Rather, it dealt with the limited question whether the inherent authority of a federal court to impose contempt sanctions had been entirely displaced by the FSIA. The court of appeals answered that question in the negative, but emphasized the narrowness of its holding. *See id.* at 380 ("We hold today only that the FSIA does not abrogate a court's inherent power to impose contempt sanctions on a foreign sovereign, and that the district court did not abuse its discretion in doing so here."). In this case, by contrast, Chabad asks the Court not simply to utilize its contempt power, but to create an alternative enforcement scheme that conflicts with the carefully defined, and limited, system of remedies authorized under the FSIA. Because Russia is not subject to such remedies under the FSIA, the Court should not award the sanctions that Chabad requests. *See id.* at 379 (noting "serious[]" concern that would arise from a contempt sanction for violation of an order that would be overbroad under the FSIA, but declining to consider issue for the first time in the court of appeals).

II. Even if the Proposed Order of Civil Contempt Sanctions Were Lawfully Available, the Court Should Exercise Its Discretion Not to Issue Such an Order, so as to Avoid Damage to the Foreign Policy Interests of the United

The United States believes that this Court was correct to exercise caution before issuing an order of civil contempt sanctions, in light of "the serious impact such an order could have on the foreign policy interests of the United States." The United States believes that such an order would risk damage to significant foreign policy interests, without achieving its intended purpose. Of course, the imposition of civil contempt sanctions is a matter of equitable discretion for the district court, where such sanctions are lawfully available, *see, e.g.*, *Broderick v. Donaldson*, 437 F.3d 1226, 1234 (D.C. Cir. 2006), and a court should consider the public interest in deciding whether to award equitable relief, *see, e.g.*, *Sottera, Inc. v. FDA*, 627 F.3d 891, 893 (D.C. Cir. 2010). In this case, even if the court had the authority to impose the proposed sanctions, it nonetheless should exercise its discretion to refrain from doing so in order to avoid damage to foreign policy interests of the United States, including the United States' interest in promoting resolution of the dispute between Chabad and Russia over the Collection.

As previously noted, Congress took care when it enacted the FSIA to adhere to international norms regarding the scope of a court's authority to execute judgments against foreign sovereigns. *See* H.R. Rep. No. 94-1487, at 27. Those international norms also counsel against the imposition of civil contempt sanctions here. Although there is a growing acceptance in modern international law that a foreign state's immunity from a forum state's enforcement jurisdiction is no longer absolute, it remains clear that, absent the consent of the defendant state, the limitations on that immunity do not extend to property outside the territory of the forum state. *See* Hazel Fox, The Law of State Immunity 600-601, 626-627 (2d ed. 2008). Indeed, to the United States' knowledge, judicial efforts by one state to enforce an expropriation judgment directly against property held by another state within the latter state's territory would be entirely without precedent internationally.

An order by one state's courts that purports to dispose of tangible property held by another state in the latter state's territory is particularly problematic. Such an order would likely be viewed as a departure from accepted rules of public international law, even by those countries that do recognize some limitations on a sovereign's otherwise absolute immunity from

execution. Indeed, prevailing international practice generally excludes orders of specific performance against a sovereign altogether, as well as sanctions for refusal to comply with such orders. The imposition of civil contempt sanctions against Russia for its failure to comply with a United States court's order to take specific actions regarding tangible property within Russia's own territory would be so far removed from these international norms that any foreign government would oppose it. Such an order would risk significant criticism from the international community, and would likely be resisted in this or other cases involving foreign sovereigns.

Moreover, to the extent that the imposition of sanctions might be relied upon as a precedent elsewhere, such an order would undermine the United States' own interest in avoiding similar measures being imposed against it. For example, "some foreign states base their sovereign immunity decisions on reciprocity," and accordingly a United States court's decision to compel a foreign sovereign to surrender property that that sovereign holds in its own territory could "subject the United States to suits abroad" in like circumstances. *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984). The United States has a strong interest in ensuring that foreign courts do not assume the power to compel specific performance as to property held by the United States, particularly as to property that the United States holds within its own territory. In the limited circumstances in which any party has attempted to seek a specific performance order against the United States in a foreign court, the United States has consistently relied on its sovereign immunity to resist those efforts.

In addition, the United States holds an interest in the amicable resolution of the dispute between Chabad and Russia concerning the Collection. As we have noted, the United States has engaged in high-level diplomatic efforts with Russia to secure the transfer of the Collection. It remains committed to continuing these efforts which, as is often the case with diplomacy, require perseverance and consistency. It is the United States' judgment that the imposition of the requested civil contempt sanctions against Russia would be counter-productive to these efforts, as well as for related issues such as the continuing Russian embargo on art loans to the United States.

The inevitable accumulation of monetary contempt sanctions would also only serve to create an enduring new obstacle to resolving the dispute. These "sensitive diplomatic considerations" counsel against the imposition of civil contempt sanctions here. *FG Hemisphere Assocs.*, 637 F.3d at 380 (noting that deference would be provided to the United States' views of its foreign policy concerns where those views are "reasonably and specifically explained" to a district court). Accordingly, the United States requests that the Court exercise its discretion so as not to impose civil contempt sanctions against Russia under the circumstances presented here.

* * * *

B. IMMUNITY OF FOREIGN OFFICIALS

1. Overview

In 2010, the U.S. Supreme Court held in *Samantar v. Yousuf* that the FSIA does not govern the immunity of foreign officials. See *Digest 2010* at 397-428 for a discussion of *Samantar*,

including the *amicus* brief filed by the United States and the Supreme Court's opinion. The cases discussed below involve the consideration of foreign official immunity post-*Samantar*.

2. Samantar

As discussed in *Digest 2011* at 338-44, the United States submitted a statement of interest in the district court and an *amicus* brief in the appeals court following remand from the U.S. Supreme Court in 2011. The U.S. filings conveyed the determination that the defendant, a former Somali official, is not immune from this suit and that the case should be allowed to proceed. On November 2, 2012, the U.S. Court of Appeals for the Fourth Circuit issued its opinion affirming the district court's denial of defendant's motion to dismiss but concluding that, under international and domestic law, officials from other countries are not entitled to foreign official immunity for alleged *jus cogens* violations, even if the acts were performed in the defendant's official capacity. It gave substantial, but not controlling weight, to the U.S. statement of interest. *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012).* Excerpts from the appellate court's opinion appear below.

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…[C]onsistent with the Executive's constitutionally delegated powers and the historical practice of the courts, we conclude that the State Department's pronouncement as to head-of-state immunity is entitled to absolute deference. The State Department has never recognized Samantar as the head of state for Somalia; indeed, the State Department does not recognize the Transitional Federal Government or any other entity as the official government of Somalia, from which immunity would derive in the first place. The district court properly deferred to the State Department's position that Samantar be denied head-of-state immunity.

Unlike head-of-state immunity and other status-based immunities, there is no equivalent constitutional basis suggesting that the views of the Executive Branch control questions of foreign official immunity. Such cases do not involve any act of recognition for which the Executive Branch is constitutionally empowered; rather, they simply involve matters about the scope of defendant's official duties.

This is not to say, however, that the Executive Branch has no role to play in such suits. These immunity decisions turn upon principles of customary international law and foreign policy, areas in which the courts respect, but do not automatically follow, the views of the Executive Branch. … With respect to foreign official immunity, the Executive Branch still informs the court about the diplomatic effect of the court's exercising jurisdiction over claims against an official of a foreign state, and the Executive Branch may urge the court to grant or deny official-act immunity based on such considerations. …

In sum, we give absolute deference to the State Department's position on status-based immunity doctrines such as head-of-state immunity. The State Department's determination

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* Editor's note: In 2013, Samantar filed a petition for certiorari, seeking review of his case by the U.S. Supreme Court.

regarding conduct-based immunity, by contrast, is not controlling, but it carries substantial weight in our analysis of the issue.

* * * *

We turn to the remaining question of whether Samantar is entitled to foreign official immunity under the common law. In considering the contours of foreign official immunity, we must draw from the relevant principles found in both international and domestic immunity law, as well as the experience and judgment of the State Department, to which we give considerable, but not controlling, weight.

* * * *

…We conclude that, under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity.

Moreover, we find Congress's enactment of the TVPA, and the policies it reflects, to be both instructive and consistent with our view of the common law regarding these aspects of *jus cogens.* Plaintiffs asserted claims against Samantar under the TVPA which authorizes a civil cause of action against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation ... subjects an individual to torture" or "extrajudicial killing." Pub.L. 102–256, § 2(a), 28 U.S.C. 1350 note. "The TVPA thus recognizes explicitly what was perhaps implicit in the Act of 1789—that the law of nations is incorporated into the law of the United States and that a violation of the international law of human rights is (at least with regard to torture) *ipso facto* a violation of U.S. domestic law." *Wiwa v. Royal Dutch Petroleum Co.,* 226 F.3d 88, 105 (2d Cir.2000). Thus, in enacting the TVPA, Congress essentially created an express private right of action for individuals victimized by torture and extrajudicial killing that constitute violations of *jus cogens* norms. *See* S.Rep. No. 102–249, at 8 (1991) ("[B]ecause no state officially condones torture or extrajudicial killings, few such acts, if any, would fall under the rubric of 'official actions' taken in the course of an official's duties.").

* * * *

In its SOI, the State Department submitted a suggestion of non-immunity. The SOI highlighted the fact that Samantar "is a former official of a state with no currently recognized government to request immunity on his behalf" or to take a position as to "whether the acts in question were taken in an official capacity." J.A. 71. Noting that "[t]he immunity protecting foreign officials for their official acts ultimately belongs to the sovereign rather than the official," J.A. 71, the government reasoned that Samantar should not be afforded immunity "[i]n the absence of a recognized government ... to assert or waive [Samantar's] immunity," J.A. 73. The second major basis for the State Department's view that Samantar was not entitled to immunity was Samantar's status as a permanent legal resident. According to the SOI, "U.S. residents like Samantar who enjoy the protections of U.S. law ordinarily should be subject to the

jurisdiction of the courts, particularly when sued by U.S. residents" or naturalized citizens such as two of the plaintiffs. J.A. 71.

Both of these factors add substantial weight in favor of denying immunity. Because the State Department has not officially recognized a Somali government, the court does not face the usual risk of offending a foreign nation by exercising jurisdiction over the plaintiffs' claims. Likewise, as a permanent legal resident, Samantar has a binding tie to the United States and its court system.

Because this case involves acts that violated *jus cogens norms*, including torture, extrajudicial killings and prolonged arbitrary imprisonment of politically and ethnically disfavored groups, we conclude that Samantar is not entitled to conduct-based official immunity under the common law, which in this area incorporates international law. Moreover, the SOI has supplied us with additional reasons to support this conclusion. Thus, we affirm the district court's denial of Samantar's motion to dismiss based on foreign official immunity.

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3. Ahmed v. Magan

In 2011, the United States submitted a statement of interest conveying its determination of non-immunity in another case involving a former Somali official. *Ahmed v. Magan*, No. 10-342. See *Digest 2011* at 344. The district court subsequently denied the defendant's motion to dismiss the case on November 7, 2011, finding that Magan was not immune from suit. On November 20, 2012, the district court granted plaintiff's unopposed motion for partial summary judgment, concluding that the defendant was liable for the detention and torture of plaintiff pursuant to the TVPA and the ATS.

4. Giraldo v. Drummond: Immunity from providing testimony

As discussed in *Digest 2011* at 346-49, the plaintiffs in *Giraldo v. Drummond* appealed the decision of the U.S. District Court for the District of Columbia in 2011 that denied their motion to compel testimony of the former president of Colombia, Alvaro Uribe. The United States had submitted a statement of interest and suggestion of immunity in the district court. On August 3, 2012, the United States filed its brief as *amicus curiae* on appeal of the case to the U.S. Court of Appeals for the District of Columbia Circuit. The U.S. *amicus* brief in support of affirming the district court's decision, which is excerpted below (with footnotes and citations to the record omitted) and available in full at *www.state.gov/s/l/c8183.htm*, not only reiterated the arguments made in the suggestion of immunity but also addressed new arguments made by plaintiffs on appeal and identified one error in the district court's articulation of the scope of immunity. On October 23, 2012, the court of appeals affirmed the district court's decision in an unpublished judgment (not excerpted herein). *Giraldo v. Drummond*, No. 11-7118 (D.C. Cir. 2012).

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J U D G M E N T

Upon consideration of the record from the United States District Court for the District of Columbia and the briefs and arguments of the parties, it is

ORDERED AND ADJUDGED that the judgment of the District Court be affirmed.

Appellants seek review of the District Court's ruling denying their motion to compel the testimony of Álvaro Uribe Vélez, former President of Colombia. Finding no error in the District Court's decision, we affirm the judgment from which this appeal was taken for the reasons stated by the District Court. We need not decide whether a factual record supporting claims of illegal acts or jus cogens violations could ever lead to a different result. In this case, the District Court correctly held that the plaintiffs' mere allegations were insufficient to defeat former President Uribe's immunity. Giraldo v. Drummond Co., Inc., 808 F. Supp. 2d 247, 251 (D.D.C. 2011).

A. Under Supreme Court Precedent, the State Department's Foreign Official Immunity Determinations Are Controlling and Are Not Subject to Review.

The district court correctly deferred to the State Department's determination that former President Uribe is immune from compulsory testimony relating to acts taken or information obtained in his official capacity as a government official, taking into account the relevant principles of customary international law accepted by the Executive Branch in the exercise of its constitutional authority over foreign affairs. Except where otherwise prescribed by statute, courts have deferred to State Department determinations of foreign sovereign immunity, recognizing that to do otherwise could undermine the Executive Branch's conduct of foreign relations.

Prior to the enactment of the Foreign Sovereign Immunities Act in 1976, courts deferred to State Department determinations concerning the immunity of foreign states as well as foreign officials. *See Samantar*, 130 S. Ct. at 2284. Following the decision in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch.) 116 (1812), which first recognized the doctrine of foreign sovereign immunity, "a two-step procedure developed for resolving a foreign state's claim of sovereign immunity." *Samantar*, 130 S. Ct. at 2284 (citing *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34–36 (1945); *Ex parte Peru*, 318 U.S. 578, 587–89 (1943); *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U. S. 68, 74–75 (1938)).

Under this regime, a foreign state sued in the United States could request a "suggestion of immunity" from the State Department. *Ibid.* (quotation marks omitted). If the State Department accepted the request and filed a suggestion of immunity, the district court "surrendered its jurisdiction." *Ibid*. If the State Department took no position in the suit, "a district court had authority to decide for itself whether all the requisites for such immunity existed," applying "the established policy of the [State Department]." *Ibid*. (quotation marks omitted) (alteration in original). The Court explained that, "[a]lthough cases involving individual foreign officials as defendants were rare, the same two-step procedure was typically followed when a foreign official asserted immunity." *Id*. at 2284–85 (citing cases).

The FSIA "supersede[d] the common-law regime for claims against foreign states." *Id*. at 2292. With respect to claims against "a foreign state or its political subdivisions, agencies, or instrumentalities," the FSIA "transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Altmann*, 541 U.S. at 691 (quotation marks omitted).

The Supreme Court in *Samantar* concluded that the FSIA did not also transfer primary responsibility to the Judicial Branch for determining the immunity of foreign officials. The Court declared that "nothing in the statute's origin or aims * * * indicate[s] that Congress similarly wanted to codify the law of foreign official immunity." 130 S. Ct. at 2292. Accordingly, the Court could discern "no reason to believe that Congress saw as a problem, or wanted to

eliminate, the State Department's role in determinations regarding individual official immunity." *Id.* at 2291. The Court explained that "[t]he immunity of officials simply was not the particular problem to which Congress was responding when it enacted the FSIA." *Ibid*. It thus concluded that the FSIA did not bar suit against the defendant, and remanded to allow the district court to consider whether he "may be entitled to head of state immunity, or any other immunity, under the common law." *Id.* at 2290 n.15.

In making determinations of foreign official immunity, courts therefore apply the longstanding framework that was not displaced by the FSIA. Under that framework, the separation of powers requires courts to defer to the State Department's determination of foreign sovereign and foreign official immunity. As the Seventh Circuit observed in *Wei Ye*, "[i]t is a guiding principle in determining whether a court should [recognize a suggestion of immunity] in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs * * * by assuming an antagonistic jurisdiction." 383 F.3d at 626 (quoting *Hoffman*, 324 U.S. at 35) (quotation marks omitted).

In the absence of a controlling statute, the common law governing foreign sovereign and foreign official immunity is a "rule of substantive law" requiring courts to "accept and follow the executive determination" concerning a foreign official's immunity from suit. *Hoffman*, 324 U.S. at 36; *see Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) ("When the executive branch has determined that the interests of the nation are best served by granting a foreign sovereign immunity from suit in our courts, there are compelling reasons to defer to that judgment without question."). Because the FSIA does not apply to foreign officials, the decision concerning the immunity of foreign officials "remains vested where it was prior to 1976 — with the Executive Branch." *Wei Ye*, 383 F.3d at 625; *see also United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (Because the FSIA does not govern head-of-state immunity, "head-of-state immunity could attach in cases, such as this one, only pursuant to the principles and procedures outlined in *The Schooner Exchange* and its progeny.").

B. Uribe Is Presumptively Immune from Compulsory Testimony, and Plaintiffs Have Given the State Department No Reason to Conclude Otherwise.

The district court correctly denied plaintiffs' motion to compel Uribe's testimony in light of the State Department's immunity determination, although some aspects of the court's decision are overly broad.

1. As a general matter, under principles accepted by the Executive Branch, a former foreign official is entitled to immunity from suit based upon, or compelled testimony relating to, acts taken in an official capacity. Allegations relating to the official's exercise of the powers of office presumptively fall into that category. Where litigation involves a foreign official's exercise of the powers of his or her office, such as here, mere allegations of illegality are not sufficient to overcome the State Department's presumption that the alleged conduct was undertaken in an official capacity, giving rise to immunity under principles accepted by the Executive Branch.

* * * *

Here, plaintiffs' central claims involve Uribe's alleged exercise of the powers of his office, and the Government of Colombia has asked the State Department to recognize Uribe's immunity. The State Department accords a presumption of testimonial immunity to information

relating to Uribe's alleged actions exercising the powers of his office. Plaintiffs' allegations and submissions have given the State Department no reason to conclude that Uribe should be compelled to testify.

The gravamen of plaintiffs' initial district court filing was that Uribe could provide relevant testimony concerning alleged "illegal acts" by "*the Government of Colombia*" in "supporting, collaborating with, and covering up the criminal acts of the AUC." … In response to filings by Uribe and the United States, plaintiffs added allegations of personal wrongdoing by Uribe. But those additional allegations did not change the focus of their request for information, which concerns conduct that Uribe allegedly took exercising the powers of his office. …

In considering whether plaintiffs have offered any basis for concluding that Uribe should not be afforded testimonial immunity, the State Department's review has been informed by its own knowledge of circumstances in Colombia. State Department reports issued during the eight-year period of Uribe's presidency recognized that President Uribe took significant steps to battle paramilitary groups, including the AUC. For example, in a report addressing Uribe's first year in office as president, the State Department explained that, "[u]nder President Uribe, the Colombian military, police, and intelligence forces scored significant victories in 2003 against the [Revolutionary Armed Forces of Columbia (FARC)], National Liberation Army (ELN), and United Self-Defense Forces of Colombia (AUC) terrorist groups." Department of State, *Patterns of Global Terrorism 2003* at 73 (2004); …. The State Department made similar assessments throughout Uribe's tenure.

Plaintiffs provided no reason for the State Department to conclude that Uribe did not, in fact, combat the AUC, and instead collaborated with that terrorist group. The materials plaintiffs filed in the district court contain assertions that are unsubstantiated, and, in some instances, the materials contradict plaintiffs' allegations. …

In short, plaintiffs seek information related to alleged acts taken by Uribe in the exercise of the powers of his offices. The Executive Branch recognizes a presumption of testimonial immunity regarding such information, and plaintiffs have provided the State Department with no reason to conclude otherwise.

2. The scope of the immunity articulated in the district court's order is broader than the immunity recognized by the State Department. As discussed above, the Executive Branch suggested Uribe's testimonial immunity insofar as plaintiffs sought information "(i) relating to acts taken in [Uribe's] official capacity as a government official; or (ii) obtained in his official capacity as a government official." However, language in the district court's opinion suggests that the State Department's immunity determination extends more broadly to any attempt to depose Uribe "regarding his actions during his presidency," *Giraldo*, 808 F. Supp. 2d at 248, or during his time in other office, *id.* at 249.

The Executive Branch's suggestion of immunity did not state that Uribe is immune from compelled testimony concerning *any* conduct that occurred during the time Uribe held government office. …. An official may undertake purely private conduct—taking out a personal loan for example—during the official's time in office. Such conduct would not qualify as conduct undertaken in an official capacity, for which an official generally must exercise the powers of his or her office. Accordingly, the district court's decision is mistaken insofar as it suggests that any act by an official constitutes an act taken in an official capacity merely by virtue of the fact that the act occurred during the official's time in office. *Cf., e.g., Giraldo*, 808 F. Supp. 2d 248–49; *cf. also* Uribe Br. 38–39 (defending district court order because the conduct at issue had some "temporal" connection to Uribe's public service).

However, the court's overly broad articulation of the scope of immunity does not cast doubt on its decision to deny plaintiffs' motion to compel Uribe's testimony. As explained above, plaintiffs have given the State Department no reason to overcome the presumption of immunity that Uribe enjoys from compelled testimony relating to alleged acts involving the exercise of the powers of his office.

3. Plaintiffs appear to suggest that the Executive Branch lacks authority to determine the immunity of former foreign officials, and of foreign officials below the level of head of state, contentions for which they can provide no authority. A State Department determination of a foreign official's immunity is an exercise of the President's constitutional authority over foreign affairs. As the Supreme Court explained before the FSIA was enacted:

> [I]t is a guiding principle in determining whether a court should exercise or surrender its jurisdiction in [cases involving foreign sovereign immunity], that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs. In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.

Hoffman, 324 U.S. at 35 (quotation marks omitted); *see Spacil*, 489 F.2d at 619 ("Separation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy." (deferring to State Department suggestion of immunity)).

Suits against foreign officials below the head of state can have serious implications for the Executive Branch's conduct of foreign affairs. And, as the Supreme Court noted in *Samantar*, courts historically have deferred to the State Department's immunity determinations for officials below the head of state. *See* 130 S. Ct. at 2290 (citing *Greenspan v. Crosbie*, No. 74 Civ. 4734(GLG), 1976 WL 841 (S.D.N.Y., Nov. 23, 1976) (dismissing provincial officials from suit pursuant to State Department immunity determination)); *see also, e.g.,* Opinion an Order, *Ahmed v. Magan*, No. 2:10-cv-342 (E.D. Va. Nov. 7, 2011) (denying motion to dismiss by former Chief of the National Security Service of Somalia Department of Investigations based on State Department determination that defendant is not immune from suit); *Li Weixum v. Bo Xilai*, 568 F. Supp. 2d 35, 38–39 (D.D.C. 2008) (dismissing suit against Chinese Minister of Commerce based on State Department suggestion of immunity); *Republic of Philippines v. Marcos*, 665 F. Supp. 793, 798–800 (N.D. Calif. 1987) (quashing subpoena against Philippine Solicitor General based on State Department suggestion of immunity).

Suits against former foreign officials also can adversely affect the nation's foreign relations interests. Under international law, a foreign official's immunity is not a personal right but is for the benefit of the foreign state. *See, e.g., Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium)*, 2002 I.C.J. 3, ¶ 61 (Feb. 14). Suits against former foreign officials involving conduct taken in an official capacity thus remain of concern to foreign states even after the official leaves office, and foreign states expect the Executive Branch to suggest their former official's immunity in appropriate cases, as Colombia did here. Courts recognize the importance to our nation's foreign affairs of the Executive Branch's ability to suggest the immunity of former foreign officials and routinely defer to such determinations. *See, e.g., Matar*, 563 F.3d at 14 (dismissing suit against former head of Israeli Security Agency based on State Department suggestion of immunity); *Wei Ye*, 383 F.3d at 625–27 (deferring to suggestion of immunity for former Chinese President Jiang Zemin, who left office during pendency of litigation).

* * * *

On October 23, 2012, the court of appeals affirmed the district court's decision in an unpublished judgment, excerpted below. *Giraldo v. Drummond*, No. 11-7118 (D.C. Cir. 2012).

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J U D G M E N T

Upon consideration of the record from the United States District Court for the District of Columbia and the briefs and arguments of the parties, it is

ORDERED AND ADJUDGED that the judgment of the District Court be affirmed.

Appellants seek review of the District Court's ruling denying their motion to compel the testimony of Álvaro Uribe Vélez, former President of Colombia. Finding no error in the District Court's decision, we affirm the judgment from which this appeal was taken for the reasons stated by the District Court. We need not decide whether a factual record supporting claims of illegal acts or *jus cogens* violations could ever lead to a different result. In this case, the District Court correctly held that the plaintiffs' mere allegations were insufficient to defeat former President Uribe's immunity. *Giraldo v. Drummond Co., Inc.*, 808 F. Supp. 2d 247, 251 (D.D.C. 2011).

* * * *

5. Mumbai attacks

As discussed in section A.1.b., *supra*, the United States submitted a statement of interest and suggestion of immunity in a case brought by relatives of victims of the Mumbai terrorist attacks. *Rosenberg et al. v. Lashkar-e-Taiba et al.*, Nos. 10-05381, 10-05382, 10-05448, 11-03893 (E.D. N.Y. 2012). The section of the U.S. brief conveying the State Department's determination of immunity for former directors general of the ISI appears below (with footnotes omitted). The full text of the brief, including as an exhibit a letter from Legal Adviser Harold H. Koh to the Department of Justice, is available at *www.state.gov/s/l/c8183.htm*. '

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* * * *

II. APPLYING PRINCIPLES OF FOREIGN OFFICIAL IMMUNITY, THE DEPARTMENT OF STATE HAS DETERMINED THAT FORMER DIRECTORS GENERAL PASHA AND TAJ ARE IMMUNE FROM SUIT

A. Under Supreme Court Precedent, the Department of State's Foreign Official Immunity Determinations Are Controlling and Are Not Subject to Review

The conduct of the Nation's foreign affairs is committed to the political branches. As discussed above, prior to the enactment of the FSIA in 1976, courts deferred to the Department of State's determinations concerning the immunity of both foreign states and foreign officials. *See Samantar*, 130 S. Ct. at 2284. Although the FSIA displaced this procedure for claims against foreign states by "transfer[ring] primary responsibility for immunity determinations from the Executive to the Judicial Branch," *Altmann*, 541 U.S. at 691 (quotation marks omitted), the Supreme Court in *Samantar* concluded that the FSIA did not also transfer responsibility to the Judicial Branch for determining the immunity of foreign officials. The Court declared that "nothing in the statute's origin or aims . . . indicate[s] that Congress similarly wanted to codify the law of foreign official immunity." 130 S. Ct. at 2292. Accordingly, the Court could discern "no reason to believe that Congress saw as a problem, or wanted to eliminate, the Department of State's role in determinations regarding individual official immunity." *Id.* at 2291. The Court explained that "[t]he immunity of officials simply was not the particular problem to which Congress was responding when it enacted the FSIA." *Id*. It thus concluded that the FSIA did not bar suit against the defendant in that case and remanded to allow the district court to consider whether he "may be entitled to head of state immunity, or any other immunity, under the common law." *Id.* at 2290 n.15.

In making determinations of foreign official immunity, courts therefore apply the longstanding two-step framework (discussed above) that was not displaced by the FSIA. As the Second Circuit has held, under that framework, the separation of powers requires courts to defer to the Executive Branch's determination regarding foreign official immunity. *See Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009) ("Here, the Executive Branch has urged the courts to decline jurisdiction over appellants' suit, and under our traditional rule of deference to such Executive determinations, we do so."). For as the Seventh Circuit observed in *Ye v. Zemin*, "[i]t is a guiding principle in determining whether a court should [recognize a suggestion of immunity] in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs . . . by assuming an antagonistic jurisdiction." 383 F.3d 620, 626 (7th Cir. 2004) (quoting *Hoffman*, 324 U.S. at 35) (quotation marks omitted).

In the absence of a controlling statute, the common law governing foreign official immunity is a "rule of substantive law" requiring courts to "accept and follow the executive determination" concerning a foreign official's immunity from suit. *Hoffman*, 324 U.S. at 36; *see Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) ("When the executive branch has determined that the interests of the nation are best served by granting a foreign sovereign immunity from suit in our courts, there are compelling reasons to defer to that judgment without question."). Because the FSIA does not apply to foreign officials, the decision concerning the immunity of foreign officials "remains vested where it was prior to 1976 — with the Executive Branch." *Ye*, 383 F.3d at 625.

B. The Department of State Has Determined That Former Directors General Pasha and Taj Are Immune From This Suit

As a general matter, under principles accepted by the Executive Branch, a former foreign official enjoys immunity from suit based upon acts taken in an official capacity. In making the official capacity determination, the Department of State considers a foreign government's request (if there is such a request) that the Department of State suggest the former official's immunity.

Notwithstanding such a request, however, the Department of State could determine that a foreign official is not entitled to immunity. That would occur, for example, should the

Department of State conclude that the conduct alleged was not taken in an official capacity, as might be the case in a suit challenging a former official's purely private acts, such as personal financial dealings. In making that determination, it is for the Executive Branch, not the courts, to determine whether the conduct alleged was taken in a foreign official's official capacity. *See Hoffman*, 324 U.S. at 35 ("It is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.").

Here, the Government of Pakistan has requested the Department of State to recognize the immunities of former Directors General Pasha and Taj. Upon consideration of this matter, and after a full review of the pleadings, the Department of State has determined that former Directors General Pasha and Taj are immune from suit in this case. *See* Exhibit 1 (Letter from Harold Hongju Koh, Legal Adviser, Department of State, to Stuart F. Delery, Principal Deputy Assistant Attorney General, Civil Division, Department of Justice, requesting that the United States suggest the immunity of former Directors General Pasha and Taj). The complaint contains largely unspecific and conclusory allegations against the Directors General, and relies centrally on plaintiffs' view that the ISI is not part of the Government of Pakistan. As explained above, that view is incorrect. By expressly challenging defendants Pasha's and Taj's exercise of their official powers as Directors General of the ISI, plaintiffs' claims challenge defendants Pasha's and Taj's exercise of their official powers as officials of the Government of Pakistan. The complaint expressly refers not to any private conduct by defendants, but only to Pasha's and Taj's actions as Directors General of the ISI, which as noted above, is a fundamental part of the Government of Pakistan. All of their allegations in the Complaint are bound up with plaintiffs' claims that the former Directors General were in full command and control of the ISI and allegedly acted entirely within that official capacity. The plaintiffs repeatedly assert that the former Directors General "exerted full command and control" over the ISI. Compl. ¶ 37, ECF No. 1 (No. 10-05381). On their face, acts of defendant foreign officials who are sued for exercising the powers of their office are treated as acts taken in an official capacity, and plaintiffs have provided no reason to question that determination.

In making this immunity determination, the United States emphasizes that it expresses no view on the merits of plaintiffs' claims. The United States strongly condemns the terrorist attacks in Mumbai, and continues to believe that the Islamic Republic of Pakistan must take steps to dismantle Lashkar-e-Taiba and to support India's efforts to counter this terrorist threat.

* * * *

C. HEAD OF STATE IMMUNITY

1. President Kagame of Rwanda

In 2011, the United States submitted a suggestion of immunity for the sitting head of state of Rwanda, Paul Kagame, in the U.S. District Court for the Western District of Oklahoma. *Habyarimana et al. v. Kagame et al.*, No. 10-437-W (W.D. Okla.). See *Digest 2011* at 349-51. After the district court dismissed the case on the basis of the defendant's immunity, the plaintiffs appealed. On April 30, 2012, the United States submitted a brief as *amicus curiae* in the Court of Appeals for the Tenth Circuit in support of affirming the dismissal.

Habyarimana et al. v. Kagame, No. 11-6315 (10th Cir.). The U.S. *amicus* brief, excerpted below (with footnotes omitted), is available at *www.state.gov/s/l/c8183.htm*. On October 10, 2012, the Court of Appeals issued its opinion, agreeing with the reasoning of the district court and affirming its dismissal of the case. *Habyarimana et al. v. Kagame et al.,* 696 F.3d. 1029 (10th Cir. 2012).**

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* * * *

The district court correctly deferred to the State Department's determination that President Kagame, as a sitting head of state, is immune from this suit in consideration of customary international law principles accepted by the Executive Branch in the exercise of its constitutional authority over foreign affairs. Except where otherwise prescribed by statute, courts have deferred to Executive Branch determinations of foreign sovereign immunity, recognizing that to do otherwise could undermine the Executive Branch's conduct of foreign affairs.

Prior to the enactment of the Foreign Sovereign Immunities Act in 1976, courts deferred to Executive Branch determinations concerning the immunity of foreign states as well as foreign officials. *See Samantar*, 130 S. Ct. at 2284. Following the decision in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch.) 116 (1812), which first recognized the doctrine of foreign sovereign immunity, "a two-step procedure developed for resolving a foreign state's claim of sovereign immunity." *Samantar*, 130 S. Ct. at 2284 (citing *Hoffman*, 324 U. S. at 34–36 (1945); *Ex parte Peru*, 318 U.S. 578, 587–589 (1943); *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U. S. 68, 74–75 (1938)). A foreign state facing suit in the United States could request a "suggestion of immunity" from the State Department. *Ibid.* (quotation marks omitted). If the State Department accepted the request and filed a suggestion of immunity, the district court "surrendered its jurisdiction." *Ibid.* If the State Department took no position in the suit, "a district court had authority to decide for itself whether all the requisites for such immunity existed," applying "the established policy of the [State Department]." *Ibid.* (quotation marks omitted) (alteration in original). *Samantar* further explained that, "[a]lthough cases involving individual foreign officials as defendants were rare, the same two-step procedure was typically followed when a foreign official asserted immunity." *Id.* at 2284–85 (citing cases).

The FSIA "supersede[d] the common-law regime for claims against foreign states[.]" *Id.* at 2292. With respect to claims against "a foreign state or its political subdivisions, agencies, or instrumentalities," the FSIA "transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Altmann*, 541 U.S. at 691 (quotation marks omitted). The Supreme Court in *Samantar* concluded that the FSIA did not similarly transfer primary responsibility to the Judicial Branch in determining the immunity of foreign officials. The Court declared that "nothing in the statute's origin or aims * * *indicate[s] that Congress similarly wanted to codify the law of foreign official immunity." 130 S. Ct. at 2292. Accordingly, the Court could discern "no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity." *Id.* at 2291. The Court explained that "[t]he immunity of officials simply was not the particular problem to which Congress was responding when it enacted the FSIA." *Id.* at 2291. It thus

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** Editor's note: In 2013, plaintiffs filed a petition for certiorari, which the U.S. Supreme Court denied.

concluded that the FSIA did not bar suit against the defendant, and remanded to allow the district court to consider whether he "may be entitled to head of state immunity, or any other immunity, under the common law." *Id.* at 2290 n.15.

In making determinations of foreign official immunity, courts therefore apply the longstanding framework that was not displaced by the FSIA. Under that prior framework, the separation of powers requires courts to defer to the State Department's determination of foreign sovereign and foreign official immunity. As the Seventh Circuit observed in *Wei Ye*, "'it is a guiding principle in determining whether a court should [recognize a suggestion of immunity] in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs * * * by assuming an antagonistic jurisdiction.'" 383 F.3d at 626 (quoting *Hoffman*, 324 U.S. at 35).

In the absence of a controlling statute, the common law governing foreign sovereign and foreign official immunity is a "rule of substantive law," and it requires courts to "accept and follow the executive determination" concerning a foreign official's immunity from suit. *Hoffman*, 324 U.S. at 36; *see Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) ("When the executive branch has determined that the interests of the nation are best served by granting a foreign sovereign immunity from suit in our courts, there are compelling reasons to defer to that judgment without question."). "Because the FSIA does not apply to heads of states, the decision concerning the immunity of foreign heads of states remains vested where it was prior to 1976 — with the Executive Branch." *Wei Ye*, 383 F.3d at 625; *see also United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (Because the FSIA does not govern head-of-state immunity, "head-of-state immunity could attach in cases, such as this one, only pursuant to the principles and procedures outlined in *The Schooner Exchange* and its progeny.").

The suggestion of immunity in this case informed the district court that the State Department recognizes President Kagame's immunity from this suit. As the government's filing explained, the doctrine of head of state immunity is well recognized in customary international law. AA 94; *see Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium)*, 2002 I.C.J. 3, 20–21 (Feb. 14) (explaining that a head of state's "immunit[y] from jurisdiction in other States" is "firmly established"), *available at* http://www.icj-cij.org/docket/files/121/8126.pdf; *Satow's Guide to Diplomatic Practice* 9 (Lord Gore-Booth ed., 5th ed. 1979) (*Satow's Guide*) (same).

Under customary international law principles accepted by the Executive Branch, a sitting head of state's immunity is based on his status as the incumbent office holder, and it extends to all of his actions, whenever performed. *Arrest Warrant of 11 Apr. 2000*, 2002 I.C.J. at 21–22; *Satow's Guide* 9–10; *see Doe v. Roman Catholic Diocese of Galveston-Houston*, 408 F. Supp. 2d 272 (S.D. Tex. 2005) (accepting Executive Branch's determination that incumbent Pope enjoyed head of state immunity for acts allegedly committed before he became head of state). Accordingly, "[n]o distinction can be drawn between acts performed * * * in an 'official' capacity, and those claimed to have been performed in a 'private capacity', or, for that matter, between acts performed before the person concerned assumed office * * * and acts committed during the period of office." *Arrest Warrant of 11 Apr. 2000*, 2002 I.C.J. at 22.

The Executive Branch considered this principle of international law and determined that, "in light of his current status, President Kagame is entitled to immunity from" plaintiffs' suit. AA 96; *see id*. at 99. The State Department's determination is controlling. *See Samantar*, 130 S. Ct. at 2284, 2291. As the Seventh Circuit explained, "[t]he obligation of the Judicial Branch is clear — a determination by the Executive Branch that a foreign head of state is immune from suit is conclusive and a court must accept such a determination without reference to the

underlying claims of a plaintiff." *Wei Ye*, 383 F.3d at 626. In no case has a court ever subjected a sitting head of state to suit after the Executive Branch asserted the official's immunity.

* * * *

Plaintiffs' assertions that the State Department did not employ an appropriate process in making its immunity determination have no bearing on the Court's inquiry in this case. *See* Appellants' Br. 23–26. No statute or regulation governs the State Department's consideration of a request for head of state immunity, and a court has no basis for reviewing either the United States' suggestion of immunity following that consideration or the State Department's decision-making process. …

Plaintiffs again misunderstand the article authored by the State Department's Legal Adviser, which noted that in a "*Samantar*-case," which involves a foreign official's conduct-based immunity, the State Department typically solicits information and offers to meet with the parties' counsel. *See* Koh, *Foreign Official Immunity*, 44 VAND. J. The process is designed to assist the State Department in understanding "the various factual issues that might be relevant," in making a conduct-based immunity determination. *Id*. at 1159. In contrast, head of state immunity is a status-based immunity, which can be "disposed of purely on status grounds," for which fact finding is unnecessary. *Id*. at 1155. Accordingly, where the dispositive question is whether the defendant is the sitting head of a foreign state, there is no need for the State Department to employ the process described in the Legal Adviser's article.

The State Department employs this informal process only when it believes that additional inquiries would enhance its decision-making. Thus, even when the State Department considers a case of conduct-based immunity, further inquiries may not be profitable. Cases "differ considerably in complexity, in the degree to which Department officials are already familiar with the issues and the legal doctrines, and in the resources of the parties." *Id*. at 1159–60.

In sum, the district court properly deferred to the United States' suggestion of immunity, and plaintiffs' arguments to the contrary are insubstantial.

* * * *

2. President Rajapaksa of Sri Lanka

a. Proceedings in U.S. district court in the District of Columbia

On February 29, 2012, the U.S. district court for the District of Columbia issued its opinion in *Manoharan v. Rajapaksa*, No. 11-235, dismissing the case based on the immunity of the defendant, the sitting head of state of Sri Lanka. Plaintiffs sued President Rajapaksa under the Torture Victim Protection Act ("TVPA"), alleging that Rajapaksa authorized extrajudicial killings of their relatives. The United States had submitted a suggestion of immunity in the case on January 13, 2012, including as an exhibit a letter from Legal Adviser Koh to the Department of Justice requesting that the action be dismissed based on President Rajapaksa's immunity as the sitting head of state while in office. On February 13, 2012, the

United States submitted a reply to plantiffs' opposition to the U.S. suggestion of immunity. The U.S. suggestion of immunity, the letter from the Legal Adviser, and the U.S. reply are available at *www.state.gov/s/l/c8183.htm*. The court's opinion, excerpted below with footnotes omitted, adopted the U.S. suggestion of immunity and dismissed the case. Plaintiffs' appeal of the district court's dismissal was pending at the end of 2012.

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* * * *

The United States submits that its determination that Defendant Rajapaksa is entitled to head of state immunity "is controlling and is not subject to judicial review." Sugg. of Imm. at 2. Plaintiffs contend that the plain text of the TVPA bars the application of head of state immunity to claims brought under the statute. As explained below, the Court agrees with the United States that the Court is bound by the State Department's Suggestion of Immunity, and after applying the proper canon of statutory construction, it is clear head of state immunity applies to claims brought under the TVPA. Lacking jurisdiction to proceed, the Court will dismiss the case.

A. Foreign Sovereign Immunity and Suggestions of Individual Immunity

The immunity of foreign sovereigns in United States courts is a common law doctrine recognized by the Supreme Court nearly two centuries ago. In *Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812), Chief Justice John Marshall "concluded that, while the jurisdiction of a nation within its own territory 'is susceptible of no limitation not imposed by itself,' the United States had impliedly waived jurisdiction over certain activities of foreign sovereigns." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) (quoting *id.* at 136). The decision in *Schooner Exchange* "came to be regarded as extending virtually absolute immunity to foreign sovereigns." *Id.* Following *Schooner Exchange*, courts employed a two-part procedure to determine whether a foreign sovereign or foreign official was immune from suit. As the Supreme Court explained:

> Under that procedure, the diplomatic representative of the sovereign could request a "suggestion of immunity" from the State Department. If the request was granted, the district court surrendered its jurisdiction. But "in the absence of recognition of the immunity by the Department of State," a district court "had authority to decide for itself whether all the requisites for such immunity existed.". . . Although cases involving individual foreign officials as defendants were rare, the same two-step procedure was typically followed when a foreign official asserted immunity.

Samantar v. Yousuf, 130 S.Ct. 2278, 2284-85 (2010) (quoting *Ex parte Peru*, 318 U.S. 578, 581, 587-88 (1943)).

Prior to 1952, the State Department generally suggested immunity in all actions brought against foreign sovereigns. *Id.* at 2285. In 1952, the State Department departed from this practice, and adopted a "restrictive" theory of foreign sovereign immunity, which limited immunity to "suits involving the foreign sovereign's public acts," but not "cases arising out of a foreign state's strictly commercial acts." *Id.* (quoting *Verlinden*, 461 U.S. at 487). However, the influence of political considerations led to inconsistent submission of suggestions of immunity under this "restrictive" theory. *Id.* To remedy the inconsistent application of foreign sovereign immunity by the State Department, Congress enacted the Foreign Sovereign Immunities Act

("FSIA") in 1976. *Id.* Until 2010, a majority of Circuits held that the FSIA governed not only foreign *sovereign* immunity, but also claims of immunity by individual officers of foreign states. *Yousuf v. Samantar*, 552 F.3d 371, 378 (4th Cir. 2009) (collecting cases). In *Samantar*, the Supreme Court interpreted the FSIA to govern only the application of foreign sovereign immunity to foreign states, not foreign officials. 130 S.Ct. at 2292-93. Rather, the pre-FSIA common law regarding head of state and diplomatic immunities continues to govern whether, as in this case, an individual official from a foreign sovereign is entitled to immunity from suit. *Id.*

In accordance with the post-*Schooner Exchange* procedure, the State Department filed a Suggestion of Immunity in this case, reflecting the State Department's determination that Defendant Rajapaksa is entitled to head of state immunity while in office. The State Department's Suggestion of Immunity is conclusive and not subject to judicial review. *E.g.*, *Ex parte Peru*, 318 U.S. at 589-90 ("The certification and the request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government."); *Ye v. Zemin*, 383 F.3d 620, 625-27 (7th Cir. 2004) (holding courts must defer to the State Department's Suggestion of Immunity even in cases involving alleged violations of *jus cogens* norms). "The precedents are overwhelming. For more than 160 years American courts have consistently applied the doctrine of sovereign immunity when requested to do so by the executive branch." *Spacil v. Crowe*, 489 F.2d 614, 617 (5th Cir. 1974). "When, as here, the Executive has filed a Suggestion of Immunity as to a recognized head of a foreign state, the jurisdiction of the Judicial Branch immediately ceases." *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 111 (D.D.C. 2005); *accord, id.* ("When the Executive Branch concludes that a recognized leader of a foreign sovereign should be immune from the jurisdiction of American courts, that conclusion is determinative."); *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1119 (D.D.C. 1996) ("The United States has filed a Suggestion of Immunity on behalf of H.H. Sheikh Zayed, and courts of the United States are bound to accept such head of state determinations as conclusive."); *Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988) ("[T]he United States has suggested to the Court the immunity from its jurisdiction of Prime Minister Thatcher as the sitting head of government of a friendly foreign state. . . . The Court must accept [the suggestion] as conclusive.") *rev'd in part on other grounds*, 886 F.2d 438 (D.C. Cir. 1989). Although the Suggestion of Immunity is dispositive of the Court's jurisdiction, the Court briefly addresses Plaintiffs' argument that head of state immunity does not apply to claims brought under the TVPA.

B. Torture Victim Protection Act

Plaintiffs filed suit under the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102-256. Section 2(a) of the TVPA provides that

> An individual who, under actual or apparent authority, or color of law, of any foreign nation—
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

Plaintiffs contend that the plain text of the TVPA holds *any* individual, including sitting heads of state, liable for torture or extrajudicial killings, and that any suggestion of immunity in cases

such as this runs counter to the law. Pls.' Opp'n at 6-7. Plaintiffs posit that the TVPA should not be read to maintain the common law doctrine of head of state immunity "unless the result would be absurd or [] unreasonable in light of the statutory policy fashioned by Congress." *Id.* at 6.

Despite asserting that "[e]very relevant canon of statutory interpretation militates against the Executive's Suggestion of Immunity," Pls.' Opp'n at 5, Plaintiffs' argument neglects the canon of construction most relevant to interpretation of the TVPA. As the Supreme Court noted in *Samantar*, a statute "should be interpreted consistently with the common law," when the statute "clearly covers a field formerly governed by the common law." 130 S.Ct. at 2289; *see also Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law [] principles."). In other words, "when a statute covers an issue previously governed by the common law, we interpret the statute with the presumption that Congress intended to retain the substance of the common law." *Samantar*, 130 S.Ct. 2289 n.13. "Thus, where a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" *Astoria*, 501 U.S. at 108. It is undisputed that head of state immunity is a well-established common law principle, *see* Pls.' Opp'n at 17, and according to Plaintiffs, the TVPA covers the issue of head of state immunity for extrajudicial killings, which is traditionally governed by the common law, *id.* at 7. Therefore, the relevant question for the Court is whether there is any evidence to suggest Congress did *not* intend to maintain the common law doctrine of head of state immunity when it enacted the TVPA.

Framed this way, it is clear Congress intended to maintain head of state immunity to suit under the TVPA. The House Report accompanying the TVPA explicitly stated "nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity." H.R. Rep. No. 102-367, at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 88; *see also* S. Rep. No. 102-249, at 8 (1991) ("Nor should visiting heads of state be subject to suit under the TVPA."). The clear statutory purpose behind the TVPA was to *maintain* the common law doctrine of head of state immunity, not override it. To the extent Plaintiffs are correct that immunizing heads of state from liability under the TVPA runs contrary to the general purposes of the statute, that contradiction was recognized by Congress before the statute was enacted, and the Court is not in a position to remedy that contradiction.

* * * *

b. Proceedings on appeal to the District of Columbia Circuit

As mentioned above, plaintiffs appealed the district court's decision to defer to the U.S. suggestion of immunity in *Manoharan v. Rajapaksa*, No. 12-5087. On November 8, 2012, the United States filed its *amicus* brief in support of affirmance in the U.S. Court of Appeals for the District of Columbia Circuit. The U.S. *amicus* brief, excerpted below (with footnotes and citations to the record omitted), is available in full at *www.state.gov/s/l/c8183.htm*.

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* * * *

The district court correctly deferred to the Executive Branch's determination that President Rajapaksa is immune from this suit as a sitting head of state.

The Supreme Court has long recognized that Executive Branch determinations concerning foreign sovereign immunity are binding on the courts and not subject to review. See *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 34-36 (1945) ("It is * * * not for the courts to deny an immunity which our government has seen fit to allow."); see also *Ex Parte Peru*, 318 U.S. 578, 587-89 (1943); *Compania Espanola de Navegacion Maritima, S.A.* v. *The Navemar*, 303 U.S. 68, 74 (1938); *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 146-47 (1812).

Courts of appeals have thus deferred to Executive Branch Suggestions of Immunity, including in suits against foreign heads of state. See, *e.g*, *Habyarimana* v. *Kagame*, 696 F.3d 1029, __, slip op. at 6 (10th Cir. Oct. 10, 2012) ("We must accept the United States' suggestion that a foreign head of state is immune from suit * * * 'as a conclusive determination by the political arm of the Government * * * '") (quoting *Ex Parte Peru*, 318 U.S. at 589); *Ye* v. *Zemin*, 383 F.3d 620, 625, 627 (7th Cir. 2004) ("[T]he Executive Branch's suggestion of immunity is conclusive and not subject to judicial inquiry. * * * We are no more free to ignore the Executive Branch's determination than we are free to ignore a legislative determination concerning a foreign state."); *Southeastern Leasing Corp.* v. *Stern Dragger Belogorsk*, 493 F.2d 1223, 1224 (1st Cir. 1974) (rejecting argument that district court "erred * * * in accepting the executive suggestion of immunity without conducting an independent judicial inquiry"); *Isbrandtsen Tankers, Inc.* v. *President of India*, 446 F.2d 1198, 1201 (2d Cir. 1971) ("[O]nce the State Department has ruled in a matter of this nature, the judiciary will not interfere."); *Rich* v. *Naviera Vacuba S.A.*, 295 F.2d 24, 26 (4th Cir. 1961) ("[W]e conclude that the certificate and grant of immunity issued by the Department of State should be accepted by the court without further inquiry."). As the Tenth Circuit recently stated, "'[t]he precedents are overwhelming.'" *Habyarimana*, 696 F.3d at __, slip op. at 5 (quoting *Spacil* v. *Crowe*, 489 F.2d 614, 617 (5th Cir. 1974)); see also *Yousuf* v. *Samantar*, __ F.3d __, __, No. 11-1479, 2012 WL 5378056, at *7-*8 (4th Cir. Nov. 2, 2012) (holding that court must give "absolute deference to the State Department's position on status-based immunity doctrines such as head-of-state immunity"). Indeed, we are not aware of any case in which a court has subjected a sitting head of state to suit after the Executive Branch issued a Suggestion of Immunity. See, *e.g.*, *Doe* v. *Roman Catholic Diocese of Galveston-Houston*, 408 F. Supp. 2d 272 (S.D. Tex. 2005); *Lafontant* v. *Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994); *Kendall* v. *Saudi Arabia*, 65 Adm. 885 (S.D.N.Y. 1965), reported in Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977, 1977 Digest of U.S. Practice in International Law app. 1017, 1053.

B. The Torture Victim Protection Act does not displace this well-established rule.

The district court correctly held that the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (28 U.S.C. § 1350 note), does not displace the well-established rule of deference to the Executive Branch's Suggestions of Immunity. The TVPA cause of action has no bearing on the Executive Branch's authority to make immunity determinations.

Plaintiffs argue that the TVPA authorizes liability for "individual[s]" and makes no reference to limitations on liability created by other sources of law. Plaintiffs offer no basis for the assumption that Congress abrogated the traditional rule that courts must defer to the Executive Branch's Suggestions of Immunity, a rule that acknowledges the Executive Branch's

exercise of its constitutional authority over foreign affairs. See generally *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envt'l Protection*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."); *Armstrong* v. *Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991) ("When Congress decides purposefully to enact legislation restricting or regulating presidential action, it must make its intent clear.").

The mere creation of a statutory cause of action does not automatically override preexisting immunity rules. See *Malley* v. *Briggs*, 475 U.S. 335, 339 (1986) ("Although [§ 1983] on its face admits of no immunities, we have read it 'in harmony with general principles of tort immunities and defenses rather than in derogation of them.' ") (quoting *Imbler* v. *Pachtman*, 424 U.S. 409, 418 (1976)). Indeed, *Schooner Exchange* itself instructs that courts may not infer a rescission of foreign sovereign immunity unless expressed by the political branches "in a manner not to be misunderstood." 11 U.S. at 146. The TVPA's reference to liability for "individual[s]" must be read against the backdrop principle of deference to Suggestions of Immunity. See *Samantar*, 130 S. Ct. at 2289-90 & n.13; cf. *Malley*, 475 U.S. at 339. Thus, in *Matar* v. *Dichter*, the Second Circuit held that the TVPA's right of action did not abrogate the traditional immunities recognized by the Executive Branch. 563 F.3d 9, 14-15 (2009). And in *Belhas* v. *Moshe Ya'Alon*, this Court, operating from the premise that individual immunity is governed by the FSIA, held that the TVPA does not create an exception to the FSIA's rules of immunity. 515 F.3d 1279, 1289 (2008). See also *Ye*, 383 F.3d at 626 (treating Executive determinations as binding in TVPA actions); but cf. *Samantar*, No. 11-1479, 2012 WL 5378056, at *8-*13 (finding no conduct-based immunity in a TVPA action, but not on the theory that the TVPA abrogated pre-existing immunities).

The legislative history of the TVPA makes clear that the Act does not abrogate traditional rules concerning immunity. The House Report stated that "nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity." H.R. Rep. No. 102-367(I) at 5 (1991). It further noted that "[t]hese doctrines would generally provide a defense to suits against foreign heads of state and other diplomats visiting the United States on official business." *Ibid.* Similarly, the Senate Report stated that "[n]or should visiting heads of state be subject to suit under the TVPA." S. Rep. No. 102-249, at 8 (1991).

The district court properly rejected plaintiffs' suggestion that Congress meant to preserve immunity only for heads of state visiting the United States. The committee reports do not express any intent to abrogate the Executive's established power to make Suggestions of Immunity. Nor do the reports even express an understanding of pre-existing immunity principles that only visiting heads of state are immune. References in the legislative history to visiting heads of state may simply reflect the salient concern that heads of state not be exposed to the jurisdiction of our courts when they visit this country. Or, as the district court recognized, those references "might simply reflect the logical assumption that, given the difficulty in effecting foreign service of process, most foreign leaders would be served with complaints * * * while visiting the United States." As the court also recognized, there is no reason to think that Congress intended to preserve head of state immunity when service is made in the United States and to abrogate immunity when process is effected by other means.

Plaintiffs are similarly mistaken in asserting that head of state immunity must not apply in TVPA actions because recognition of immunity is inconsistent with the TVPA's goal of deterring and compensating for torture and extrajudicial killing, and with the broader goals of American human rights policy. The United States takes no position on the allegations in this

lawsuit, and is steadfast in its commitment to accountability for human rights abuses. However, head of state immunity is based on a person's status as the current occupant of an office and is not based on the nature of the acts alleged. Head of state immunity, like other forms of immunity, e.g. absolute and qualified immunity in a suit under 42 U.S.C. § 1983, may apply to tortious and even criminal acts. "[N]o legislation pursues its purposes at all costs," and "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam) (emphasis omitted). Indeed, "[e]very statute purposes, not only to achieve certain ends, but also to achieve them by particular means," *Dir., Office of Workers' Compensation Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995). And here, Congress appears to have been well aware that there are limits on the availability of the TVPA cause of action. See *Mohamad* v. *Palestinian Authority*, 132 S. Ct. 1702, 1710 (2012).

C. Plaintiffs' arguments about customary international law have no bearing on this case.

Plaintiffs cite examples of criminal prosecutions of foreign leaders in international tribunals or of foreign leaders who are no longer in office, and argue that the district court therefore should have declined to accept the Executive Branch's Suggestion of Immunity.

This argument, however, offers no basis on which to set aside the Suggestion of Immunity. The United States takes principles of customary international law into account in considering a request for immunity, and the Suggestion of Immunity in this case is fully consistent with customary international law. But the common law governing foreign sovereign immunity is a "rule of substantive law" that requires courts to "accept and follow the executive determination" concerning a foreign official's immunity from suit. *Hoffman*, 324 U.S. at 36; see *Habyarimana*, 693 F.3d at __, slip op. at 5-6; *Ye*, 383 F.3d at 626-27; see also *Spacil*, 489 F.2d at 618 ("[W]e are analyzing here the proper allocation of functions of the branches of government in the constitutional scheme of the United States. We are not analyzing the proper scope of sovereign immunity under international law."); *Rich* v. *Naviera Vacuba S.A.*, 295 F.2d 24, 26 (4th Cir. 1961) (holding that a Suggestion of Immunity "should be accepted by the court without further inquiry" because "the doctrine of the separation of powers under our Constitution requires [the court] to assume that all pertinent considerations have been taken into account") (internal citations omitted).

It is in recognition of this fundamental principle that courts have unanimously accepted Executive Branch Suggestions of Immunity on behalf of sitting heads of state, and this Court should reject plaintiffs' invitation to become the first Court to do otherwise.

* * * *

c. Proceedings in the U.S. district court for the Southern District of New York

On April 26, 2012, the United States submitted a suggestion of immunity in another case against President Rajapaksa brought in the Southern District of New York. *Devi v. Rajapaksa*, 11-6634 (S.D.N.Y.). The suggestion of immunity includes as an exhibit a letter from Legal Adviser Koh requesting dismissal on the basis of head of state immunity. The U.S. suggestion of immunity and the letter from the Legal Adviser are available at *www.state.gov/s/l/c8183.htm*. The suggestion of immunity is excerpted below (with

footnotes omitted). On September 4, 2012, the district court issued its opinion dismissing the case based on the U.S. suggestion of immunity. 2012 WL 3866495 (S.D.N.Y.). Plaintiff filed an appeal to the Second Circuit Court of Appeals. *Devi v. Rajapaksa*, No. 12-4081 (2d Cir.).[***]

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* * * *

1. The United States has an interest in this action because the sole Defendant, President Rajapaksa, is the sitting head of state of a foreign state, thus raising the question of President Rajapaksa's immunity from the Court's jurisdiction while in office. The Constitution assigns to the U.S. President alone the responsibility to represent the Nation in its foreign relations. As an incident of that power, the Executive Branch has sole authority to determine the immunity from suit of sitting heads of state. The interest of the United States in this matter arises from a determination by the Executive Branch of the Government of the United States, in consideration of the relevant principles of customary international law, and in the implementation of its foreign policy and in the conduct of its international relations, to recognize President Rajapaksa's immunity from this suit while in office. As discussed below, this determination is controlling and is not subject to judicial review. Thus, no court has ever subjected a sitting head of state to suit once the Executive Branch has determined that a head of state is immune.

2. The Legal Adviser of the U.S. Department of State has informed the Department of Justice that Sri Lanka has formally requested the Government of the United States to determine that President Rajapaksa is immune from this lawsuit. The Legal Adviser has further informed the Department of Justice that the "Department of State recognizes and allows the immunity of President Rajapaksa as a sitting head of state from the jurisdiction of the United States District Court in this suit." Letter from Harold Hongju Koh to Stuart F. Delery (copy attached as Exhibit A).

3. The immunity of foreign states and foreign officials from suit in our courts has different sources. For many years, such immunity was determined exclusively by the Executive Branch, and courts deferred completely to the Executive's foreign sovereign immunity determinations. *See, e.g.*, *Republic of Mexico v. Hoffmann*, 324 U.S. 30, 35 (1945) ("It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."). In 1976, Congress codified the standards governing suit against foreign states in the Foreign Sovereign Immunities Act, transferring to the courts the responsibility for determining whether a foreign state is subject to suit. 28 U.S.C. §§ 1602 *et seq.*; *see id.* § 1602 ("Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.").

4. As the Supreme Court recently explained, however, Congress has not similarly codified standards governing the immunity of foreign officials from suit in our courts. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2292 (2010) ("Although Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the statute's origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity.").

[***] Editor's note: On January 30, 2013, the Second Circuit dismissed the appeal "because Appellant's claims lack an arguable basis in law or fact."

Instead, when it codified the principles governing the immunity of foreign states, Congress left in place the practice of judicial deference to Executive Branch immunity determinations with respect to foreign officials. *See id*. at 2291 ("We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity."). Thus, the Executive Branch retains its historic authority to determine a foreign official's immunity from suit, including the immunity of foreign heads of state. *See id*. at 2284–85 & n.6 (noting the Executive Branch's role in determining head of state immunity).

5. The doctrine of head of state immunity is well established in customary international law. *See Satow's Guide to Diplomatic Practice* 9 (Lord Gore-Booth ed., 5th ed. 1979). In the United States, head of state immunity decisions are made by the Department of State, incident to the Executive Branch's authority in the field of foreign affairs. The Supreme Court has held that the courts of the United States are bound by Suggestions of Immunity submitted by the Executive Branch. *See Hoffman*, 324 U.S. at 35–36; *Ex parte Peru*, 318 U.S. 578, 588–89 (1943). In *Ex parte Peru*, in the context of foreign state immunity, the Supreme Court, without further review of the Executive Branch's immunity determination, declared that such a determination "must be accepted by the courts as a conclusive determination by the political arm of the Government." 318 U.S. at 589. After a Suggestion of Immunity is filed, it is the court's duty" to surrender jurisdiction. *Id.* at 588. The courts' deference to Executive Branch determinations of foreign state immunity is compelled by the separation of powers. *See, e.g., Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974).

6. For the same reason, courts have also routinely deferred to the Executive Branch's immunity determinations concerning sitting heads of state. *See Ye v. Jiang Zemin*, 383 F.3d 620, 626 (7th Cir. 2004) ("The obligation of the Judicial Branch is clear—a determination by the Executive Branch that a foreign head of state is immune from suit is conclusive and a court must accept such a determination without reference to the underlying claims of a plaintiff."); *Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988) (holding that the determination of Prime Minister Thatcher's immunity was conclusive in dismissing a suit that alleged British complicity in U.S. air strikes against Libya), *aff'd in part and rev'd in part on other grounds*, 886 F.2d 438 (D.C. Cir. 1989). When the Executive Branch determines that a sitting head of state is immune from suit, judicial deference to that determination is predicated on compelling considerations arising out of the Executive Branch's authority to conduct foreign affairs under the Constitution. *See Ye*, 383 F.3d at 626 (citing *Spacil*, 489 F.2d at 618). Judicial deference to the Executive Branch in these matters, the court of appeals noted, is "motivated by the caution we believe appropriate of the Judicial Branch when the conduct of foreign affairs is involved." *Id. See also Spacil*, 489 F.2d at 619 ("Separation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy." (citing *United States v. Lee*, 106 U.S. 196, 209 (1882))); *Ex parte Peru*, 318 U.S. at 588. As noted above, in no case has a court subjected a sitting head of state to suit after the Executive Branch has determined that the head of state is immune.

7. Indeed, the District Court for the District of Columbia, in the case *Manoharan v. Rajapaksa*, -- F. Supp. 2d --, 2012 WL 642446 (D.D.C. Feb 29, 2012), recently dismissed other claims against President Rajapaksa. As in this case, the plaintiffs named President Rajapaksa as the sole defendant and the United States conveyed its determination that President Rajapaksa is immune from suit while in office. *Id.* The court dismissed the claims against President Rajapaksa, holding that it was "bound by the State Department's Suggestion of Immunity," *id.*

8. Under the customary international law principles accepted by the Executive Branch, head of state immunity attaches to a head of state's status as the current holder of the office. After a head of state leaves office, however, that individual generally retains residual immunity only for acts taken in an official capacity while in that position. *See* 1 *Oppenheim's International Law* 1043–44 (Robert Jennings & Arthur Watts eds., 9th ed. 1996). In this case, because the Executive Branch has determined that President Rajapaksa, as the sitting head of a foreign state, enjoys head of state immunity from the jurisdiction of U.S. courts in light of his current status, President Rajapaksa is entitled to immunity from the jurisdiction of this Court over this suit.

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3. Sheikh Al-Sabah, the Emir of Kuwait

On April 5, 2012, the United States submitted another suggestion of immunity in the U.S. district court for the Southern District of New York in a case brought against Sheikh Sabah Al-Ahmad Al-Jaber Al-Sabah, the emir and sitting head of state of Kuwait. The suggestion of immunity was substantially the same as the one filed by the United States in the *Rajapaksa* case, discussed above. The suggestion of immunity again included as an exhibit a letter from Legal Adviser Koh requesting dismissal on the basis of head of state immunity. The U.S. suggestion of immunity and the letter from the Legal Adviser are available at *www.state.gov/s/l/c8183.htm*. On August 16, 2012, the district court issued its opinion and order dismissing the case based on the U.S. suggestion of immunity. *Tawfik v. Al-Sabah*, 2012 WL 3542209 (S.D.N.Y.). In September 2012, plaintiffs filed an appeal in the U.S. Court of Appeals for the Second Circuit, which was subsequently dismissed for failure to file a brief. *Tawfik*. No. 12-3828 (2d. Cir.).

4. Former President Ernesto Zedillo of Mexico

On September 7, 2012, the United States filed a suggestion of immunity in a case brought against the former president of Mexico, Ernesto Zedillo Ponce de Leon, in U.S. district court in Connecticut. *Doe v. Zedillo*, No. 3:11-cv-01433. Ten anonymous Mexican plaintiffs brought suit under the ATCA and the TVPA relating to a massacre in Chiapas in 1997 carried out by paramilitary groups with alleged support from the Mexican army. The U.S. suggestion of immunity included as an exhibit a letter from Legal Adviser Koh to the Department of Justice, requesting that the State Department's determination of immunity for Mr. Zedillo be conveyed to the court. The letter and the suggestion of immunity are available at *www.state.gov/s/l/c8183.htm*. Excerpts of the suggestion of immunity below discuss the different considerations that bear on determining the immunity of a former head of state, versus a sitting head of state.

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7. As a general matter, under customary international law principles accepted by the Executive Branch, a sitting head of state's immunity is based on his *status* as the incumbent office holder and extends to all his actions. *See* 1 *Oppenheim's International Law* 1038 (Robert Jennings & Arthur Watts eds., 9th ed. 1996). After a head of state leaves office, however, that individual's residual immunity depends on the *conduct* at issue and generally applies only to acts taken in an official capacity while in that position. *See id.* at 1043–44. In determining whether certain acts were taken in an official capacity, the Department of State generally presumes that allegations relating to the official's exercise of the powers of his or her office fall into that category. This preliminary assessment is particularly apt for former heads of state, who typically have wide-ranging responsibilities. The Department of State also considers a foreign government's request for a suggestion of immunity, averring that the acts of its former official that are the subject of a lawsuit were taken (if at all) in an official capacity, to further strengthen that preliminary assessment. In such cases, unless the plaintiff provides the Department of State with a basis for questioning the preliminary assessment, the Department of State will generally determine that the former official is immune.

8. Upon consideration of the facts and circumstances of this case, the Department of State has determined that former President Zedillo is entitled to immunity from suit in this action. *See* Ex. 1. The alleged actions as set forth in the Complaint are predicated on former President Zedillo's actions as President of Mexico, thus involving the exercise of his powers of office. Accordingly, the Department of State presumes that those actions, if taken at all, were taken in his official capacity. The Department of State has not found a sufficient reason to question that preliminary assessment. Plaintiffs' allegations that former President Zedillo should be held liable for lower level officials' tortious conduct simply by virtue of his position as President at the time do not provide a sufficient reason to question that initial assessment. The Department of State has further determined that those allegations in the Complaint that allege particular conduct of former President Zedillo himself do not provide a sufficient reason to question whether that conduct was taken in his official capacity. Accordingly, the United States has determined that former President Zedillo enjoys immunity from this lawsuit.

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5. President Biya of Cameroon

On December 21, 2012, the United States filed a suggestion of immunity attaching a letter from Legal Adviser Koh in a case brought in U.S. district court in Oregon against Paul Biya, the President and sitting head of state of the Republic of Cameroon. *Fotso v. Cameroon et al.*, No. 12-01415 (D. Ore. 2012). The suggestion of immunity was substantially the same as the one filed by the United States in the *Rajapaksa* case, discussed above. The U.S. suggestion of immunity and the letter from the Legal Adviser are available at *www.state.gov/s/l/c8183.htm.*[****]

[****] Editor's note: The district court later dismissed Paul Biya from the case based on his immunity.

6. President Saleh of Yemen: immunity from deposition in military commission case

On February 6, 2012, Legal Adviser Koh sent a letter to Brigadier General Mark Martins, Chief Prosecutor, Office of Military Commissions, requesting that General Martins convey to the Military Commission the State Department's determination of immunity of His Excellency Ali Abdullah Saleh, current president of the Republic of Yemen. A defendant in a case before a military commission, *United States v. Al-Nashiri*, filed a motion on January 31, 2012 to depose President Saleh. Mr. Koh's letter conveyed the State Department's recognition of President Saleh's immunity as a sitting head of state from the Military Commission's jurisdiction to compel oral depositions. The letter was subsequently filed with the Military Commission as an exhibit to the U.S. brief in opposition to the motion to depose President Saleh. The U.S. brief and the letter are available at *www.state.gov/s/l/c8183.htm*. The U.S. brief includes much of the same background on head of state immunity that is contained in the brief in *Devi v. Rajapaksa*, excerpted in section C.2.c., *supra*. Excerpts below from the U.S. brief, filed February 6, 2012, explain how the principles of immunity apply in a criminal case.

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In consideration of the relevant principles of customary international law, and in the implementation of the United States' foreign policy and in the conduct of its international relations, the executive branch has determined that Ali Abdullah Saleh, President of the Republic of Yemen, is presently immune from the jurisdiction of the Military Commission Trial Judiciary to compel his deposition. See Attachment B, Letter from Harold Hongju Koh, Legal Adviser, U.S. Department of State to Brigadier General Mark Martins, Chief Prosecutor, Office of Military Commissions (Feb. 6, 2012). As discussed below, the prosecution respectfully submits this determination is controlling and is not subject to judicial review.

* * * *

As courts have recognized, the executive branch's head of state immunity determinations govern not only in civil litigation, but in criminal prosecutions as well. See *United States v. Noriega*, 117 F.3d 1206, 1211-12 (11th Cir. 1997); *cf. Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 20-21 (Feb. 14) (recognizing applicability under customary international law of head of state immunity principles in both civil and criminal context). Tellingly, no U.S. court has subjected a sitting head of state to its jurisdiction after the executive branch has determined the head of state's immunity.

In consideration of the relevant principles of customary intemational1aw, and in the implementation of the United States' foreign policy and in the conduct of its international relations, the executive branch has determined that President Saleh is immune from the Military Commission Trial Judiciary's jurisdiction to compel the testimony of President Saleh in the

instant matter.

* * * *

On February 13, 2012, the Military Commission denied the defense motion to depose President Saleh in *Al-Nashiri*. A military judge issued an opinion on February 17, 2012 containing findings in support of the Commission's order. Among other things, the military judge found that "President Saleh's presence in the United State for medical treatment does not serve as a waiver of immunity." The military judge's opinion is available on the website of the Office of Military Commissions at *www.mc.mil/CASES/MilitaryCommissions.aspx*.

D. DIPLOMATIC AND CONSULAR PRIVILEGES AND IMMUNITIES

The U.S. statement of interest in *Walters v. People's Republic of China*, discussed in section A.3.c. above, also addresses the impropriety of service of process on ambassadors and embassies pursuant to the Vienna Convention on Diplomatic Relations. Excerpts discussing this issue appear below (with footnotes and citations to the record omitted). The statement of interest is available in full at *www.state.gov/s/l/c8183.htm*.

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* * * *

Under the Court's discovery Order, Plaintiffs' counsel was directed to serve the Order upon China's Ambassador at the Chinese Embassy in the District of Columbia. Pursuant to an applicable treaty, however, service of legal papers upon ambassadors or embassies is improper.

The Vienna Convention on Diplomatic Relations ("VCDR"), done at Vienna on Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. 7502 (entered into force with respect to the United States Dec. 13, 1972)—to which the United States and China are both parties—provides that "[t]he premises of the mission shall be inviolable." *See* Art. 22(1). A court order requiring service of legal documents upon an embassy conflicts with Article 22(1) of the VCDR. *See, e.g.*, *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 748 (7th Cir. 2007) ("[S]ervice through an embassy is expressly banned both by an international treaty to which the United States is a party and by U.S. statutory law. The Vienna Convention on Diplomatic Relations . . . prohibits service on a diplomatic officer.").

Moreover, Article 29 of the VCDR provides that "[t]he person of a diplomatic agent shall be inviolable." Likewise, then, a court order requiring service upon an ambassador as the agent of the government conflicts with the VCDR. *See, e.g.*, *Tachiona v. United States*, 386 F.3d 205, 222 (2d Cir. 2004) ("[C]ourts have held that the inviolability principle precludes service of process on a diplomat as agent of a foreign government[.]"). In light of the VCDR, courts should refrain from ordering—and parties should not be encouraged to effect—service of legal papers upon ambassadors or embassies.

More generally, the United States also has a reciprocal interest in ensuring that foreign states have sufficient notice and an adequate opportunity to respond to any post-judgment

execution proceedings initiated against them. Such treatment encourages other nations to treat the United States similarly within their judicial systems.

Here, the United States notes that Plaintiffs' underlying motion for judgment debtor examination, according to the certificate of service, was also served on the Ambassador at the Chinese Embassy in the District of Columbia. The problems raised by that improper notice are compounded by the relatively short deadlines provided for compliance with the Court's extensive discovery Order. The United States suggests that the Court, as a matter of prudence and comity, consider the issue of adequate notice and opportunity to respond when determining how to proceed in this case, particularly in light of the United States' reciprocal interest in receiving fair treatment in foreign proceedings. *Cf. FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447 F.3d 835, 838 (D.C. Cir. 2006) (stressing "a foreign sovereign's interest—and our interest in protecting that interest—in being able to assert defenses based on its sovereign status").

* * * *

E. INTERNATIONAL ORGANIZATIONS

On May 14, 2012, the United States filed a statement of interest in the U.S. District Court for the Southern District of New York in *PCP Int'l. v. Bishop, et al.*, No. 11- 0637 (S.D.N.Y.). Plaintiff brought the action against the UN seeking to vacate an arbitration award rendered after the UN terminated three contracts with plaintiff based on alleged fraud by plaintiffs. The statement of interest explained that the UN enjoys absolute immunity from suit and legal process, absent an express waiver. The statement of interest is excerpted below (with footnotes and citations to the record omitted) and available in full (with exhibits) at *www.state.gov/s/l/c8183.htm*. On May 15, 2012, the district court issued its order dismissing the case based on the U.S. statement of interest.

* * * *

The UN Charter provides that the UN "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes." UN Charter, art. 105, § 1. The UN's General Convention, which the UN membership adopted shortly after the UN Charter, further defines the UN's privileges and immunities, providing that "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." General Convention, art. II, § 2.

The United States understands this provision to mean what it unambiguously says: the UN enjoys absolute immunity from this or any suit—indeed, "from every form of legal process"—unless the UN itself expressly waives its immunity. There is no allegation, much less evidence, that the UN has waived its immunity here. On the contrary, the UN itself expressly maintains its immunity from this suit. *See* letters dated September 12, 2011, December 8, 2011 and February 16, 2012 from Stephen Mathias, Assistant Secretary-General in charge of UN Office of Legal Affairs, to Susan E. Rice, U.S. Mission to the UN (in which the UN requested

"the competent United States authorities to take appropriate action to ensure full respect for the privileges and immunities" of the United Nations), annexed hereto as Exhibit A.

To the extent there could be any contrary reading of the General Convention's text, the Court should defer to the United States Executive Branch's interpretation. *See Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."). Here, the Executive Branch, and specifically the Department of State, is charged with maintaining relations with the United Nations, and so its views are entitled to deference under, *inter alia*, *Kolovrat*. The Executive Branch's interpretation should be given still greater deference in this case because, as noted above, the interpretation is shared by the UN. *See Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) (where parties to treaty agree on meaning of treaty provision, and interpretation "follows from the clear treaty language, [the court] must, absent extraordinarily strong contrary evidence, defer to that interpretation").

Consistent with the applicable treaty language and the Executive Branch's views, courts repeatedly, and indeed to the United States' knowledge uniformly, have recognized that "[u]nder the Convention the United Nations' immunity is absolute, subject only to the organization's express waiver thereof in particular cases." *Boimah v. United Nations General Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987); *see also, e.g.*, *Askir*, 933 F. Supp. at 371. Controlling Second Circuit authority recognizes the UN's absolute immunity. *See Brzak*, 597 F.3d at 112 ("the United Nations enjoys absolute immunity from suit unless it has expressly waived its immunity.") (internal quotation marks omitted). As the *Brzak* district court held, "where, as here, the United Nations has not waived its immunity, the General Convention mandates dismissal of Plaintiffs' claims against the United Nations for lack of subject matter jurisdiction." *See Brzak*, 551 F. Supp. 2d at 318.

Furthermore, questions regarding the UN's absolute immunity from suit should be decided at the outset, as a threshold jurisdictional matter. *See Tuck v. Pan American Health Org.*, 668 F.2d 547, 549 (D.C. Cir. 1981) ("This shield would be lost if the merits of a complaint were fully tried before the immunity question was addressed."); *De Luca v. United Nations Organization*, 841 F. Supp. 531, 533 (S.D.N.Y. 1994) ("Properly invoked immunity shields a defendant not only from the consequences of litigation's results, but also from the burden of defending themselves.") (internal quotation marks and citation omitted); *cf. NYSA-ILA Pension Trust Fund ex rel. Bowers v. Garuda Indonesia*, 7 F.3d 35, 39 (2d Cir. 1993) (holding that, before applying "any other rule of law in a case involving a foreign state," the foreign state's immunity must be addressed as a threshold matter).

Cross References

Litigation under the Alien Tort Claims Act and the Torture Victim Protection Act, **Chapter 5.B.**
Act of state, **Chapter 5.C.**
Protecting power, **Chapter 9.A.**
International civil litigation, **Chapter 15.B.**
U.S. filing in Hausler *regarding Cuba as a State Sponsor of Terrorism*, **Chapter 16.B.2.**

Chapter 11

Trade, Commercial Relations, Investment, and Transportation

A. TRANSPORTATION BY AIR

1. Bilateral Open Skies and Air Transport Agreements

Information on recent U.S. Open Skies and other air transport agreements, by country, is available at *www.state.gov/e/eb/rls/othr/ata/index.htm*. During 2012, activities on Open Skies included the following:

- On March 2, the United States and Montenegro signed a new air transport agreement which entered into force upon signature and establishes a bilateral Open Skies air transportation relationship between the two countries (agreement available at *www.state.gov/e/eb/rls/othr/ata/m/mj/185209.htm*);
- On June 21, the United States and the Republic of Suriname initialed the U.S.-Republic of Suriname Open Skies Agreement (agreement available at *www.state.gov/e/eb/rls/othr/ata/s/ns/194417.htm*);
- On June 26, the United States and Sierra Leone initialed the U.S.-Sierra Leone Open Skies Agreement, which was applied on the basis of comity and reciprocity pending its entry into force; on September 10, the Open Skies Agreement with Sierra Leone entered into force (agreement available at *www.state.gov/e/eb/rls/othr/ata/s/sl/197599.htm*);
- On August 23, the United States and the Republic of Macedonia signed the U.S.-Macedonia Open Skies air services agreement, which they had initialed in July 2011; the agreement will enter into force 30 days after the date of the final notification, via exchange of diplomatic notes between the two sides (agreement available at *www.state.gov/e/eb/rls/othr/ata/m/mk/168779.htm*);
- On December 12, the United States and the Seychelles initialed the U.S.-Seychelles Open Skies air transport agreement, which will be applied on the basis of comity and reciprocity pending its entry into force;
- Also on December 12, the United States and Yemen initialed the text of an Open Skies agreement that will be applied on the basis of comity and reciprocity pending its entry into force.

2. European Union's Emissions Trading Scheme

In 2012, the United States continued to participate in multilateral efforts to prevent the European Union ("EU") from including in the EU Emissions Trading Scheme ("ETS") all international air carriers flying into or out of Europe. See *Digest 2011* at 358-59 for background on these efforts. A group of countries with significant aviation activity and which are united in their opposition to the application of the ETS to foreign carriers convened on two occasions in 2012.

As discussed by State Department deputy spokesperson Mark Toner at a February 22, 2012 press briefing, the United States participated in a meeting of 32 countries that are concerned about the application of the ETS to non-EU air carriers, which was hosted by the Russian government in Moscow from February 21 to 22, 2012. Transcript of February 22, 2012 Daily Press Briefing, available at *www.state.gov/r/pa/prs/dpb/2012/02/184344.htm*. The United States and Singapore served as vice chairs of the meeting. The U.S. delegation included representation from the Department of State and the Department of Transportation, including the Federal Aviation Administration. Mr. Toner reiterated the U.S. position, conveyed in Moscow: "We believe that the EU needs to cease application of this scheme to foreign airlines and engage meaningfully with the International Civil Aviation Organization to find and develop a global approach to this problem." At the conclusion of the meeting in Moscow, the Russian government issued a joint declaration by the parties ("Moscow Declaration"), which appears below and is available at *www.ruaviation.com/docs/1/2012/2/22/50/*.

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Representatives of Armenia, Argentina, Republic of Belarus, Brazil, Cameroon, Chile, China, Cuba, Guatemala, India, Japan, Republic of Korea, Mexico, Nigeria, Paraguay, Russian Federation, Saudi Arabia, Seychelles, Singapore, South Africa, Thailand, Uganda and United States of America, gathered in Moscow, on the 21st and 22nd February 2012,

Recalling the Delhi Joint Declaration, adopted by the Council of ICAO on November 2nd, 2011 according to C-DEC 194/2;

Recalling the relevant provisions of the United Nations Framework Convention on Climate Change (UNFCCC);

Stressing the importance of the Kyoto Protocol to its Parties;

Reiterating the importance of the Chicago Convention and the need to ensure full compliance with its provisions;

Keeping in mind their national laws and regulations;

Affirming the importance of the role of the International Civil Aviation Organization (ICAO) in addressing international civil aviation emissions, including pursuant to the request from the Parties to the UNFCCC;

Stressing that the unilateral inclusion of international civil aviation in the EU-ETS has constituted an obstacle to the progress of ICAO's work underway to address international civil aviation emissions;

Underlining the lack of an adequate response from EU Member States to the ICAO Council's Decision C-DEC 194/2, including the lack of a constructive dialogue to address the concerns of the non-EU States expressed in that decision and elsewhere;

Considering that the inclusion of international civil aviation in the EU-ETS leads to serious market distortions and unfair competition;

Decided to:

a) ***Adopt*** this Joint Declaration as a clear manifestation of their unanimous position that the EU and its Member States must cease application of the Directive 2008/101/EC to airlines/ aircraft operators registered in third States;

b) ***Strongly urge*** the EU Member States to work constructively forthwith in ICAO on a multilateral approach to address international civil aviation emissions;

c) ***Consider*** taking actions/ measures set forth in Attachment A to this Joint Declaration including, for example, a proceeding under Article 84 of the Chicago Convention and barring participation by their respective airlines/aircraft operators in the EU ETS;

d) ***Exchange*** information on the measures adopted and to be adopted, particularly to ensure better coordination, by each non-EU Member State after this Meeting in future;

e) ***Continue*** their intensified common efforts to make progress at ICAO to address international civil aviation emissions;

f) ***Request*** the Russian Federation, on their behalf, to communicate this Joint Declaration to the EU and its Member States; and

g) ***Invite*** any other State to associate itself with this Joint Declaration and, in this connection, request the Russian Federation to extend this invitation.

Attachment A to the Moscow Joint Declaration

Basket of ACTIONS/ MEASURES

1. Filing an application under Article 84 of the Chicago Convention for resolution of the dispute according to the ICAO Rules for the Settlement of Differences (Doc 7782/2);
2. Using existing or new State legislation, regulations, or other legal mechanism to prohibit airlines/aircraft operators of that State from participating in the EU ETS;
3. Holding meetings with the EU carriers and/or aviation-related enterprises in their respective States and apprise them about the concerns arising out of the EU-ETS and the possibility of reciprocal measures that could be adopted by the State, which may adversely affect those airlines and/or entities.
4. Mandating EU carriers to submit flight details and other data;
5. Assessing whether the EU ETS is consistent with the WTO Agreements and taking appropriate action;
6. Reviewing Bilateral Air Services Agreements, including Open Skies with individual EU Member States, and reconsidering the implementation or negotiation of the 'Horizontal Agreement' with the EU;
7. Suspending current and future discussions and/or negotiations to enhance operating rights for EU airlines/ aircraft operators;
8. Imposing additional levies/charges on EU carriers/ aircraft operators as a form of countermeasure;
9. Any other actions/ measures.

* * * *

On July 31 and August 1, 2012, the United States hosted a meeting at the U.S. Department of Transportation in Washington, D.C. with 16 other non-EU countries that have significant aviation activity and oppose the application of the ETS to foreign carriers. The group convened to discuss other ways to achieve the goal of reducing emissions from aviation, principally working through the International Civil Aviation Organization ("ICAO"). The meeting followed up on previous meetings in Delhi and Moscow. For more information on the 2012 meetings in Washington, D.C., see the July 30 and August 1, 2012 special briefings by an administration official involved in the meetings, available at *www.state.gov/r/pa/prs/ps/2012/07/195781.htm* and *www.state.gov/r/pa/prs/ps/2012/08/195960.htm*. The chair's summary of the meeting in Washington D.C. appears below.

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The United States hosted a meeting on international aviation emissions on July 31st/August 1st, 2012, in Washington, D.C., of representatives from Australia, Brazil, Canada, Chile, China, Colombia, India, Japan, Korea, Mexico, Nigeria, Russia, Saudi Arabia, Singapore, South Africa, and the United Arab Emirates.

Participants reaffirmed their opposition to the application of the EU Emissions Trading System (ETS) to non-EU carriers. Those Participants adhering to the Delhi and Moscow Declarations reaffirmed their support for those Declarations.

Participants considered that the emissions of greenhouse gases (GHGs) from international aviation should be addressed multilaterally and that ICAO is the appropriate forum to pursue the issue. They recognized the historic importance of ICAO Assembly Resolution A37-19. They strongly supported continued efforts in that forum to enhance ICAO's contribution to global efforts to address GHG emissions. In this regard, they considered that the EU ETS continues to undermine ICAO efforts on aviation emissions and that the EU should halt application of the ETS to non-EU carriers in order to facilitate more effective progress in ICAO on this issue.

Participants reaffirmed their commitment to addressing the abatement of GHG emissions from international aviation through ICAO. Taking the ICAO Assembly's 2010 Resolution as a foundation, Participants discussed various national actions they have taken and intend to take with respect to the Resolution's aspirational global goal for carbon-neutral growth. These included, for example:

- operational improvements, such as air traffic management modernization;
- technological improvements, such as acceleration of the use of fuel-efficient aircraft technologies;
- development and deployment of sustainable alternative fuels; and
- the use of market-based measures (MBMs) appropriate to their respective airlines.

Many States represented have already submitted national action plans to ICAO, and others plan to do so.

Participants also noted the significant steps that ICAO has taken in implementation of the 2010 Resolution, including:

• advancement of the work necessary to create an aircraft CO2 standard, including the recent decision by the Steering Group of the Committee on Aviation Environmental Protection on the agreed metric;
• implementation of the fuel reporting requirements taken on by ICAO Member States;
• promotion of improvements in air navigation to reduce aviation emissions;
• development of technical aspects of a framework for MBMs, as well as of a possible global MBM; and
• assisting States in their development and deployment of alternative fuels, in particular by sharing information on best practices.

Participants intend to continue to move forward, nationally and in ICAO, on all elements of the Resolution, as adopted, including with respect to:

• the aspirational 2020 carbon-neutral growth goal;
• adoption of a meaningful CO2 standard;
• mandatory fuel reporting;
• submission of State climate action plans;
• advancing improvements in air traffic management at the upcoming ANC-12 meeting to reduce fuel burn; and
• the appropriate role of MBMs.

With respect to MBMs, participants considered that, consistent with the Resolution's provisions, work should continue to "develop a framework" for MBMs and to "explore the feasibility" of a global MBM scheme, while recognizing the need to prioritize work on the framework.

Drawing on the discussions, Participants had the view that considerable work has been undertaken, and is ongoing, in ICAO and in Member States to address the reduction of aviation GHG emissions.

Participants agreed that further discussions of both a policy and technical nature would be useful to facilitate a way forward within ICAO.

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In considering the matter of international aviation and climate change, the Council of ICAO on November 9, 2012 requested that its President establish a High Level Group ("HLG"), composed of senior government officials nominated by their administrations to develop policy recommendations on, inter alia, the development of a framework for market-based measures ("MBMs"), the feasibility of a global MBM scheme, national action plans, and a global CO2 standard. Council decision C-DEC 197/6. By letter dated November 16, 2012, the President of the Council notified Members of the Council of the dates of the HLG's first meeting and the terms of reference and names of those scheduled to participate in the group. The first meeting of the HLG, in which the United States participated, was held December 12-13, 2012. Under its terms of reference, the HLG is tasked with reporting to the 198th and 199th Sessions of the Council on "its progress concerning a proposal for an Assembly Resolution to be considered by the Council for submission to the 38th Session of the Assembly." The 38th Session of the Assembly is scheduled to take place September 24 to October 4, 2013.

On November 27, 2012, President Obama signed into law the European Union Emissions Trading Scheme Prohibition Act of 2011 (P.L. 112-200). The law directs the Secretary of Transportation to prohibit U.S. air carriers from participating in the EU's ETS in cases where the Secretary determines that a prohibition is in the public interest. It also urges the Secretary of Transportation, the Administrator of the Federal Aviation Administration, and other appropriate officials of the U.S. Government to conduct international negotiations on a "worldwide approach" to addressing aviation-related emissions, and requires that such authorities, as appropriate, take other actions, in the public interest and under existing authorities, to hold U.S. air carriers "harmless" from the scheme. The law expressly prohibits U.S. federal authorities from using, inter alia, appropriated funds to pay any tax or penalty imposed on U.S. air carriers under the EU's ETS.

B. INVESTMENT DISPUTE SETTLEMENT UNDER FREE TRADE AGREEMENTS

1. Investment Dispute Settlement under Chapter 11 of the North American Free Trade Agreement

a. Apotex, Inc. v. United States of America

A tribunal established to hear claims originally brought in 2009 by Apotex, Inc., a Canadian pharmaceutical corporation, convened for a hearing on jurisdictional issues in February 2012. In this case, Apotex claims that U.S. court decisions regarding setraline and U.S. court decisions and a U.S. Food and Drug Administration ("FDA") decision regarding pravastatin violate NAFTA Articles 1102, 1105, and 1110. Transcripts of the hearing are available at *www.state.gov/s/l/c27648.htm*. See *Digest 2011* at 368-70 for background on the case and excerpts from a U.S. submission made prior to the hearing.

b. Apotex Holdings, Inc. and Apotex, Inc. v. United States of America

Apotex and Apotex Holdings filed a notice of arbitration in 2012 alleging injuries arising out of "Import Alerts" issued by the FDA concerning two of Apotex's Canadian manufacturing facilities. Apotex seeks at least $520 million in damages for alleged violations of NAFTA Articles 1102 (national treatment), 1103 (most favored nation treatment), and 1105 (minimum standard of treatment). On December 14, 2012, the United States submitted its Counter-Memorial and Objections to Jurisdiction in the case, which also included a request for bifurcation to determine jurisdictional issues as a preliminary matter. The preliminary statement from the public version of the U.S. Counter-Memorial appears below. The public version of the U.S. Counter-Memorial and Objections to Jurisdiction is available in its entirety at *www.state.gov/s/l/c50826.htm*.

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2. The Tribunal should deny Apotex's improper and unsupported claims concerning the United States' lawful and appropriate exercise of its authority to protect the health of its people. The Tribunal has no jurisdiction to hear Apotex's claims, which in any event fail on the merits.

3. For more than a century, the United States has established laws and regulations to prevent importation of adulterated drugs in order to protect public health. The United States did not relinquish this authority and responsibility when it concluded the NAFTA. Nor did the United States and its NAFTA partners establish Chapter Eleven investment arbitration to resolve complaints by foreign traders whose adulterated drugs have been turned away at the border.

4. The material facts of this case are largely undisputed. In December 2008, the U.S. Food and Drug Administration (FDA) inspected Apotex Inc.'s manufacturing facility in Etobicoke, Ontario following complaints from U.S. consumers, doctors, and pharmacists about problems with Apotex drugs. FDA's eight-day inspection uncovered significant violations of U.S. laws and regulations, including numerous deviations from current good manufacturing practice (cGMP). The investigators informed Apotex of their findings at the close of the inspection. FDA subsequently issued Apotex Inc. a "warning letter," apprising the firm that drugs from its Etobicoke facility were "adulterated" under U.S. law and thus could be denied admission to the United States. FDA further warned Apotex that the agency could withhold approval of drug applications linked to the facility. Apotex Inc. acknowledged the serious problems with its manufacturing practices and promised to implement corrective action.

5. In August 2009, FDA inspected the firm's Signet manufacturing facility in Toronto, Ontario. The inspection was prompted by the serious cGMP deficiencies found at the Etobicoke facility and by additional complaints FDA had received concerning the quality and efficacy of Apotex drugs. FDA's 14-day inspection uncovered, once again, significant violations of U.S. laws and regulations, including numerous cGMP deficiencies, several of which mirrored those found at Etobicoke. These violations affected many products and confirmed systemic problems with Apotex's entire manufacturing program. FDA found that Apotex had distributed products in the U.S. market contaminated with hair, glue, plastic, nylon, metal, rust, acetate fibers, fluorocarbons, and PVC-based material. FDA also cited Apotex for improperly produced and misbranded drug products; poor cleaning practices; a failure to investigate or report manufacturing problems properly; inadequate production procedures; poor recordkeeping; and a host of other serious failings. FDA placed Apotex's Etobicoke and Signet facilities on "Import Alert," signaling to FDA district offices that drugs from those facilities were deemed to be adulterated and could be detained at the border without physical examination.

6. Apotex did not dispute FDA's cGMP findings or protest having been placed on Import Alert. Nor did Apotex exercise its right to challenge FDA's actions in administrative proceedings or in federal court. And although Apotex now professes ignorance of FDA's 40-year-old Import Alert process, it neglected to mention that its own drugs were the subject of an Import Alert in 1992, when Apotex founder Bernard Sherman participated in a scheme to sell unapproved Apotex drugs in the United States through the mail and through offshore companies.

7. After being placed on Import Alert in August 2009, Apotex accepted responsibility for systemic problems with its manufacturing practices; recalled adulterated drug products from the U.S. market; hired third-party consultants to help bring its facilities into compliance with U.S. law; and pledged to overhaul its operations, management structure, and quality control systems.

8. Apotex's primary regulator, Health Canada, launched its own inspections of the Etobicoke and Signet facilities. Health Canada corroborated FDA's findings, recording 37 "major observations" at the two sites. Health Canada discovered, for instance, "a dead insect or insect fragment" in active pharmaceutical ingredients, prompting Apotex to recall drugs using those ingredients from the Canadian market. Health Canada further faulted Apotex for using the same material to fabricate cytotoxic and non-cytotoxic materials without taking proper precautions to prevent cross-contamination—a violation that alone would have warranted stripping Apotex of its establishment license under Canadian law. Health Canada also discovered that Apotex had, among other violations, misreported test results; released failed products for sale in Canada; failed to conduct timely investigations of potentially unsafe products; and delayed product recalls long after learning of health risks to consumers. Once again, Apotex acknowledged the problems with its manufacturing practices and pledged to address the "system deficiencies highlighted by them." Health Canada opted not to shut down Apotex's facilities—Apotex is Canada's largest supplier of generic drugs—but placed Apotex under close, continuous, on-site supervision for more than a year, ensuring that Apotex followed through with its promised corrective actions.

9. Over the ensuing year, FDA communicated continuously with Apotex on how to achieve sustainable compliance with U.S. law, devoting extraordinary agency resources to the task. Apotex notified FDA that its manufacturing facilities would be first ready for reinspection in October 2010, more than a year after issuance of the Import Alert.

10. The follow-up reinspections of the Etobicoke and Signet facilities in January and February 2011 revealed significant, ongoing cGMP problems, and the FDA investigators recommended against lifting the Import Alert. But after carefully evaluating Apotex's corrective actions to date and its plan for continued improvements, FDA headquarters decided to lift the Import Alert. Separately, FDA resumed evaluating whether, from a cGMP perspective, it could approve Apotex's drug applications from the Etobicoke and Signet facilities.

11. Apotex does not dispute these facts. It simply downplays their seriousness. …

12. FDA, however, cannot allow companies to market drugs in the United States that "almost without exception" are safe and effective, or that fail testing "only" 11 percent of the time. And when serious manufacturing and quality control problems are identified, "good will gestures" are not enough. As the recent meningitis outbreak in the United States tragically reminds, pharmaceuticals produced in violation of cGMP can be deadly. All companies, foreign and domestic, must comply with current good manufacturing practice to market their drugs in the United States.

13. Apotex now blames the U.S. government for having prevented Apotex from exporting its adulterated drugs to the United States. Apotex believes that the U.S. taxpayer should compensate Apotex for the costs of bringing its manufacturing practices into compliance with U.S. law. And although Apotex previously claimed that the Import Alert violated NAFTA's *trade* provisions, Apotex now frames its case as an *investment* dispute, in order to claim money damages.

14. To that end, Apotex claims that Apotex Inc.—a Canadian drug manufacturer with facilities in Canada—is an "investor" that made and sought to make "investments" in the United States. In particular, Apotex Inc. contends that its *applications* for regulatory approval to market its drugs constitute "intangible property" in the United States, despite the fact that FDA has statutory authority to deny or revoke that approval at any time without paying compensation.

Apotex has failed to establish that Apotex Inc. made or sought to make any investments in the United States within the meaning of NAFTA Chapter Eleven.

15. Although Apotex Holdings has made investments in the United States (including by establishing Apotex Corp., a U.S. distributor of generic drugs), that is not enough to establish an investment claim under the NAFTA. Chapter Eleven also requires that the challenged measure "relate to," or have a "legally significant connection" to, the investor or its investment. The sole challenged measure in this case—the Import Alert—did not relate to Apotex Holdings as an investor or to its U.S. investment, Apotex Corp., which continued marketing generic drugs throughout the period of the Import Alert. Apotex contends that the Import Alert prevented Apotex Corp. from receiving drugs from Apotex Inc.'s Etobicoke and Signet facilities. The Import Alert, however, prevented Apotex Inc. from exporting its drugs to any U.S. distributor of Apotex Inc. products, including Apotex Corp. Although Apotex seeks to show that the Import Alert particularly relates to Apotex Corp., because of its relationship with Apotex Inc., its arguments before this Tribunal directly contradict statements Apotex previously has made in U.S. court…

Apotex thus argues one thing to establish jurisdiction before this Tribunal and the opposite when seeking to avoid jurisdiction in U.S. court. The Tribunal should not countenance such opportunism.

16. The Import Alert also is not related to Apotex Inc.'s putative investments—its drug applications for generic drugs. The Import Alert concerned Apotex Inc.'s ability to *export* its products to the United States. The Import Alert did not mention or have any effect on FDA's consideration of Apotex's generic drug applications. Rather, FDA was unable to approve the ANDAs during this period because of the underlying cGMP violations. The Import Alert had no impact of any kind on Apotex Inc.'s alleged investments, and thus Apotex Inc. cannot bring a NAFTA Chapter Eleven claim for that additional reason.

17. Apotex's arguments on the merits are equally unavailing. Apotex does not dispute that its drugs were "adulterated" as a matter of U.S. law. Nor does Apotex challenge the underlying legality of the Import Alert policy, given similar policies by Canada and other States. Instead, Apotex alleges that the United States accorded better treatment to U.S. and foreign companies, in violation of NAFTA Articles 1102 (national treatment) and 1103 (most-favored-nation treatment). Apotex's claims, however, suffer from three defects.

18. First, Apotex cannot establish a national or most-favored-nation treatment claim because the Import Alert (which applied to two of Apotex Inc.'s *Canadian* manufacturing facilities) had no legally significant connection to Apotex as an "investor" or to its "investments," and thus Apotex did not receive any "treatment" for purposes of NAFTA Chapter Eleven.

19. Second, Apotex cannot establish a national treatment claim, because Apotex failed to identify comparators in "like circumstances." Apotex cites FDA's treatment of drug manufacturing facilities *in the United States*, which obviously are not subject to import alerts, and thus are not in "like circumstances" with Apotex Inc.

20. Third, Apotex cannot establish a most-favored-nation treatment claim, because it failed to identify any third-country-owned comparator that received more favorable treatment. One company identified by Apotex, for instance, shut down operations of a non-compliant facility. Another company had two facilities placed on import alert for more than three years, forfeited dozens of drug applications, and set aside $500 million for potential civil and criminal

penalties. Any suggestion, then, that the United States discriminated in favor of these firms is simply not credible.

21. Apotex's Article 1105 claim is equally baseless. Apotex contends that the United States should have allowed the firm to continue exporting adulterated drugs to the United States until Apotex had been afforded six "procedural safeguards": (1) a hearing (2) with advance notice (3) before an impartial decision-maker (4) at which Apotex could present evidence and contest the decision and (5) obtain a reasoned decision relying on all relevant legal and factual considerations (6) with judicial review of that decision. Failure to provide these, Apotex claims, put the United States in violation of the customary international law *minimum* standard of treatment.

22. And yet Apotex has made no showing for its alleged new rule of customary international law. Apotex does not even purport to establish a general and consistent practice of States followed from a sense of legal obligation requiring these generous "safeguards" *before* blocking the importation of adulterated drugs. Apotex does not address how other States prevent importation of adulterated drugs, and whether those States provide the six "safeguards" claimed by Apotex. Instead, Apotex has plucked this proposed new rule of customary international law from a grab bag of soft law sources, law review articles, working papers, human rights cases, and other sources that have no bearing on the challenged measure. Even if Apotex could demonstrate such a new rule of customary international law, the facts show that the United States actually offered Apotex the "procedural safeguards" it now claims were due, through both administrative and judicial processes. Apotex simply chose not to invoke them.

23. Finally, although the United States is not required to address issues of quantum in this submission, it bears recalling Apotex's assertions that: (1) the Apotex group of companies generates around $1 billion annually from sales in more than 115 countries; (2) the United States represented 30 percent of Apotex's worldwide market just prior to the Import Alert; and (3) the Import Alert effectively barred access to the United States market for drugs exported from two of its several manufacturing facilities for just under two years. And yet Apotex claims damages in this arbitration from "hundreds of millions of US dollars" to $[redacted] billion, an amount [redacted] greater than its claimed annual U.S. sales, [redacted] greater than its annual worldwide sales, and even greater than the value of the entire Apotex group of companies. Apotex's damages claim highlights the absurdity of Apotex's allegations in this case.

24. Because Apotex's claims fall outside the scope and coverage of NAFTA Chapter Eleven, the Tribunal should bifurcate the jurisdictional issues and, for reasons of cost, efficiency, and fairness, decide them as a preliminary matter. The Tribunal should then dismiss Apotex's baseless claims with prejudice and award the United States the full costs of these proceedings.

* * * *

2. Investment Dispute Settlement under the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR")

The text of the CAFTA-DR is available at *www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text*.

a. U.S. Submission in Railroad Development Corp. v. Guatemala

On January 12, 2012, the United States made a submission pursuant to Article 10.20.2 in the arbitration brought under CAFTA-DR Chapter 10 by Railroad Development Corporation ("RDC") against the Republic of Guatemala. (ICSID Case No. ARB/07/23). RDC, a United States railway investment and management company, alleges that the Republic of Guatemala wrongfully interfered with RDC's railroad concessions. RDC alleges CAFTA-DR violations of Article 10.3 (national treatment), Article 10.5 (minimum standard of treatment) and Article 10.7 (expropriation). The U.S. submission is excerpted below and available in full at *www.state.gov/s/l/cafta15/c33261.htm*.

* * * *

1. Pursuant to Article 10.20.2 of the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR"), the United States of America makes this submission on a question of interpretation of the Agreement. The United States does not take a position, in this submission, on how the interpretation it offers below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.

2. CAFTA-DR Article 10.5(1) requires that each Party "accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security." CAFTA-DR Article 10.5(2) specifies that, "[f]or greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights." In CAFTA-DR Annex 10-B, "[t]he Parties confirm[ed] their shared understanding that 'customary international law' generally and as specifically referenced in Article[] 10.5 . . . results from a general and consistent practice of States that they follow from a sense of legal obligation."

3. These provisions demonstrate the CAFTA-DR Parties' express intent to incorporate the minimum standard of treatment required by customary international law as the standard for treatment in CAFTA-DR Article 10.5. Furthermore, they express an intent to guide the interpretation of that Article by the Parties' understanding of customary international law, *i.e.*, the law that develops from the practice and *opinio juris* of States themselves, rather than by interpretations of similar but differently worded treaty provisions. The burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets these requirements.

* * * *

b. U.S. Submission in Teco Guatemala Holdings, LLC v. Guatemala

On November 23, 2012, in an arbitration brought under CAFTA-DR Chapter 10, the United States made a submission pursuant to Article 10.20.2 on a question of interpretation of CAFTA-DR in *Teco Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23). Claimant Teco Guatemala Holdings, LLC ("TGH") is a United States corporation. TGH alleges that the Republic of Guatemala wrongfully interfered with its indirect subsidiary's investment in an electricity distribution company in Guatemala. TGH alleges CAFTA-DR violation of Article 10.5 (minimum standard of treatment). Further information about the case is available on the website of the Government of Guatemala, Ministry of Economy, Directorate of Foreign Trade Administration at *http://portaldace.mineco.gob.gt/casos-guatemala*. The U.S. submission on interpretation of the CAFTA-DR is excerpted below and available in full at *www.state.gov/documents/organization/201834.pdf*.

* * * *

1. Pursuant to Article 10.20.2 of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), the United States of America makes this submission on a question of interpretation of the Agreement. The United States does not take a position, in this submission, on how the interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.

2. CAFTA-DR Article 10.5.1 requires that each Party "accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security." CAFTA-DR Article 10.5.2 specifies that:

> For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.

In CAFTA-DR Annex 10-B, "[t]he Parties confirm[ed] their shared understanding that 'customary international law' generally and as specifically referenced in Article[] 10.5 . . . results from a general and consistent practice of States that they follow from a sense of legal obligation."

3. These provisions demonstrate the States Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in CAFTA-DR Article 10.5. As the United States has noted in previous submissions under the NAFTA, the minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts.[1]

[1] See, *e.g.*, U.S. Memorial on Jurisdiction and Admissibility, *Methanex v. United States*, NAFTA/UNCITRAL (Nov. 13, 2000), *www.state.gov/documents/organization/3949.pdf*; U.S. Post-Hearing Submission on Article 1105(1) and *Pope & Talbot*, *ADF Group Inc. v. United States*, NAFTA/ICSID Case No. ARB(AF)/00/1 (June 27, 2002), *www.state.gov/documents/organization/12001.pdf*; U.S. Counter-Memorial, *Glamis Gold Ltd v. United States*,

4. These provisions demonstrate the States Parties' intention that Article 10.5 articulate a standard found in customary international law — *i.e.*, the law that develops from State practice and *opinio juris* — rather than an autonomous, treaty-based standard. Although States may decide, expressly by treaty, to extend protections under the rubric of "fair and equitable treatment" and "full protection and security" beyond that required by customary international law, that practice is not relevant to ascertaining the content of the customary international law minimum standard of treatment.[2] Arbitral decisions interpreting "autonomous" fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, do not constitute evidence of the content of the customary international law standard required by Article 10.5.

5. Nor is the principle of "good faith" a separate element of the minimum standard of treatment embodied in the Agreement. It is well established in international law that good faith is "one of the basic principles governing the creation and performance of legal obligations," but "it is not in itself a source of obligation where none would otherwise exist."[3]

6. States may modify or amend their regulations to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor's "expectations" about the state of regulation in a particular sector.[4] Regulatory action violates "fair and equitable treatment" under the minimum standard of treatment where, for example, it amounts to a denial of justice, as that term is understood in customary international law, or manifest arbitrariness falling below the international minimum standard.[5]

7. The burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*.[6] "The party which relies on a custom," therefore, "must prove that this custom is

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NAFTA/UNCITRAL (Sept. 19, 2006), *www.state.gov/documents/organization/73686.pdf*; U.S. Counter-Memorial, *Grand River Enters. v. United States*, NAFTA/UNCITRAL (Dec. 22, 2008), *www.state.gov/documents/organization/114065.pdf*.

[2] See, *e.g.*, *Glamis Gold, Ltd v. United States*, NAFTA/UNCITRAL, Award VI 607-08 (June 8, 2009) (concluding that "arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom").

[3] *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, 1988 I.C.J. 69, 94 (Judgment of Dec. 20) (internal quotation marks omitted).

[4] See, *e.g.*, *Mobil Investments Canada Inc. & Murphy Oil Corp. v. Canada*, NAFTA/ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum 153 (May 22, 2012) ("Article 1105 is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made.").

[5] See, *e.g.*, *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 194 (Jan. 26, 2006) (citations omitted); see also U.S. Counter-Memorial, *Glamis Gold Ltd. v. United States*, NAFTA/UNCITRAL, at 218-262 (Sept. 19, 2006), *www.state.gov/documents/organization/73686.pdf* (discussing the customary international law minimum standard of treatment in the context of regulatory action); U.S. Rejoinder, *Glamis Gold Ltd. v. United States*, NAFTA/UNCITRAL, at 139-243 (Mar. 15, 2007), *www.state.gov/documents/organization/82700.pdf* (same).

[6] *Rights of Nationals of the United States of America in Morocco (France v. United States)*, 1952 I.C.J. 176, 200 (Judgment of Aug. 27) ("The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.") (citation and internal quotation marks omitted).

established in such a manner that it has become binding on the other Party."[7] Once a rule of customary international law has been established, the claimant must show that the State has engaged in conduct that violated that rule.[8]

Determining a breach of the minimum standard of treatment "must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders."[9]

* * * *

3. Arbitration under U.S.-Ecuador Bilateral Investment Treaty

In 2012, the United States made two key submissions in arbitral proceedings initiated in 2011 by the Republic of Ecuador against the United States concerning the interpretation and application of the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, August 27, 1993 (the U.S.-Ecuador Bilateral Investment Treaty, or "Treaty"). Ecuador requested arbitration pursuant to Article VII of the Treaty based on its dissatisfaction with the award in a separate investor-state arbitration under the Treaty (in which the United States did not participate). That award concluded that Ecuador had failed to uphold its obligation under Article II(7) of the Treaty to "provide effective means of asserting claims and enforcing rights" with respect to the investment of certain U.S. investors (Texaco and Chevron).

On March 29, 2012, the United States submitted its statement of defense in the arbitration instituted by Ecuador against the United States. On April 25, 2012, the United States submitted its memorial on jurisdiction. In July, the arbitral tribunal constituted to hear the claims held a hearing on jurisdiction. In August, the tribunal cancelled the scheduled hearing on the merits. In an award dated September 29, 2012, the Tribunal, by majority, dismissed the case for lack of jurisdiction, "due to the absence of the existence of a dispute falling within the ambit of Article VII of the Treaty." Subject to the confidentiality requirements of the rules of procedure governing the case, certain documents—including the tribunal's award—are not public. The public U.S. submissions in the proceeding in 2012 are excerpted below. These and other public submissions in the U.S.-Ecuador arbitration are

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[7] *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 276 (Judgment of Nov. 20); see also *North Sea Continental Shelf (Federal Rep. of Germany v. Netherlands/Denmark)*, 1969 I.C.J. 3, ¶ 74 (Judgment of Feb. 20) ("[A]n indispensable requirement [of showing a new rule of customary international law] would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; — and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."); CLIVE PARRY ET AL., ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 81-82 (1986) (noting that a customary international legal rule emerges from "a concordant practice of a number of States acquiesced in by others; and a conception that the practice is required by or consistent with the prevailing law").

[8] *Feldman v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 177 (Dec. 16, 2002) ("[I]t is a generally accepted canon of evidence in civil law, common laws, and in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence.").

[9] *S.D. Myers v. Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 263 (Nov. 13, 2000).

available in full at *www.state.gov/s/l/c53491.htm*. The United States also submitted with its memorial on jurisdiction expert opinions by Professors W. Michael Reisman and Christian Tomuschat. These opinions are available at *www.pca-cpa.org/showpage.asp?pag_id=1455*.

a. U.S. Statement of Defense

Excerpts below are from the U.S. Statement of Defense, submitted on March 29, 2012 in the arbitration brought by Ecuador against the United States under the Treaty and the UNCITRAL Arbitration Rules.

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This arbitration does not fall within the scope of Article VII of the U.S.-Ecuador Bilateral Investment Treaty ("Treaty"). Ecuador has initiated this arbitration by asserting that it is necessary to resolve a "dispute" between Ecuador and the United States "concerning the interpretation or application" of Article II(7) of the Treaty. In fact, there is no such dispute. Rather, this arbitration reflects Ecuador's unilateral attempt to secure a new interpretation of that Article in order to counter an interpretation rendered by another arbitral tribunal, which had issued an award in an investment dispute brought by two U.S. investors against Ecuador. The United States was not a party to the underlying arbitration.

Unhappy with the outcome of that arbitration, Ecuador now seeks to compel the United States to re-arbitrate the meaning of Article II(7) before a different tribunal. After the investor-State tribunal issued its partial award on the merits, Ecuador sent the United States a diplomatic note containing Ecuador's unilateral statement of the meaning of Article II(7) and requesting confirmation of Ecuador's views. The diplomatic note stated that if the United States failed to confirm Ecuador's views, "an unresolved dispute must be considered to exist" between Ecuador and the United States under the Treaty. Without ever formally requesting consultations with the United States, Ecuador then commenced these proceedings, seeking an "authoritative" interpretation of Article II(7).

This Tribunal lacks jurisdiction to grant Ecuador the relief it seeks, for three principal reasons.

First, there is no "dispute concerning the interpretation or application" of Article II(7) of the Treaty, as required by Article VII. The United States has not taken any position on the interpretations of Article II(7) as stated either in the investor-State tribunal's partial award or in Ecuador's diplomatic note. As such, Ecuador and the United States are not in positive opposition concerning a concrete set of facts affecting the parties' legal rights and obligations, as required by international law. Ecuador's request thus presents no interpretive dispute between the Parties, as required by Article VII to establish this Tribunal's jurisdiction.

Second, Ecuador cannot compel the United States to take a position on Ecuador's interpretation of the Treaty by unilaterally declaring that a failure to do so creates a dispute concerning that interpretation. Each State Party has the right, but not the obligation, to interpret the Treaty and to comment on the other Party's interpretation of the Treaty. Nothing in the Treaty or in international law supports Ecuador's request to convert impermissibly a State prerogative into a State obligation.

Third, contrary to Ecuador's view, the Treaty Parties did not, in Article VII, consent to arbitrate questions that do not relate to actual disputes between them over the performance of their Treaty obligations. Article VII does not create a mechanism by which an interstate tribunal, at the request of one Party, may render "authoritative" decisions on legal questions divorced from concrete factual situations over a Party's failure to perform under the Treaty. Nor does Article VII create a review mechanism by which a Party may appeal unfavorable decisions rendered by investor-State tribunals. In the same way, Article VII does not create advisory jurisdiction that is available to any Party to invoke at its unilateral discretion. Ecuador's Request for Arbitration suggests that the Treaty Parties, *sub silentio*, intended in Article VII to establish a new regime of international adjudication under investment treaties, under which State Parties can judicialize diplomatic discussions by demanding interpretations by ultimatum, thereby generating arbitrable disputes. Because a provision similar to Article VII exists in thousands of investment treaties around the world, Ecuador's novel theory would turn investment treaty practice on its head.

Further, even if Ecuador could have pointed to facts demonstrating an actual dispute with the United States over the interpretation or application of Article II(7), Ecuador failed to invoke the proper mechanism for consultations with the United States under the Treaty before commencing arbitration. Ecuador merely announced its views on the Treaty, demanded that the United States confirm those views, and then pronounced that an "unresolved dispute" would exist if the United States failed to yield to Ecuador's request. Ecuador's "request" was in fact a decree, not a good-faith invitation to consultations under the Treaty.

Because the Tribunal has no jurisdiction to hear Ecuador's request, it should reject the request in its entirety and award the United States the full costs of these proceedings.

* * * *

b. U.S. Memorial on Jurisdiction

Excerpts below (with most footnotes omitted) are from the argument section of the U.S. Memorial on Jurisdiction, submitted April 25, 2012.

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* * * *

A. Ecuador's Claims Fall Outside the Scope of Article VII Because There Is No "Dispute Between the Parties Concerning the Interpretation or Application of the Treaty"

This arbitration presents the threshold question of whether Ecuador is entitled under Article VII of the BIT to convene an international arbitral tribunal to render an "authoritative interpretation" of Article II(7) if the United States remains silent or fails to agree with Ecuador's unilateral statement concerning the meaning of that provision. Ecuador is not so entitled. An arbitral tribunal's jurisdiction rests on the common and unequivocal consent of the disputing Parties, and the United States never consented to submit purely advisory matters of this kind to arbitration under Article VII.

Ecuador does not allege any facts establishing a dispute with the United States over the "interpretation or application" of Article II(7) of the Treaty. Rather, Ecuador admits that its

"dispute" is not with the United States, but with the award rendered by the *Chevron* tribunal, an investor-State tribunal constituted under Article VI. Ecuador suggests that when an investment tribunal renders an "erroneous" award, Ecuador has the right to proclaim the "proper" interpretation, seek confirmation of its proclamation from its treaty partner, and, failing the reply it demanded, put the issue to an Article VII tribunal for an "authoritative interpretation." Yet nothing in Article VII of the BIT or in general international law supports this remarkable proposition, which is contradicted by the plain meaning of Article VII, read in context and in light of the Treaty's object and purpose, as well as nearly a century of unbroken international jurisprudence.

1. Under the Ordinary Meaning of Article VII, Read in Context and in Light of the Treaty's Object and Purpose, There Is No "Dispute" Between the Parties Under Article VII

Ecuador's request for arbitration does not present a "dispute" between the Parties within the ordinary meaning of Article VII of the BIT, read in context and in light of the Treaty's object and purpose, as required by Article 31(1) of the Vienna Convention on the Law of Treaties. Article VII of the BIT states:

> Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law.

By its terms, Article VII applies only to a "dispute" between the Parties concerning the interpretation or application of the Treaty.

i. The Ordinary Meaning of "Dispute" Does Not Encompass Ecuador's Claims

The use of the term "dispute" in the text of Article VII, together with the fact that the Tribunal is to render a "binding decision," demonstrate the Parties' intention to create contentious jurisdiction, rather than advisory, appellate, or referral jurisdiction. The leading English-language legal dictionary defines "dispute" as "a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other."[48] As Professor Tomuschat explains in the accompanying expert report, the word "dispute" has "obtained a specific meaning in international practice," requiring that the parties to a treaty have put themselves in positive opposition with one another over a concrete case involving a claim of breach under the treaty. None of these conditions is present here.

A "dispute" concerning the interpretation or application of the Treaty cannot arise in the abstract. While issues regarding the "interpretation" or "application" of the Treaty may be presented and adjudicated in any arbitration pursuant to Article VII, either independently or in combination, they must stem from an actual controversy. Article VII does not grant the Tribunal any form of jurisdiction that might allow for the determination of general or theoretical matters. Here, Ecuador's claim fails because it presents nothing more than abstract legal questions about the general meaning of Article II(7).

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[48] BLACK'S LAW DICTIONARY 327 (6th ed. 1991) [R-108]. *See also* 1 SHORTER OXFORD ENGLISH DICTIONARY 709 (5th ed. 2002) (defining "dispute" as "[a]n instance of dispute or arguing against something or someone …; *esp.* … a disagreement in which opposing views are strongly held") [R-109].

Disputes under Article VII must be "between the Parties." According to the plain terms of Article VII, any conflict of claims or rights must therefore be directed against the other Party. The conflict cannot arise out of a separate controversy or a dispute with a third party. Here, however, Ecuador admits that its problem is with the *Chevron* tribunal's interpretation of Article II(7), and not with the United States, which Ecuador agrees has not failed to perform under the Treaty.

The phrase "for binding decision in accordance with the applicable rules of international law" confirms that Article VII covers *legal* and not *political* disputes. A "dispute" under Article VII thus requires a *conflict of claims or rights* between the Parties based on the Treaty that is capable of binding resolution by application of legal rules and principles. Article VII does not contemplate resolution of a political disagreement between the Parties about whether to interpret Article II(7).

ii. The Treaty's Context Confirms the Absence of a "Dispute"

Other provisions of the Treaty provide essential context for interpreting Article VII. Article V states:

> The Parties agree to consult promptly, on the request of either, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty.

Article V, in contrast to Article VII, thus provides a forum for the discussion of a wide range of subjects, including "any *matter* relating to the interpretation or application of the Treaty." According to a leading English dictionary, a "matter" is "[a]n event, circumstance, or question, etc., which is or may be an object of consideration or practical concern."[52] Unlike a "dispute," a "matter" need not arise out of assertions by the Parties of contrary claims or rights. Use of the term "matter" in Article V thus establishes a broader scope for consultations between the Parties than dispute resolution under Article VII. In other words, under Article V, the Parties agree to consult and negotiate about any "matters," *i.e.*, any *issues* that might arise under the Treaty; under Article VII, by contrast, the Parties are permitted to seek adjudication of only a limited subset of those issues, namely "dispute[s] between the Parties concerning the interpretation or application of the Treaty." To the extent Ecuador's claim is that the United States refused to enter into negotiations with it to agree on the meaning of Article II(7), it is Article V and not Article VII that provides the mechanism for raising that complaint. But Ecuador never invoked Article V.

Article VII must also be read in the context of Article VI, under which investors of one Party may (1) initiate arbitration against the other Party with respect to "investment disputes" concerning treatment allegedly inconsistent with obligations under the BIT, and (2) obtain a final and binding award. Article VI sets out the jurisdictional and procedural requirements by which each Party consents to allow investors of the other Party to submit to arbitration claims against it for alleged violations of the BIT's substantive obligations.

This provision is central to the operation of the BIT and serves as a separate, principal mechanism by which the Parties have authorized arbitral tribunals to resolve actual disputes that investors have brought directly against the host Party. Article VI contemplates annulment or set-aside proceedings under the applicable arbitration rules and law, consistent with any relevant treaty on the enforcement of arbitral awards, as the exclusive means for challenging awards rendered by investor-State tribunals. This confirms that a State-to-State tribunal constituted

[52] 1 SHORTER OXFORD ENGLISH DICTIONARY 709 (5th ed. 2002) [R-109].

under Article VII has no appellate jurisdiction over such awards. As Professor Reisman notes, Articles VI and VII create two distinct tracks of arbitration that "assign[] a different range of disputes exclusively to each of the tracks."

iii. The Treaty's Object and Purpose Further Confirms the Absence of a "Dispute"

The limited scope of Article VII is further confirmed by the Treaty's object and purpose, which first and foremost is "the encouragement and reciprocal protection of investment." Although Article VI serves as the main avenue for resolving disputes concerning a Party's failure to comply with its obligations under the Treaty,[60] Article VII remains a residual procedural mechanism for ensuring Party compliance with the Treaty in limited circumstances. Article VII may be invoked, for example, to resolve a dispute over a Party's non-payment of an investor-State arbitration award in violation of Article VI(6) of the Treaty. It may not be invoked, by contrast, to exercise any form of advisory, appellate or referral jurisdiction, given the express limitations on the Tribunal's contentious jurisdiction.

The ordinary meaning of Article VII, read in context and in light of the Treaty's object and purpose, thus confirms that this Tribunal has jurisdiction only to adjudicate a (1) concrete case alleging a violation of the Treaty by one Party that is (2) positively opposed by the other Party. Ecuador has failed to satisfy either requirement. To find otherwise would contravene the longstanding rule that treaty parties are bound by a compromissory clause, like the one in Article VII, "only within the limits of what can be clearly and unequivocally found in [its] provisions."[62]

…

2. A "Dispute" Requires a "Concrete Case" Alleging a Treaty Violation

Ecuador cannot bring an international claim under the contentious jurisdiction of Article VII, because it cannot establish (and has not alleged) the existence of a "dispute" concerning the United States' failure to comply with the Treaty. There must be, in other words, an *actual controversy* before the Tribunal concerning a Party's alleged breach of the Treaty. A "dispute" must be *concrete* in the sense that one Party claims that the other Party's act or omission has violated its legal rights, thereby warranting judicial relief capable of affecting the Parties' rights and obligations.

This requirement of a "concrete case" concerning an alleged treaty violation has been recognized by nearly every form of international dispute-settlement tribunal, from investor-State to State-to-State tribunals, to protect States "from international litigation that is unnecessary, premature, inadequately motivated, or merely specious."

Ecuador's request is so extraordinary, in fact, that the United States was able to identify only one case that has squarely addressed the question before this tribunal – the Anglo-Italian Conciliation Commission's 1954 decision in the *Dual Nationality Cases* – and that tribunal

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[60] *See* KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 24-30 (2009) [R-11].

[62] *See* Arbitral Decision Rendered in Conformity with the Special Agreement Concluded on December 17, 1939, Between the Kingdom of Sweden and the United States of America Relating to the Arbitration of a Difference Concerning the Swedish Motor Ships *Kronprins Gustaf Adolf* and *Pacific*, *reprinted in* 26 AM. J. INT'L L. 834, 846 (1932) [R-41]. *See also Ambatielos Case* (Greece v. U.K.), 1952 I.C.J. 27, 39 (Preliminary Question of July 1) (expressing "no doubt that in the absence of a clear agreement between the Parties [regarding their consent to be bound], the Court has no jurisdiction to go into all the merits[.]" [R-42]); *Interpretation of Peace Treaties* (Second Phase), 1950 I.C.J. 221, 227 (Advisory Opinion of July 18) (noting that agreements to arbitrate between States "must be strictly construed and can be applied only in the case expressly provided for therein") [R-43].

determined that it lacked jurisdiction.[65] Interpreting a compromissory clause with virtually identical operative language as the one at issue here, the Commission was confronted with a request by the United Kingdom to interpret the meaning of a provision of the underlying peace treaty related to its scope of coverage, outside the context of a concrete case. The Commission concluded that it could never address such legal questions in the abstract, lest it improperly engage in judicial lawmaking. The Commission therefore rejected the United Kingdom's request for an "authoritative" interpretation, concluding:

> An interpretation according to which the Commission would also have the faculty to interpret the [Treaty] in an abstract and general manner, with obligatory effect for all future cases, would run the risk, because it is abusive, of ending in a judgement blemished by excess of power (it would create rules of law, which is not a jurisdictional function, but a legislative function), a very serious position in our case . . . .

If this Tribunal were to address Ecuador's question regarding the meaning of Article II(7) in the abstract, contrary to the requirements of Article VII, it would similarly exceed the boundaries of its judicial function and thrust this Tribunal into general lawmaking under the Treaty.

The International Court of Justice has emphasized the importance of a concrete case for establishing its contentious jurisdiction. …

The same "concreteness" concept is found in the World Trade Organization's dispute settlement system …

Investor-State tribunals similarly condition their jurisdiction on a finding of an actual controversy in a concrete case. …

* * * *

The United States has long expressed views consistent with this unbroken jurisprudence. …

Ecuador itself has recognized that jurisdiction under the Treaty is premised on the existence of an actual controversy. Contrary to the position it now takes here, Ecuador argued to the *Chevron* tribunal that "simply making an arbitration demand stating that a dispute exists is insufficient to invoke the BIT." Ecuador cannot have it both ways…

In this case, Ecuador has failed to establish the existence of a concrete case, as required under Article VII. By its own admission, Ecuador makes no allegation that the United States has failed to comply with the Treaty. Ecuador has stated unequivocally:

> Ecuador has not accused the United States of any wrongdoing. It does not accuse the United States of violating any of its international obligations. It does not seek compensation from the United States. It does not seek an order against the United States.

Instead, Ecuador asks this Tribunal an entirely open-ended question, not connected to any concrete facts: "What precisely are Ecuador's obligations under Article II(7), obligations which it did not understand it was assuming when it signed the BIT with the United States?" Ecuador points not to an actual dispute with the United States, but to a need for guidance in its domestic implementation of the Treaty. According to Ecuador, the Tribunal's interpretation of the Treaty will resolve such open questions as:

- "How is Ecuador to organize its court system to avoid violating its obligations under Article II(7)?"

[65] *Cases of Dual Nationality*, XIV UN REPS. INT'L ARB. AWARDS 27 [R-30].

- "[D]oes Ecuador have to double the number of its judges?"
- "Does it have to survey all civil cases involving foreign nationals and monitor their progress in court?"
- "How aggressively must it act to speed up cases and by what means?"
- "What measure is it required to adopt . . . under Article II(7) that Ecuador never intended to assume or understood that it was undertaking when it entered the BIT?"

The questions Ecuador has put to this Tribunal provide the strongest justification for why the "concrete case" requirement is essential. These questions do not lend themselves to definitive and binding resolution, but rather to an advisory opinion. This Tribunal is not a general advisor to Ecuador on such questions as how many judges it should have or what it should do to increase the speed of adjudication within its domestic judicial system. In view of the complete lack of any alleged breach or other wrongdoing by the United States, this Tribunal should decline Ecuador's invitation to engage in judicial lawmaking, and dismiss Ecuador's request.

3. Because the United States Has Not Positively Opposed any Allegation of Treaty Violation, There Is No "Dispute" Between the Parties

To establish the existence of a "dispute," Ecuador must prove that the Parties are in "positive opposition" to one another in a concrete case involving a breach of the Treaty. Even if Ecuador had claimed that the United States had violated its obligations under the Treaty, Ecuador still could not establish a "dispute," as it could not establish that the Parties are in "positive opposition" over any such claim. It takes two parties to make a treaty, and two parties in disagreement over its interpretation or application to create a dispute.

Ecuador acknowledges that the United States did not affirmatively oppose Ecuador's unilateral interpretation of Article II(7) of the Treaty. Ecuador nonetheless claims that the United States put itself in positive opposition through its silence. Ecuador is mistaken. Silence alone cannot establish positive opposition. It is only when a party's *actions* make it obvious that its views are positively opposed to another party's views that silence might allow an objective determination of positive opposition. Ecuador itself concedes that the United States has taken *no action* whatsoever, and thus has created no positive opposition.

The definition of positive opposition is well established in international jurisprudence: it is a conflict of legal views or interests between two parties.[97] To find positive opposition, a tribunal must make an "objective determination" that "the claim of one party is positively opposed by the other."[98] In most cases, parties put themselves in positive opposition by expressing conflicting views over an alleged breach of a treaty. In two cases, as discussed below, the ICJ found manifest positive opposition in the actions of a party, because those actions clearly showed that it had taken an opposing view with respect to an alleged breach of that party's obligations. In all cases, both parties need to have taken positions on the underlying

[97] *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. (ser. A) No. 2 (Judgment of Aug. 30) [R-4]; *East Timor (Portugal v. Australia)* 1995 I.C.J. 90, 99-100 (Judgment of June 30) (recognizing that a dispute can be between parties as well as persons) [R-55]. *See also* Tomuschat Opinion ¶ 6.

[98] *Interpretation of Peace Treaties* (First Phase), 1950 I.C.J. 65, 74 (Advisory Opinion of Mar. 30) [R-6]; *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, 1962 I.C.J. at 328 [R-5]. *See also East Timor (Portugal v. Australia)*, 1995 I.C.J. 90, 100 (Judgment of June 30) [R-55]; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States*), 1998 I.C.J. 115, 122-23 (Judgment on Preliminary Objections of Feb. 27) [R-56]; *Certain Property (Liechtenstein v. Germany)*, 2005 I.C.J. 6, 18 (Judgment on Preliminary Objections of February 10) [R-7].

matter, expressly or impliedly, and those positions must contradict one another. One party cannot force another into positive opposition; nor can one party unilaterally create a dispute.

i. "Positive Opposition" Requires that Parties Take Contradictory Positions on Obligations at Issue in a Concrete Case

Although Ecuador asserts that "[t]he existence of a dispute can be established by a Party's conduct alone, *including its silence*," the very cases Ecuador cites to support that assertion – *Georgia v. Russia*, *Cameroon v. Nigeria*, and *UN Headquarters* – demonstrate precisely the opposite. In each case, one party had claimed that the other had breached international law obligations owed to that party – a serious allegation calling for a response. This case, by contrast, involves no claim of breach of the treaty by the United States implicating the interpretation or application of Article II(7) and, hence, no requirement to respond to Ecuador's request to confirm its interpretation.

* * * *

ii. Ecuador Cannot Create Positive Opposition Where None Exists

Ecuador cannot unilaterally create "positive opposition" in order to manufacture jurisdiction before this Tribunal. Positive opposition requires an *objective determination* by this Tribunal that one Party's claims of a Treaty breach are refuted by the other Party.[111] It is the stated positions and actions of the parties related to an alleged breach of international law – not a unilateral ultimatum – that can place the parties in positive opposition.

Ecuador claims that the State Department Legal Adviser stated that the United States "will not rule" on Ecuador's request that it agree to Ecuador's interpretation of Article II(7). Even if that were true, however, it would not create positive opposition over the interpretation of Article II(7). In fact, Ecuador concedes that "the U.S. never informed Ecuador that it agreed with Ecuador's interpretation of Article II(7) or, for that matter, that it disagreed with Ecuador's interpretation." Ecuador cannot show that the United States contradicted a claim of treaty violation by Ecuador in diplomatic or public statements, and thus no objective assessment of this statement could lead to the conclusion that the Parties were in positive opposition.

* * * *

Here, … even by Ecuador's account, the Legal Adviser reportedly stated that the United States would not "rule" on Ecuador's request – not that it disagreed with Ecuador's interpretation of Article II(7). The United States, therefore, has not refuted any alleged violation of an obligation under international law, unlike the situation in all cases cited by Ecuador. Ecuador thus cannot demonstrate that the Legal Adviser's statement evidenced positive opposition between the Parties.

* * * *

B. The United States Does Not Owe Ecuador an Obligation to Respond to, Let Alone Confirm, Ecuador's Unilateral Interpretation of the Treaty

Because there is no "dispute between the Parties concerning the interpretation or application of the Treaty," Ecuador seeks to manufacture a dispute by citing to general principles

[111] *Interpretation of Peace Treaties* (First Phase), 1950 I.C.J. at p. 74 [R-6]; *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa),* 1962 I.C.J. at p. 328 [R-5].

of international law. In particular, Ecuador alleges that the principle of "good faith" – the key international legal principle underlying *pacta sunt servanda* – obligated the United States to confirm Ecuador's unilateral interpretation of Article II(7). Ecuador's theory is fundamentally flawed for two reasons.

1. Ecuador Cannot Unilaterally Require the United States to Respond to its Demand for Confirmation of its Interpretation

Ecuador cannot, by fiat, impose an obligation on the United States to respond to its request. Although a State may bind itself under international law by a unilateral act, it may not bind another by that act.[123] Were it otherwise, one party could force another to create treaty mechanisms and obligations to which it did not consent. If accepted here, Professor Tomuschat cautions, Ecuador could "bring into being a specific mechanism not provided for by the treaty itself" and instead allow Ecuador, "at any time, whenever considered necessary and appropriate by it, [to] call upon the United States to pronounce itself on the proper interpretation of any provision of the BIT."

This unbounded power that Ecuador asserts is inconsistent with any notion of mutuality upon which a State's entering into a treaty presumes. Professor Tomuschat observes:

> [Ecuador] does not even contend that its alleged power to require such an authoritative interpretation is limited by any objective criteria. It simply wishes to be able to proceed with its wishes for clarification at its own volition, irrespective of any act of the United States that would have taken a position to the contrary. Under its logic, it would be able to draw the United States into an arbitral proceeding according to its own political determinations, without any regard for the actual practice shown or supported by the United States.

Ecuador's action is not authorized by any provision of the Treaty, any applicable general principle of law, or any established practice of states. It is unprecedented and cannot be the grounds on which this Tribunal can find jurisdiction under Article VII.

2. Nothing in the Treaty Obligates the United States to Respond to Ecuador's Demand for Confirmation of its Interpretation

The text of the BIT, which is the Parties' authentic expression of their mutual intent and understanding, contains no provision obligating the United States to interpret the Treaty beyond the four corners of the text itself. As Professor Tomuschat notes, "[t]he BIT does not provide for such an obligation," and no such obligation can be read into the Treaty.

The only provision in the Treaty under which the United States has committed to engage regarding the meaning of its provisions is Article V, on consultations. Article V states that the United States and Ecuador "agree to consult promptly . . . to discuss any matter relating to the interpretation or application of the Treaty." As Professor Tomuschat has opined, this would have been the proper avenue to see if the Parties could agree to a mutually acceptable interpretive statement.

Even had the United States "promptly" agreed to "consult" and "discuss" any "matter relating to the interpretation or application of the Treaty," upon a request from Ecuador, nothing in Article V would have obligated the United States to respond to Ecuador's demand to confirm its interpretive statement. As *Oppenheim's* observes, "[w]hile consultations must be undertaken

[123] *See Nuclear Tests (Australia v. France)*, Judgment, 1974 I.C.J. REP. 253 (Dec. 20) [R-59]; *Nuclear Tests (France v. New Zealand)*, 1974 I.C.J. 457 (Judgment of Dec. 20) [R-60].

in good faith, they do not give to any of the states involved a right to have its views accepted by the others or to stop them acting in whatever way they propose."[129]

i. "Good Faith" Cannot Expand a Party's Obligations Under a Treaty

Ecuador argues that principles of good faith and *pacta sunt servanda* obligate the United States to respond to its demand for an interpretation. But this argument fails for two reasons. *First*, it is well established in international law that "[t]he principle of good faith is . . . one of the basic principles governing the creation and performance of legal obligations," but "*it is not in itself a source of obligation where none would otherwise exist*."[131] In other words, any obligation to respond must be found in the Treaty. Absent a specific treaty obligation, a State "may not justifiably rely upon the principle of good faith" to support a claim.[132] Here, the Treaty contains no obligation that the United States has failed to carry out in good faith. Ecuador cannot rely on the principle of good faith to create an international obligation where none exists.

The principle of "good faith," moreover, applies to *both* parties to an agreement; it cannot be construed to require one State to agree or disagree with any position proffered by the other. Ecuador, moreover, has an obligation to comport itself in accordance with the principle of good faith. It is hard to find evidence of such good faith, however, in Ecuador's decision to invoke Article VII for purposes of this arbitration just months after having successfully petitioned its own court to declare that provision unconstitutional. Once again, Ecuador cannot have it both ways; if it did not intend to be bound by Article VII, or if it genuinely believed that that provision violated its own domestic constitutional law, it should not have sought to convene this Tribunal.

Second, Ecuador cannot rely on *pacta sunt servanda* to forge an obligation requiring the United States to interpret the Treaty to prevent "any misinterpretation and misapplication" of the BIT "that results in harm" to Ecuador. It is of course true that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[135] But again, Ecuador can point to no obligation that the United States has failed to perform or acted in bad faith. Nor can Ecuador allege that the lack of a response by the United States somehow prevents Ecuador from performing under the BIT.

ii. General International Law Does Not Require a State to Respond to an Interpretative Declaration

Aside from *pacta sunt servanda*, Ecuador has not proffered any international law principle that supports its assertion that the United States must confirm its unilateral statement of interpretation. The reason is simple: there is no such rule. Ecuador cannot make up for the absence of any obligation here on the United States by framing its demand as a request for an interpretation. In essence what Ecuador has presented in its diplomatic note is akin to a unilateral interpretative declaration, coupled with a demand that another State accept it. But as Professor McRae has observed, "[t]here is no duty to respond to [such a unilateral] declaration

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[129] OPPENHEIM'S INTERNATIONAL LAW at § 573 (recognizing that States in negotiations, even when they are obligated to negotiate, "are under no legal obligation to reach agreement.") [R-83].

[131] *Border and Transborder Armed Actions Case (Nicaragua v. Honduras)*, 1988 I.C.J. 69, 105 (Judgment on Jurisdiction and Admissibility of Dec. 20) (emphasis added) [R-62]. *See also* Tomuschat Opinion ¶ 15 (stating that ancillary duties cannot "be derived from the principle of *bona fides*.").

[132] *Land and Maritime Boundary Case (Cameroon v. Nigeria)*, 1998 I.C.J. at ¶ 39 [R-8].

[135] Vienna Convention, art. 26 [R-15]. …

nor is the declaration a threat to or infringement of rights" of the other State.[138] Unilateral interpretative statements generally are "subjective; they express the views of the declaring State . . . but do not deal with the legal effect of the treaty."[139] Nor are they are regulated by international law.[140] Accordingly, international law generally neither compels a State to respond to a demand to agree to one State's unilateral interpretation nor prohibits a State from remaining silent when confronted with such a demand.[141]

* * * *

iii. Treaty Practice Under BITs Does Not Support Ecuador's Unprecedented Actions in this Case

Ecuador's effort to compel the United States, as a treaty partner, to issue an interpretation is unprecedented in the operation of investment treaties over at least the past 50 years. Here, the Tribunal should be guided by State practice and the common habitual pattern adopted under previous treaties. There is no example we know of where a State Party has responded to another Party's demand for an interpretation because it believed it was under an obligation to do so. Nor have we found a treaty that creates such an obligation.

Where the United States and its treaty partners have made express provision for States to offer their unilateral views on the meaning of a provision of an investment treaty, they have created a discretionary rather than a mandatory right. For example, in the context of NAFTA Chapter Eleven, which sets forth each Party's obligations toward the others' investors, "a Party *may* make submissions to a Tribunal on a question of interpretation of this Agreement." The United States' more recent BITs and FTA investment chapters include similar provisions. Often the NAFTA Parties have not expressed views, either jointly or individually, even when invited

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[138] D.M. McRae, *The Legal Effect of Interpretative Declarations*, 49 BRIT. Y.B. INT'L L. 155, 169 (1978) (examining the legal effect of a unilateral interpretative declaration by one State in the context of the reaction of the other State and concluding that they can indicate how a State construes its obligations) (internal quotations and citation omitted) [R-84].

[139] Bruno Simma, *The Work of the International Law Commission at Its Fifty-First Session*, 68 NORDIC J. INT'L L., 293, 319 (1999) (noting that "good practice would suggest that interpretative declarations only be made at certain times, *preferably as specified by treaty*.") (emphasis added) [R-85].

[140] REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SIXTY-THIRD SESSION, Chapter VI, Reservations to Treaties, *Text of the Guide to Practice on the Reservation of Treaties, with Commentaries*, 115, Guideline 1.6.2, commentary 1, *reprinted in* Y.B. INT'L L. COMM'N 2011 ("*ILC Guide to Practice on Reservations to Treaties*") ("The silence of the [ ] Vienna Conventions [on the Law of Treaties] extends a fortiori to interpretative declarations made in respect of bilateral treaties: the Conventions do not mention interpretative declarations in general and are quite cautious insofar as the rules applicable to bilateral treaties are concerned.") [R-19]. The ICJ has concluded that the lack of a prohibition against particular State conduct generally implies that such conduct is in accord with general international law. *See, e.g., Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion of July 22, 2010) ¶¶ 79-84 (holding that Kosovo's declaration of independence was "in accordance with international law" because "general international law contains no applicable prohibition of declarations of independence") [R-65]; *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 247 (Advisory Opinion of July 8) ("State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition.") [R-20].

[141] *See, e.g., ILC Guide to Practice on Reservations to Treaties*, Guideline 1.6.2, commentary 6, 116 (An interpretative declaration "may also be simply intended to inform the partner of the meaning and scope which the author attributes to the provisions of the treaty without, however, seeking to impose that interpretation on the partner, and in this case it is a 'simple interpretative declaration,' which . . . can actually be made at any time"). …

by an investment tribunal to do so. Aside from U.S. practice, in the conduct of investor-State arbitration, unilateral expressions of the meaning of a treaty by non-disputing States Parties are exceedingly rare.

In the same way, where State practice exists, it confirms that States have the discretion, not the obligation, to agree to interpret a treaty jointly. These voluntary joint interpretations – "subsequent agreements," as understood by Article 31(3)(a) of the Vienna Convention – can then become part of the context in which the text of a treaty provision must be construed.

* * * *

In those instances where investment treaties expressly contemplate the issuance of "authoritative" interpretations to clarify the meaning of a treaty, they expressly require the Parties' mutual agreement. The NAFTA Parties, for instance, have given the tripartite Free Trade Commission the authority to issue authoritative, *binding* interpretations of Chapter Eleven, leaving it to the Parties themselves to resolve questions of the meaning of the treaty's obligations if they choose to do so and can agree. Article 1131 of the NAFTA, which also is reflected in the U.S. Model BIT and in recent U.S. free trade agreements, was an innovation when first introduced. Such provisions remain the exception rather than the rule in international practice.

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C. WORLD TRADE ORGANIZATION

1. Dispute Settlement

U.S. submissions in WTO dispute settlement cases are available at *www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement*. The following discussion of a selection of WTO disputes involving the United States is drawn largely from Chapter II, "World Trade Organization," of the 2012 Annual Report of the President of the United States on the Trade Agreements Program ("2012 Annual Report"), available at *www.ustr.gov/about-us/press-office/reports-and-publications/2013/2013-tpa-2012-ar*. WTO legal texts referred to below are available at *www.wto.org/english/docs_e/legal_e/legal_e.htm*. As described below, the WTO Appellate Body issued reports in six disputes in 2012 in which the United States was a party.

a. Disputes brought by the United States

(1) Disputes brought by the United States against China

(i) China—Measures Relating to the Exportation of Various Raw Materials (DS394)

As discussed in *Digest 2009* at 423-24, and Digest 2011 at 371-72, the United States, along with the European Union and Mexico, sought relief at the WTO regarding China's export restraints on certain raw materials (bauxite, coke, fluorspar, magnesium, manganese, silicon metal, silicon carbide, yellow phosphorus, and zinc) that are inputs in the steel, aluminum,

and chemical sectors. The panel established in the dispute issued its final report in 2011, finding China's restraints to constitute a breach of WTO rules.

On January 30, 2012, the Appellate Body affirmed the panel's findings on all significant claims. As described in the 2012 Annual Report (at p. 60):

> In particular, the Appellate Body confirmed that: China may not seek to justify its imposition of export duties as environmental or conservation measures; China failed to demonstrate that certain of its export quotas were justified as measures for preventing or relieving a critical shortage; and the Panel correctly made recommendations for China to bring its measures into conformity with its WTO obligations. The Appellate Body also found that the Panel erred in making findings related to licensing and administration claims, declaring those findings moot and in its legal interpretation of one element of the exception set forth in Article XX(g) of the GATT 1994.
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> The DSB adopted the Appellate Body report, and the panel report as modified by the Appellate Body report, on February 22, 2012. The United States, the European Union, Mexico, and China agreed that China would have until December 31, 2012, to comply with the rulings and recommendations.

(ii) China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States (DS414)

As discussed in *Digest 2010* at 475-78, and *Digest 2011* at 372, the United States requested consultations with China and then requested the establishment of a panel relating to China's imposition of antidumping ("AD") duties and countervailing duties ("CVD") on imports of grain oriented flat rolled electrical steel ("GOES") from the United States. As described in the 2012 Annual Report (at p. 61), the WTO dispute settlement process was completed in 2012, with the panel issuing its report, the appellate body deciding the appeal, and China announcing its intention to comply with the recommendations of the Dispute Settlement Body ("DSB"):

> In June 2012, the Panel issued its report, upholding U.S. claims that China had breached a number of substantive and procedural obligations under the WTO Agreement in imposing AD and CVD duties on GOES from the United States. The Panel found that China initiated the countervailing duty investigation with respect to several alleged programs based on insufficient evidence, failed to provide non-confidential summaries of submissions containing confidential information, calculated the subsidy rates for U.S. companies in a manner unsupported by the facts, calculated the "all others" subsidy rate and dumping margin without a factual basis, failed to disclose essential facts and failed to explain the calculation of the "all others" subsidy rate and dumping margin, and made unsupported findings that U.S. exports caused injury to China's domestic industry.

In July 2012, China filed a notice of appeal challenging certain aspects of the panel report. The Appellate Body held a hearing in August 2012. In October 2012, the Appellate Body issued its report, and rejected all of China's claims on appeal.

In November 2012, the Dispute Settlement Body adopted the panel and Appellate Body reports. The same month, China announced its intention to implement the DSB recommendations and rulings in the dispute, and stated that it would need a reasonable period of time in which to do so.

(iii) China – Certain Measures Affecting Electronic Payment Services (DS413)

A panel was established in 2011 to hear the dispute brought by the United States concerning certain restrictions and requirements maintained by China pertaining to electronic payment services ("EPS") for payment card transactions and the suppliers of those services. See *Digest 2011* at 372. The panel issued its report on May 25, 2012, finding in favor of the United States on significant issues. China did not appeal any of the panel's findings. The panel's report was adopted by the DSB and China agreed to implement the DSB's recommendations and rulings by July 31, 2013.

(2) Dispute brought by the United States against the European Union: Measures Affecting Trade in Large Civil Aircraft (DS316)

As discussed in *Digest 2011* at 373, in 2011, the United States requested consultations regarding the EU's notification of compliance with the DSB ruling in this long-standing dispute and also requested authorization from the DSB to impose countermeasures. The United States and the EU held consultations on January 13, 2012, but failed to reach agreement. On March 30, 2012, the United States requested that the DSB refer the matter to the original panel pursuant to Article 21.5 of the DSU. In April 2012, the DSB referred the matter to a compliance panel that included the members of the original panel. Also in January 2012, the United States and the EU agreed that arbitration be suspended regarding the suspension of concessions requested by the United States pending the conclusion of the compliance proceeding.

b. Disputes brought against the United States

(1) United States—Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products (DS381)

In January 2012, both Mexico and the United States notified the DSB of their appeals of certain aspects of the report issued in 2011 by the WTO panel established to examine measures concerning the importation, marketing, and sale of tuna products in the United States. For background on this dispute, including a summary of the panel report issued in 2011, see *Digest 2011* at 375-76. As summarized in the 2012 Annual Report (at pp. 91-92), the Appellate Body circulated its report on May 16, 2012, which:

- upheld the panel's finding that the measure at issue is a technical regulation;
- reversed the panel's finding that the U.S. measure is not inconsistent with the national treatment provisions of Article 2.1 of the TBT Agreement;
- reversed the panel's finding that the measure at issue is more trade restrictive than necessary and therefore inconsistent with Article 2.2 of the TBT Agreement; and
- reversed the panel's finding that the AIDCP is a relevant international standard within the meaning of Article 2.4 of the TBT Agreement.

On June 13, 2012, the DSB adopted the Appellate Body report, and the panel report as modified by the Appellate Body report. On September 17, 2012, the United States and Mexico notified the DSB that they agreed that the United States would implement the recommendations and rulings of the DSB no later than July 13, 2013.

(2) United States – Certain Country of Origin Labeling (COOL) Requirements (Canada) (DS384) and (Mexico) (DS386)

As discussed in *Digest 2011* at 376-77, the panel issued its report in 2011 on disputes brought separately by Canada and Mexico challenging U.S. country of origin labeling ("COOL") requirements. In 2012, the United States, Mexico, and Canada each appealed certain findings by the panel. The 2012 Annual Report (at pp. 94-95) summarizes the conclusions of the Appellate Body:

> The Appellate Body agreed with the United States that the panel's Article 2.2 analysis was insufficient. Moreover, the Appellate Body found that, due to the absence of relevant factual findings by the panel and the lack of sufficient undisputed facts on the record, the Appellate Body was unable to complete the analysis under Article 2.2, and Canada's claim must fail.
>
> With regard to Article 2.1, the Appellate Body upheld the panel's finding that the COOL measure was inconsistent with the national treatment obligation, albeit with different reasoning. The Appellate Body first upheld the panel's finding that COOL measure has a disparate impact on Canadian and Mexican livestock. However, the Appellate Body reasoned that the analysis could not end there but that the panel should have analyzed whether the detrimental impact stemmed exclusively from a legitimate regulatory distinction. The Appellate Body found that the COOL measure did not as it imposes costs that are disproportionate to the information conveyed by the labels. Having upheld the panel's Article 2.1 finding, the Appellate body found it unnecessary to make findings on Mexico's and Canada's appeals under Articles III:4 and XXIII:1(b) of the GATT 1994.
>
> On December 4, 2012, a WTO arbitrator determined that the reasonable period of time ("RPT") for the United States to comply with the DSB recommendations and rulings is 10 months, meaning that the RPT ends on May 23, 2013.

(3) United States – **Measures Affecting Trade in Large Civil Aircraft; Recourse to Article 21.5 of the DSU** (DS353)

On March 12, 2012, the Appellate Body issued its report in the dispute regarding alleged subsidies to large civil aircraft, which was initiated by the European Union in 2004. The excerpt below from the 2012 Annual Report (at pp. 88-90) summarizes the findings of the Appellate Body and other developments in the case in 2012.

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On March 12, 2012, the Appellate Body circulated its report with the following findings:

- The panel erred in its analysis of whether NASA and DoD research funding was a subsidy. However, the Appellate Body affirmed the panel's subsidy finding with regard to NASA research funding and DoD research funding through assistance instruments on other grounds. The Appellate Body declared the panel's findings with regard to DoD procurement contracts moot, but made no further findings.
- The panel correctly found that NASA and DoD rules regarding the allocation of patent rights were not, on their face, specific subsidies. The Appellate Body found that [the] panel should have addressed the EU allegations of de facto specificity, but was unable to complete the panel's analysis of this issue.
- The panel correctly found that Washington state tax measures and industrial revenue bonds issued by the city of Wichita were subsidies.
- The panel erred in concluding that the WTO Dispute Settlement Body was not obligated to initiate information-gathering procedures requested by the EU, but this error did not require any modification in the panel's ultimate findings.
- The panel correctly concluded that NASA research funding and DoD funding of research through assistance instruments caused adverse effects to Airbus.
- The panel erred in analyzing the effects of the Wichita industrial revenue bonds separately from other tax measures. The Appellate Body grouped the Wichita measure with the other tax benefits.
- The panel erred in concluding that Washington state tax benefits, in tandem with FSC/ETI tax benefits, caused lost sales, lost market share, and price depression of the Airbus A320 and A340 product lines. The Appellate Body found that the evidence before it justified a finding of lost sales only in two instances, involving 50 A320 airplanes.

On March 23, 2012, the DSB adopted its recommendations and rulings in this dispute. At the following DSB meeting, on April 13, 2012, the United States informed the DSB of its intention to implement the recommendations and rulings of the DSB in connection with this matter. On September 23, 2012, the United States notified the DSB that it has brought the challenged measures into compliance with the recommendations and rulings of the DSB.

On September 25, 2012, the EU requested consultations regarding the U.S. notification. The United States and the EU held consultations on October 10, 2012. On October 11, 2012, the EU requested that the DSB refer the matter to the original panel pursuant to Article 21.5 of the DSU. The DSB did so at a meeting held on October 23, 2012. On October 30, 2012, the

compliance panel was composed with the members of the original panel: Mr. Crawford Falconer, Chair; and Mr. Francisco Orrego Vicuña and Mr. Virachai Plasai, Members.

On September 27, 2012, the EU requested authorization from the DSB to impose countermeasures. On October 22, 2012, the United States objected to the level of suspension of concessions requested by the EU, and the matter was referred to arbitration pursuant to Article 22.6 of the DSU. On November 27, 2012, the United States and the EU each requested that the arbitration be suspended pending the conclusion of the compliance proceeding.

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(4) United States—Clove Cigarettes (DS 406)

The Appellate Body also issued a decision in a dispute initiated by Indonesia in 2010 relating to the regulations in the U.S. that ban the sale of clove cigarettes. The 2012 Annual Report (at pp. 96-97) summarizes the findings of the Appellate Body:

> The United States appealed the Panel Report's finding with respect to Article 2.1 of the TBT Agreement in January 2012, and a hearing was held in February. The WTO Appellate Body report affirmed the Panel Report's finding that the U.S. measure is inconsistent with Article 2.1 of the TBT Agreement.
>
> With respect to Indonesia's claims concerning the U.S. process for adopting the ban, the Panel found in favor of the United States on all of these claims, with two exceptions. The Panel found that the United States should have notified the ban to the WTO prior to it becoming U.S. law and should have waited six months until enforcing the ban instead of the three months the law provided for. The United States appealed the latter finding, and the Appellate Body affirmed the Panel's finding.
>
> The DSB adopted the Appellate Body and Panel Reports on April 24, 2012. At the following DSB meeting on May 24, 2012, the United States notified the DSB of its intention to implement the recommendations and rulings of the DSB. The United States and Indonesia agreed that the reasonable period of time for the United States to implement the recommendations and rulings of the DSB would end on July 24, 2013.

(5) Zeroing

As discussed in *Digest 2010* at 487-90, and *Digest 2011* at 377, the United States has taken steps to comply with findings adopted by the DSB in several disputes challenging the U.S. practice of "zeroing" in antidumping administrative reviews. In 2012, the United States resolved the "zeroing" disputes brought by the European Union and Japan. As part of this resolution, the U.S. Department of Commerce published in the Federal Register on February 14, 2012 its final modification to its methodology. 77 Fed. Reg. 8101 (Feb. 14, 2012). As a result of the resolution of the disputes, the EU and Japan withdrew their requests for further proceedings and the arbitrations on the level of suspensions concluded without the issuance of reports.

2. Russia: WTO Accession and Extending Normal Trade Relations

The *Wall Street Journal* published an op-ed by Secretary Clinton on June 20, 2012 in which she urged Congress to respond to Russia's accession to the WTO by terminating the application of the Jackson-Vanik Amendment and extend "permanent normal trading relations" to Russia. Secretary Clinton's piece is excerpted below and is also available at *www.state.gov/r/pa/prs/ps/2012/06/193480.htm*. On December 6, 2012 the U.S. Senate passed a bill to terminate the application of Jackson-Vanik to both Russia and Moldova. See State Department press statement, available at *www.state.gov/r/pa/prs/ps/2012/12/201640.htm*. The House of Representatives had passed a bill to do likewise on November 16, 2012.

President Obama issued a proclamation extending normal trade relations treatment to Russia and Moldova on December 20, 2012. Daily Comp. Pres. Docs. 2012 DCPD No. 00960, pp. 1-2 (Dec. 20, 2012).

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* * * *

Later this summer, Russia will join the World Trade Organization (WTO) in the culmination of a process that began nearly two decades ago. This is good news for American companies and workers, because it will improve our access to one of the world's fastest-growing markets and support new jobs here at home.

U.S.-Russian bilateral trade isn't reaching anything close to its full potential today. While that trade has increased over the past few years, America's exports to Russia still represent less than 1% of our global exports. Given the potential for expanding these links, Russia's WTO membership will be a net benefit for our economy.

But there is one obstacle standing in the way. American businesses won't be able to take advantage of this new market opening unless Congress terminates the application of the Jackson-Vanik Amendment and extends "permanent normal trading relations" (PNTR) to Russia.

Jackson-Vanik, which restricts U.S. trade with countries that limit their people's emigration rights, was adopted by Congress in the early 1970s to help thousands of Jews leave the Soviet Union. It long ago achieved this historic purpose.

Now it's time to set it aside. Four decades after the adoption of this amendment, a vote to extend permanent normal trading relations to Russia will be a vote to create jobs in America. Until then, Russia's markets will open and our competitors will benefit, but U.S. companies will be disadvantaged.

Extending permanent normal trading relations isn't a gift to Russia. It is a smart, strategic investment in one of the fastest growing markets for U.S. goods and services. It's also an investment in the more open and prosperous Russia that we want to see develop.

As the demonstrations across Russia over the past six months make clear, the country's middle class is demanding a more transparent and accountable government, a more modern political system, and a diversified economy. We should support these Russian efforts.

When Russia joins the WTO, it will be required—for the first time ever—to establish predictable tariff rates, ensure transparency in the publication and enactment of laws, and adhere to an enforceable mechanism for resolving disputes. If we extend permanent normal trading

relations to Russia, we'll be able to use the WTO's tools to hold it accountable for meeting these obligations.

The Obama administration is under no illusions about the challenges that lie ahead. WTO membership alone will not suddenly create the kind of change being sought by the Russian people. But it is in our long-term strategic interest to collaborate with Russia in areas where our interests overlap.

Already our work together over the past three years has produced real results, including the New Start Treaty to reduce strategic nuclear weapons, an agreement on civilian nuclear cooperation, military transit arrangements to support our efforts in Afghanistan, and cooperation on Iran sanctions. With permanent normal trading relations, we would add expanded trade to the list.

To be sure, we have real differences with Russia. We disagree fundamentally about the situation in Georgia. On Syria, we are urging Russia to push Bashar al-Assad to implement former U.N. Secretary-General Kofi Annan's six-point plan, end the violence, and work with the international community in promoting a transition.

In addition, President Obama and I have clearly expressed our serious concerns about human rights in Russia. And we have taken steps to address these challenges, including support for programs that promote human rights, rule of law, and civil society there. We have strengthened ties between nongovernmental organizations in both countries, from political activists to groups working for women's rights. Following the tragic death of Sergei Magnitsky, a lawyer who blew the whistle on official corruption, we imposed restrictions to ensure that no one implicated in this crime can travel to the United States. We are continuing to work with Congress on addressing these issues.

Some argue that continuing to apply Jackson-Vanik to Russia would give us some leverage in these areas of disagreement. We disagree—and so do leaders of Russia's political opposition. They have called on the U.S. to terminate Jackson-Vanik, despite their concerns about human rights and the Magnitsky case. In fact, retaining Jackson-Vanik only fuels more anti-American sentiment in Russia.

Russia's membership in the WTO will soon be a fact of life. Failing to extend permanent normal trading relations will not penalize Russia, nor will it provide a lever with which to change Moscow's behavior. It will only hurt American workers and American companies. By extending those trading relations, we can create new markets for our people and support the political and economic changes that Russia's people are demanding. These reforms will ultimately make Russia a more just and open society as well as a better partner over the long term for the U.S.

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3. Other WTO Developments

On December 10, 2012, the General Council of the WTO approved Tajikistan's accession. See *www.wto.org/english/news_e/news12_e/acc_tjk_10dec12_e.htm*. Tajikistan applied for membership in 2001. Tajikistan was on track to become the 159th member of the WTO upon completion of its domestic ratification process within the time frame prescribed by the WTO.*

* Editor's note: Tajikistan became the 159th member of the WTO on March 1, 2013.

D. INVESTMENT TREATIES AND AGREEMENTS

1. Revised 2012 Model Bilateral Investment Treaty

On April 20, 2012, the U.S. Department of State and the Office of the U.S. Trade Representative announced the conclusion of the Obama Administration's review of the U.S. model bilateral investment treaty ("BIT") and the release of the revised 2012 model BIT. The 2012 model BIT is available at *www.state.gov/e/eb/ifd/bit/index.htm*. An April 20, 2012 State Department media note, available at *www.state.gov/r/pa/prs/ps/2012/04/188198.htm*, summarizes the changes made in the 2012 model BIT:

> Like the predecessor 2004 model BIT, the 2012 model BIT continues to provide strong investor protections and preserve the government's ability to regulate in the public interest. The Administration made several important changes to the BIT text so as to enhance transparency and public participation; sharpen the disciplines that address preferential treatment to state-owned enterprises, including the distortions created by certain indigenous innovation policies; and strengthen protections relating to labor and the environment.

The April 20 media note also provides background on the use of the U.S. model BIT:

> A BIT is an international agreement that provides binding legal rules regarding one country's treatment of investors from another country. The United States negotiates BITs on the basis of a high-standard "model" text that provides investors with improved market access; protection from discriminatory, expropriatory, or otherwise harmful government treatment; and a mechanism to pursue binding international arbitration for breaches of the treaty. High-standard BITs, such as those based on the U.S. model, improve investment climates, promote market-based economic reform, and strengthen the rule of law. The United States has more than 40 BITs in force with countries around the world, and the investment chapters of U.S. free trade agreements (FTAs) contain substantially similar rules and protections. USTR and the Department of State co-lead the U.S. BIT program.

2. Termination of the BIT with Bolivia

Effective June 10, 2012, the Treaty Between the Government of the United States of America and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment ("bilateral investment treaty" or "BIT") ceased to have effect. 77 Fed. Reg. 30,584 (May 23, 2012). The Government of Bolivia provided notice of termination pursuant to the BIT on June 10, 2011. According to the BIT's terms, termination takes effect one year from the date of such notice. The BIT will continue to apply for another 10 years to covered investments existing at the time of termination. The BIT was signed in Santiago, Chile on April 17, 1998, and

entered into force on June 6, 2001. The BIT provided protections to cross-border investment between the two countries and the option to resolve investment disputes through international arbitration.

3. U.S.-EU Statement on Shared Principles for International Investment

On April 10, 2012, the United States and the EU announced their development of Shared Principles for International Investment. These principles are available at *www.ustr.gov/webfm_send/3337*. A joint statement issued by the State Department and the U.S. Trade Representative, available at *www.state.gov/r/pa/prs/ps/2012/04/187645.htm*, describes the principles:

> U.S. Cabinet-level principals and EU commissioners attending a Transatlantic Economic Council meeting on November 29, 2011, urged that a joint set of international investment principles be developed to strengthen our collaborative efforts to foster open investment policies worldwide. These principles would guide the United States and EU and the governments of third countries in developing future investment policies. The United States looks forward to working with the EU to promote the principles around the world, including through the G8 Deauville Partnership with countries in the Middle East and North Africa (MENA) region.
>
> The principles embody a number of shared core values, including a commitment to open and non-discriminatory investment policies, a level competitive playing field, strong protections for investors and their investments, neutral and binding international dispute settlement, strong rules on transparency and public participation, responsible business conduct, and narrowly-tailored reviews of national security considerations. The joint statement recognizes that governments can fully embrace these principles without compromising their ability to regulate in the public interest.

E. TRADE AGREEMENTS AND TRADE-RELATED ISSUES

1. Trade Legislation and Trade Preferences

a. Generalized System of Preferences

On March 26, 2012, President Obama issued a proclamation modifying duty-free treatment under the Generalized System of Preferences ("GSP") program for Argentina and South Sudan, as well as taking other actions related to trade preferences. Daily Comp. Pres. Docs. 2012 DCPD No. 00220, pp. 1-5 (Mar. 26, 2012); 77 Fed. Reg. 18,899 (Mar. 29, 2012). Congress created the GSP program in the Trade Act of 1974, 19 U.S.C. 2461 et seq. ("the 1974 Act"), to help developing countries expand their economies by allowing certain goods to be imported into the United States duty free. The President determined that Argentina's designation as a GSP beneficiary developing country should be suspended, in accordance with sections 502(b)(2)(E) and 502(d)(2) of the 1974 Act, because Argentina "has not acted

in good faith in enforcing arbitral awards in favor of United States citizens or a corporation, partnership, or association that is 50 percent or more beneficially owned by United States citizens." In the same proclamation, President Obama also designated South Sudan as a GSP beneficiary developing country and a least-developed beneficiary developing country pursuant to section 502(a) of the 1974 Act.

On June 29, 2012, President Obama made additional determinations under the GSP program. First, the President determined that Senegal should be added to the GSP program's list of least-developed beneficiary developing countries, in accordance with section 502(a)(2) of the 1974 Act. Daily Comp. Pres. Docs. 2012 DCPD No. 00527, p. 1 (June 29, 2012). Second, he determined that both Gibraltar and the Turks and Caicos Islands have become high income countries as defined by the World Bank and, in accordance with section 502(e) of the 1974 Act, would no longer be eligible for trade benefits as beneficiary developing countries under the GSP program after January 1, 2014. Daily Comp. Pres. Docs. 2012 DCPD No. 00526, p. 1 (June 29, 2012).

On December 20, 2012, President Obama determined , pursuant to section 502(e) of the Trade Act of 1974, that the Federation of Saint Kitts and Nevis has become a "high-income" country and therefore terminated its designation as a beneficiary developing country for purposes of the GSP, effective January 1, 2014. Daily Comp. Pres. Docs. 2012 DCPD No. 00961, p. 1 (Dec. 20, 2012).

b. African Growth and Opportunity Act

By proclamation dated December 20, 2012, President Obama designated South Sudan as "an eligible sub-Saharan African country and as a beneficiary sub-Saharan African country" under the African Growth and Opportunity Act, title I of Public Law 106–200 ("AGOA"). Daily Comp. Pres. Docs. 2012 DCPD No. 00961 (Dec. 20, 2012). In the same proclamation, President Obama determined that Mali and Guinea-Bissau "are not making continual progress in meeting the requirements" of eligibility as beneficiary sub-Saharan African countries and therefore terminated their designations as such under AGOA, effective January 1, 2013. *Id*.

2. Arbitration and Related Actions Arising from the Softwood Lumber Agreement

On January 23, 2012, the governments of the United States of America and Canada agreed to extend for two years, until October 12, 2015, the 2006 Softwood Lumber Agreement Between the Government of the United States of America and the Government of Canada ("SLA"). The agreement extending the SLA is available at *www.ustr.gov/webfm_send/3255*. The text of the SLA is available at *www.state.gov/documents/organization/107266.pdf* and amendments and annexes are available at *www.state.gov/documents/organization/107267.pdf*. See *Digest 2006* at 762-63 for an overview of the SLA.

The United States has availed itself of the dispute settlement provisions under the SLA in three separate arbitration proceedings.** Documents related to these proceedings are available at *www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/2006-softwood-lumber-agreement*.

Of the three aforementioned proceedings, only one was outstanding at the beginning of 2012. One of the disputes was resolved by the 2009 award of a London Court of International Arbitration ("LCIA") tribunal. See *Digest 2009* at 442-44. Another was resolved by the 2011 award of an LCIA tribunal. See *Digest 2011* at 387. The third dispute, Case No. 111790, relates to the underpricing of timber harvested from public lands in the Interior region of British Columbia, about which the United States requested arbitration at the LCIA on January 18, 2011. On January 5, 2012, the United States submitted the non-confidential version of its Reply in the arbitration, excerpted below (with some footnotes omitted) and available at *www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/2006-softwood-lumber-agreement*. The excerpts below include parts of the introduction, which summarizes the entire brief, and a portion of the liability section arguing that circumstantial evidence suffices under the SLA and international law. On July 26, 2012, the LCIA issued the non-confidential version of its award in the case, dismissing the U.S. claims in their entirety. The award is available at *www.international.gc.ca/controls-controles/assets/pdfs/softwood/111790.pdf*.

* * * *

1. This case is about Canada's longstanding practice of selling underpriced timber affected by the mountain pine beetle ("MPB timber") to softwood lumber producers. In the 2006 Softwood Lumber Agreement ("SLA"), the United States and Canada agreed to a regime of Export Measures that Canada administers internally to control its exports of softwood lumber into the United States. The SLA also grandfathered a newly-reformed timber grading and pricing system that British Columbia ("BC") had put into place for the BC Interior just months before the SLA was signed. Under these reforms, BC is supposed to grade and sell MPB timber according to its suitability to make lumber and not automatically sell it for minimum stumpage as it had done before. After applying the reforms for the first six months of the SLA, BC responded to the collapse of the North American housing market by assisting its softwood lumber producers through the old practice of selling MPB timber for minimum stumpage. In effect, it is partially reimbursing the softwood lumber producers for their payment of export charges under the SLA regime. This offsets the Export Measures in the SLA, and, as a result, Canada has circumvented the Agreement. The United States is entitled to a remedy that accounts for these benefits.

2. Before 2006, BC had sold all MPB timber for the minimum stumpage fee simply because it was dead and dry. Given the MPB epidemic then facing the BC Interior, however, BC decided in April 2006 to reform its timber grading and pricing system to recognize, for the first

** Editor's note: An additional proceeding brought by Canada, Case No. 91312, related to remedy issues flowing from the liability award in Case No. 7941 and was heard by the same tribunal as Case No. 7941.

time, that dead and dry logs harvested from trees killed by MPB retain significant value as a source of lumber. These reforms would allow the provincial government to obtain more revenue from the sale of MPB timber.

3. Under the new system, BC would price and sell all timber harvested from Crown forests based on its suitability for lumber, not, as before, on whether it was harvested from trees that were live or dead and dry. To measure lumber suitability, BC would apply the "50/50 rule" to timber, regardless of whether it was dead and dry; it would grade timber that was generally suitable for lumber as sawlog "Grade 1" or "Grade 2;" and it would sell it at the price generated by BC's Market Pricing System ("MPS"). The Grade 1 and Grade 2 stumpage prices would specifically take into account the extent of any MPB damage in a given stand of trees and would fluctuate depending on the amount of MPB damage. By contrast, BC would grade timber that was not generally suitable for lumber as "lumber reject" Grade 4 and would sell it at the flat rate of C$0.25 per cubic meter. In short, under the reformed system, the log's usability for lumber would determine whether BC would command stumpage for a sawlog quality log at the variable rate, or whether it would command stumpage for a lumber reject log at the fixed minimum rate of C$0.25 per cubic meter. In announcing the reforms, BC predicted that stumpage fees for MPB timber would increase and explained that the new system would better reflect market conditions.

4. In the SLA, the United States agreed to have this newly-reformed provincial timber pricing system, among others, grandfathered by the Agreement. Canada, in turn, agreed that BC (or any other province) could change its timber pricing system but only if the change maintained or improved the extent to which the system reflected market conditions.

5. The United States has honored its commitments in the SLA (relinquishing US$5 billion in collected duties and refraining from invoking certain domestic trade remedies), but Canada has not. The reforms worked as BC had predicted in the months after the Agreement took effect, but in 2007, just six months after the parties entered into the Agreement, BC began to misgrade as Grade 4 timber that was suitable for lumber and should have passed the 50/50 rule, and then sell that timber at the flat minimum rate of C$0.25 per cubic meter. BC's action of selling misgraded public timber that should have been graded as Grade 1 or Grade 2 for the flat minimum stumpage rate has provided a tremendous benefit to lumber producers. We know this because BC's own data show that dead and dry timber during the very same timeframe was not only suitable for merchantable lumber, but also, in fact, was manufactured into merchantable lumber. We also know this because BC's lumber output emerging from the mills reflected percentages of merchantable lumber that are entirely inconsistent with the amount of Grade 4 timber going into the mills. It circumvents the SLA for BC to sell lumber- suitable MPB timber for the Grade 4 "lumber reject" stumpage rate.

6. To meet its burden of proof, the United States demonstrated in its Statement of Case that any decline in timber quality due to MPB accounts for no more than a very small portion of the otherwise substantial increase in Grade 4 that started in 2007 and continues to this day. By underpricing these logs, Canada has provided its softwood lumber producers the benefit of a primary input for their products for a price much lower than dictated by the system grandfathered by the SLA. Selling timber for less than that required by the provincial pricing system constitutes an action taken on the part of Canada or one of its provinces. According to Article XVII, when Canada or one of its provinces takes an action that provides a grant or benefit to softwood lumber producers, that action circumvents the Agreement, subject to limited exceptions that do not apply here.

7. Canada's response in its Statement of Defence is two-fold. First, Canada attempts to elevate the claimant's burden of proof far beyond anything required by the terms of the SLA. It contends that the United States has not proven any actual underpricing because it relies on circumstantial evidence and does not identify any action by BC, and that, to the extent the United States identifies specific actions, it has not proven that they directly caused any misgrading. Second, Canada offers one—and only one—explanation for the sudden rise in Grade 4, namely an abrupt shift in the harvest of longer-dead MPB timber, a singular explanation which Canada vows to prove, but wholly fails to prove. In fact, the new data that Canada itself provides establishes that the rise in Grade 4 has been due to a province-wide shift in grading practices and policy to divert more MPB timber to Grade 4, which BC has been selling at the minimum stumpage fee ofC$0.25 per cubic meter. By the end of the Statement of Defence, Canada leaves the Tribunal with nothing but a single, unproven cause for the increase of Grade 4, built on a series of disconnected and implausible contentions. These allow for no other conclusion but that Canada has breached the SLA.

8. Canada's first line of attack is to claim that the United States has failed to identify any direct evidence of an action by Canada and that circumstantial evidence is insufficient to meet its burden of proof. Presumably Canada means that, to establish a breach in this case, the SLA requires the United States to present to the Tribunal individual logs with their assigned grades and an independent laboratory assessment of the volume of merchantable lumber that could be derived from those logs. But Canada fails to identify any language in the SLA requiring any particular form of evidence as the exclusive means of proving a circumvention under Article XVII. More importantly, the United States would never have access to direct evidence of systemic misgrading of logs because that data is maintained by Canadian mills; circumstantial evidence is the only type of evidence that could ever prove its claim.

9. It is well-established under international law that circumstantial evidence is sufficient to prove a claim particularly where other evidence is unavailable. Here the circumstantial evidence is overwhelming that BC is selling underpriced timber to Canadian softwood lumber producers. …

10. In its second line of attack, Canada provides the single, unproven cause for• the rise in Grade 4—a sudden shift in the harvesting of longer-dead MPB timber. Canada does not so much as deny that BC has resumed pricing MPB timber at a salvage rate as defend it. According to Canada, BC is grading the MPB timber as Grade 4 because it has been dead and dry for more than two years and thus is of poor quality. Canada completely ignores that BC enacted the 2006 reforms specifically to address BC's historical underpricing of MPB timber, and that the goal of the reforms was to cease pricing timber based solely on whether it was dead and dry. By pricing timber based on how long it had been dead and dry, Canada essentially concedes that BC's April 2006 reforms grandfathered by the SLA abruptly became all for naught, just months after the SLA went into effect.

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17. In short, to refute the demonstration of misgrading in the Statement of Case, Canada's Statement of Defence provides a string of implausible contentions that all share one common thread—that BC's grading reforms in Apri12006 were all for naught and therefore the grading system grandfathered by the SLA is worthless in ensuring that BC sells MPB timber according to its suitability for lumber. According to Canada, the

50/50 rule has no purpose or effect because it is dissociated from predicting lumber output, as are the scaling conventions. …

18. Given this, Canada has failed to fulfill the promise in its Statement of Defence that it would prove that the rise in Grade 4 timber resulted from an increase in longer-dead logs, logs that—if Canada is to be believed—were unsuitable for lumber production. The only logical explanation for the sharp and sudden rise in Grade 4 in 2007 and beyond is the collapse of the North American housing market and the pressure BC felt to aid its industry. To be sure, lumber producers on both sides of the border have suffered since the housing market collapsed, and BC, in particular, has felt the effects of the MPB. But BC could have addressed the effects of the MPB without circumventing the SLA. The BC timber grading system grandfathered by the SLA accounts for the effects of the MPB by reducing the variable stumpage rates for Grade 1 and Grade 2 logs to reflect diminished value caused by the MPB. But the SLA does not countenance diversion of lumber-suitable MPB timber into Grade 4. Thus, although BC's instincts to aid its suffering lumber industry may be understandable, they do not excuse Canada from its obligations under the SLA. The parties' Agreement should be enforced, and compensatory adjustments to the Export Measures are required to remedy Canada's breach.

19. In this reply, the United States first addresses liability by discussing the most important failure in Canada's defence—Canada's own data—which not only fails to support Canada's contentions, but actually supports the claim in this arbitration. The data show that the share of logs used to produce lumber did not decrease significantly between 2006 and 2009 despite Canada's claim that the volume of longer-dead trees increased significantly during that time period. This is confirmed by Canada's own Mill Studies, despite Canada's sudden disavowals of them.

20. This reply next addresses the purpose and application of the 2006 grading reforms that were grandfathered by the SLA, noting first, that Canada fails to acknowledge that those reforms worked as planned for approximately one year, and explaining in detail how Canada's application of those reforms has been inconsistent with the intent and letter of the reforms themselves. Next, the reply refutes Canada's lone explanation for the sudden rise in Grade 4, and shows that it is implausible, including a discussion of Canada's understanding of salvage economics, the role of technology, and opening of the lumber market to China.

21. Finally, the liability section concludes with a discussion of the other myriad ways in which Canada has encouraged the misgrading that has led to BC's underpricing of timber, including kiln warming, the manipulation of local knowledge, new bucking and sweep policies, and changes to the scaling manual, explaining that Canada has created a false dichotomy in the United States' claim. The claim is that Canada has taken the action of selling underpriced timber that has been misgraded. Canada has accomplished this in a variety of ways, but the breaching action is the selling of timber at less than its value.

22. In the remedy section, the United States first explains the fundamental flaws in Canada's interpretation of the Anti-circumvention provision, addresses the Awards from previous arbitrations under the SLA, and rebuts the arguments made by Canada's expert, Professor Joseph Kalt.

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25. In its Statement of Case, the United States established that Canada's own data show that the increase in Grade 4 was only minimally attributable to the MPB. In response, Canada accuses the United States as having merely an "inferential case" based upon circumstantial evidence.

26. The evidence supporting the claim is indeed circumstantial, as it must be where direct evidence of misgrading is unavailable to the United States. The United States relies on BC's own studies regarding lumber recovery from MPB timber, as well as on the actual amount of merchantable lumber that BC lumber mills produced to conclude that BC underpriced timber that actually satisfied the 50/50 rule. The United States simply does not have access to other types of evidence in this case.

27. International tribunals have consistently and historically accepted circumstantial evidence and inferences, particularly where direct evidence is not the sort that would be available to the claimant.[3] For example, the International Court of Justice has held that inferences of fact and circumstantial evidence were acceptable when the control of one country over evidence would have made it impossible for the claimant to obtain direct proof.[4] Other tribunals have held the same.[5] Although the absence of obtainable direct evidence does not relieve the Claimant of meeting its burden of proof,[6] an exclusive reliance on circumstantial evidence is appropriate when "direct evidence is out of reach,"[7] and when the inference is consistent with the facts and not contradicted by the evidence.

28. Here, Canada contends that the United States has presented only inferences and has not demonstrated that even one log was misgraded. But it would be impossible for the United States to prove that any particular log has been misgraded because BC does not make publicly available, and has not disclosed in this arbitration, data that would allow a fact-finder to directly correlate how a log was graded with its ultimate lumber output. Even though this is the precise information that would be required to demonstrate directly and conclusively that the 50/50 rule has been applied accurately, Canada has never provided the information. Instead, as Canada itself explained when it declined to provide disclosure, only the private mills retain this data. When a government denies access to direct evidence and a claimant has no means to access that evidence, circumstantial evidence is more than sufficient. Canada cannot, on the one hand, withhold direct evidence, and other hand, complain that the claims fail for a lack of that direct evidence. If the United States were unable to rely on circumstantial evidence, Canada would effectively have a blueprint for circumvention simply by failing to collect data on the operation of its pricing systems.

29. In any event, circumstantial evidence establishes the claims presented by the United States, and Canada has failed to rebut this evidence.

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[3] See CA-9 at 322 (BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 322 (1953) ("In cases where direct evidence of a fact is not available, it is a general principle of law that proof may be administered by means of circumstantial evidence."); CA-10 at 259 (MOJTABA KAZAZI, BURDEN OF PROOF AND RELATED ISSUES: A STUDY ON EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 259 (1996) ("Similar to municipal fora, it is the common practice of international tribunals to rely, in each particular case, on reasonable inferences drawn from facts. A common form of inference is draw on the basis of the circumstances and usually is referred to as circumstantial evidence.").

[4] CA-11, 1949 ICJ Reports 4, 18 (Apr. 9), *The Corfu Channel Case* (Merits) (UK v. Albania).

[5] See, *e.g.*, CA-12, *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No.4 (1988), at 124.

[6] CA-14, *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18 (26 July 2007), at14.

[7] CA-15, *Alpha Projektholding GMBH v. Ukraine*, ICSID Case No. ARB/07/16 (Award ofNov. 8, 2010), at 373.

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3. Free Trade Agreements

a. Free trade agreement with Korea

On June 23, 2012, the United States and Korea signed the U.S.-Korea Environmental Cooperation Agreement (ECA), an agreement that had been negotiated in parallel with the United States-Korea Free Trade Agreement ("KORUS"), which was approved by the two countries in 2011. See *Digest 2011* at 392-93. The ECA provides for the two countries to cooperate on environmental protection. See Department of State media note, January 23, 2012, available at *www.state.gov/r/pa/prs/ps/2012/01/182351.htm*.

On March 6, 2012, President Obama issued Proclamation 8783 to implement key provisions of KORUS, such as designating an office to provide administrative assistance to panels established under chapter 22 of the Agreement; modifying duties; proclaiming tariff treatment; adding appropriate rules of origin to the Harmonized Tariff Schedule, etc. 77 Fed. Reg. 14,265 (Mar. 9, 2012).

On March 15, 2012, KORUS entered into force. Secretary Clinton issued a press statement on the day of entry into force, excerpted below, and available at *www.state.gov/secretary/rm/2012/03/185844.htm*:

> Today, the U.S.-Korea Free Trade Agreement (KORUS) enters into force, marking an historic milestone that will lead to even more trade and investment between our two countries. KORUS will provide new market access opportunities in Korea's dynamic trillion dollar economy for U.S. exporters, creating jobs here at home while increasing opportunities for Korean companies in the United States. This agreement is another example of this Administration's commitment to deepening our economic engagement throughout the world.
>
> Not only will the agreement provide a significant economic boost to both of our economies, it will strengthen the U.S. partnership with a key ally in a strategically important region. This is a powerful signal of America's commitment to the Asia Pacific and to securing and sustaining our role as a regional leader and Pacific power. …

b. Free trade agreement with Colombia

The United States-Colombia Trade Promotion Agreement entered into force on May 15, 2012. President Obama signed legislation implementing the trade agreement with Colombia in 2011. See *Digest 2011* at 392-93. Subsequently, the United States and Colombia completed the requisite review of each other's laws and regulations related to implementation of the agreement, and Colombia took steps to fulfill the Action Plan Related to Labor Rights. Prior to entry into force, United States Trade Representative Ron Kirk exchanged letters with officials from the Government of Colombia in which each country confirmed that it had completed its applicable legal requirements and procedures for the

agreement's entry into force. See USTR press release, available at www.ustr.gov/about-us/press-office/press-releases/2012/april/united-states-colombia-set-date-entry-force-us-colom. President Obama issued a proclamation implementing the Colombia agreement on May 14, 2012. Daily Comp. Pres. Docs. 2012 DCPD No. 00370, p. 1-6 (May 14, 2012).

c. Free trade agreement with Panama

The United States-Panama Trade Promotion Agreement was signed in 2007 and President Obama signed legislation implementing the agreement in 2011. See *Digest 2007* at 584-85 and *Digest 2011* at 392-93. On May 2, 2012, the United States and Panama signed an Environmental Cooperation Agreement ("ECA") as a complement to the TPA. The Panama ECA is available at www.state.gov/documents/organization/189455.pdf. A May 2, 2012 State Department media note, available at www.state.gov/r/pa/prs/ps/2012/05/189163.htm, described the ECA:

> The ECA will help ensure that trade and environmental policies work together to provide greater economic opportunities for businesses and workers in the United States and Panama. The ECA recognizes the U.S. and Panama's commitment to expanding cooperation on environmental matters. … [T]he ECA establishes a framework for bilateral cooperation to protect the environment and promote sustainable development in concert with the U.S.-Panama trade and investment relationship.

The Panama TPA entered into force on October 31, 2012, approximately one year after President Obama signed the implementing legislation. During that year, Panama completed changes in its laws necessary to comply with the provisions of the TPA. On October 22, 2012, U.S. Trade Representative Ron Kirk and Panamanian Minister of Commerce and Industry Ricardo Quijano exchanged letters setting October 31, 2012 as the date for entry-into-force of the U.S.-Panama FTA. See USTR press release, available at www.ustr.gov/about-us/press-office/press-releases/2012/october/us-panama-set-date-eif. President Obama issued a proclamation implementing the agreement on October 29, 2012, and the TPA entered into force on October 31, 2012. Daily Comp. Pres. Docs. 2012 DCPD No. 00839, pp. 1-5 (Oct. 29, 2012). Secretary Clinton issued a press statement hailing the entry into force of the agreement, available at www.state.gov/secretary/rm/2012/10/199953.htm.

d. Trans-Pacific Partnership

The fifteenth round of negotiations of the Trans-Pacific Partnership ("TPP") closed on December 11, 2012. USTR issued a press release summarizing the progress in the negotiations, excerpted below and available at www.ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/round-15-newzealand.

* * * *

Canada and Mexico, the United States' two largest export markets, participated in the TPP negotiations for the first time this round. Over the past several months, United States and the other eight TPP countries—Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, and Vietnam—worked with Canada and Mexico as they prepared to join, and both countries contributed to the progress achieved during this 10-day round. Their participation adds significantly to the economic importance of the agreement as well as to establishing TPP as the most promising pathway to promote regional economic integration and to support the creation and retention of U.S. jobs.

During the 10-day round, the 11 delegations concentrated on finding pragmatic and mutually-beneficial outcomes to remaining issues under consideration, while isolating the outstanding challenges to be addressed in the months ahead. They furthered their efforts to close the outstanding legal texts of the 29 chapters of the agreement covering all trade and investment-related issues between them, making progress across the agreement. With most chapters far along, the United States and its TPP partners agreed to work between now and the next round to address the handful of issues still open in them, in such areas as customs, telecommunications, technical barriers to trade, sanitary and phytosanitary issues, and other issues; and to intensify their efforts on the chapters where the volume of remaining work is more substantial.

Through the TPP, the United States is seeking to address new issues that respond to concerns raised by U.S. stakeholders and that will enhance U.S. competitiveness in the 21st century and support the expansion of U.S. exports. The United States also is committed to advancing core U.S. values, such as transparency, labor rights and environmental protection.

Further steps forward were also made on goods, services and investment, and government procurement during this round; leaders of the 11 TPP countries have agreed to comprehensive access to each other's markets in all areas. TPP member delegations continued to advance their work to develop the tariff packages on industrial goods, agriculture, and textiles, as well as on rules of origin promoting the development of supply chains that include companies based in the United States and the other TPP countries. In addition, they discussed their respective market-opening commitments on services and investment, and government procurement. The TPP delegations recognize that further work is needed to meet the Leaders' goals for a high-standard result in the market access negotiations, and were able to set timetables for intersessional work that would ensure additional progress at the next round.

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F. COMMUNICATIONS

1. U.S.—Mexico Telecommunications Agreements

On June 8, 2012, the United States and Mexico signed two agreements concerning the use of radiospectrum along their common border. The first was the Protocol Between the Department of State of the United States of America and the Secretariat of Communications

and Transportation of the United Mexican States Concerning the Allotment, Assignment and Use of the 806-824/851-869 Mhz and 896-901/935-940 Mhz Bands for Terrestrial Non-Broadcasting Radiocommunication Services Along the Common Border. See *www.state.gov/e/eb/rls/othr/telecom/192035.htm*. The second was the Protocol Between the Department of State of the United States of America and the Secretariat of Communications and Transportation of the United Mexican States Concerning the use of the 1850-1915 MHz and 1930-1995 MHz Bands for Personal Communications Services Along the Common Border. See *www.state.gov/e/eb/rls/othr/telecom/192029.htm*. The two countries entered into the Protocols pursuant to the Agreement Between the Government of the United States of America and the Government of the United Mexican States Concerning the Allocation and Use of Frequency Bands by Terrestrial Non-Broadcasting Radiocommunication Services Along the Common Border, signed at Williamsburg, Virginia, June 16, 1994. See *www.fcc.gov/ib/sand/agree/files/mex-nb/framewrk.pdf*.

2. World Radiocommunication Conference

The World Radiocommunication Conference 2012 was held in Geneva, January 23-February 17, 2012, under the auspices of the International Telecommunication Union ("ITU"). The purpose of the conference was to revise the Radio Regulations, the treaty governing the use of radio-frequency spectrum and satellite orbit resources. The World Radiocommunication Conference typically occurs every three to four years, and each conference also provides for technical studies on spectrum issues and sets an agenda for the ensuing conference. The full text of a press briefing in which Ambassador S. Decker Anstrom, the U.S. Representative to the World Radiocommunication Conference, and several senior government officials addressed U.S. priorities on the first day of the Conference is available at *http://geneva.usmission.gov/2012/01/24/u-s-delegation-to-the-world-radiocommunication-conference-press-conference/*. On February 17, 2012, the Conference adopted Final Acts that included revisions to the Radio Regulations treaty addressing evolving global demands for radio-frequency spectrum. See *www.itu.int/net/pressoffice/press_releases/2012/10.aspx*. The United States joined consensus and signed the Final Acts.

3. World Conference on International Telecommunications

From December 3 to December 14, 2012, the ITU held the World Conference on International Telecommunications ("WCIT") in Dubai, United Arab Emirates. The conference reviewed the International Telecommunications Regulations ("ITRs"), a treaty governing routing and termination of telecommunications traffic among nations, which had not been revised since 1988, and also considered a number of non-binding resolutions related to international telecommunications. The United States sought to preserve the ITRs as a high-level treaty, with minimal changes to reflect the liberalization of the international telecommunications market. See State Department media note on the opening of the conference, December 3, 2012, available at *www.state.gov/r/pa/prs/ps/2012/12/201449.htm*. However, the United States disagreed

with a number of problematic amendments to the ITRS, as well as a non-binding resolution on Internet governance, that the conference adopted, and the United States did not sign the WCIT Final Acts. The head of the U.S. delegation, Ambassador Terry Kramer, delivered the U.S. intervention on December 13 explaining U.S. decision not to sign the Final Acts of the WCIT. His statement is excerpted below and available in full at *www.state.gov/r/pa/prs/ps/2012/12/202037.htm*.

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* * * *

…[I]t is with a heavy heart and a sense of missed opportunities that the U.S. must communicate that it is not able to sign the agreement in the current form.

The Internet has given the world unimaginable economic and social benefits during these past 24 years—all without UN regulation. We candidly cannot support an ITU treaty that is inconsistent with a multi-stakeholder model of Internet governance. As the ITU has stated, this conference was never meant to focus on internet issues; however, today we are in a situation where we still have text and resolutions that cover issues on spam and also provisions on internet governance. These past two weeks, we have of course made good progress and shown a willingness to negotiate on a variety of telecommunications policy issues, such as roaming and settlement rates, but the United States continues to believe that internet policy must be multi-stakeholder driven. Internet policy should not be determined by member states but by citizens, communities, and broader society, and such consultation from the private sector and civil society is paramount. This has not happened here.

We live in an interconnected world which is becoming more interconnected with every passing day. We came to this conference with a hope for finding ways to advance our cooperation in the telecommunications arena and continue to believe that's an important goal. We are disappointed that this conference did not fully provide that opportunity, but remain committed to finding other ways to advance on our shared common goals.

* * * *

Ambassador Kramer elaborated on the U.S. position with regard to the WCIT in a December 13, 2012 teleconference from Dubai. His remarks at that teleconference, excerpted below, are available at *www.state.gov/e/eb/rls/rm/2012/202040.htm*.

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* * * *

The United States today has announced that it cannot sign the revised international telecommunication regulations in their current form. Throughout the WCIT, the U.S. and other likeminded governments have worked consistently and unwaveringly to maintain and enhance an environment for success for the international telecommunications and internet sectors. The United States has consistently believed, and continues to believe, that the ITRs should be a high-level document and that the scope of the treaty does not extend to internet governance or content. Other administrations have made it clear that they believe the treaty should be extended to cover those issues, and so we cannot be part of that consensus.

There are a number of issues that were critical to the United States in these negotiations. Number one, recognized operating agencies versus operating agencies. The United States consistently sought to clarify that the treaty would not apply to internet service providers or governments or private network operators.

Number two, spam. The United States position remains that spam is a form of content and that regulating it inevitably opens the door to regulation of other forms of content, including political and cultural speech.

Number three, network security. The United States continues to believe that the ITRs are not a useful venue for addressing security issues and cannot accede to vague commitments that would have significant implications but few practical improvements on security.

Number four, internet governance. In several proposals, it was clear that some administrations were seeking to insert government control over internet governance, specifically internet naming and addressing functions. We continue to believe these issues can only be legitimately handled through multi-stakeholder organizations.

And finally, number five, the internet resolution. This document represented a direct extension of scope into the internet and of the ITU's role therein despite earlier assertions from Secretary General Hamadoun Toure that the WCIT would not address internet issues.

The United States has been willing to engage in good-faith discussions regarding these issues, and we'd like to thank and commend the other delegates for engaging with us. However, while we have consistently maintained our positions regarding the scope of the conference, other administrations have continually filed out-of-scope proposals that unacceptably altered the nature of the discussions, and ultimately of the ITRs.

* * * *

The United States continues to believe that multi-stakeholder governance of the internet, coupled with liberalized telecommunication markets and the growth of network infrastructure in all countries, will accelerate growth and spread of the international telecommunications and internet throughout the world. The U.S. will remain engaged in a global dialogue on the role of governments and other stakeholders in the growth and development of international telecommunications and the internet sectors. This conversation will not be over when WCIT-12 ends. Rather, the discussion will continue for many months and years.

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G. OTHER ISSUES

1. Committee on Foreign Investment in the United States

The Committee on Foreign Investment in the United States ("CFIUS") is an interagency committee, originally created by Executive Order 11858 (May 7, 1975), to oversee the national security implications of foreign investment in the U.S. economy. The Foreign Investment and National Security Act of 2007 ("FINSA"), Pub. L. No. 110-49, 121 Stat. 246, amended § 721 of the Defense Production Act of 1950 ("DPA"), 50 U.S.C. App. § 2170, under which the President and the Committee review foreign acquisitions. See *Digest 2007*

at 601-05. Executive Order 13456 (January 23, 2008) further amended Executive Order 11858 by, among other things, adding executive branch members to CFIUS and specifying procedures for CFIUS reviews. See *Digest 2008* at 593-600.

In 2012, CFIUS took under consideration the national security implications of an acquisition by Ralls Corporation, a Chinese-owned entity, of certain wind farm project companies located in Oregon, within or in the vicinity of restricted air space at a U.S. Navy weapons system facility. On September 28, 2012, President Obama issued an order prohibiting the acquisition and requiring Ralls Corporation and its owners to divest all interest in the wind farm project companies and their assets and remove all construction, improvements, and installations they had made on the sites. Daily Comp. Pres. Docs. 2012 DCPD Doc. No. 00764, pp. 1-3 (Sept. 28, 2012). The President acted pursuant to § 721 of the DPA, as amended by FINSA. On the same day as the President issued the order prohibiting the acquisition, the Treasury Department, which chairs CFIUS, issued a statement about the determination. The Treasury Department's statement is excerpted below and available in full at *www.treasury.gov/press-center/press-releases/Pages/tg1724.aspx*.

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The President issued an order prohibiting the acquisition and ownership of four wind farm project companies by Ralls Corporation, its owners, its subsidiaries, and its affiliates. The order directs Ralls Corporation to divest its interest in the wind farm project companies that it acquired earlier this year, and to take other actions related to the divestment. Ralls Corporation is owned by Chinese nationals, and is affiliated with a Chinese construction equipment company that manufactures wind turbines. The wind farm sites are all within or in the vicinity of restricted air space at Naval Weapons Systems Training Facility Boardman in Oregon.

The President took this action pursuant to section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007 ("section 721"). Section 721 authorizes the President to suspend or prohibit certain acquisitions of U.S. businesses by foreign persons where he finds that there is credible evidence that the foreign interest exercising control might take action that threatens to impair national security, and where provisions of law other than section 721 and the International Emergency Economic Powers Act do not provide adequate and appropriate authority to protect national security in the matter under review.

* * * *

The President's decision took into consideration the factors described in subsection 721(f), as appropriate, and the recommendation by the Committee on Foreign Investment in the United States ("CFIUS") that he issue an order prohibiting this transaction. CFIUS is an interagency committee whose purpose is to review transactions that could result in the control of a U.S. business by a foreign person in order to determine the effect of such transactions on the national security of the United States. In assessing the transaction's impact on national security, CFIUS conducted both a 30-day, first-stage review, and an additional 45-day, second-stage

investigation. CFIUS's detailed analysis took into account all relevant national security factors, including those elements enumerated in section 721. CFIUS also received a thorough analysis of the threat posed by this transaction from the Office of the Director of National Intelligence, as required by section 721.

CFIUS is chaired by the Secretary of the Treasury and includes as members the Secretaries of State, Defense, Commerce, Energy, and Homeland Security, the Attorney General, the Director of the White House Office of Science and Technology Policy, and the U.S. Trade Representative. The Director of National Intelligence and the Secretary of Labor participate as non-voting, ex-officio members.

* * * *

While the CFIUS investigation of the Ralls acquisition of the wind farm projects was underway, Ralls filed suit in U.S. district court, challenging the exercise of authority by CFIUS. *Ralls Corp. v. Obama*, Case No. 1:12-cv-01513-ABJ (D.D.C.). After the President issued the order prohibiting the acquisition, Ralls amended its complaint to bring additional challenges to the President's order. On October 29, 2012, the United States filed a motion to dismiss the complaint in the U.S. District Court for the District of Colombia. The U.S. brief in support of dismissal is excerpted below (with footnotes omitted), and available in full at *www.state.gov/s/l/c8183.htm*. The U.S. brief in reply is also available at *www.state.gov/s/l/c8183.htm.*[***]

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A. The Defense Production Act Explicitly Prohibits Judicial Review of Presidential Orders

The Defense Production Act could scarcely be more explicit. If the President finds that "there is credible evidence that leads [him] to believe that the foreign interest exercising control might take action that threatens to impair the national security," and that other provisions of law (apart from the International Emergency Economic Powers Act) do not, in his judgment, provide adequate authority for him to protect the national security, he is empowered to take action under the Act. 50 U.S.C. App. § 2170(d)(4). The Act defines his powers quite broadly: "the President may take *such action* for *such time* as the President *considers appropriate* to suspend or prohibit *any* covered transaction that threatens to impair the national security of the United States." 50 U.S.C. App. § 2170(d)(1) (emphasis added). And the Act expressly precludes judicial review of the President's exercise of these powers. "The actions of the President under [paragraph (d)(1)] and the findings of the President under [paragraph (d)(4)] shall not be subject to judicial review." 50 U.S.C. App. § 2170(e). In light of this Congressional ratification of

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[***] Editor's note: On February 22, 2013, the district court granted the U.S. motion to dismiss as to the challenges that the President acted *ultra vires* and in violation of the equal protection clause. However, the court allowed the due process claim in the case to proceed to the merits. *Digest 2013* will discuss further developments in the case.

Presidential power in a field in which he holds independent authority—specifically, his power to address threats to national security that arise from foreign acquisitions of United States businesses—the President's actions under the Defense Production Act are "'supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion [rests] heavily upon any who might attack it.'" *Dames & Moore*, 453 U.S. at 668 (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring).

Ralls cannot meet this heavy burden of persuasion, because its challenge to the Presidential Order falls squarely within the Defense Production Act's preclusion of review. It asks the Court to review the President's selection of the conditions that he considered appropriate for enforcement of the Presidential Order (Count III); the President's failure to provide Ralls with a fuller opportunity to participate in the process leading to his decision to issue the Order (Count IV); and the President's failure to explain why Ralls, and not other allegedly similarly-situated entities, was subjected to the Presidential Order (Count V). Ralls's amended complaint directly asks the Court to review the "actions" and "findings" of the President in issuing the Presidential Order. This Court, thus, need only apply the plain language of Section 2170(e) to hold that it lacks jurisdiction to review Ralls's challenge to the Presidential Order. "Here, the issue is . . . whether a clear and explicit withdrawal of jurisdiction withdraws jurisdiction. It undoubtedly does so." *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 468 (2007). See also *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 318 (D.C. Cir. 2012) (applying "plain language" of statutory withdrawal of jurisdiction to preclude review of due process claim).

B. The Structure of the Defense Production Act Demonstrates that Congress Had Good Reason to Preclude Review of Presidential Orders

As noted, the Court need look no further than the plain language of 50 U.S.C. App. § 2170(e) to conclude that it lacks jurisdiction over Ralls's challenge to the Presidential Order; there is no question that Ralls seeks review of the President's "findings" and "actions" under the Defense Production Act, and that review is expressly prohibited by Section 2170(e). In addition, "the statutory scheme as a whole," *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349 (1984), provides a further demonstration of Congress's intent to prevent judicial interference with the President's exercise of his powers under the Act. See *McBryde v. Comm. to Review Circuit Council Conduct and Disability Orders of the Judicial Conf. of the United States*, 264 F.3d 52, 60 (D.C. Cir. 2001) (reviewing legislative history to support conclusion that statutory withdrawal of jurisdiction bars review of as-applied constitutional claims); *Armstrong v. Bush*, 924 F.2d 282, 290 (D.C. Cir. 1991) (reviewing structure of Presidential Records Act to find intent to preclude review of claims against the President under that statute).

1. Congress's Decision to Preclude Judicial Review of a Presidential Action to Address a Foreign Transaction that Raises a Threat to National Security Is Consistent with the Scope of Presidential Authority in this Area

Congress recognized that it was legislating in an area where—even apart from an express statutory withdrawal of jurisdiction—Presidential exercises of discretion are not ordinarily subject to judicial review. Congress intentionally afforded the President a broad authority to take action with respect to foreign acquisitions that he finds raise threats to "national security," without seeking to limit his discretion in the application of that standard. See H.R. Conf. Rep. No. 100-576, at 926 (1988) (noting intent that standard of "national security" be applied broadly). Moreover, Congress made the deliberate decision to place the power to suspend or prohibit foreign acquisitions that threaten to impair national security directly in the hands of the President. In doing so, it recognized that this authority arose against the backdrop of the

President's inherent power: "[E]xclusive of any powers derived from the Exon-Florio amendment or related regulations or executive orders, the President ultimately reserves the right in any transaction and at any time to reverse a transaction for national security purposes. This authority derives both from the International Emergency Economic Powers Act and his inherent powers in the conduct of foreign affairs." H.R. Rep. No. 110-24, pt. 1, at 12 (2007).

Congress and the President are thus in agreement that he holds broad discretion to prohibit foreign acquisitions that threaten national security, and that his exercise of that discretion is unreviewable. In issuing the Presidential Order, the President took the actions that he considered appropriate to address the threats to national security that he found had arisen from such a foreign acquisition, Ralls's acquisition of the Project Companies. See Presidential Order, § 1, 77 Fed. Reg. at 60,281. Ralls's challenge to the Presidential Order would require the Court to entangle itself in the President's determinations concerning foreign relations and national security. But, as the Supreme Court has long recognized:

> the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & Southern Airlines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111-12 (1948). See also *Haig v. Agee*, 453 U.S. 280 (1981); *United States v. Pink*, 315 U.S. 203, 222-23 (1942); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Dakota Cent. Tel. Co. v. South Dakota ex rel. Payne*, 250 U.S. 163, 184 (1919).

The Court resolved an issue analogous to this case in *Waterman*. The case involved the Civil Aeronautics Act, which required Presidential approval of orders of the Civil Aeronautics Board granting or denying applications by foreign carriers to engage in domestic air transportation, or by domestic carriers to engage in international air transportation. The governing statute explicitly precluded judicial review by any foreign carrier of a Presidential decision under this scheme. That preclusion was not challenged in the case, and the Supreme Court held that the statute also impliedly precluded review of a challenge by a domestic carrier to a Presidential order involving an overseas air route, despite the absence of express language in the statute withdrawing that review. The Court noted that:

> [t]he President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences.

Waterman, 333 U.S. at 111.

Likewise, here, the President exercised his authority in the fields of foreign policy and national security to issue the Presidential Order challenged in this case, and he relied on classified information in so doing. In making his finding that there is credible evidence that led him to believe that Ralls might take action that threatens to impair the national security, the President engaged in precisely the type of analysis that the Court in *Waterman* understood to be

in the competence of the Executive Branch. Congress enacted Section 2170(e) in recognition that this analysis is the prerogative of the Executive, and not the judiciary. See *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) ("The political question doctrine bars our review of claims that, regardless of how they are styled, call into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion.") See also *People's Mojahedin Org. v. Dep't of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (finding question whether "terrorist activity of the organization threatens the security of United States nationals or the national security of the United States" to be nonjusticiable); *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988) (noting that the presumption in favor of judicial review "runs aground when it encounters concerns of national security").

Moreover, this case involves an attempt to seek review of the President's own decision-making in the field that has been entrusted to him both by the Constitution and by Congress. This case therefore raises precisely the concerns that led Congress to preclude review of the President's actions under the Defense Production Act. If Ralls were to succeed in this action, the President would effectively be required to re-open his determination and to issue a modified order after providing Ralls its requested opportunity to participate in Presidential decision-making, subject to the review of this Court. But "[a] court—whether via injunctive or declaratory relief—does not sit in judgment of a President's executive decisions." *Newdow v. Roberts*, 603 F.3d 1002, 1012 (D.C. Cir. 2010) (citing *Mississippi v. Johnson*, 71 U.S. (4 Wall. 475, 499 (1867), and *Swan*, 100 F.3d at 976 n.1). See also *Mississippi v. Johnson*, 71 U.S. (4 Wall.) at 501 ("this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties"). In light of this impossibility that injunctive or declaratory relief could run against him, at all events, the President should be dismissed from this action. And the same considerations warrant the dismissal of the action in its entirety. In enacting the preclusion of review in Section 2170(e), Congress averted the possibility that the President might be required "to exercise the 'executive Power' in a judicially prescribed fashion," *Franklin*, 505 U.S. at 826-27 (Scalia, J., concurring in the judgment), if he were subject to review for his actions under the Act. The balance that Congress chose between Presidential and judicial power should be respected here.

It is clear that Congress intended to preclude review of the President's actions to address foreign acquisitions that raise threats to national security. Judicial review would entangle the courts in the supervision of the President's actions in a field where the Executive holds broad discretion and particular competence. The plain language of Section 2170(e) thus should be applied to bar Ralls's challenge to the Presidential Order.

2. The Structure of the Act Confirms that Congress Intended to Preclude Judicial Review of Presidential Actions under the Act

In addition, the Congressional preclusion of judicial review is consistent with the structure of the Defense Production Act, which establishes Congress as the exclusive check on the President's exercise of his authority under the Act. The Act—which does not apply to all acquisitions, but instead only to those acquisitions that could result in foreign control of a person engaged in interstate commerce, 50 U.S.C. App. § 2170(a)(3)—contains detailed provisions that require the President and CFIUS to report to Congress on reviews and investigations of such foreign acquisitions, and that specify the timing and content of those reports. See 50 U.S.C. App. § 2170(b)(3)(A) (CFIUS to submit certified notice of Congress, upon completion of review that concludes action under Section 721); 50 U.S.C App. § 2170(b)(3)(B) (CFIUS to transmit certified written report on results of investigation, upon completion of investigation that concludes action under Section 721); 50 U.S.C. App. § 2170(b)(3)(C) (specifying content of

reports); 50 U.S.C. App. § 2170(g) (requiring a briefing upon request to Congress on any covered transaction for which action has concluded); 50 U.S.C. App. § 2170(m) (specifying timing and content of annual reports to Congress). In contrast, the Act does not specify the content of any reporting that the President or CFIUS might make to the parties to a covered transaction. See 50 U.S.C. App. § 2170(b)(6) (specifying only that CFIUS shall notify parties of the "results" of the review or investigation); 50 U.S.C. App. § 2170(d)(2) (requiring only that the President "announce the decision on whether or not to take action").

Moreover, Congress expressly recognized that, by necessity, any review or investigation of national security concerns arising from a foreign acquisition would rely heavily on the use of sensitive and classified information within the Executive Branch, as well as confidential, proprietary material submitted by the parties to a transaction. See 50 U.S.C. App. § 2170(b)(4) (requiring Director of National Intelligence to prepare analysis of threat to national security posed by covered transactions). See also 50 U.S.C App. § 2170(c) (specifying confidentiality of information or documentary material filed with the President or his designee). In prohibiting judicial review of the President's findings and actions, Congress recognized that those findings and actions would, be necessity, depend on information that is within the executive, and not the judicial, competence to evaluate. See *Waterman*, 333 U.S. at 111.

Congress recognized—in light of the obvious concerns of confidentiality would inevitably arise from a Presidential Order under the Act—that its own review would stand in the place of judicial review to serve as a check on Executive action under the Defense Production Act. In requiring reporting, Congress understood that "[s]uch reports are not intended to establish precedents under the Exon-Florio amendment since each case is unique. However, the reports will help Congress and the public develop an understanding of the policies underlying Presidential determinations, and hold the President accountable for actions under the Exon-Florio amendment." H.R. Conf. Rep. No. 102-966, at 731-32 (1992) (emphasis added). Thus, "permitting judicial review . . . would upset the intricate statutory scheme Congress carefully drafted to keep in equipoise important competing political and constitutional concerns." *Armstrong v. Bush*, 924 F.2d 282, 290 (D.C. Cir. 1991) (holding that Presidential Records Act impliedly precludes judicial review of Presidential actions under that statute).

Moreover, Congress specified strict deadlines for review, investigation, and Presidential action under Section 721; those strict deadlines further indicate Congress's intent to preclude judicial review. As noted, CFIUS is instructed to complete a review within 30 days of accepting a notice of a covered transaction, and, if it proceeds to investigation, CFIUS must complete that investigation within an additional 45-day period. 50 U.S.C. App. § 2170(b)(1)(E), (b)(2)(C). The President is then directed to determine whether he will exercise his authority under the Defense Production Act within 15 days of the conclusion of the investigation. 50 U.S.C. App. § 2170(d)(2). Congress acted deliberately in providing for this schedule, recognizing that a guarantee of a timely review "is important in ensuring that foreign investors are not subjected to disparate treatment relative to their domestic competitors in the vast majority of cases where the foreign investment does not pose significant national security concerns and any concerns are addressed through mitigation agreements within the 30-day period." H.R. Rep. No. 110-24, pt. 1, at 11 (2007). These "tight and rigid deadlines on administrative review and Presidential action," coupled with Congress's "nonjudicial opportunities to assess any procedural (or other) irregularities" in the President's actions, strongly support the inference—made express in the statutory text—that Congress did not intend judicial interference in this process. See *Dalton v. Specter*, 511 U.S. at 481-482 (Souter, J.,

concurring). See also *Am. Soc'y of Cataract & Refractive Surgery v. Thompson*, 279 F.3d 447, 454 (7th Cir. 2002) (statutory deadline for establishing fee schedules supports inference that Congress intended to preclude review).

In sum, the plain language of Section 2170(e) precludes this Court's jurisdiction over Ralls's challenge to the President's findings and actions under the Defense Production Act. Congress's decision to preclude review is eminently sensible; given that this case involves a Presidential action against the backdrop of his inherent foreign affairs authority and in the field of national security, an area that is not traditionally a subject of judicial cognizance. Further, the structure of the Act provides further proof that Congress intended expedited action that would ultimately be subject to its own review, not that of the courts.

C. The Preclusion of Judicial Review Applies with Particular Force to Ralls's Insubstantial, As-Applied Challenges to the Presidential Order

The foregoing suffices to demonstrate that Congress meant what it said when it expressly precluded judicial review of any challenge, such as those raised by Ralls here, to the President's findings and actions under the Defense Production Act. Accordingly, this Court need only apply 50 U.S.C. App. § 2170(e) to dismiss this action for lack of subject matter jurisdiction. Ralls's complaint, moreover, presents no reason to depart from the express statutory preclusion of review. Its challenge to the President's interpretation of the scope of his authority under the Defense Production Act is not cognizable under the APA or otherwise. Its constitutional challenges to the Presidential Order do not suffice to invoke jurisdiction, given that Congress foreclosed judicial review in order to avoid serious concerns that would arise from subjecting the President to the supervision of federal courts, and given the insubstantiality of those claims. Congress's express instruction that judicial review shall not be had of the Presidential Order, therefore, should be heeded here. See *Fischer v. Resolution Trust Corp.*, 59 F.3d 1344, 1351 (D.C. Cir. 1995) (finding preclusion of review of "insubstantial" constitutional claims against agency action).

1. Ralls Raises No Challenge to the President's Interpretation of His Authority under the Defense Production Act that Allows It to Circumvent the Jurisdictional Bar

Ralls contends that the President exceeded his statutory authority by specifying certain conditions on Ralls's use of the Project Companies, rather than solely ordering the divestiture of those companies. Because Ralls directly challenges the President's own actions, it could not (even in the absence of the express withdrawal of review in Section 2170(e)) raise its challenge to the Presidential Order under the Administrative Procedure Act (APA), because the President is not an agency subject to the APA's terms. See *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992); *Dalton v. Specter*, 511 U.S. 462, 473-74 (1994); *Swan v. Clinton*, 100 F.3d 973, 981 n.4 (D.C. Cir. 1996). Nor could Ralls pursue a challenge against the Presidential Order outside of the scope of the APA on the theory that the dispute over the scope of the President's interpretation of his statutory authority rises to the level of a constitutional challenge. Although the Court recognized in Franklin that some constitutional claims may proceed outside of the APA as to Presidential actions, "if every claim alleging that the President exceeded his statutory authority were considered a constitutional claim, the exception identified in Franklin would be broadened beyond recognition." *Dalton v. Specter*, 511 U.S. at 474 (declining to permit "evisceration" of preclusion of statutory claims against the President by characterizing such claims as constitutionally based). Ralls presents exactly the sort of challenge that the Court rejected in *Specter*; its claim that the President misinterpreted his authority under Section 2170(d) would not

be judicially cognizable, even in the absence of an express statutory withdrawal of judicial review. In enacting Section 2170(e), Congress underscored the rule of *Specter* that the President's interpretation of the scope of this authority under a statutory grant of authority to him will not be subject to judicial second-guessing.

The only potential means for Ralls to assert that the President exceeded his statutory authority would be a non-statutory cause of action under the authority of *Leedom v. Kyne*, 358 U.S. 184 (1958); such a claim, if it were available, could be brought only against a subordinate official charged with carrying out the President's instructions, not against the President himself. By enacting Section 2170(e), however, Congress clarified that Presidential actions under the Defense Production Act are not subject even to this circumscribed form of non-statutory review. See *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (noting Congressional power to preclude non-statutory judicial review of Presidential action).

The *Kyne* exception applies only where three conditions are met: "(i) the statutory preclusion of review is implied rather than express; (ii) there is no alternative procedure for review of the statutory claim; and (iii) the agency plainly acts 'in excess of its delegated powers and contrary to a specific prohibition in the' statute that is 'clear and mandatory.'" *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009) (quoting *Kyne*, 358 U.S. at 188) (internal citations omitted). Neither the first nor the third condition is satisfied here. In enacting 50 U.S.C. App. 2170(e), Congress has explicitly precluded review of the President's actions. And the third condition requires that the government's error be "so extreme that one may view it as jurisdictional or nearly so." *Griffith v. FLRA*, 842 F.2d 487, 493 (D.C. Cir. 1988).

Ralls's claim falls far short of that standard. The Act authorizes the President to "take such action for such time as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States." 50 U.S.C. App. § 2170(d)(1). The provision affords the President a broad range of authority, and certainly permits him to take action that he considers to be appropriate to ensure the effective implementation of his order that prohibits a foreign acquisition on national security grounds.

* * * *

2. Ralls Raises No Substantial Constitutional Challenge to the President's Exercise of His Discretion under the Defense Production Act

Second, Ralls raises constitutional challenges to the manner in which the President exercised his discretion under the Defense Production Act. Those challenges amount to nothing more than disguised challenges to the President's exercise of his statutory discretion under the Act; they do not, therefore, justify departing from Congress's preclusion of judicial review. To be sure, in some circumstances, courts will apply a presumption that Congress does not intend a statutory withdrawal of jurisdiction to preclude review of all constitutional claims that could arise in response to particular agency action. See *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974). This presumption is invoked to avoid the constitutional concerns that assertedly would arise if all such claims were precluded. That presumption does not apply here. As noted, this case concerns the President's action in the area of national security exercising power expressly afforded to him by Congress. In light of the Congressional and Presidential agreement that the President's exercise of his discretion under the Defense Production Act should not be subject to review, and in light of the fact that judicial review would require the Court to superintend the President's exercise of that discretion, serious separation-of-powers concerns would arise if this

Court were permitted to supervise the President's exercise of his authority under Section 721. Accordingly, there is no reason to doubt that Congress meant what it said in withdrawing all review of the President's actions under the Defense Production Act.

The presumption is also inapplicable because the constitutional claims that Ralls raises are insubstantial. Ralls asserts that the President deprived it of property without due process because he did not provide Ralls with a fuller opportunity to participate in the process of Presidential decision-making that led to the Presidential Order. But Ralls had no property interest in completing its acquisition of the Project Companies free from CFIUS oversight. In order to hold a property interest, a person "must have more than a unilateral expectation of" a benefit; "[h]e must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Ralls, like any other foreign acquirer of a United States entity in a transaction that implicates national security, had no legitimate claim of entitlement to complete its acquisition without CFIUS approval. As noted, the Defense Production Act contemplates that parties will voluntarily file a notice of their intended transaction with CFIUS before completing the transaction, and a party that does not do so takes the risk that its transaction will be unwound. For that reason, no well-advised purchaser would proceed with a transaction that raises potential national security concerns without first seeking CFIUS clearance. See Review of the CFIUS Process at 114 (statement of Deputy Secretary Kimmitt). Because Ralls chose to ignore these considerations and to proceed with its acquisition, "the consequences of [its] conduct were entirely foreseeable." *Paradissiotis v. United States*, 304 F.3d 1271, 1276 (Fed. Cir. 2002); see also *Dames & Moore*, 453 U.S. at 674 n.6 (given President's authority to revoke attachments on foreign assets under the IEEPA, party "did not acquire any 'property' interests in its attachments").

Moreover, the President and CFIUS followed the procedures prescribed by 50 U.S.C. App. § 2170 by inviting Ralls to submit its notice of the covered transaction. (Lago Decl., ¶ 5.) Ralls submitted that notice, which included its detailed argument as to why it believed that its transaction did not present a threat to national security, and why it believed that any possible national security threat could be addressed by provisions of law other than the Defense Production Act. (ECF 7-7.) Due process did not require the President to give Ralls further opportunities to participate in his decision-making. See *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) (due process does not prevent decision based on classified information to which party did not have access). See also *Haig v. Agee*, 453 U.S. 280, 307 (1981) ("[N]o governmental interest is more compelling than the security of the Nation.").

Ralls also asserts that the President denied it the equal protection of the laws by not explaining why allegedly similarly-situated persons have not also been subject to a Presidential Order under the Defense Production Act. This is merely an attempt to restate an APA rational decision-making claim in constitutional terms. Section 2170(e) prohibits any inquiry into the President's findings and actions, and the mere re-assertion of that inquiry as a rational-basis equal protection claim does not change that result. See, *e.g.*, *Manani v. Filip*, 552 F.3d 894, 900 n.3 (8th Cir. 2009) ("[A] petitioner may not create the jurisdiction that Congress chose to remove simply by cloaking an abuse of discretion argument in constitutional garb."). In any event, Ralls' equal protection claim obviously lacks merit. Its mere speculation that the President should also have issued an order addressing other windfarm projects in the area that have foreign-made equipment does not suffice to carry its "heavy burden" to negate "every conceivable basis which might support" the Presidential Order. *Tate v. District of Columbia*, 627 F.3d 904, 910 (D.C. Cir. 2010) (internal quotations omitted).

Ralls presents no substantial challenge to the Presidential Order. Thus—even if Section 2170(e) contained an exception allowing review of meritorious challenges to such orders—there is no reason to depart from the plain language of the statutory withdrawal of jurisdiction. This Court lacks jurisdiction over Ralls's claim with respect to the Presidential Order.

* * * *

2. Intellectual Property:

a. Beijing Treaty on Audiovisual Performances

On June 26, 2012, the United States and 47 other countries signed the Beijing Treaty on Audiovisual Performances at a diplomatic conference convened by World Intellectual Property ("WIPO") members. As explained in a June 26, 2012 State Department media note, available at *www.state.gov/r/pa/prs/ps/2012/06/194101.htm*, the Beijing Treaty, "fills a gap in the system of international copyright protection by extending to actors in motion pictures and television programs the type of protections previously accorded to authors and to performers in sound recordings." Negotiation of the treaty began over twelve years ago and involved developing and developed countries. The U.S. Patent and Trademark Office ("PTO") issued a press release about the conclusion of the Beijing Treaty on June 26, with links to the treaty text, a more detailed fact sheet about the treaty, and a description of the negotiations, available at *www.uspto.gov/news/pr/2012/12-39.jsp*. The text of the treaty is available at *www.wipo.int/edocs/mdocs/copyright/en/avp_dc/avp_dc_20.pdf*.

b. Special 301 Report

In April 2012, the Office of the U.S. Trade Representative ("USTR") issued the 2012 Special 301 Report ("Report") to identify those foreign countries that deny adequate and effective protection of intellectual property rights ("IPR") or deny fair and equitable market access to U.S. persons that rely upon intellectual property protection. USTR submits the Report annually pursuant to § 182 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act (enacted in 1994). The 2012 Report reviewed 77 trading partners' protection and enforcement of IPR and identified 13 countries on the Priority Watch List, 26 on the Watch List, and one country under § 306 monitoring. Countries listed in these categories are found lacking with respect to IPR protection, enforcement, or market access for persons relying on intellectual property protection. See *Digest 2007* at 605–7 for additional background.

The 2012 Report includes an invitation to all trading partners listed in the Report to cooperatively develop action plans to resolve IPR issues of concern. In the past, successful completion of action plans has led to trading partners' removal from the Special 301 lists. The Report identified particular problems in the listed countries, including Ukraine, which was moved onto the Priority Watch List in 2012. The Report also recognized positive accomplishments in a number of areas. These accomplishments included the adoption of

significant IPR laws, regulations, or other measures in Malaysia, Spain, Israel, the Philippines, Russia, China, Korea, and Colombia. Malaysia and Spain were removed from the watch list due to their accomplishments. The full text of the Report is available at *www.ustr.gov/about-us/press-office/reports-and-publications/2012-2*. For a list of the countries identified in the 2012 Report, see USTR's press release, available at *www.ustr.gov/about-us/press-office/press-releases/2012/april/ustr-releases-annual-special-301-report-intellectual*.

Separately, on December 13, 2012 USTR announced the results of a Special 301 Review of Notorious Markets, available at *www.ustr.gov/sites/default/files/121312%20Notorious%20Markets%20List.pdf*. The results of the review identified concerns with more than 30 Internet and physical markets that exemplify marketplaces that deal in infringing goods and services, facilitating and sustaining global piracy and counterfeiting. The review also identified eight previously listed markets that were removed due to law enforcement actions against those markets or significant voluntary actions by market operators aimed at addressing identified problems. For further information on the Notorious Markets list, see USTR's press release of December 13, 2012, available at *www.ustr.gov/about-us/press-office/press-releases/2012/december/ustr-announces-results-special-301*.

3. Food Assistance Convention

On April 25, 2012, the UN Food Assistance Convention was adopted in London. The United States became a signatory and deposited its instrument of acceptance on September 26, 2012.[****] The Convention had garnered 14 signatories by December 31, 2012 in accordance with Article 12. The text of the Convention is available at *http://treaties.un.org/doc/source/signature/2012/CTC_XIX-48.pdf*. As stated in its preamble, the purpose of the Convention is to

> improve the effectiveness, efficiency, and quality of food assistance in preserving the lives and alleviating the suffering of the most vulnerable populations, especially in emergency situations, by strengthening international cooperation and coordination, in particular among the Parties and stakeholders.

Article 2 of the Convention lays out principles to which the Parties should adhere in providing food assistance, while Article 4 defines terms used in the Convention. Article 5 provides that each Party agrees to make a "minimum annual commitment" of food assistance in accordance with its laws and regulations. Article 6 requires an annual report

[****] Editor's Note: The Convention entered into force on January 1, 2013, in accordance with Article 15(1), which provides that "This Convention shall enter into force on 1 January 2013 if by 30 November 2012 five Signatories have deposited instruments of ratification, acceptance, or approval."

and information sharing by the Parties, and Article 7 establishes a Food Assistance Committee with representatives of all the Parties as a forum for discussion with respect to food assistance matters. Article 8 provides for a Chairperson and Vice-Chairperson of the Committee and lists their duties. Article 9 specifies that the Committee shall hold at least one formal session per year and other informal meetings. Article 10 directs that the Committee shall have a Secretariat which initially will be the International Grains Council's Secretariat.

4. Voluntary Principles on Security and Human Rights

See Chapter 6.A.3.c. for a discussion of U.S. involvement in the work of the UN to promote the Guiding Principles on Business and Human Rights. In March 2012, the United States participated in the annual plenary meeting in Ottawa of the Voluntary Principles on Security and Human Rights, at which participants approved the creation of an association under Dutch law to be based in The Hague, Netherlands to address the administrative needs of the Voluntary Principles initiative. The Voluntary Principles initiative began in 2000 when governments, multinational corporations, and non-governmental organizations came together to express support for principles to guide private companies in the extractive industries in three categories: risk assessment, relations with public security, and relations with private security. See *Digest 2000* at 364-68. The State Department issued a media note on March 30, 2012, announcing the decision to create the new organization to advance the Voluntary Principles initiative. The entity, the Association of the Voluntary Principles on Security and Human Rights, was created in November 2012. The media note is excerpted below and available at *www.state.gov/r/pa/prs/ps/2012/03/187239.htm*. For more information on the Voluntary Principles, see *www.voluntaryprinciples.org/*.

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… Along with the approval of governance rules in 2011, this transforms the Voluntary Principles from an ad hoc collaboration to a stable, structured initiative as it starts its second decade. This is a key step in cementing the relationship between governments, industry, and civil society in finding solutions to human rights problems that none could solve alone.

The Voluntary Principles initiative consists of 20 oil, mining, and gas companies; seven governments; and 10 non-governmental organizations (NGOs). In Ottawa, the Voluntary Principles welcomed the French oil and gas giant Total, S.A., as a new participant, and the International Finance Corporation and Democratic Control of Armed Forces, as observers. Participants discussed best practices and challenges on human rights and security issues, and strategies for engaging the governments of other countries where oil, gas, and mining companies are headquartered or operate. During the meeting, 13 participating companies led a conversation on the status of their pilot project to develop key performance indicators, which will guide and validate the ways that companies fulfill the commitments they make under the Voluntary Principles. These companies will integrate the indicators into their systems this year. This

important step will help companies maintain high standards while they do business in these difficult areas of the world.

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5. SEC Final Rules Implementing the Dodd-Frank Act

On August 22, 2012, the U.S. Securities and Exchange Commission ("SEC") adopted two final rules mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). The State Department issued a media note on August 23, 2012, available at *www.state.gov/r/pa/prs/ps/2012/08/196882.htm*, welcoming the SEC's action. The final rule adopted to implement Section 1502 of Dodd-Frank requires certain public companies to publicly disclose their use of conflict minerals that originated in the Democratic Republic of the Congo ("DRC") or an adjoining country. The final rule adopted to implement Section 1504 of Dodd-Frank, the "Cardin-Lugar amendment," requires companies engaged in the commercial development of oil, natural gas, or minerals to disclose payments made to governments for the commercial development of resources. Companies must disclose the type and total amount of covered payments made for each project and to each government. Each of these rules is described more fully below.

a. Rule requiring disclosure of use of conflict minerals

The SEC released a statement and fact sheet regarding the new rule implementing Section 1502, available at *www.sec.gov/news/press/2012/2012-163.htm.* The Federal Register publication of the final rule includes the following summary:

> We are adopting a new form and rule pursuant to Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act relating to the use of conflict minerals. Section 1502 added Section 13(p) to the Securities Exchange Act of 1934, which requires the Commission to promulgate rules requiring issuers with conflict minerals that are necessary to the functionality or production of a product manufactured by such person to disclose annually whether any of those minerals originated in the Democratic Republic of the Congo or an adjoining country. If an issuer's conflict minerals originated in those countries, Section 13(p) requires the issuer to submit a report to the Commission that includes a description of the measures it took to exercise due diligence on the conflict minerals' source and chain of custody. The measures taken to exercise due diligence must include an independent private sector audit of the report that is conducted in accordance with standards established by the Comptroller General of the United States. Section 13(p) also requires the issuer submitting the report to identify the auditor and to certify the audit. In addition, Section 13(p) requires the report to include a description of the products manufactured or contracted to be manufactured that are not ''DRC conflict free,'' the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of

> origin. Section 13(p) requires the information disclosed by the issuer to be available to the public on its Internet Web site.

77 Fed. Reg. 56,274 (Sept. 12, 2012).

Under the final rule, companies that are required to file a Conflict Minerals Report must exercise due diligence on the source and chain of custody of their conflict minerals (tantalum, tin, gold, and tungsten). The due diligence measures must conform to a nationally or internationally recognized due diligence framework. The SEC indicated that the due diligence guidance approved by the Organisation for Economic Co-operation and Development ("OECD") satisfies this requirement.

The United States government had previously endorsed and promoted the "OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas." See *Digest 2011* at 402-04; see also *Digest 2010* at 675n.

b. Rule requiring disclosure of payments by resource extraction issuers

The SEC fact sheet describing the final rule implementing section 1504 of Dodd-Frank is available at *www.sec.gov/news/press/2012/2012-164.htm*. The Federal Register notice issued by the SEC about the final rule includes the following summary:

> We are adopting new rules and an amendment to a new form pursuant to Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act relating to disclosure of payments by resource extraction issuers. Section 1504 added Section 13(q) to the Securities Exchange Act of 1934, which requires the Commission to issue rules requiring resource extraction issuers to include in an annual report information relating to any payment made by the issuer, a subsidiary of the issuer, or an entity under the control of the issuer, to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. Section 13(q) requires a resource extraction issuer to provide information about the type and total amount of such payments made for each project related to the commercial development of oil, natural gas, or minerals, and the type and total amount of payments made to each government. In addition, Section 13(q) requires a resource extraction issuer to provide information regarding those payments in an interactive data format.

77 Fed. Reg. 56,365 (Sept. 12, 2012).

The Federal Register Notice also provided, by way of background, this rationale for the rule:

> Based on the legislative history,… Congress enacted Section 1504 to increase the transparency of payments made by oil, natural gas, and mining companies to governments for the purpose of the commercial development of their oil, natural gas, and minerals. A primary goal of such transparency is to help empower citizens of those resource-rich countries to hold their governments accountable for the wealth generated by those resources.

Id. at 56,366 (with footnotes citing statement by Senator Richard Lugar omitted).

The final rule, in keeping with Dodd-Frank section 1504, defines the types of payments that must be disclosed consistent with the statute, which specifically references the Extractive Industries Transparency Initiative ("EITI"), "a voluntary coalition of oil, natural gas, and mining companies, foreign governments, investor groups, and other international organizations dedicated to fostering and improving transparency and accountability in countries rich in oil, natural gas, and minerals." *Id*. In 2011, the United States announced its commitment to the EITI. See *www.whitehouse.gov/the-press-office/2011/09/20/opening-remarks-president-obama-open-government-partnership* and *www.whitehouse.gov/sites/default/files/us_national_action_plan_final_2.pdf*. The U.S. Department of the Interior (''DOI'') is responsible for implementing the U.S. EITI. See *www.whitehouse.gov/the-press-office/2011/10/25/white-house-announces-secretary-ken-salazar-administrations-senior-offic*.

6. Tax Treaties

a. Bilateral Tax Treaties

On May 17, 2012, President Obama transmitted to the Senate for its advice and consent to ratification the Convention between the Government of the United States of America and the Government of the Republic of Chile for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to taxes on Income and Capital, signed February 3, 2010, with a Protocol and a related Agreement. As described by the President in his transmittal letter,

> The proposed Convention, Protocol, and related Agreement (together "proposed Treaty") would be the first bilateral income tax treaty between the United States and Chile. The proposed Treaty contains comprehensive provisions designed to address "treaty shopping," which is the inappropriate use of a tax treaty by residents of a third country, and provides for a robust exchange of information between the tax authorities in the two countries to facilitate the administration of each country's tax laws.

Daily Comp. Pres. Docs. 2012 DCPD No. 00382, p. 1.

b. Protocol Amending the Convention on Mutual Administrative Assistance in Tax Matters

On May 17, 2012, President Obama transmitted to the Senate for its advice and consent to ratification the Protocol Amending the Convention on Mutual Administrative Assistance in Tax Matters. Daily Comp. Pres. Docs 2012 DCPD No. 00383, p. 1 (May 17, 2012). The Protocol was signed by the United States in 2010 and would amend the existing Convention that entered into force for the United States in 1995. The President's transmittal letter to the Senate explained:

The proposed Protocol amends the existing Convention in order to bring it into conformity with current international standards on exchange of information, as reflected in the Organization for Economic Co-operation and Development's (OECD) Model Tax Convention on Income and Capital and the current U.S. Model Income Tax Convention. Furthermore, it updates the existing Convention's rules regarding the confidentiality and permitted uses of exchanged tax information, and opens the existing Convention to adherence by countries other than OECD and Council of Europe members. The Protocol entered into force on January 6, 2011, following ratification by five parties to the existing Convention.

c. Foreign Account Tax Compliance Act (FATCA) Agreements

In 2012, the United States actively engaged with more than 50 countries and jurisdictions around the world to improve international tax compliance and implement the Foreign Account Tax Compliance Act ("FATCA"). FATCA was enacted in 2010 to target non-compliance by U.S. taxpayers using foreign accounts. In 2012, the U.S. Treasury Department published model bilateral intergovernmental agreements to be used with FATCA partners to facilitate cooperation in implementing FATCA's provisions requiring foreign financial institutions to report to the IRS information about financial accounts held by U.S. taxpayers, or by foreign entities in which U.S. taxpayers hold a substantial ownership interest. The U.S. successfully concluded bilateral intergovernmental agreements to implement FATCA with the United Kingdom, Denmark, Ireland, and Mexico in 2012 and is engaged in discussions about concluding such agreements or other understandings with many other jurisdictions. The bilateral intergovernmental agreements concluded in 2012 are available at *www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx*. The Treasury Department identified other countries with which the United States is discussing possible agreements or understandings in a November 8, 2012 press release, available at *www.treasury.gov/press-center/press-releases/Pages/tg1759.aspx*.

7. Antitrust

On September 27, 2012, the United States Department of Justice and the United States Federal Trade Commission entered into a memorandum of understanding to promote cooperation and communication on antitrust matters with the Competition Commission of India ("CCI"). The document is available at *www.ftc.gov/opa/2012/09/indiamou.shtm*.

Cross References

Counternarcotics majors list, **Chapter 3.B.2.**
Corruption, **Chapter 3.B.7.**
Anti-Counterfeiting Trade Agreement, **Chapter 4.A.2.**
*Statute implementing Berne (Copyright) Convention (*Golan v. Holder*)*, **Chapter 4.B.2.**
Constitutional challenge to tax treaties, **Chapter 4.B.6.**
Alien Tort Claims Act and Torture Victim Protection Act, **Chapter 5.B.**
Act of state and political question doctrines, **Chapter 5.C.**
Guiding principles on business and human rights, **Chapter 6.A.3.b.**
Nationality of corporations, **Chapter 8.C.1.**
U.S.-Mexico transboundary hydrocarbons agreement, **Chapter 12.A.6.**
Commercial private international law, **Chapter 15.A.**
Securities law, **Chapter 15.B.**
International civil litigation in U.S. courts, **Chapter 15.D.**
Sanctions, **Chapter 16.**

Chapter 12

Territorial Regimes and Related Issues

A. LAW OF THE SEA AND RELATED BOUNDARY ISSUES

1. UN Convention on the Law of the Sea

On May 23, 2012, U.S. Secretary of State Hillary Rodham Clinton testified before the Foreign Relations Committee of the U.S. Senate on the UN Convention on the Law of the Sea ("Convention"). Secretary Clinton's testimony advocating U.S. accession to the Convention is excerpted below and available at *www.state.gov/secretary/rm/2012/05/190685.htm*. U.S. Secretary of Defense Leon Panetta and General Martin Dempsey, Chairman of the Joint Chiefs of Staff, also testified at the same hearing. Their testimony is available at *www.foreign.senate.gov/hearings/the-law-of-the-sea-convention-treaty-doc-103-39-the-us-national-security-and-strategic-imperatives-for-ratification*.

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We believe that it is imperative to act now. No country is better served by this Convention than the United States. As the world's foremost maritime power, we benefit from the Convention's favorable freedom of navigation provisions. As the country with the world's second longest coastline, we benefit from its provisions on offshore natural resources. As a country with an exceptionally large area of seafloor, we benefit from the ability to extend our continental shelf, and the oil and gas rights on that shelf. As a global trading power, we benefit from the mobility that the Convention accords to all commercial ships. And as the only country under this treaty that was given a permanent seat on the group that will make decisions about deep seabed mining, we will be in a unique position to promote our interests.

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Now, one could argue, that 20 years ago, 10 years ago, maybe even five years ago, joining the Convention was important but not urgent. That is no longer the case today. Four new developments make our participation a matter of utmost security and economic urgency.

First, for years, American oil and gas companies were not technologically ready to take advantage of the convention's provisions regarding the extended U.S. continental shelf. Now they are. The Convention allows countries to claim sovereignty over their continental shelf far out into the ocean, beyond 200 nautical miles from shore. The relevant area for the United States

is probably more than 1.5 times the size of Texas. In fact, we believe it could be considerably larger.

U.S. oil and gas companies are now ready, willing, and able to explore this area. But they have made it clear to us that they need the maximum level of international legal certainty before they will or could make the substantial investments, and, we believe, create many jobs in doing so needed to extract these far-offshore resources. If we were a party to the Convention, we would gain international recognition of our sovereign rights, including by using the Convention's procedures, and therefore be able to give our oil and gas companies this legal certainty. Staying outside the Convention, we simply cannot.

The second development concerns deep seabed mining, which takes place in that part of the ocean floor that is beyond any country's jurisdiction. Now for years, technological challenges meant that deep seabed mining was only theoretical; today's advances make it very real. But it's also very expensive, and before any company will explore a mine site, it will naturally insist on having a secure title to the site and the minerals that it will recover. The Convention offers the only effective mechanism for gaining this title. But only a party to the Convention can use this mechanism on behalf of its companies.

So as long as the United States is outside the Convention, our companies are left with two bad choices—either take their deep sea mining business to another country or give up on the idea. Meanwhile, as you heard from Senator Kerry and Senator Lugar, China, Russia, and many other countries are already securing their licenses under the Convention to begin mining for valuable metals and rare earth elements. And as you know, rare earth elements are essential for manufacturing high-tech products like cell phones and flat screen televisions. They are currently in tight supply and produced almost exclusively by China. So while we are challenging China's export restrictions on these critical materials, we also need American companies to develop other sources. But as it stands today, they will only do that if they have the secure rights that can only be provided under this Convention. If we expect to be able to manage our own energy future and our need for rare earth minerals, we must be a party to the Law of the Sea Convention.

The third development that is now urgent is the emerging opportunities in the Arctic. As the area gets warmer, it is opening up to new activities such as fishing, oil and gas exploration, shipping, and tourism. This Convention provides the international framework to deal with these new opportunities. We are the only Arctic nation outside the Convention. Russia and the other Arctic states are advancing their continental shelf claims in the Arctic while we are on the outside looking in. As a party to the Convention, we would have a much stronger basis to assert our interests throughout the entire Arctic region.

The fourth development is that the Convention's bodies are now up and running. The body that makes recommendations regarding countries' continental shelves beyond 200 nautical miles is actively considering submissions from over 40 countries without the participation of a U.S. commissioner. The body addressing deep seabed mining is now drawing up the rules to govern the extraction of minerals of great interest to the United States and American industry. It simply should not be acceptable to us that the United States will be absent from either of those discussions.

Our negotiators obtained a permanent U.S. seat on the key decision-making body for deep seabed mining. I know of no other international body that accords one country and one country alone—us—a permanent seat on its decision making body. But until we join, that reserved seat remains empty.

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Now as a non-party to the Convention, we rely—we have to rely—on what is called customary international law as a legal basis for invoking and enforcing these norms. But in no other situation …in which our security interests are at stake do we consider customary international law good enough to protect rights that are vital to the operation of the United States military. So far we've been fortunate, but our navigational rights and our ability to challenge other countries' behavior should stand on the firmest and most persuasive legal footing available, including in critical areas such as the South China Sea.

I'm sure you have followed the claims countries are making in the South China Sea. Although we do not have territory there, we have vital interests, particularly freedom of navigation. And I can report from the diplomatic trenches that as a party to the Convention, we would have greater credibility in invoking the Convention's rules and a greater ability to enforce them.

Now, I know a number of you have heard arguments opposing the Convention. And let me just address those head-on. Critics claim we would surrender U.S. sovereignty under this treaty. But in fact, it's exactly the opposite. We would secure sovereign rights over vast new areas and resources, including our 200-mile exclusive economic zone and vast continental shelf areas extending off our coasts and at least 600 miles off Alaska. I know that some are concerned that the treaty's provisions for binding dispute settlement would impinge on our sovereignty. We are no stranger to similar provisions, including in the World Trade Organization which has allowed us to bring trade cases; many of them currently pending against abusers around the world. As with the WTO, the U.S. has much more to gain than lose from this proposition by being able to hold others accountable under clear and transparent rules.

Some critics invoke the concern we would be submitting to mandatory technology transfer and cite President Reagan's other initial objections to the treaty. Those concerns might have been relevant decades ago, but today they are not. In 1994, negotiators made modifications specifically to address each of President Reagan's objections, including mandatory technology transfer, which is why President Reagan's own Secretary of State, George Shultz, has since written we should join the Convention in light of those modifications having been made.

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Now some mischaracterize the payments for the benefit of resource rights beyond 200 miles as quote "a UN tax"—and this is my personal favorite of the arguments against the treaty—that will be used to support state sponsors of terrorism. Honestly, I don't know where these people make these things up, but anyway the Convention does not contain or authorize any such taxes. Any royalty fee does not go to the United Nations; it goes into a fund for distribution to parties of the Convention. And we, were we actually in the Convention, would have a permanent veto power over how the funds are distributed. And we could prevent them from going anywhere we did not want them to go. I just want to underscore—this is simple arithmetic. If we don't join the Convention, our companies will miss out on opportunities to explore vast areas of continental shelf and deep seabed. If we do join the Convention, we unlock economic opportunities worth potentially hundreds of billions of dollars, for a small percentage royalty a few years down the line.

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2. Other Boundary or Territorial Issues: South China Sea

On April 30, 2012, in remarks delivered after a meeting with U.S. Defense Secretary Leon Panetta, Philippines Foreign Secretary Albert del Rosario, and Philippines Defense Secretary Voltaire Gazmin, Secretary Clinton summarized the discussion during their meeting related to the South China Sea. Secretary Clinton's remarks, along with those of Secretary Panetta, are available at *www.state.gov/secretary/rm/2012/04/188982.htm*, and included the following:

> We also discussed the evolving regional security situation. We both share deep concerns about the developments on the Korean Peninsula and events in the South China Sea, including recent tensions surrounding the Scarborough Shoal. In this context, the United States has been clear and consistent. While we do not take sides on the competing sovereignty claims to land features in the South China Sea, as a Pacific power we have a national interest in freedom of navigation, the maintenance of peace and stability, respect for international law, and the unimpeded, lawful commerce across our sea lanes. The United States supports a collaborative diplomatic process by all those involved for resolving the various disputes that they encounter. We oppose the threat or use of force by any party to advance its claims. And we will remain in close contact with our ally, the Philippines. I look forward to continuing to work closely with the foreign secretary as we approach the ASEAN Regional Forum in July.

On August 3, 2012, the U.S. Department of State issued a press statement on the U.S. position on territorial and maritime disputes in the South China Sea. That statement is excerpted below and available at *www.state.gov/r/pa/prs/ps/2012/08/196022.htm*. See *Digest 2010* at 513-14 and *Digest 2011* at 405-06 for Secretary Clinton's past remarks on the South China Sea disputes.

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As a Pacific nation and resident power, the United States has a national interest in the maintenance of peace and stability, respect for international law, freedom of navigation, and unimpeded lawful commerce in the South China Sea. We do not take a position on competing territorial claims over land features and have no territorial ambitions in the South China Sea; however, we believe the nations of the region should work collaboratively and diplomatically to resolve disputes without coercion, without intimidation, without threats, and without the use of force.

We are concerned by the increase in tensions in the South China Sea and are monitoring the situation closely. Recent developments include an uptick in confrontational rhetoric, disagreements over resource exploitation, coercive economic actions, and the incidents around the Scarborough Reef, including the use of barriers to deny access. In particular, China's upgrading of the administrative level of Sansha City and establishment of a new military garrison

there covering disputed areas of the South China Sea run counter to collaborative diplomatic efforts to resolve differences and risk further escalating tensions in the region.

The United States urges all parties to take steps to lower tensions in keeping with the spirit of the 1992 ASEAN Declaration on the South China Sea and the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea. We strongly support ASEAN's efforts to build consensus on a principles-based mechanism for managing and preventing disputes. We encourage ASEAN and China to make meaningful progress toward finalizing a comprehensive Code of Conduct in order to establish rules of the road and clear procedures for peacefully addressing disagreements. In this context, the United States endorses the recent ASEAN Six-Point Principles on the South China Sea.

We continue to urge all parties to clarify and pursue their territorial and maritime claims in accordance with international law, including the Law of the Sea Convention. We believe that claimants should explore every diplomatic or other peaceful avenue for resolution, including the use of arbitration or other international legal mechanisms as needed. We also encourage relevant parties to explore new cooperative arrangements for managing the responsible exploitation of resources in the South China Sea.

As President Obama and Secretary Clinton have made clear, Asia-Pacific nations all have a shared stake in ensuring regional stability through cooperation and dialogue. To that end, the United States actively supports ASEAN unity and leadership in regional forums and is undertaking a series of consultations with ASEAN members and other nations in the region to promote diplomatic solutions and to help reinforce the system of rules, responsibilities and norms that underpins the stability, security and economic dynamism of the Asia-Pacific region.

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3. Piracy

For discussion of U.S. piracy prosecutions in 2011, see Chapter 3.B.8.

4. Freedoms of Navigation and Overflight

a. Airspace warning area—Mexico

On January 11, 2012, the United States responded, through its embassy in Mexico City, to a September 20, 2011 communication from the Secretariat for Foreign Relations of the United Mexican States. Mexico had requested that the United States modify its airspace warning area off the coast of Mexico, established in 1949. At the time the warning area was established, Mexico's territorial sea was considered to extend 9 nautical miles. The United States, through its 2012 diplomatic note, amended the coordinates of the airspace warning area to recognize a 12 nautical mile territorial sea. The substance of the U.S. diplomatic note sent in January 2012 appears below.

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The Embassy of the United States of America presents its compliments to the Secretariat of Foreign Relations of the United Mexican States and has the honor to refer to the Secretariat's diplomatic note of September 20, 2011, regarding a special use airspace warning area that lies to the West of the Pacific Coast of the United States and Mexico.

Since the establishment of Warning Area 291 (W-291) in 1949, U.S. Navy Fleet Area Control and Surveillance Facility San Diego has facilitated the safe and orderly passage of aircraft within its confines. Tens of thousands of air and surface operations take place in W-291 each year. W-291 is a necessary tool that alerts aircraft to the operations going on around them. It facilitates the timely exchange of information about the operating environment so that aircraft can operate safely and avoid incident.

During the establishment of W-291 in 1949, the original boundaries were calculated to avoid Mexico's territorial sea. In acknowledgement that Mexico's territorial sea now extends out to 12 nautical miles, the boundaries of W-291 will be amended…

The process to amend and publish the legal description of W-291 may take several months. However, in the interim and until the W-291 is redesigned and published, the U.S. Navy will continue to ensure that all naval and air operations will take place outside of 12 nautical miles offshore.

To coordinate the operational functioning of W-291 and the associated airspace, the Embassy asks that the Secretariat extend to the appropriate Mexican civil aviation officials an invitation to attend a conference with the U.S. Navy and Federal Aviation Administration (FAA) at the U.S. Navy Fleet Area Control and Surveillance Facility…

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b. Freedom of Navigation—Pakistan

On January 10, 2012 and January 13, 2012, the Ministry of Foreign Affairs of the Islamic Republic of Pakistan sent diplomatic notes to the U.S. Embassy in Islamabad concerning activities of a U.S. military survey vessel, the USNS INVINCIBLE, in the Exclusive Economic Zone ("EEZ") of Pakistan. The U.S. Embassy responded by diplomatic note on February 17, 2012, asserting that under international law, no prior notification or approval for such activities is required. Excerpts from the U.S. diplomatic note follow.

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The United States has the honor to inform the Ministry of Foreign Affairs that the USNS INVINCIBLE was engaged in the exercise of high seas freedoms. International law as reflected in the Law of the Sea Convention (the Convention), indicates that the exercise of these freedoms is not subject to coastal state requirements for prior notification or approval.

The United States notes that, as stated in Article 56 of the Convention, a coastal State's rights and jurisdiction within its exclusive economic zone are subject to the rights and duties of

other states as provided for in international law. The rights specifically preserved for ships and aircrafts of all States in the exclusive economic zone include the freedom of navigation and overflight, and other internationally lawful uses of the sea related to those freedoms, without requirement to provide prior notification to or obtain prior permission from the coastal State. These include military surveys, exercises and maneuvers.

The United States does not accept the view that a coastal state may require its prior notification or consent. As reflected in the Convention, the United States considers that all States have the right to conduct military activities within the EEZ, subject to an obligation to have due regard to coastal State resource and other rights as well as the rights of other States as set forth in the Convention. It is the duty of the flag State, not the right of the coastal State, to enforce this due regard obligation. The United States has the honor to inform the Ministry of Foreign Affairs that the USNS INVINCIBLE conducted its activities with due regard to the rights and duties referenced in Article 58 of the Convention.

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c. Archipelagic States

On January 18, 2012, the United States delivered a diplomatic note to the Dominican Republic contesting the Dominican Republic's claim to be an archipelagic state. The British Embassy and the chiefs of mission of several European Union member states delivered similar demarches in January 2012. The United States and the United Kingdom had previously contested the Dominican Republic claim to be an archipelagic state on several occasions, including by diplomatic notes delivered in 2007 and 2010. See *Digest 2010* at 522-24 and *Digest 2007* at 641-43. The substantive paragraphs of the January 2012 U.S. diplomatic note appear below.

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The Embassy of the United States of America in the Dominican Republic presents its compliments to the Ministry of Foreign Relations and has the honor to refer to Law No. 66-07 of May 22, 2007, by which the Dominican Republic:

a) declared itself an Archipelagic State;
b) drew straight baselines connecting a number of turning points on certain banks and keys;
c) claimed certain bodies of waters as internal waters and others as historic bays;
d) sets out the coordinates of the outer limits of its claimed exclusive economic zone (EEZ);
e) purported to limit the right of innocent passage through its archipelagic waters and territorial sea (and over-flight) to those ships and aircraft not carrying cargoes of radioactive substances or highly toxic chemicals;
f) does not recognize the right of archipelagic sea lanes passage; and
g) claimed rights over old shipwrecks within its EEZ.

The Embassies of the United States and the United Kingdom informed the Ministry that their governments contested these claims by the Dominican Republic and requested clarifications

in U.S. Diplomatic Note 234 of October 18, 2007, and UK Diplomatic Note 64 of that same date, and in their concurrent joint representation to the Ministry of Foreign Relations.

The Embassies the United States, the United Kingdom and Japan made a similar demarche to the Ministry of Foreign Relations on December 16, 2008, requesting that the Ministry of Foreign Relations respond to the requests for clarifications contained in U.S. Diplomatic Note 234 of October 18, 2007, and UK Diplomatic Note 64 of that same date.

The Embassies of the United States and the United Kingdom made a similar demarche to the Ministry of Foreign Relations on October 28, 2010, requesting that the Ministry of Foreign Relations respond to the requests for clarifications contained in U.S. Diplomatic Note 234 of October 18, 2007, and UK Diplomatic Note 64 of that same date.

No substantive reply has yet been received from the Ministry of Foreign Relations to any of these requests for clarification.

The Embassy emphasizes that the Government of the United States of America contests the Government of the Dominican Republic's claim to be an archipelagic state and requests that the Ministry of Foreign Relations respond to these requests for clarification of the Dominican Republic's claims.

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5. Maritime Security and Law Enforcement

a. Agreement with Samoa

On June 2, 2012, the United States and Samoa signed a bilateral maritime law enforcement agreement. This is the ninth such agreement with Pacific island nations. The agreement, which entered into force upon signature, will facilitate law enforcement cooperation on counter-narcotics and fisheries. As provided for in Article 2 of the agreement, its purpose is to "strengthen ongoing cooperative maritime surveillance and interdiction activities between the parties, for the purposes of identifying, combating, preventing, and interdicting illicit transnational maritime activity." The agreement contains shiprider provisions, allowing officers of Samoa's Ministry of Police and Prison and Ministry of Agriculture and Fisheries to embark on U.S. law enforcement vessels or aircraft to conduct joint operations. These vessels or aircraft carrying "embarked officers" may be authorized on a case-by-case basis to enter the territorial sea of Samoa to assist in stopping, boarding, and searching vessels suspected of violating Samoa's laws and in arresting suspects and seizing contraband and vessels. The agreement also permits U.S. law enforcement vessels and aircraft, with embarked officers, to assist in fisheries surveillance and law enforcement activities in Samoa's exclusive economic zone. For operations without an embarked Samoan law enforcement official, the agreement further authorizes the United States to board and search suspect vessels claiming registry or nationality in Samoa and located seaward of any State's territorial sea. The full text of the agreement is available at *www.state.gov/documents/organization/198382.pdf*.

b. Agreement with Canada

On October 11, 2012, the Framework Agreement on Integrated Cross-Border Maritime Law Enforcement Operations between the Government of the United States of America and the Government of Canada, signed at Detroit, May 26, 2009, entered into force. For further discussion of the agreement, see *Digest 2009* at 469-70. The full text of the agreement with Canada is available at *http://www.state.gov/documents/organization/153586.pdf*.

6. United States-Mexico Transboundary Hydrocarbons Agreement

On February 20, 2012, the United States and Mexico signed an agreement concerning the development of oil and gas reservoirs that cross the international maritime boundary between the two countries in the Gulf of Mexico. See State Department February 20, 2012 fact sheet, available at *www.state.gov/r/pa/prs/ps/2012/02/184235.htm*. Excerpts from the fact sheet summarizing the elements of the agreement appear below.

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The United States and Mexico today signed an agreement concerning the development of oil and gas reservoirs that cross the international maritime boundary between the two countries in the Gulf of Mexico. The Agreement is designed to enhance energy security in North America and support our shared duty to exercise responsible stewardship of the Gulf of Mexico. It is built on a commitment to the safe, efficient, and equitable exploitation of transboundary reservoirs with the highest degree of safety and environmental standards.

Elements of the Agreement

The United States and Mexico jointly announced their intention to negotiate a transboundary hydrocarbons agreement on June 23, 2010, following the Joint Statement adopted by Presidents Obama and Calderon at the conclusion of President Calderon's State Visit to Washington on May 19, 2010.

Upon entry into force, the current moratorium on oil exploration and production in the Western Gap portion of the Gulf of Mexico will end.

The Agreement establishes a cooperative process for managing the maritime boundary region that promotes joint utilization of transboundary reservoirs.

The Agreement provides a legal framework for possible commercial activities at the maritime boundary and sets clear guidelines for transboundary developments. It establishes incentives for oil and gas companies to voluntarily enter into arrangements to jointly develop any transboundary reservoirs. In the event such an arrangement is not achieved, the Agreement establishes a process by which U.S. companies and PEMEX can individually develop the resources on each side of the border while protecting each nation's interests and resources.

The legal certainty created by the Agreement will enable U.S. companies to explore new business opportunities and carry out collaborative projects with PEMEX.

The Agreement also provides for joint inspections teams to ensure compliance with applicable laws and regulations. Both governments will review all plans for the development of any transboundary reservoirs.

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B. OUTER SPACE

1. International Code of Conduct for Outer Space Activities

On January 17, 2012, Secretary Clinton issued a press statement regarding the U.S. decision to join with other nations to develop an International Code of Conduct for Outer Space Activities. Secretary Clinton's statement is excerpted below and available at *www.state.gov/secretary/rm/2012/01/180969.htm*. On the same day, the State Department issued a fact sheet about the Code of Conduct, available at *www.state.gov/r/pa/pl/2012/180998.htm*. The January 17 fact sheet explained that the European Union's draft Code of Conduct could serve as a foundation for developing an International Code of Conduct that would be non-legally binding and would be "focused on the use of voluntary and pragmatic transparency and confidence-building measures to help prevent mishaps, misperceptions, and mistrust in space." The fact sheet further stated that "an International Code of Conduct, if adopted, would establish guidelines for responsible behavior to reduce the hazards of debris-generating events and increase the transparency of operations in space to avoid the danger of collisions."

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The long-term sustainability of our space environment is at serious risk from space debris and irresponsible actors. Ensuring the stability, safety, and security of our space systems is of vital interest to the United States and the global community. These systems allow the free flow of information across platforms that open up our global markets, enhance weather forecasting and environmental monitoring, and enable global navigation and transportation.

Unless the international community addresses these challenges, the environment around our planet will become increasingly hazardous to human spaceflight and satellite systems, which would create damaging consequences for all of us.

In response to these challenges, the United States has decided to join with the European Union and other nations to develop an International Code of Conduct for Outer Space Activities. A Code of Conduct will help maintain the long-term sustainability, safety, stability, and security of space by establishing guidelines for the responsible use of space.

As we begin this work, the United States has made clear to our partners that we will not enter into a code of conduct that in any way constrains our national security-related activities in space or our ability to protect the United States and our allies. We are, however, committed to working together to reverse the troubling trends that are damaging our space environment and to preserve the limitless benefits and promise of space for future generations.

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2. UN Group of Government Experts on Outer Space

Deputy Assistant Secretary Rose also delivered remarks about developing TCBMs on February 16, 2012 at the 15th Annual Federal Aviation Administration ("FAA") Commercial Space Transportation Conference. His February 16 remarks are available at www.state.gov/t/avc/rls/184066.htm*. In addition to describing the U.S. efforts relating to the International Code of Conduct and UNCOPUOS, Mr. Rose mentioned U.S. participation in the Group of Government Experts ("GGE") on Outer Space TCBMs established by UN General Assembly Resolution 65/68 and set to begin work in 2012. Mr. Rose remarked:*

> *We support the full consideration of all helpful proposals for bilateral and multilateral TCBMs. Such proposals could include measures aimed at enhancing the transparency of national security space policies, strategies, activities and experiments or notifications regarding environmental or unintentional hazards to spaceflight safety. International consultations to prevent incidents in outer space and to prevent or minimize the risks of potentially harmful interference could also be a helpful TCBM to consider. We look forward to working with our international colleagues in a GGE that serves as a constructive mechanism to examine voluntary and pragmatic TCBMs that enhance stability and safety, and promote responsible operations in space.*

In his October 23, 2012 remarks to the UN General Assembly, discussed above and available at www.state.gov/t/avc/rls/199713.htm*, Mr. Reid also provided an update on the work of the GGE:*

> This year has also seen the first meeting of the U.N.-established Group of Government Experts (GGE) on Space TCBMs. We congratulate Victor Vasiliev of the Russian Federation on his election as Chair of the study, and we welcome the progress made by the GGE at its first session in New York. The indicative program of work adopted provides a solid framework for experts to conduct a comprehensive review of the role of unilateral, bilateral, and multilateral mechanisms to strengthen stability in space. This GGE study provides a significant opportunity to explore international cooperation on pragmatic, voluntary, effective, and timely TCBMs. By maintaining a focus on voluntary and non-legally binding measures, a consensus report can contribute to a substantive discussion on space security here at the UN General Assembly First Committee.

Cross References

U.S. efforts to counter piracy, **Chapter 3.B.8.**
Proliferation Security Initiative, **Chapter 18.B.5**

Chapter 13

Environment and Other Transnational Scientific Issues

A. LAND AND AIR POLLUTION AND RELATED ISSUES

1. Climate Change

a. Climate and Clean Air Coalition ("CCAC")

On February 16, 2012 at the State Department, Secretary of State Hillary Clinton announced the launch of the Climate and Clean Air Coalition ("CCAC"), an international effort to reduce short-lived climate pollutants ("SLCPs"). Initially, the CCAC's founding membership included six countries and the UN Environment Program ("UNEP"). Secretary Clinton's remarks are excerpted below and are also available, along with remarks of representatives of other nations joining the coalition, at *www.state.gov/secretary/rm/2012/02/184061.htm*.

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It's a very big honor for me to have you here for the purpose of launching the Climate and Clean Air Coalition, our new global effort to fight climate change, protect health, improve agricultural productivity, and strengthen energy security.

I'm very pleased to welcome my friend and colleague Lisa Jackson, the administrator of the U.S. Environmental Protection Agency; the environmental ministers from Bangladesh, Canada, Mexico, and Sweden; the ambassador from Ghana; Achim Steiner, the executive director of the UN Environment Program; other ambassadors and representatives from NGOs and the private sector.

The range of countries, organizations, and industries gathered in this room today reflects the weight of scientific research showing that climate change is one of the most serious and complex problems facing our world. We know its impacts. It impacts global security, the global economy, global food and water supplies, and the health and well-being of people everywhere. And we know that in the principal effort necessary to reduce the effects of carbon dioxide, the world has not yet done enough. So when we discover effective and affordable ways to reduce global warming—not just a little, but by a lot—it is a call to action.

The Climate and Clean Air Coalition will spread practical ideas and practices regarding so-called short-lived pollutants, which remain in the atmosphere only for a short time—pollutants such as methane, black carbon or soot, hydrofluorocarbons. In the past few years, we've learned that this group contributes much more to climate change than we previously realized. More than one-third of current global warming is caused by short-lived pollutants. They also destroy millions of tons of crops every year and wreak havoc on people's health. Millions

die annually from constantly breathing in black carbon soot that comes from cookstoves in their own homes, from diesel cars and trucks on their roads, from the open burning of agricultural waste in their fields. Furthermore, methane—a greenhouse gas more than 20 times more potent than carbon dioxide—can also be an abundant source of energy if we capture it instead of just venting it into the air or flaring it.

By focusing on these pollutants—how to reduce them and, where possible, use them for energy—we can have local and regional effects that people can see and feel. They can see those effects and become convinced that this commitment is one we all must all undertake. There will be better health, cleaner air, more productive crops, more energy—in addition to less warming. The UN Environment Program has determined that reducing these pollutants can slow global warming by up to a half degree Celsius by 2050. To put that into context, the world's goal is to limit the rise in global temperature to two degrees. So a half a degree, or 25 percent, is significant.

Now, exceptional work has already been done to investigate how to reduce these pollutants. For example, UNEP has identified a package of 16 major actions, which include replacing inefficient cookstoves and traditional brick kilns with more efficient ones to cut down on black carbon, stopping the burning of agricultural waste, harvesting coal mine methane, improving wastewater treatment, and adopting emissions standards on vehicles.

Now, every one of the actions has already been applied somewhere, and so we know they work. Every one is based on existing technology, and fully half of them are considered low-cost interventions. So when you put all these factors together, they add up to an important opportunity that we cannot miss.

This coalition—the first international effort of its kind—will conduct a targeted, practical, and highly energetic global campaign to spread solutions to the short-lived pollutants worldwide. It will mobilize resources, assemble political support, help countries develop and implement a national action plan, raise public awareness, and reach out to other countries, companies, NGOs and foundations.

Now, we have every hope that we will see results soon, both on the ground and in the atmosphere. One of the benefits of focusing on pollutants that are short-lived is, if we can reduce them significantly, we will have a noticeable effect on our climate in relatively short order.

I am pleased to announce that our foundation partners are committing more than $15 million to get the coalition up and running. And the United States is proud to commit $12 million of new funding to this effort, in addition to the $10 million in annual support already provided to each of two existing efforts: the Global Methane Initiative and the Global Alliance for Clean Cookstoves that I had the honor of announcing in 2010.

Now, this project holds a lot of promise, especially in the context of our larger battle against climate change. Now we know, of course, that this effort is not the answer to the climate crisis. There is no way to effectively address climate change without reducing carbon dioxide, the most dangerous, prevalent, and persistent greenhouse gas. It stays in the atmosphere for hundreds of years. So this coalition is intended to complement—not supplant—the other actions we are, and must be, taking.

Now to that end, the Obama Administration has been acting aggressively across the board. The Administration adopted fuel efficiency standards that will double the fuel economy of our cars and trucks. We're making a big push to improve energy efficiency in commercial buildings, a major source of carbon emissions, as well to improve standards for home appliances. We've nearly doubled how much electricity we generate from renewable sources. And looking

ahead, we will be focusing on the goal of putting a million electric vehicles on the road by 2015 and pursuing President Obama's call for a clean energy standard to slash carbon emissions while building domestic and export markets for clean energy technology.

The nations represented here today have made strong progress, and I'm pleased that the international community took steps in the right direction at the climate conference in Durban. It followed up both on previous agreements to establish a transparency regime, a green climate fund, and a technology center and network, and also helped to lay the groundwork for negotiations for a new legal agreement that applies to all parties.

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By December 6, 2012, when the CCAC held its High Level Assembly, its membership had expanded to 49 partners. The CCAC operates in accordance with the "Framework for the Climate and Clean Air Coalition to Reduce Short-Lived Climate Pollutants," which is excerpted below and available at *www.unep.org/ccac/Portals/24183/docs/CoalitionFramework.pdf*. As set forth in the Framework, the CCAC has an assembly, working group, steering committee, scientific advisory panel, and other sub-groups. UNEP serves as the secretariat for the CCAC, and all decisions of the CCAC are made by consensus. The Framework provides that the Coalition shall continue for five years unless extended.

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FRAMEWORK FOR THE CLIMATE AND CLEAN AIR COALITION TO REDUCE SHORT-LIVED CLIMATE POLLUTANTS

The representatives of the Governments of Bangladesh, Canada, Ghana, Mexico, Sweden, and the United States of America:

Recognizing that key short-lived climate pollutants (SLCPs), including methane, black carbon, tropospheric ozone, and many hydrofluorocarbons, are responsible for a substantial fraction of near term climate change, with a particularly large impact in sensitive regions of the world;

Concerned that SLCPs have significant, detrimental health, agricultural, and environmental impacts;

Recognizing that control of SLCPs is expected to have near term and multiple benefits for human well-being;

Acknowledging the ongoing efforts by states, organizations, and partnerships to address SLCPs and related public health issues;

Recognizing that these efforts will benefit from the active involvement of the private sector, environmental groups, civil society, and intergovernmental organizations;

Committed to control and to reduce SLCPs, including in their own countries;

Appreciating the unique capabilities of the United Nations Environment Programme (UNEP);

Recognizing the central importance of reducing emissions of green house gases, including through national action and multilateral cooperation under the United Nations Framework Convention on Climate Change, in order to address climate change effectively;

Set forth the following Framework for the Climate and Clean Air Coalition to Reduce Short-Lived Climate Pollutants ("the Framework").

I. Purpose

The Coalition is a voluntary international framework for concrete and substantial action to accelerate efforts to reduce SLCPs, with an initial focus on methane, black carbon, and many hydrofluorocarbons (HFCs), in ways that protect the environment and public health, promote food and energy security, and address near term climate change.

II. Functions

The Coalition intends to enhance global, regional, and national public and private efforts to reduce SLCPs by:

A. raising awareness of SLCPs and their impacts;

B. enhancing existing and developing new national actions to reduce SLCPs;

C. encouraging existing and new regional actions and promoting opportunities for greater international coordination;

D. reinforcing and tracking existing efforts to reduce SLCPs and developing and improving inventories;

E. identifying barriers to action and seeking to surmount them;

F. promoting best practices or available technologies and showcasing successful efforts to address SLCPs;

G. improving understanding of and reviewing scientific progress on SLCPs, their impacts, and the benefits of mitigation, and disseminating knowledge; and

H. mobilizing targeted support for those developing countries that require resources to develop their capacity and to implement actions consistent with national strategies to support sustainable development.

Each Partner is expected to undertake activities under this Framework in accordance with the laws, regulations, and policies under which it operates and applicable international instruments.

III. Participation

A. Any member State of the United Nations or regional economic integration organization (REIO) may join the Coalition as a Partner ("State and REIO Partners"), subject to the conditions in paragraph C and the consensus approval of the State and REIO Partners.

B. A non-governmental organization accredited to the United Nations, an intergovernmental entity or initiative, or a regional or international organization (or subsidiary thereof) may join the Coalition as a Partner, subject to the conditions in paragraph C and the consensus approval of the State and REIO Partners.

C. A State or other stakeholder may join the Coalition under paragraph A or B, respectively, if it:

1. endorses this Framework;

2. endorses meaningful action to address SLCPs consistent with the Framework; and

3. identifies particular areas of interest related to SLCPs and any specific actions taken or planned to address near term climate change.

D. UNEP is to participate in the Coalition as a Partner and to perform the functions described in section IV.F. UNEP will also contribute to the Coalition through its ongoing assessment efforts regarding SLCPs.

E. Participation in the Coalition is voluntary, and each Partner individually determines the nature of its participation.

F. This Framework does not create any legally binding obligations between or among its Partners.

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b. UN Framework Convention on Climate Change ("UNFCCC")

(1) Statement on negotiations under the Durban Platform

On August 2, 2012, the United States Special Envoy for Climate Change, Todd Stern, delivered a speech on climate change at Dartmouth College. Special Envoy Stern commented on the international negotiations in the UNFCCC, and highlighted the decision reached in 2011, the Durban Platform, that launched negotiations for a new agreement, to be negotiated by 2015 and entering into force by 2020, that would be "applicable to all Parties." Special Envoy Stern noted the importance of this shift, away from the perception of a binary system of developed and developing Parties that have fundamentally different obligations under the UNFCCC, toward a system where all Parties accept legal obligations while still recognizing the different national circumstances of countries. The speech, excerpted below, is available in full at *www.state.gov/e/oes/rls/remarks/2012/196004.htm*.

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Today, I'm going to talk about where we stand both internationally and domestically and offer some thoughts about where we need to go in our efforts to limit climate change.

We'll begin in the international arena, and I want to make a preliminary point. Climate change negotiations are very difficult. They are difficult, first, because climate change is not just an environmental issue—it implicates virtually every aspect of national economies, including industry, energy, transportation, agriculture and forests. So limits on emissions make countries nervous about economic growth and development. They are also difficult because the multilateral climate body—the UN Framework Convention on Climate Change—includes over 190 countries; these countries are grouped into various blocs with criss-crossing agendas and priorities; long-standing north-south resentments continue to rile the debate; and negotiations are governed by a consensus rule of procedure, which, in effect, enables any small handful of determined countries to block progress. So this is challenging stuff.

Right now, we are at an interesting juncture in light of what occurred at the negotiating session in South Africa last December—a juncture from which we can look back and reflect on what we have learned over the past three years, and from which we can look ahead to a revised model of international climate action.

Shifting the paradigm. At the time President Obama took office in early 2009, hopes were running high around the world that a major new treaty would be concluded in December in Copenhagen at the annual meeting of the "Conference of the Parties" to the UN Framework Convention.

But we believed from the outset that these hopes were built on a dubious foundation. The prevailing paradigm of climate negotiations was still that a firewall existed between developed and developing countries as they were defined in the 1992 Framework Convention, with all

specific obligations to cut emissions assigned to developed countries. This paradigm is embodied in the 1997 Kyoto Protocol and the Berlin Mandate that gave rise to it.

The U.S. never thought that paradigm was legitimate. In 2009 we saw it as an unworkable basis for moving forward. As a matter of substance, you cannot meet the climate challenge by focusing only on developed countries when developing countries already account for around 55% of global emissions from fossil fuels and will account for 65% by 2030. You cannot build a system that treats China like Chad when China is the world's second largest economy, largest emitter, second largest historic emitter, will be twice the size of the U.S. in emissions in a few years and has even caught up to the EU in *per capita* emissions, according to recent numbers from the Netherlands Environmental Assessment Agency.

This is no knock on China. Their economic success is remarkable, and they have surely lifted more people out of poverty faster than any country in history. They are also determined to become the world's leading producer of renewable energy. But the Chinese emission numbers do mean that if we're going to be serious about taming climate change, we need to include all the major emitters, both developed and developing, accounting for some 80% of global emissions, and build out from there.

Further, as a matter of U.S. politics, any agreement that requires action by us but not by the emerging economies would be a dead letter in the U.S. Senate. Remember that all the way back in 1997, the Senate, by a vote of 95-0, passed the Byrd-Hagel resolution, declaring that the U.S. should not accept commitments to reduce greenhouse gases unless developing countries accepted such commitments as well. Securing Senate support for climate agreements is difficult under any circumstances, but unless all major countries are seen as committing to real action, it will be hopeless. Of course, the actions of different countries need not be the same—addressing climate change is not a one-size fits all proposition—but they need to be seen as fair.

With this in mind, our focus for the Copenhagen meeting in 2009 was clear. First, while we supported the objective of a new legally binding agreement, we made clear that we would only consider such an agreement if it fully included at least China and other emerging economies. Second, whether the product of Copenhagen was to be legally binding or not, it was crucial that all major players, developed and developing, commit to real action. And third, everyone's implementation needed to be subject to genuine transparency so that all countries could have confidence that others were acting.

If you look at the major climate meetings of 2009, 2010 and 2011 through this lens, you will see that we accomplished quite a bit.

Copenhagen is remembered for its chaos, for the spectacle of world leaders improvising an agreement in the final hours to avoid meltdown, and for the dashing of over-inflated expectations. But it was also important. The Copenhagen Accord included, for the first time, agreement by all major countries to implement a set of listed actions and to do so with international transparency. It thus struck a blow against the firewall. It also ushered in a new, more "bottom-up" structure in which countries put forward their own pledges. This structure was essential for bringing in the emerging economies in a manner roughly parallel to the industrialized countries. And Copenhagen also included important provisions on funding, technology and forest protection.

Although the full Conference of the Parties refused to formally adopt the Copenhagen Accord, owing to the hard opposition of a small handful of countries, the next year's meeting in Cancun adopted a fleshed out, 30-page version of the Accord.

Last December's meeting in Durban, South Africa, took further steps to make the Copenhagen and Cancun agreements operational for the period up to 2020, writing guidelines for the new transparency regime, outlining the structure and functions of a new Green Climate Fund, and taking steps to set up a new Technology Center and Network.

But the headline out of Durban was an understanding reached in another short decision, called the "Durban Platform," to negotiate a new legal agreement by 2015, taking effect after 2020.

For us, the pivotal features of the Durban Platform that will shape the contours of the new agreement are that it is to be "applicable to all Parties" and that it applies to the world of the 2020s. "Applicable to all" matters because it means the 1990s firewall, according to which commitments were only applicable to some, is finished. The 2020s matter because by that time we will be 30 years removed from the original 1992 division of countries, making that division ever more anachronistic.

None of this means that all countries will be expected to limit emissions in the same way. Differentiation among parties is an accepted premise of climate diplomacy. But in the world of the Durban Platform, it can no longer be the differentiation of two distinct categories of countries; rather, it will have to be the differentiation of a continuum, with each country expected to act vigorously in accordance with its evolving circumstances, capabilities and responsibilities.

These initial observations about the Durban Platform are the only the start of the discussion. A live and active debate is just beginning about the kind of legal agreement that should take effect after 2020.

Pursuing what can work. For many countries, the core assumption about how to address climate change is that you negotiate a treaty with binding emission targets stringent enough to meet a stipulated global goal—namely, holding the increase in global average temperature to less than 2° centigrade above pre-industrial levels—and that treaty in turn drives national action. This is a kind of unified field theory of solving climate change—get the treaty right; the treaty dictates national action; and the problem gets solved. This is entirely logical. It makes perfect sense on paper. The trouble is it ignores the classic lesson that politics—including international politics—is the art of the possible.

Nations, as a rule, do not act in ways they see as contrary to their core interests or in disregard of what a great British colleague of mine once described as their "compelling constraints," whether economic or political. If countries are told that, in order to reach a global goal, they must accept targets their leadership sees as contrary to their core interest in growth and development those countries are likely to say no.

These basic facts of life suggest that the likelihood of all relevant countries reaching consensus on a highly prescriptive climate agreement are low, and this reality in turn argues in favor of a more flexible approach that starts with nationally derived policies. Back in 2009, Australia proposed a "schedules" structure—lingo borrowed from the trade world—in which each country would offer up its own commitments. Such a scheme could be legally binding at the national level or the international level.

This kind of approach would have a far better chance of being broadly acceptable to all parties, but the risk of a system like this is that the policies and targets countries submit prove to be too modest. The question is whether a system could be structured to increase its overall ambition. For example, the system might include a six-month period after countries submitted initial offers in which other governments, experts and civil society could react and urge

modifications. How to encourage ambition in an agreement that is broadly inclusive will be one of the fundamental challenges in designing a new system.

The keys to making headway in this early conceptual phase of the new agreement is to be open to new ideas that can work in the real world and to keep our eyes on the prize of reducing emissions rather than insisting on old orthodoxies.

In addition, we have to develop an agreement that builds in the capacity for modification over time. Remember that we have agreed to complete this new instrument by the end of 2015, but it won't take effect for five more years. No one in 2015 can have a full understanding of what sort of reductions will be possible so many years in advance. Unforeseen changes in technology in the mid-2020s may make mitigation offers put forward in 2015 obsolete. So the new agreement should give countries flexibility to modify and update their mitigation commitments, spurring more and more aggressive action over time. In addition, the dynamic nature of development around the world means that expectations for country action can no longer be frozen in time. The developing country of 2015 may be a top five economy by 2025.

This kind of flexible, evolving legal agreement cannot guarantee that we meet a 2 degree goal, but insisting on a structure that *would* guarantee such a goal will only lead to deadlock. It is more important to start now with a regime that can get us going in the right direction and that is built in a way maximally conducive to raising ambition, spurring innovation, and building political will.

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(2) Conference of the Parties

The United States participated in the Eighteenth Session of the Conference of the Parties to the UNFCCC in Doha, November 26-December 7, 2012. At the Eighteenth Session, the Conference of the Parties ("COP") adopted the "Doha Gateway," a package of decisions that, among other things, closed out the work of the Ad Hoc Working Group on Long-term Cooperative Action ("LCA") that had been formed by a decision of the COP at its Thirteenth Session in 2008. U.N. Doc. FCCC/CP/2012/8/Add.1. Upon adoption of the Doha Gateway decisions, Special Envoy Stern read a statement, which appears below.

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Mr. President, I want to extend my appreciation to you personally and to the whole Qatari team for the fine work you did in hosting this conference and the warm [hospitality] you extended to all parties.

Much has been accomplished in this conference. This transitional COP was designed to conclude the Kyoto Protocol and the LCA tracks from Bali and make progress on the Durban track we agreed on last year. And it has significantly realized those objectives.

The LCA has accomplished a great deal in the past three years. Now we are concluding it. We have mitigation pledges from dozens and dozens of countries, both developed and developing. We have agreed to and put in place transparency guidelines, we've set up the Green Climate Fund, and established a standing committee on finance as well as both promised and

carried out the promise of Fast Start Financing. We have established a Technology Executive Committee and a Climate Technology Center and Network, an adaptation committee and so forth.

Mr. President, there are three provisions of the package that I must make particular comments on. First, with respect to paragraph 2 of the LCA outcome document, I would like to make clear that the United States does not accept paragraph 2 to the extent that it is read in a manner that is inconsistent with the FCCC or the Cancun agreements.

Second, with respect to paragraph 54, Article 3.5 of the FCCC addresses the issue of trade measures, we interpret the words "of concern" to refer to the concern of the Party that raises an issue.

Third, regarding the last preambular paragraph of the decision on the [Ad Hoc Working Group on the Durban Platform for Enhanced Action ("ADP")], which references the principles of the Convention, the United States views this reference as having no effect on the mandate for the negotiations that was agreed last year in Durban. This provision cannot and will not be the basis upon which the U.S. will engage in the work of the ADP. We will reject any attempt to invoke this provision as having any relevance to that mandate. We request that the report of this meeting reflect this statement under the relevant agenda items.

Once again, thank you for your work during this COP.

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2. Ozone Depletion

From November 12 to 16, 2012, the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer ("Montreal Protocol") held their 24th Meeting, marking the 25th anniversary of the Montreal Protocol. Discussions at the Meeting included proposals to phase down the consumption and production of hydrofluorocarbons ("HFCs"), potent greenhouse gases used as alternatives to ozone-depleting substances that are being phased out under the Montreal Protocol. See *Digest 2011* at 418-19, *Digest 2010* at 542-44, and *Digest 2009* at 493-95 for past versions of the proposal to reduce the use of HFCs presented by Canada, Mexico, and the United States. Although a few states persisted in opposition to the proposal, over 100 Parties expressed support. U.N. Doc. UNEP/OzL.Pro.24/5. The Parties agreed to form a "discussion group" to consider the HFC phase down proposals, and to conduct a technical review of HFC alternatives that will inform discussions at the next Meeting of Parties. UNEP/OzL.Pro.24/10, Decision XXIV/7; UNEP/OzL.Pro.24/10, Decision XXIV/5. Documents for the 24th Meeting of the Parties are available at *http://conf.montreal-protocol.org/meeting/mop/mop-24/presession/default.aspx*.

B. PROTECTION OF MARINE ENVIRONMENT AND MARINE CONSERVATION

1. Marine Pollution from Ships

a. U.S. Ratification of the 2001 Anti-Fouling Convention

On August 21, 2012, the United States ratified the International Convention on the Control of Harmful Anti-Fouling Systems on Ships, concluded in 2001 ("Anti-Fouling Convention"). The Anti-Fouling Convention aims to address the negative effects on the marine environment of anti-fouling systems, which are used on the hulls of ships to prevent the growth of marine organisms. The instrument of ratification was deposited with the International Maritime Organization ("IMO"), and the Anti-Fouling Convention entered into force for the United States on November 21, 2012. The U.S. Senate provided its advice and consent to ratification in 2008. See *Digest 2008* at 695-98. The U.S. Congress subsequently enacted Title X of the Coast Guard Authorization Act of 2010, Pub. L. 111-281 (33 U.S.C. 3801-3857), to implement the Anti-Fouling Convention. Further background on the Anti-Fouling Convention, including a link to the text of the convention, is available on the website of the U.S. Coast Guard, at *https://homeport.uscg.mil/mycg/portal/ep/browse.do?channelId=-18361&channelPage=%2Fep%2Fchannel%2Fdefault.jsp&pageTypeId=13489&BV_*. The Coast Guard's October 15, 2012 Policy Letter providing guidance on implementation of the Anti-Fouling Convention is available at *www.uscg.mil/hq/cg5/TVNCOE/Documents/policyletters/AntiFoulingSystems12-08.pdf*.

b. U.S. Implementation of Amendments to MARPOL Annex I

On April 9, 2012, the U.S. Coast Guard issued a notice of proposed rulemaking, proposing "to amend our regulations covering Navigation and Navigable Waters to align with recent amendments to Annex I of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 [("MARPOL 73/78")], which were adopted by the Marine Environment Protection Committee during its 52nd, 54th, 56th, and 59th sessions." 77 Fed. Reg. 21,360 (Apr. 9, 2012). The amendments are described in the excerpts below from the Federal Register notice. The comment period for the proposed rule was extended on July 26, 2012. 77 Fed. Reg. 43,741 (July 26, 2012). The final rule had not been published or taken effect as of the end of 2012.

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Amendments to MARPOL 73/78 are made through the resolution drafting and adoption process within the Marine Environment Protection Committee (MEPC) of IMO. The United States takes part in revising and updating MARPOL 73/78 by sending delegates to MEPC, who are charged with negotiating with delegates of other signatory nations to support the U.S. position regarding pollution from ships.

Since the last revision of Coast Guard regulations implementing Annex I in 2001, (66 FR 55571)… Annex I was revised by the following resolutions:

MEPC.117(52) (October 15, 2004): This resolution revised all of Annex I and adopted new Annex I Regulations 22 and 23. Regulation 22 requires that every tanker of 5,000 deadweight tons or more, constructed on or after January 1, 2007, meet minimum standards of pump-room bottom protection, while Regulation 23 requires that every tanker delivered on or after January 1, 2010, must meet the standard for accidental oil outflow performance. MEPC.117(52) became effective January 1, 2007.

MEPC.141(54) (March 24, 2006): This resolution adopted Annex I Regulation 12A, which contains requirements for the protected location of oil fuel tanks and performance standards for accidental oil fuel outflow for all ships delivered on or after August 1, 2010. This resolution became effective August 1, 2007.

MEPC.154(55) (October 13, 2006): In this resolution, the MEPC adopted the Southern South African Waters as a special area, which prohibits the discharge of bilge water and oil in the defined area. This resolution entered into force on March 4, 2008.

MEPC.186(59) (July 17, 2009): This resolution adopted a new Chapter 8 (consisting of Regulations 40, 41, and 42) to Annex I to prevent pollution during transfer of oil cargo between oil tankers at sea. In addition, it added a requirement for a Ship-to-Ship transfer (STS) operations plan. This entered into force on January 1, 2011, and
applies to STS Operations involving oil tankers of 150 gross tons and more.

MEPC.187(59) (July 17, 2009): This resolution amended Annex I Regulations 1, 12, 13, 17, and 38 by altering definitions relating to oil residue, and by adding requirements that ships over 400 gross tons contain sludge tanks that meet certain enumerated requirements to Regulation 12. It also amended International Oil Pollution Prevention (IOPP) Certificate Forms A and B to include a section regarding the means for retention and disposal of oil residues, and added new recordkeeping requirements prescribing entries in the Oil Record Book for bunkering of fuel or bulk lubricating oil or any failure of oil filtering equipment. This resolution entered into force on January 1, 2011.

With this proposed rule, and as required by the APPS, we would align our regulations in 33 CFR parts 151, 155, 156, and 157 with international standards in Annex I regarding oil pollution from ships. By aligning the U.S. domestic regulations with international standards, compliant U.S. vessels would not be subject to Port State Control (PSC) enforcement measures while engaged in international trade.

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c. Alaska v. Clinton: *case challenging creation of ECA pursuant to MARPOL*

See Chapter 4.B.4. for discussion of a legal challenge brought by the state of Alaska to the procedure by which an emissions control area ("ECA") that includes waters off the coast of Alaska was established pursuant to MARPOL.

d. Pacific Merchant Shipping Association v. Goldstene: *case challenging California vessel fuel emission standards*

On May 25, 2012, the United States filed a brief as *amicus curiae* in the Supreme Court of the United States opposing a petition for certioriari brought by Pacific Merchant Shipping Association ("PMSA"). PMSA filed suit in U.S. district court in California challenging regulations promulgated by the California Air Resources Board ("CARB") of the sulfur content of fuel used by ocean-going vessels traveling within 24 nautical miles of the California coast and bound to or from a California port. The district court denied PMSA's motion for summary judgment, in which PMSA argued that the state regulations were preempted by federal law. The U.S. Court of Appeals for the Ninth Circuit affirmed on appeal. *Pacific Merchant Shipping Ass'n. v. Goldstene*, 639 F.3d. 1154 (9th Cir. 2011). PMSA then sought certiorari. The U.S. amicus brief, excerpted below (with some footnotes omitted) and available at *www.state.gov/s/l/c8183.htm*, explains the interrelation between California's regulations and the treaty-based regulations under MARPOL. The Supreme Court denied certiorari in the case on June 25, 2012. 133 S.Ct. 22 (2012).

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b. In April 2009, CARB transmitted its vessel fuel regulation to the California Secretary of State for filing, and the regulations became effective in July 2009. The vessel fuel rule applies to U.S.- and foreign-flagged tankers, container ships, bulk carriers, and other large vessels operating within 24 nautical miles of California's coast and bound to or from a California port. Cal. Code Regs. tit. 13, § 2299.2(b)(1)-(2), 2299.2(d)(23), and (e) (2012).[1] Vessels are exempt from the rule if they are merely traversing that zone without calling at a California port. Id. § 2299.2(c)(1).

California's vessel fuel rule provides for a series of increasingly stringent limitations on the sulfur content of fuel. As of July 2009, the rule requires vessel operators to use either marine gas oil (MGO) with a maximum of 1.5% sulfur or marine diesel oil (MDO) with a maximum of

[1] The zone regulated by California's vessel fuel rule encompasses both the United States' "territorial sea," which extends from 0 to 12 nautical miles seaward of the coastal baseline, see Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988), as well as portions of the United States' "exclusive economic zone" (EEZ), which extends from 12 to 200 miles, see Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983). As a matter of international law, the sovereignty of every coastal nation extends to its territorial sea, including the air space over the territorial sea as well as its bed and subsoil, and is exercised subject to applicable rules of international law, including certain passage rights of foreign vessels. See Proclamation No. 5928, 54 Fed. Reg. 777 (1988); see also United Nations Convention on the Law of the Sea (LOS Convention), Dec. 10, 1982, arts. 2, 17, 1833 U.N.T.S. 397. Within the EEZ, the United States exercises sovereign rights for purposes of "exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superadjacent waters." Proclamation No. 5030, 48 Fed. Reg. 10,605; see also LOS Convention art. 56.

Although the decisions below refer to the 12-mile marginal belt of sea beyond the territorial sea (*i.e.*, between 12 and 24 miles [seaward] of the coastal baseline) known as the "contiguous zone," the nature of the United States' authority in that zone is not relevant to the analysis in this case. See Proclamation No. 7219, 64 Fed. Reg. 48,701 (Aug. 2, 1999) (the United States' authority in the contiguous zone encompasses "the control necessary to prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea, and to punish infringement of the above laws and regulations committed within its territory or territorial sea").

0.5% sulfur by weight. Cal. Code Regs. tit. 13, § 2299.2(e)(1)(A)(1) and (1)(B)(1) (2012). On August 1, 2012, the sulfur limit for MGO changes to a maximum of 1.0% sulfur, while the limit for MDO remains unchanged at a maximum of 0.5% sulfur. *Id.* § 2299(e)(1)(A)(2) and (1)(B)(2). Finally, on January 1, 2014, the sulfur limit for both MGO and MDO changes to a maximum of 0.1% sulfur. *Id.* § 2299.2(e)(1)(A)(3) and (1)(B)(3).

c. California adopted its vessel fuel rule against the backdrop of treaty-based regulation of air pollution from ships. In 2008, the United States ratified Annex VI of the International Convention for the Prevention of Pollution from Ships (MARPOL), Nov. 2, 1973, 1340 U.N.T.S. 184, as modified by Protocol of 1978, Feb. 17, 1978, 1340 U.N.T.S. 61, which contains globally applicable limits for the sulfur content of fuel used by ships, as well as permitting imposition of more stringent, geographically based limits for the sulfur content of fuel used by ships operating within designated Emissions Control Areas (ECAs). See Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, Sept. 26, 1997, S. Treaty Doc. No. 108-7.

In 2009, the United States and Canada jointly proposed to designate waters up to 200 miles seaward of the North American coast as an ECA, which would establish fuel sulfur limits more stringent than the globally applicable limits under Annex VI.[3] The Parties to MARPOL Annex VI, acting through the International Maritime Organization (IMO), adopted the North American ECA designation in March 2010. Marine Env't Protection Comm., IMO, Res. MEPC.190(60) (adopted Mar. 26, 2010).

The United States implemented Annex VI's requirements through amendments to the Act to Prevent Pollution from Ships (APPS), 33 U.S.C. 1901-1915 (2006 & Supp. V 2011). Maritime Pollution Prevention Act of 2008, Pub. L. No. 110-280, 122 Stat. 2611; see 40 C.F.R. Pt. 1043. Under MARPOL Annex VI, as implemented by APPS, a 1.0% fuel sulfur standard will apply to both U.S.-and foreign-flagged vessels operating within the U.S. exclusive economic zone (generally defined as the zone between 12 and 200 miles from U.S. shores), as well as the area between 0 and 12 miles from U.S. shores, beginning on August 1, 2012. See 40 C.F.R. 1043.60(b) Tbl. 2; Pet. App. 9a; see also Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983) (establishing exclusive economic zone). Beginning on January 1, 2015, the same 0.1% sulfur limit applicable under California's vessel fuel rule will apply to U.S.- and foreign-flagged vessels traveling within the North American ECA, including the area within 200 miles of California's coast. See 40 C.F.R. 1043.60(b) Tbl. 2.

California's vessel fuel rule contains a sunset provision under which the rule will "cease to apply" upon the written finding by the Executive Officer of CARB that these or other federal requirements will achieve equivalent emissions reductions. Cal. Code Regs. tit. 13, § 2299.2(j)(1) (2012).

d. Respondents CARB and South Coast Air Quality Management District (South Coast AQMD) are charged with bringing California's South Coast Air Basin into compliance with federal Clean Air Act standards for particulate matter pollution by 2015. Pet. App. 8a n.1. Under Clean Air Act requirements, the South Coast Air Basin must achieve federal air quality standards for particulate matter, including the precursor pollutant sulfur dioxide, by 2015. See 42 U.S.C. 7502(a)(2)(A) (requiring that nonattainment areas achieve national air quality standards no later

[3] The North American ECA includes waters adjacent to the Pacific, Atlantic, and Gulf coasts and the eight main Hawaiian Islands. United States Environmental Protection Agency, *Designation of North American Emissions Control Area to Reduce Emissions from Ships* (Mar. 2010), available at *http://www.epa.gov/otaq/regs/nonroad/marine/ci/420f10015.pdf*.

than five years from the date of nonattainment designation and giving EPA authority to extend the deadline by no more than five additional years); 76 Fed. Reg. 69,928 (Nov. 9, 2011) (extending deadline to April 5, 2015). Because compliance is based on calendar annual averages, all pollution reduction measures needed to meet the federal particulate matter standards must be in place in 2014. See 42 U.S.C. 7502(c)(1); 40 C.F.R. 51.1007(b). Failure to comply with Clean Air Act nonattainment requirements may result in restrictions on federal transportation funding. 42 U.S.C. 7509.

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The California vessel fuel regulation at issue in this case raises important and difficult questions about the scope of a State's power to regulate seagoing vessels for the protection of the health, safety, and welfare of its residents, in the face of the national government's paramount authority to regulate maritime commerce. In the government's view, however, further review of the court of appeals' interlocutory decision is not warranted at this time. … [T]he specific questions presented in this case are of limited practical impact, because California's vessel fuel rule is largely consonant with federal requirements under Annex VI and APPS, and should be overtaken by those requirements by January 2015. The petition for a writ of certiorari accordingly should be denied.

* * * *

2. Nonetheless, as the court of appeals itself recognized, see Pet. App. 12a, 54a, California's vessel fuel rule raises other difficult and important questions about the permissible scope of state regulation of matters affecting maritime commerce. At this juncture, however, this case does not present a suitable opportunity to explore those questions.

As an initial matter, the Court's consideration of the issues would be constrained by the narrow scope of the issues raised and decided below. Although petitioner raises substantial questions about California's authority to "directly regulat[e] the operation of vessels engaged in international and national commerce while the ships are beyond a state's territorial waters," petitioner did not raise, and the court below therefore did not consider, any questions concerning the effect of the [Ports and Waterways Safety Act of 1972 ("PWSA")], which provides for the promulgation of federal standards for the operation of covered vessels "that may be necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment." 46 U.S.C. 3703(a).

Similarly, while the petition briefly raises questions about whether California's rule can be squared with the United States' international commitments or undermines the United States' ability to speak with one voice in matters of foreign affairs, Pet. 23-24 (citing, *inter alia*, [*United States v.*] *Locke*, 529 U.S. [89 (2000)] at 99), petitioner's argument below largely focused on the fact that California's vessel fuel rule imposes a sulfur limit different from the MARPOL standard between 2012 (now 2014, see n.2, *supra*) and 2015. Pet. C.A. Br. 44-46. Petitioner acknowledged (*id*. at 46 n.7), however, that APPS contains an express savings clause authorizing the imposition of standards more stringent than MARPOL. See 33 U.S.C. 1911 (2006 & Supp. V 2011); cf. H.R. Conf. Rep. No. 54, 110th Cong., 1st Sess., at 7 (2007) (noting that proposed amendments accompanying implementation of Annex VI "clarif[y] that authorities, requirements, and remedies" of APPS "do not amend or repeal any authorities *** under any

other provision of law, including the Clean Air Act of 1990 and the rights of States under that Act"). The court of appeals accordingly cited the savings clause in response to the concerns petitioner had raised, without otherwise addressing the impact of MARPOL or other international obligations on the questions presented in this case. See Pet. App. 50a-51a.

Nor, finally, has petitioner challenged California's authority to enforce the vessel fuel rule within three miles of the coast—thereby narrowing the issues before the court below to the question whether there is a constitutionally significant difference between a state regulation that operates 3 miles offshore and one that operates 24 miles offshore. The practical consequences of the decision below are also correspondingly diminished because, under petitioner's current position, the vessel fuel rule would remain applicable to all ships calling at California ports. The only effect of petitioner's argument, if accepted by this Court, would be to limit the portion of the voyage by such a ship during which the vessel fuel rule applied.

Because these issues were not pressed or passed on below, they are not before the Court at this time. See *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). To grant review at this juncture therefore would thus prevent the Court from considering important dimensions of the underlying controversy in this case.

Moreover, the court of appeals rejected petitioner's Commerce Clause argument "at this juncture," and affirmed the denial of summary judgment. Pet. App. 52a-53a. Further proceedings in the district court, including any further development of the record as regarding the burden of the vessel fuel rule relative to the health benefits to California, may bear on the Commerce Clause questions petitioner raises. At this interlocutory stage of the proceedings, this Court's intervention to address those issues would be premature.

3. Although this case touches on important matters of maritime commerce and foreign affairs, as the record currently stands, the practical consequences of the court of appeals' interlocutory ruling appear limited.

As noted above, … California's vessel fuel rule applies in parallel with federal vessel fuel standards implemented under MARPOL Annex VI. Although there are at present certain differences between the applicable standards, the federal standard should overtake California's standard by January 2015. We assume that the State at that time will not second-guess the efficacy of the federal standard expressly adopted through MARPOL and implemented through APPS.

In the interim, because Annex VI "does not, as a matter of international law, prohibit Parties from imposing more stringent measures as a condition of entry into their ports," Letter of Submittal from Secretary of State Powell to President Bush, in S. Treaty Doc. No. 108-7, at VIII (internal citations omitted), and APPS's savings clause contemplates the adoption of such measures, 33 U.S.C. 1911 (2006 & Supp. V 2011); … it does not appear at present that the divergence between California and federal standards will pose a substantial risk of interference with the federal government's international commitments under MARPOL.

While California's vessel fuel rule could raise significant concerns under international law if it were interpreted to exceed a coastal nation's limited jurisdiction over passing ships or to otherwise impair navigational rights and freedoms under the law of the sea in areas beyond internal waters and ports, no party disputes that California's vessel fuel rule exempts any vessel that is merely traversing the zone covered by the vessel fuel rule without entering California internal waters or calling at a California port. Cal. Code. Regs. tit. 13, § 2299.2(c)(1) (2012); see also Pet. App. 4a ("In general, the Vessel Fuel Rules only cover vessels calling at a California port, and they accordingly contain an express exemption for vessels simply traveling through the

region"); *id*. at 71a ("It is uncontroverted that the Vessel Fuel Rules at issue herein are limited to vessels visiting California ports.").

Finally, on its face, California's vessel fuel rule appears to have been designed to minimize interference with applicable Coast Guard regulations. See Cal. Code Regs. tit. 13, § 2299.2(b)(3) (2012) ("Nothing in this section shall be construed to amend, repeal, modify, or change in any way any applicable U.S. Coast Guard requirements."). Whether California has in practice avoided such interference is a question that would require further record development. The rule also appears to require CARB to exempt vessel owners who demonstrate that equipment modifications—rather than the mere use of a different type of fuel—would be necessary in order to comply with the rule. See *id*. § 2299.2(g); *id* § 2299.2(d)(10) (defining "essential modifications" as "the addition of new equipment, or the replacement of existing components with modified components, that can be demonstrated to be necessary to comply with this regulation").

At present, therefore, it does not appear that review of the court of appeals' interlocutory decision in this case is warranted at this time to address any effect California's vessel fuel rule might have in the remaining period before it is overtaken by federal requirements.

* * * *

2. Antarctic Marine Protection Proposal

The 31st Meeting of the Commission for the Conservation of Antarctic Marine Living Resources ("CCAMLR") concluded on November 1, 2012 with the United States and New Zealand reaching agreement on a joint proposal to establish the world's largest marine protected area ("MPA") in the region around Antarctica's Ross Sea. See State Department November 8, 2012 media note, available at *www.state.gov/r/pa/prs/ps/2012/11/200312.htm*. Members of the CCAMLR agreed to convene in July 2013 to consider pending MPAs, including the Ross Sea MPA, which was not finalized during the 2012 meeting.

3. Fish and marine mammals

a. Illegal, unreported, and unregulated fishing: the Pacific Maritime Surveillance Partnership

On August 31, 2012, Australia, France, New Zealand, and the United States made a political commitment to coordinate and share maritime surveillance information to better combat illegal, unreported, and unregulated fishing in the Pacific. The text of their joint declaration appears below and is available at *www.state.gov/r/pa/prs/ps/2012/08/197258.htm*.

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* * * *

Recognising the centrality of the fisheries resource to sustainable economic development in the Pacific region,

Deeply concerned that Illegal, Unreported and Unregulated fishing is depriving Pacific Island countries and territories of the full benefit of the resource,

Aware that the protection of the value of the fisheries sector requires well-resourced and coordinated monitoring, control and surveillance (MCS) activities underpinned by reliable information,

Acknowledging that in 2010 Pacific Island Forum Leaders endorsed the Regional Monitoring Control and Surveillance Strategy as the overarching MCS framework to support the fisheries management objectives of Forum Fisheries Agency members,

Welcoming progress in the development of a Niue Treaty Subsidiary Agreement, scheduled to be completed by the end of 2012, that is intended to foster enhanced cooperation and strengthened enforcement mechanisms in maritime surveillance,

Sharing the view that improved cooperation and coordination between maritime surveillance providers, Pacific Island countries and regional fisheries organisations leads to better targeted surveillance activities and, in turn, improved fisheries management outcomes,

Australia, France, New Zealand and the United States, as the four principal providers of aerial and surface maritime surveillance that supports the efforts of Pacific Island countries, intend to:

(i) Strengthen as far as possible maritime surveillance activities in the Pacific region, with a particular focus on fisheries surveillance, to support sustainable economic development in the region,

(ii) Work closely together, in partnership and through regular consultation with Pacific Island countries, to ensure maritime surveillance activities—including overflights and surface patrols—are coordinated to maximise their operational effectiveness, and

(iii) Improve the exchange, analysis and utilisation of MCS information between maritime surveillance providers and Pacific Island countries, consistent with national and international MCS confidentiality requirements and practices, and to support the capability of Pacific Island countries with a view to improved fisheries management outcomes.

* * * *

b. Sea turtle conservation and shrimp imports

The Department of State makes annual certifications related to conservation of sea turtles, consistent with § 609 of Public Law 101-162, 16 U.S.C. § 1537, which prohibits imports of shrimp and shrimp products harvested with methods that may adversely affect sea turtles. On April 19, 2012, the Department of State made its annual certifications related to conservation of sea turtles, certifying 39 nations and one economy as having adequate measures in place to protect sea turtles during the course of shrimp trawl fishing. See State Department media note, June 8, 2012, available at *www.state.gov/r/pa/prs/ps/2012/06/191996.htm*. As excerpted below, the Federal Register notice announcing the State Department's April 19 certifications explained the Department's determinations and the applicable legal framework. 77 Fed. Reg. 31,062 (May 24, 2012).

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* * * *

Section 609 of Public Law 101-162 ("Section 609") prohibits imports of certain categories of shrimp unless the President certifies to the Congress not later than May 1 of each year either: (1) That the harvesting nation has adopted a program governing the incidental capture of sea turtles in its commercial shrimp fishery comparable to the program in effect in the United States and has an incidental take rate comparable to that of the United States; or (2) that the fishing environment in the harvesting nation does not pose a threat of the incidental taking of sea turtles. The President has delegated the authority to make this certification to the Department of State ("the Department"). Revised State Department guidelines for making the required certifications were published in the Federal Register on July 2, 1999 (Vol. 64, No. 130, Public Notice 3086).

On April 30, 2012, the Department certified 13 nations on the basis that their sea turtle protection programs are comparable to that of the United States: Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Nigeria, Pakistan, Panama, and Suriname. Costa Rica is re-certified this year based on improvement in the implementation and enforcement of its turtle excluder device regulatory program in their commercial shrimp trawl fishery. The Department also certified 26 shrimp harvesting nations and one economy as having fishing environments that do not pose a danger to sea turtles. Sixteen nations have shrimping grounds only in cold waters where the risk of taking sea turtles is negligible. They are: Argentina, Belgium, Canada, Chile, Denmark, Finland, Germany, Iceland, Ireland, the Netherlands, New Zealand, Norway, Russia, Sweden, the United Kingdom, and Uruguay. Ten nations and one economy only harvest shrimp using small boats with crews of less than five that use manual rather than mechanical means to retrieve nets, or catch shrimp using other methods that do not threaten sea turtles. Use of such small-scale technology does not adversely affect sea turtles. The 10 nations and one economy are: the Bahamas, Belize, China, the Dominican Republic, Fiji, Hong Kong, Jamaica, Oman, Peru, Sri Lanka, and Venezuela.

The Department of State has communicated the certifications under Section 609 to the Office of Field Operations of U.S. Customs and Border Protection. All DS-2031 forms accompanying shrimp imports from uncertified nations must be originals and signed by the competent domestic fisheries authority.

In order for shrimp harvested with turtle excluder devices (TEDs) in an uncertified nation to be eligible for importation into the United States under the DS-2031 section 7(A)(2) provision for "shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States", the Department of State must determine in advance that the government of the harvesting nation has put in place adequate procedures to ensure the accurate completion of the DS-2031 forms. At this time, the Department has made such a determination only with respect to Australia, Brazil and France. Thus, the importation of TED-caught shrimp from any other uncertified nation will not be allowed. For Brazil, only shrimp harvested in the northern shrimp fishery are eligible for entry under this provision. For Australia, shrimp harvested in the Exmouth Gulf Prawn Fishery, the Northern Prawn Fishery, the Queensland East Coast Trawl Fishery, and the Torres Strait Prawn Fishery are eligible for entry under this provision. For France, shrimp harvested in the French Guiana domestic trawl fishery are eligible for entry under this provision. An official of the competent domestic fisheries

authority for the country where the shrimp were harvested must sign the DS-2031 form accompanying these imports into the United States.

In addition, the Department has determined that shrimp harvested in the Spencer Gulf region in Australia may be exported to the United States under the DS-2031 section 7(A)(4) provision for "shrimp harvested in a manner or under circumstances determined by the Department of State not to pose a threat of the incidental taking of sea turtles." An official of the Government of Australia must certify the DS-2031 form accompanying these imports into the United States.

* * * *

C. OTHER CONSERVATION ISSUES

On November 20, 2012, officials from the United States and Mexico signed Minute 319 to the 1944 Treaty Concerning the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande (Feb. 3, 1944, U.S.-Mex., 59 Stat. 1219, T.S. 994) ("1944 Water Treaty"). Minute 319 to the 1944 Water Treaty is the result of several years of ongoing discussions between the United States and Mexico, and, in particular, the U.S. and Mexico Sections of the International Boundary and Water Commission ("IBWC") on cooperative measures for management of the Colorado River. Minute 319 is available on the website of the IBWC at *www.ibwc.gov/Files/Minutes/Minute_319.pdf*. The U.S. Department of the Interior press release announcing the signing of Minute 319 is excerpted below and available at *www.usbr.gov/lc/region/feature/minute319.html*. Remarks made by U.S. IBWC Commissioner Michael L. Connor at the signing ceremony are available at *www.usbr.gov/newsroom/speech/detail.cfm?RecordID=741*. The Memorandum of Agreement on implementation of Minute 319 in the U.S., signed by representatives of agencies of the U.S. federal government and of the states of Arizona, Colorado, Nevada, New Mexico, Utah, Wyoming, and California, is available at *www.state.gov/s/l/c8183.htm*.

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The five-year agreement approved by both governments provides for a series of joint cooperative actions between the United States and Mexico. Elements of the agreement include:

- Implementing efforts to enhance water infrastructure and promote sharing, storing, and conserving water as needed during both shortages and surpluses;
- Establishing proactive basin operations by applying water delivery reductions when Lake Mead reservoir conditions are low in order to deter more severe reductions in the future;
- Extending humanitarian measures from a 2010 agreement, Minute 318, to allow Mexico to defer delivery of a portion of its Colorado River allotment while it continues to make repairs to earthquake-damaged infrastructure;

- Establishing a program of Intentionally Created Mexican Allocation (ICMA) whereby Mexico could temporarily reduce its order of Colorado River water, allowing that water to be delivered to Mexico in the future; and
- Promoting the ecological health of the Colorado River Delta.

Signed by all parties today, Minute 319 becomes effective immediately. Many of the projects and programs outlined in the agreement will be implemented through the U.S. Department of the Interior's Bureau of Reclamation, Lower Colorado Region. The Lower Colorado Region manages the final 688 miles of the Colorado River on behalf of the Secretary of the Interior.

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Cross References

*MARPOL litigation (*Alaska v. *Clinton)*, **Chapter 4.B.4.**
EU's Emissions Trading Scheme, **Chapter 11.A.2.**
Environmental cooperation agreements, **Chapter 11.E.3.**

Chapter 14

Educational and Cultural Issues

A. CULTURAL PROPERTY: IMPORT RESTRICTIONS

In 2012, the United States took steps to protect the cultural property of Peru, Cyprus, Mali, and Guatemala by extending import restrictions on certain archaeological and ethnological material from those countries. These actions were based on determinations by the Department of State's Bureau of Educational and Cultural Affairs that the statutory threshold factors permitting initial entry into each agreement still pertained and that there was no cause for suspension of such agreement. 19 U.S.C. § 2602 (a)(1)(A). The United States extended these agreements pursuant to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("Convention"), to which the United States became a State Party in 1983 and pursuant to the Convention on Cultural Property Implementation Act, which implements parts of the Convention. See Pub. L. No. 97-446, 96 Stat. 2350, 19 U.S.C. §§ 2601–2613 ("the Act"). If the requirements of 19 U.S.C. § 2602 are satisfied, the President has the authority to enter into or extend agreements to apply import restrictions for up to five years on archaeological or ethnological material of a nation which has requested such protections and which has ratified, accepted, or acceded to the Convention. The President may also impose import restrictions on cultural property in an emergency situation pursuant to 19 U.S.C. §§ 2603 and 2604.

Also in 2012, the United States Department of State continued to participate in litigation relating to the imposition of import restrictions under the Act. And in May 2012, the State Department renewed the charter of the Cultural Property Advisory Committee, which reviews requests from States Parties to the Convention seeking the imposition of U.S. import restrictions on archaeological or ethnological material, and makes recommendations thereon to the Department's Bureau of Educational and Cultural Affairs.

1. Peru

Effective June 9, 2012, the United States and Peru extended for five years the Memorandum of Understanding ("MOU") Between the Government of the United States of America and the Government of the Republic of Peru Concerning the Imposition of Import Restrictions on Archaeological Material from the Pre-Hispanic Cultures and Certain Ethnological Material from the Colonial Period of Peru, signed in June 1997, 62 Fed. Reg. 31,713 (June 11, 1997), as amended and last extended on June 6, 2007. 72 Fed. Reg. 31,176

(June 6, 2007). See *Digest 2007* at 741-42. The text of the MOU and the diplomatic notes exchanged on May 30, 2012 to further extend the MOU are available at *http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements*.

Also on June 9, the Department of Homeland Security, U.S. Customs and Border Protection ("CBP"), and the Department of the Treasury extended the import restrictions imposed previously with respect to certain archaeological and ethnological materials from Peru. 77 Fed. Reg. 33,624 (June 7, 2012).

2. Cyprus

Effective July 16, 2012, the United States and the Republic of Cyprus amended and extended for five years the MOU Between the Government of the United States of America and the Government of the Republic of Cyprus Concerning the Imposition of Import Restrictions on Pre-Classical and Classical Archaeological Objects and Byzantine Period Ecclesiastical and Ritual Ethnological Materials of Cyprus, originally entered into in 2002. The 2012 amendment added to the list of materials subject to import restrictions certain ecclesiastical and ritual material from the Post-Byzantine period (up to 1850 A.D.). The original MOU entered into force on July 16, 2002, and the two countries amended it in 2006 and extended and amended it in 2007. See 67 Fed. Reg. 47,447 (July 19, 2002); 71 Fed. Reg. 51,724 (Aug. 31, 2006); 72 Fed. Reg. 38,470 (July 13, 2007); see also *Digest 2002* at 814-15, *Digest 2006* at 899-901, and *Digest 2007* at 741. The text of the amended MOU and related documents are available at *http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements*.

Also on July 13, 2012, the Department of Homeland Security, CBP, and the Department of the Treasury issued a notice in the Federal Register extending the import restrictions imposed previously with respect to Pre-Classical and Classical archaeological objects and Byzantine ecclesiastical and ritual ethnological materials and amending the restrictions to include materials from the Post-Byzantine period. 77 Fed. Reg. 41,266 (July 13, 2012).

3. Mali

Effective September 19, 2012, the United States and Mali extended the Agreement Between the Government of the United States of America and the Government of the Republic of Mali Concerning the Imposition of Import Restrictions on Archaeological Material from Mali from the Paleolithic Era (Stone Age) to Approximately the Mid-Eighteenth Century. See September 19, 2012 Media Note, available at *www.state.gov/r/pa/prs/ps/2012/09/197945.htm*. The original Agreement that provided the basis for the import restrictions was concluded in 1997. 62 Fed. Reg. 49,594 (Sept. 23, 1997). The United States and Mali previously extended and amended the Agreement in 2002 and 2007. See *Digest 2007* at 740-41. Under the newly extended Agreement, the United States will continue the existing import restrictions until September 19, 2017. The text of the amended MOU and related documents are available at

http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements.

On September 19, 2012 the Department of Homeland Security, CBP, and the Department of the Treasury published a notice in the Federal Register extending the import restrictions imposed previously with respect to certain categories of archaeological materials from Mali. 77 Fed. Reg. 58,020 (Sept. 19, 2012).

4. Guatemala

Effective September 29, 2012, the United States and Guatemala extended and amended the MOU Between the Government of the United States of America and the Government of the Republic of Guatemala Concerning the Imposition of Import Restrictions on Archaeological Objects and Materials from the Pre-Columbian Cultures of Guatemala signed at Washington September 29, 1997, as amended and extended. The amendment and extension were completed by exchange of diplomatic notes, with the U.S. diplomatic note dated September 14, 2012. The diplomatic notes and the MOU text are available at http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements. The original MOU signed in 1997 had previously been extended in 2002 and 2007. See *Digest 2007* at 740. The amendment in 2012 added to the list of materials subject to import restrictions certain ecclesiastical ethnological materials of the Conquest and Colonial periods (A.D. 1524-1821).

On September 28, 2012 the Department of Homeland Security, CBP, and the Department of the Treasury published a notice in the Federal Register extending the import restrictions imposed previously with respect to certain categories of archaeological and ethnological materials from Guatemala and adding the additional materials included in the amendment. 77 Fed. Reg. 59,541 (Sept. 28, 2012).

5. *Ancient Coin Collectors Guild v. U.S. Department of State*

In 2012, the United States filed its brief as appellees in a case involving an attempted importation into the U.S. of ancient Cypriot and Chinese coins of types restricted under agreements with those countries pursuant to the Convention and the Act. *Ancient Coin Collectors Guild v. United States*, No. 11-2012 (4th Cir. 2012). Appellant, the Ancient Coin Collectors Guild, had purchased the coins in London and attempted to bring them into the United States. Because the coins were of types subject to import restrictions, they were seized. Rather than seeking to demonstrate any legal basis for importing the coins and going through the administrative procedures to determine whether they could be imported, the Guild challenged the restrictions in U.S. district court. The district court granted the government's motion to dismiss and the Guild appealed to the U.S. Court of Appeals for the Fourth Circuit. The section of the U.S. brief summarizing the U.S. argument in the case appears below. The brief is available in full at www.state.gov/s/l/c8183.htm.

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The Convention on Cultural Property Implementation Act ("CPIA") authorizes the President to agree to enter into agreements with other nations to protect their cultural patrimony and curb the ongoing pillaging of archaeological sites. Pursuant to the CPIA and the international convention that it implements, the United States has entered into memoranda of understanding with Cyprus and China. In consequence, the United States has precluded several types of archaeological items including certain types of ancient Cypriot and Chinese coins.

Plaintiff sought to import 22 ancient Cypriot and Chinese coins which are concededly of the types designated in Customs regulations, and Customs agents duly seized the coins in accordance with the statute. In this action, plaintiff contests that seizure, claiming that the import restrictions on these coins are unlawful.

This Court should decline plaintiff's invitation to review its claims. The CPIA and its implementing regulations provide for judicial forfeiture proceedings. Plaintiff has invoked those procedures, but they have not occurred as this litigation has been ongoing. Plaintiff does not explain why its arguments should not be considered in the forum designated by Congress.

Even apart from that threshold question, plaintiff's request for extra-statutory *ultra vires* review and review under the Administrative Procedures Act misconceives the appropriate scope of judicial review. The CPIA purports to authorize the negotiation of agreements with foreign nations and consequent import restrictions. The structure and text of the statute, which contemplate discretionary determinations by the President or his delegee, do not suggest that Congress intended review under the APA of these decisions, which are imbued with foreign policy concerns. For similar reasons, it would be anomalous to create extra-statutory review procedures here.

If the Court concludes that some form of judicial review is nevertheless appropriate in these proceedings, it should affirm the district court's conclusion that plaintiff has not stated a viable claim. Plaintiff's primary contention is that its 22 ancient Cypriot and Chinese coins were unlawfully seized based on their "type." Plaintiff urges that, although the coins appear on the Designated Lists of restricted materials published by Customs, the coins must be allowed entry to the United States unless the government can prove, on a coin by coin basis, that each was first unearthed in Cyprus or China. Pl. Br. 22; see Am. Compl. 44 (JA 178). The district court correctly concluded that plaintiff's proposed scheme lacks any basis in the statute.

Contrary to plaintiff's assertions, the CPIA expressly anticipates that the "archaeological . . . material of the State Party" will be subject to restrictions based on "type or other appropriate classification." 19 U.S.C. § 2604; see also *id*. § 2605(f)(4). In turn, the CPIA defines "archaeological material of the State Party" as being, inter alia, "first discovered" in the State Party. 19 U.S.C. § 2602(1). The question of "first discovery" is thus addressed by the State Department when determining what "archaeological material" is to be covered by a given MOU and thus included on the Designated List of restricted materials. *Id*. § 2602(a)(2). The Assistant Secretary exercised her judgment and discretion under the CPIA in determining that certain types of ancient Cypriot and Chinese coins qualify as the "archaeological material of the State Party" and applying import restrictions to them. As the district court concluded, plaintiff's approach cannot be reconciled with the plain terms of the

Act, is unworkable, and "would undermine the core purpose of the CPIA." D. Ct. Op. 35 (JA 461).

Finally, the district court correctly rejected plaintiff's request for discovery with regard to the precise contents of China's diplomatic note requesting that the United States impose import restrictions under Article 9 of the Convention on Cultural Property. The United States has met all of its statutory obligations, and is not required to make such information public.

* * * *

On October 22, 2012, the Court of Appeals for the Fourth Circuit issued its decision in the case. *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection*, 698 F.3d 171 (4th Cir. 2012).* The appeals court affirmed the district court's dismissal of the case. Excerpts of the court's opinion follow.

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The Guild asks this court to engage in a searching review of the State Department's conclusions that (1) import restrictions on coins were requested by China and Cyprus, (2) the restricted articles were part of each state's respective cultural patrimony, and (3) the restrictions were necessary to protect each state's respective cultural patrimony. …Congress set out an elaborate statutory scheme for promulgating import restrictions on culturally sensitive items and gave the Executive Branch broad discretion in negotiating Article 9 agreements with foreign states. See 19 U.S.C. § 2602(a). Congress itself retained oversight of the CPIA process, *id.* § 2602(g), and placed significant responsibility in the hands of CPAC [the Cultural Property Advisory Committee], a body composed of experts in the fields of archaeology and ethnology, *id.* § 2605. Congress also provided forfeiture procedures through which importers could challenge any seizures made pursuant to the CPIA. *Id.* § 2609.

The conclusions to be drawn from the entirety of this statutory scheme are clear. The federal judiciary has not been generally empowered to second-guess the Executive Branch in its negotiations with other nations over matters of great importance to their cultural heritage, to overrule CPAC in its conclusion that import restrictions on coins were necessary to protect the cultural patrimonies of Cyprus and China, or to challenge Congress in its decision to channel CPIA disputes through forfeiture proceedings. Mindful of the deference owed the political branches under the statute, we consider the Guild's arguments.

A.

The Guild contends that the State Department acted *ultra vires* when it imposed import restrictions on certain Cypriot and Chinese coins. Our review under the *ultra vires* standard is necessarily narrow. We may not dictate how government goes about its business but only whether a public entity "has acted within the bounds of its authority or overstepped them." *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 497 (D.C.Cir.2010) (Brown, J., concurring in the judgment). Government action is *ultra vires* if the agency or other government entity "is not doing the business which the sovereign has empowered him to do or he is doing it in a way

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* Editor's note: The Guild filed a petition for certiorari in the Supreme Court of the United States. On March 25, 2013, the Supreme Court denied the petition. 133 S.Ct. 1645, 81 USLW 3475 (U.S. Mar 25, 2013) (NO. 12-996).

which the sovereign has forbidden." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); see also *U.S. Dep't of Interior v. 16.03 Acres of Land*, 26 F.3d 349, 355 (2d Cir.1994).

The statute, as noted, involves a sensitive area of foreign affairs where Congress itself has delegated the Executive Branch significant discretion. Given that approach, a searching substantive review of the State Department's diplomatic negotiations or CPAC's application of its archaeological expertise would be singularly inappropriate in this forum. And the record itself leaves no room for an ultra vires challenge on any other basis.

As the district court noted, there is no question that the State Department complied with CPIA procedures when it placed import restrictions on Chinese coins…

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…[T]he Guild argues that the State Department and CBP ran off the rails by enacting import restrictions on Chinese coins without following the procedures required by the CPIA. The Guild alleges two distinct violations of the statute. First, the Guild argues that the State Department imposed restrictions on Chinese coins even though China did not mention coins in its May 2004 request. In making this argument, however, the Guild seeks to add a provision to the statute that is simply not there, namely a requirement that a request under Article 9 include "a detailed accounting of every item eventually covered by an Article 9 agreement." *ACCG*, 801 F.Supp.2d at 410.

The CPIA requires that a State Party (here China) formally request assistance from the United States in protecting its cultural patrimony, 19 U.S.C. § 2602(a)(1), (a)(3), but the request need not include a comprehensive list of all the items that might later be found appropriate for inclusion in a negotiated Article 9 agreement. Were the federal judiciary to require a State Party to include such a list, we would be placing burdens that Congress nowhere mentioned upon China, Cyprus, and every other foreign country that sought this country's assistance in protecting its own cultural heritage. We would be drawn into preliminary negotiations between the State Department and foreign countries in a far more detailed manner than the CPIA contemplated. This is the very intervention into sensitive diplomatic matters that we have earlier emphasized is not permissible, and we decline to require from China more than the statute itself does.

Second, the Guild contends that the State Department's notice in the Federal Register was defective because it did not mention that China requested restrictions on coins. Once again, the Guild effectively seeks to have us impose a requirement that does not appear in the CPIA, this time that the State Department "publish verbatim the list of items requested to be restricted." *ACCG*, 801 F.Supp.2d at 410.

The statute merely requires that the State Department publish "notification of the request" in the Federal Register, 19 U.S.C. § 2602(f)(1), not an exhaustive description of its terms. To scrutinize the adequacy of the State Department's publication and require a verbatim publication of a foreign request would involve the judiciary in the very early stages of the CPIA process and place upon the State Department a burden that Congress did not intend. Requiring the Department of State to reveal every detail of a request made by a foreign government through confidential diplomatic channels runs afoul of the admonition that such revelations may "compromise the Government's negotiating objectives or bargaining positions on the negotiations of any agreement authorized by [the CPIA]." 19 U.S.C. § 2605(h). Because Congress required that the Department of State simply publish "notification of the request" by a

State Party, we decline to accept the Guild's suggestion that we require more from State Department's notice in the Federal Register.

In sum, each of the Guild's arguments with respect to State's procedural compliance would have us add encumbrances to the CPIA, ultimately placing additional burdens on foreign governments and State Department officials negotiating Article 9 agreements with those governments. It is true that at the conclusion of negotiations and upon the reaching of an Article 9 agreement with the foreign government in question, CBP must publish a list of import restrictions by type in the Federal Register. *Id*. § 2604. CBP complied with that requirement here. 74 Fed. Reg. 2,839–2,842. But the detail required by the statute at the conclusion of the process is altogether different from the level of detail required before negotiations between our country and another nation have even so much as begun.

Congress sought to strike a balance here between the need for notice and transparency on the one hand, and the need for confidentiality in sensitive matters of diplomacy on the other. Likewise in balance is the aim of having the CPIA process move forward with some modicum of efficiency while still providing both proper notice of the restrictions and procedural recourse for those who are subject to them. It is clear that deviation from the provisions of the statute runs every risk of throwing this balance out of kilter in an area where traditional competencies and constitutional allocations of authority have counseled reluctance on the part of the judiciary to intervene. The Guild asks us to do just that, and we decline its invitation.

C.

Section 2601 narrows the universe of articles that may be subjected to import restrictions under the CPIA. Only an object of archaeological or ethnological interest "which was first discovered within, and is subject to export control by" the requesting state may be restricted. 19 U.S.C. § 2601(2). The Guild alleges that State and CBP acted *ultra vires* by placing import restrictions on all coins of certain types without demonstrating that all coins of those types were "first discovered within" China or Cyprus. Guild Br. at 21–22. According to the Guild, the government and the district court effectively read the "first discovered" requirement out of the statute. *Id*. at 24.

We are not persuaded. As an initial matter, the CPIA is clear that defendants may designate items by "type or other appropriate classification" when establishing import restrictions. 19 U.S.C. § 2604. State and CBP are under no obligation to list restricted items with more specificity than the statute commands, and they are certainly not required to impose restrictions on a coin-by-coin basis. Such a requirement would make the statutory scheme utterly unworkable in practice.

Here, CBP published detailed lists of restricted types from both China and Cyprus. The requests categorize the restricted articles by material (*e.g.*, "Bronze," "Iron"), then by category (*e.g.*, "Coins," "Sculpture"), then by time period, and finally by specific "type." *E.g.*, 74 Fed. Reg. 2,842; 72 Fed. Reg. 38,473. One Cypriot coin type, for example, was described as follows: "III. Metal, D. Coins of Cypriot Types, 3. Provincial and local issues of the Roman period from c. 30 B.C. to 235 A.D. Often these have a bust or head on one side and the image of a temple (the temple of Aphrodite at Palaipaphos) or statue (statue of Zeus Salaminios) on the other." 72 Fed. Reg. 38,472–73.

CPAC and the Assistant Secretary did consider where the restricted types may generally be found as part of the review of the Chinese and Cypriot requests. CBP listed the articles in question in the Federal Register by "type"—but only after State and CPAC had determined that each type was part of the respective cultural patrimonies of China and Cyprus. 74 Fed. Reg.

2,839–42 (Chinese coins); 72 Fed. Reg. 38,470–73 (Cypriot coins). Among the members of CPAC are three "experts in the fields of archaeology, anthropology, ethnology, or related areas" and three "experts in the international sale of archaeological, ethnological, and other cultural property." 19 U.S.C. § 2605(b)(1). Plaintiffs have given us no reason to question CPAC's conclusion, as adopted by State, as to where the types of cultural property at issue were discovered. To the contrary, it was hardly illogical for CPAC to conclude that, absent evidence suggesting otherwise, Chinese and Cypriot coins were first dis-covered in those two countries and form part of each nation's cultural heritage.

As the district court noted, "the CPIA anticipates that there may be some archaeological objects without precisely documented provenance and export records." *ACCG*, 801 F.Supp.2d at 408. In those cases, the statute expressly provides that CBP may seize the articles at the border: "If the [importer] of any designated archaeological or ethnological material is unable to present to the customs officer" the required documentation, the "officer concerned shall refuse to release the material from customs custody ... until such documentation or evidence is filed with such officer." 19 U.S.C. § 2606(b). In short, CBP need not demonstrate that the articles are restricted; rather, the statute "expressly places the burden on importers to prove that they are importable." ACCG, 801 F.Supp.2d at 408.

This conclusion is borne out by § 2606, which states that once archaeological or ethnological material has been designated by "type" and included in the list of restricted articles, it may not be imported into the United States without specific documentation showing that it is eligible for import. 19 U.S.C. § 2606. Such documentation must show that the article in question was either (1) lawfully exported from its respective state while CPIA restrictions were in effect; (2) exported from its respective state more than ten years before it arrived in the United States; or (3) exported from its respective state before CPIA restrictions went into effect. *Id*. In other words, the importer need not document every movement of its articles since ancient times. It need demonstrate only that the articles left the country that has requested import restrictions before those restrictions went into effect or more than ten years before the date of import.

Here, CBP has listed the Chinese and Cypriot coins by type, in accordance with 19 U.S.C. § 2604, and CBP has detained them, in accordance with 19 U.S.C. § 2606. The detention was lawful as an initial matter, and the Guild had an opportunity at the time of detention to present evidence that the coins were subject to one of the CPIA exemptions. See *id*. As explained above, the Guild need not have documented every movement of its coins since ancient times. To comply with § 2606, the Guild need demonstrate only that the Cypriot coins left Cyprus prior to 2007 and that the Chinese coins left China prior to 2009. See *id*. It never so much as attempted to do so.

III.

We now turn to the Guild's claims under the Administrative Procedure Act. The Guild alleges that State violated the APA by, inter alia, making decisions influenced by "bias and/or prejudgment and/or ex parte contact." Am. Compl. ¶ 135; see also *ACCG*, 801 F.Supp.2d at 401. It also alleges that CBP violated the APA by promulgating import restrictions on Cypriot and Chinese coins and by seizing those coins despite the fact that they were not covered by the CPIA. Am. Compl. ¶ 102, 117; see also ACCG, 801 F.Supp.2d at 413–14.

The district court held that the APA did not apply to State's actions because State was acting at the behest of the President and was therefore not an "agency" for APA purposes. *ACCG*, 801 F.Supp.2d at 403–04. On appeal, the government argues that even if State were an "agency," the APA's provisions would still not apply to it because agency action on behalf of the

President in foreign affairs is covered by the exemption for actions "committed to agency discretion by law." 5 U.S.C. § 701(a)(2); *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111–12, 68 S.Ct. 431, 92 L.Ed. 568 (1948); see also *Jensen v. Nat'l Marine Fisheries Serv.*, 512 F.2d 1189, 1191 (9th Cir.1975).

We have emphasized throughout the restricted scope of judicial review when it comes to the statutory discretion Congress has conferred upon the Executive Branch in carrying out the international obligations of the United States under the Convention. These cautions are nowhere more pertinent than where this nation's protection and recognition of another's cultural patrimony is involved. Congress recognized that the CPIA "is important to our foreign relations, including our international cultural relations," and it enacted the statute to ensure that the United States did not become an illegal market for foreign cultural property, a development that would have "severely strain[ed] our relations with the countries of origin, which often include close allies." S. Rep. 97–564, at 23 (1982), 1982 U.S.C.C.A.N. 4078 at 4100.

The standard for review under the APA is a familiar one: a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706. Under the APA, the scope of our review is narrow, and we may not "substitute [our own] judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). Even were we to assume that State was fully subject to the APA, none of its actions were remotely arbitrary or capricious.

Here, Congress laid out specific procedures for State to follow in concluding Article 9 agreements and imposing import restrictions on covered articles. As discussed above, the Department of State fulfilled each of those statutory requirements and, in doing so, put the Guild on notice that import restrictions were in effect. For the reasons set forth at length in the previous section, the governmental actions challenged herein did not run afoul of any APA standard or otherwise transgress enacted law.

We also agree with the district court that CBP did not violate the APA because it merely promulgated regulations at the behest of State and in full compliance with the CPIA. See ACCG, 801 F.Supp.2d at 413–14. When CBP received instructions from State to promulgate the regulations, it was entirely reasonable for CBP to follow those instructions, given its statutory obligation to do so. 19 U.S.C. § 2612 (indicating that CBP "*shall* prescribe such rules and regulations as are necessary and appropriate to carry out the provisions of [the CPIA]" (emphasis added)).

* * * *

6. Renewal of the Charter of the Cultural Property Advisory Committee

Effective May 1, 2012, the U.S. Department of State renewed for two years the Charter of the Cultural Property Advisory Committee. See May 18, 2012 State Department media note, available at *www.state.gov/r/pa/prs/ps/2012/05/190320.htm*. The Committee was established pursuant to the Convention on Cultural Property Implementation Act ("the Act") to review requests for the imposition of import restrictions on archaeological or ethnological material. The media note explained, "the membership of the Committee consists of private sector experts in archaeology, anthropology, ethnology or related fields;

experts in the international sale of cultural property; and representatives of museums and of the general public."

B. PRESERVATION OF AMERICA'S HERITAGE ABROAD

The Commission for the Preservation of America's Heritage Abroad ("the Commission") is an independent agency of the U.S. government established in 1985 by § 1303 of Public Law 99-83, 99 Stat. 190, 16 U.S.C. § 469j (1985). Among other things, the Commission negotiates bilateral agreements with foreign governments in Central and Eastern Europe and the former Soviet Union to protect and preserve cultural heritage. The agreements focus on protection of communal properties that represent the cultural heritage of groups that were victims of genocide during World War II. The website of the Commission describes these bilateral agreements, and refers to efforts to negotiate additional agreements, at *www.heritageabroad.gov/Agreements.aspx*. For additional background, see *II Cumulative Digest 1991–1999* at 1793–94.

Cross References

Availability of contempt sanctions in Chabad, **Chapter 10.A.3.**

Chapter 15

Private International Law

A. COMMERCIAL LAW: UNCITRAL

On October 15, 2012, John Arbogast, Counselor to the United States Mission to the United Nations, addressed the UN General Assembly's Sixth (Legal) Committee during its debate on the report of the UN Commission on International Trade Law ("UNCITRAL") on the work of its forty-fifth session. See U.N. Doc. A/67/465. Mr. Arbogast's statement, excerpted below, is available at *http://usun.state.gov/briefing/statements/199254.htm*.

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The United States wishes to commend the UNCITRAL Secretariat for its continuing work in promoting the harmonization of international trade law. The Report of the 45th session of the Commission reveals significant accomplishments during the past year.

We welcome the adoption of the Guide to Enactment to accompany the 2011 UNCITRAL Model Law on Public Procurement. The Guide to Enactment will assist states in implementing in their domestic systems the Model Law, which provides a blueprint for states seeking to establish a modern, transparent, and efficient government procurement system. We also note favorably the adoption of the "Recommendations to Assist Arbitral Institutions and Other Interested Bodies with Regard to Arbitration under the UNCITRAL Arbitration Rules (as revised in 2010)." These updated Recommendations will provide important practical guidance to arbitral institutions and others regarding application of the revised Arbitration Rules, which differ in some key respects from the earlier 1976 Arbitration Rules. The Recommendations should help promote the continued broad global use of the UNCITRAL Arbitration Rules.

The Report highlights the important role of UNCITRAL in furthering the broader rule of law agenda of the UN. We continue to believe that, through the practical mechanism of international instruments designed to harmonize international trade law, UNCITRAL contributes in a very concrete manner to promotion of the rule of law internationally. We think that UNCITRAL deserves recognition for this contribution.

We are pleased to see the progress noted in the Report made by the new UNCITRAL Regional Center for Asia and the Pacific, which opened in Incheon, Korea last January.

The Report also details the ongoing work in the various UNCITRAL working groups: in Working Group II, development of new rules on transparency in investor-State arbitration; the

drafting in Working Group III of generic procedural rules for online dispute resolution for the resolution of disputes arising from cross-border electronic commerce; Working Group IV's consideration of the electronic transferability of rights; continued work in Working Group V on the concept of the center of main interests and the responsibilities of directors and officers in the period approaching insolvency; and, in Working Group VI, development of a registry guide that would supplement the UNCITRAL Legislative Guide on Secured Transactions.

In terms of future work, our government supports the proposal, endorsed by the Commission, to prepare a model law on secured transactions. We note favorably that the Commission agreed that priority should be given to the holding of a colloquium or colloquia on microfinance and related matters, specifically, facilitating simplified business incorporation and registration; access to credit for micro, small and medium sized enterprises; dispute resolution applicable to microfinance transactions; and other topics related to creating an enabling legal environment for micro, small and medium sized enterprises. We also support the holding of a colloquium to address the scope of possible work and primary issues to be addressed in the area of public-private partnerships (PPPs) specifically in the context of privately financed infrastructure projects (PFIPs), taking into account previous UNCITRAL work in that area.

Our government would like, however, to reiterate its concerns regarding another proposal that was considered at the Commission regarding the further harmonization of principles of contract law. The Report of the Commission shows that several delegations—the United States was among them—objected to the Chair's determination that there was a prevailing majority view in favor of holding a colloquium or colloquia on that subject. As noted in the Report, in the discussion of that proposal, a number of delegations had expressed clear opposition and strong reservations to further work on the topic. In such circumstances, in our view, while we respect the Commission's Rules of Procedure and methods of work, it was improper to conclude that there was consensus support for further work. We continue to believe that the proposal to further harmonize principles of contract law, while perhaps well intentioned, does not merit the expenditure of valuable UNCITRAL resources, because neither the need for nor the feasibility of such a project has been demonstrated.

* * * *

B. SECURITIES LAW

On May 17, 2012, President Obama transmitted to the Senate for its advice and consent to ratification the Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary ("Convention"), done at The Hague on July 5, 2006 and signed by the United States on that same day. S. Treaty Doc. No. 112-6. In his transmittal letter, the President explained:

> The United States supported the development of the Convention, which provides uniform rules for determining the law applicable to certain rights in commercial transactions involving investment securities held through intermediaries (such as brokers, banks, and other financial institutions). The Convention incorporates modern commercial finance methods already market-tested in the United States through the Uniform Commercial Code. It would ensure that countries that become party to this

Convention would also apply those methods. The Convention, once in force, would improve the functioning of investment securities markets, reduce uncertainty in cross-border commerce, and reduce national and cross-border systemic risk.

Enclosed with the transmittal was the report of the Secretary of State, including an overview of the Convention and an article-by-article analysis. The overview of the Convention appears below.

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* * * *

The Convention provides uniform rules for rapidly determining the law applicable to certain rights in commercial transactions involving investment securities held through intermediaries.

In modern capital markets, investment securities are commonly held in electronic form by banks, securities brokers and other entities collectively known as ''securities intermediaries.'' Securities interests in computer data form move today through intermediaries in increasingly high volumes and cross borders frequently, and it is exceedingly difficult to determine in advance which law would apply to particular transactions or intermediaries if traditional choice of law principles are employed. Even when the initial parties may be located within the United States, the nature of computer-based transfers of securities through various intermediaries means that any transfer typically involves book-entries by a chain of intermediaries located in several countries all in the same day; securities moving between accounts thus may quickly involve dispositions of securities or collateral in other jurisdictions, raising issues as to which countries' laws may apply.

The question of which law governs has become a matter of significant concern to market participants as well as securities and derivatives markets regulators, banking supervisors, and regulators. The objective of the Convention is to provide greater legal certainty in this area, thereby reducing legal and systemic risk, enhancing efficiency in market transactions and facilitating the global flow of capital.

The rules adopted by the Convention reflect modern finance law in the U.S. as set out in Articles 8 and 9 of the Uniform Commercial Code (''UCC''), adopted by all U.S. states and the District of Columbia, which have provided the necessary legal certainty for domestic securities transactions. That certainty is absent today from most transactions that cross national borders or for other countries and foreign markets in their relations to securities interests in the U.S. The Convention's provisions would apply as stated to transactions within its scope, but would not otherwise displace applicable provisions of the UCC.

An Explanatory Report on the Convention was prepared by the Conference Drafting Group on which U.S. government and securities industry experts were represented, which sets forth interpretations of the provisions of the Convention that were agreed to in the negotiation process.

The Convention deals only with choice of law, and only with securities held with an intermediary and credited to a securities account. It has no effect on the substantive law that will be applied once the choice of law determination has been made. It does not otherwise deal with the relationship between an issuer and its registered owner or with interests in securities transferred by physical delivery or direct registration on the books of an issuer.

Because of the transactional and regulatory risk incurred by the inability to rapidly determine applicable law in cross-border securities-based commerce, U.S. agencies and financial and securities industries were active proponents of the negotiation, seeking to achieve sufficient certainty in world markets comparable to that already achieved in the U.S. by uniform state law through the Uniform Commercial Code.

The Convention would be self-executing. No implementing legislation would be required. We note that although the Convention would be self-executing, existing U.S. laws, including the Securities and Exchange Act of 1934, already provide to U.S. Government regulatory and supervisory authorities, including the Treasury Department and the Federal Reserve, authority to act in areas covered by the Convention. The U.S. and Switzerland signed the Convention together on July 5, 2006 in order to underscore the important level of support from two major banking and securities countries, and Switzerland has ratified it. U.S. ratification of the Convention is expected to have a positive effect on the willingness of other countries to take similar action.

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C. FAMILY LAW

Hague Convention on the Civil Aspects of International Child Abduction

1. *Chafin*: appeal from order returning a child to country of habitual residence

On October 4, 2012, the United States filed a brief as amicus curiae in the U.S. Supreme Court in a case under the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention"). *Chafin v. Chafin*, No. 11-1347. The case involves the question of whether the return of a child to his or her country of habitual residence pursuant to a district court order under the Hague Convention renders the case moot.

The petitioner in the case (the father of the child) is a U.S. citizen, who was married to the respondent (mother of the child), a citizen of the United Kingdom. Their child was born in Germany and then lived with her mother in Scotland while petitioner was deployed to Afghanistan with the U.S. army. After petitioner was transferred to Alabama, respondent and the child traveled there in an attempt by the parties to salvage their marriage. But after a few months, they decided to divorce and petitioner filed a child custody petition in Alabama state court. Respondent filed suit in federal court seeking the child's return to Scotland, which she contended was the child's habitual residence. The district court agreed with respondent and issued an order permitting respondent to return to Scotland with her child. Petitioner sought a stay, which was denied, so respondent took the child with her when she returned to Scotland. Petitioner then appealed and respondent moved to dismiss on the ground the case was moot. The court of appeals granted the motion to dismiss and petitioner appealed to the Supreme Court.[*]

[*] Editor's note: On February 19, 2013, the U.S. Supreme Court issued its decision agreeing with the argument in the U.S. brief that the fact that the child had been removed did not moot the appeal. The Supreme Court vacated and remanded the case.

The U.S. *amicus* brief, excerpted below (with footnotes and citations to the record omitted), argues that the return order does not moot the appeal. The U.S. brief is available in full at *www.state.gov/s/l/c8183.htm*.

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* * * *

The question in this case is whether an appeal of a Hague Convention return order is rendered moot when the child is returned in accordance with the order. This case is not moot under Article III of the Constitution because there remains a live dispute between the parties, and appellate resolution of that dispute would have concrete consequences for the parties. Moreover, the Convention's history and purposes suggest that prompt return of a child to her habitual residence should not moot the opposing parent's appeal of the return order. The United States expresses no views on the merits of the underlying Hague Convention petition. But this case is not moot.

A. Whether This Case Is Moot Depends On Whether There Is A Live Controversy The Resolution Of Which Would Have Real-World Consequences For The Parties

1. Article III of the Constitution grants the Judicial Branch the authority to adjudicate "Cases" and "Controversies." U.S. Const. Art. III, § 2. A federal court may not "give opinions upon moot questions or abstract propositions," or "declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). There must be an "actual controversy" between the parties "at the time the complaint is filed" and at "all stages" of the case. *Alvarez v. Smith*, 130 S. Ct. 576, 580 (2009); see *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) ("This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate.").

A case becomes moot when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam) (internal quotation marks omitted), or when an event occurs while the case is pending "that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party." *Church of Scientology*, 506 U.S. at 12 (quoting *Mills*, 159 U.S. at 653). If appellate resolution of the case would not "affect the matter in issue," then the case is moot. *Ibid*.

2. In a Hague Convention case, a court's charge is limited: the court is to decide only whether one parent has wrongfully removed the child to, or retained the child in, a country that is not her habitual residence and if so, whether any exception to return applies. Convention Arts. 3, 5, 12-13.

Here, respondent sought return of the child to the United Kingdom under the Hague Convention. The federal district court held a two-day bench trial, concluded that petitioner had wrongfully retained the child in the United States because Scotland is the child's habitual residence, and entered an order permitting respondent to return to Scotland with the child. Petitioner sought a stay of that order, which was denied, and respondent immediately left for Scotland with the child. Petitioner appealed the return order. Respondent and the child have remained in Scotland, and respondent initiated child-custody proceedings there. In the Alabama proceedings, the state appellate court determined that the trial court had lost jurisdiction to adjudicate child custody because, under the federal court's Hague Convention ruling, the child's

country of habitual residence is the United Kingdom. See *Chafin v. Chafin*, No. 2110421, 2012 WL 3055522, at *4 (Ala. Civ. App. July 27, 2012).

At this point, it is plain that the parties still have a real-world dispute about where the child should reside. The parties disagree about whether the child's habitual residence changed from the United Kingdom to the United States when respondent and the child came to live in Alabama in February 2010 and whether, if the child's habitual residence remained in Scotland, any defenses to return might apply. Accordingly, "notwithstanding the return of the child, the issue as to whether the initial [retention of the child] was wrongful [is] still very much alive." *Whiting v. Krassner*, 391 F.3d 540, 545 (3d Cir. 2004), cert. denied, 545 U.S. 1131 (2005). Further, the parties' ongoing child-custody dispute, while addressing an issue distinct from whether return is required under the Convention, underscores that the parties have maintained the type of "concrete adverseness" and "personal stake in the outcome" required for Article III purposes. *City of LA. v. Lyons*, 461 U.S. 95, 101 (1983) (quoting *Bakery. Carr*, 369 U.S. 186, 204 (1962)).

The mootness issue in this case therefore depends on whether the court of appeals could "grant 'any effectual relief whatever' to a prevailing party" or otherwise " affect the matter that remains in issue" between the parties. *Church of Scientology*, 506 U.S. at 12 (quoting *Mills*, 159 U.S. at 653). As explained below, the court of appeals could provide relief to the prevailing party, and appellate resolution of the dispute likely would have a number of real-world consequences for both parties.

B. This Case Is Not Moot Because A Federal Appellate Court's Order Could Have Concrete Consequences For The Parties

1. The primary remedy envisioned by the Convention—return of the child—has occurred. The Convention does not address what should happen if a return order is overturned on appeal after the child has left the jurisdiction; instead, it leaves that issue (and most procedural questions) to the domestic law of each State Party. ICARA [the International Child Abduction Remedies Act], the Convention's implementing statute in the United States, likewise does not address what might happen if a return order is overturned on appeal. But under general principles that are presumptively applicable in this setting, the courts can afford petitioner relief if he prevails on appeal.

This Court has long recognized that "so long as [the court] retains control of the subject-matter and of the parties," it has inherent "equitable powers" to "correct that which has been wrongfully done by virtue of its process." *Arkadelphia Milling Co. v. St. Louis Sw. Ry.*, 249 U.S. 134, 145-146 (1919)…. The court's equitable authority extends to compelling a party properly before it to perform an act outside its territorial jurisdiction. See *Steele v. Bulova Watch Co.*, 344 U.S. 280, 287 (1952).

When respondent filed suit in federal district court, seeking a return order under the Hague Convention, she submitted herself to the jurisdiction of that court. The court may continue to exercise personal jurisdiction over her despite the fact that she is outside its territorial jurisdiction. See *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451-452 (1932); see also, *e.g., Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). If the court of appeals concluded that the district court's return order was erroneous because the United States was the country of the child's habitual residence, it could reverse the district court's decision and order respondent to bring the child back to the United States. See, *e.g., Larbie v. Larbie*, 5:11-CV-00160 Docket entry No. 60, at 2 (W.D. Tex. Aug. 29, 2012) (order directing parties to "immediately comply with the Fifth Circuit's judgment" by

"return[ing] K.L. to the United States" and "to the custody of [the parent who prevailed on appeal]").

If the court of appeals (or the district court on remand) orders a non-resident parent to bring a child back to the United States, the parent might voluntarily comply with that order. *Larbie v. Larbie*, 690 F.3d 295, 305 (5th Cir. 2012), petition for cert, pending, No. 12-304 (filed Sept. 7, 2012). If the non-resident parent declines to comply, enforcement of such an order may be complicated, but that does not make enforcement impossible. See *Knox v. Service Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) ("A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." (internal quotation marks omitted)). The district court could impose contempt sanctions. *Larbie*, 690 F.3d at 305; see *Leman*, 284 U.S. at 452 ("contempt of the court" is "none the less contempt because the act was committed outside the district"; "the contempt lay in the fact, not in the place, of the disobedience to the requirement"). That contempt order could be enforced if the non-resident parent returned to the United States.

Moreover, a party who succeeds in obtaining a judgment on appeal reversing a return order could bring that decision to the attention of a foreign court. The foreign court's response would depend on that country's domestic law regarding recognition and enforcement of foreign judgments. Neither the Hague Convention itself nor the UK statute implementing the Convention specifically provides for enforcement of foreign Hague Convention decisions. See Child Abduction and Custody Act 1985, ch. 60, Pt. I, §§ 1-11 (UK) (available at *www.legislation.gov.uk/ukpga/1985/60*). But if petitioner filed a new Hague Convention petition in the United Kingdom and sought recognition of the U.S. judgment, a UK court might give effect to it as a matter of comity, or at least apply preclusion principles with respect to certain issues. See 1 Dicey, Morris & Collins, *The Conflict of Laws*, R. 35(2) & cmt., at 575-576 (14th ed. 2006) (Conflict of Laws) (identifying circumstances in which UK courts might recognize certain foreign judgments); *cf. Hilton v. Guyot*, 159 U.S. 113, 164 (1895) (describing circumstances under which U.S. courts might recognize foreign judgments as a matter of international comity).

There likewise could be consequences under the Convention if respondent prevailed on appeal. After concluding that petitioner's appeal was moot, the court of appeals vacated the district court's return order. [S]ee *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). That disposition "strip[ped] the decision below of its binding effect," *Deakins v. Monaghan*, 484 U.S. 193, 200 (1988), so that respondent was left with no court order establishing that the child's habitual residence was in the United Kingdom and that no defenses to return applied. By contrast, affirmance of the return order would provide respondent with a judgment she could invoke against petitioner if she and the child returned to the United States, and that she could bring to a UK court's attention and rely upon if petitioner filed a Hague Convention petition there.

2. Appellate resolution of the parties' Hague Convention dispute likely would also have consequences in their ongoing child-custody proceedings. The Hague Convention is not itself a mechanism for litigating child-custody issues; a court considering a Hague Convention petition may not decide custody and the court's decision "shall not be taken to be a determination on the merits of any custody issue." Convention Arts. 16-17, 19. Nonetheless, once the court decides the child's habitual residence in adjudicating the Hague Convention petition, the courts of the country of habitual residence may adjudicate custody under their domestic law.

If petitioner prevailed in this case on appeal, that ruling would remove a legal barrier to adjudication of custody in the United States. Petitioner filed divorce and child custody proceedings in Alabama state court, and then respondent filed a Hague Convention petition. The state court stayed its custody proceedings, because once judicial or administrative authorities in a contracting State receive notice that the child has been wrongfully removed or retained, they "shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention" or an application seeking return of the child is not lodged within a reasonable time. Convention Art. 16. After the federal district court entered its return order, the state appellate court determined that petitioner's child-custody case could no longer be litigated in Alabama by virtue of the UCCJEA [Uniform Child Custody Jurisdiction and Enforcement Act]. See *Chafin*, 2012 WL 3055522, at *4. Under the UCCJEA, a state court may not exercise its jurisdiction to make a child-custody determination when the child's home State is elsewhere and a court in that State has jurisdiction to adjudicate custody. See UCCJEA § 201(a), 9 U.L.A. 671 (codified in relevant part at Ala. Code § 30-3B-102(4) (LexisNexis 2011)).

If the return order were overturned on appeal, it would remove the Hague Convention barrier to adjudication of custody in the Alabama courts, and petitioner could ask the Alabama courts to take account of the federal district court's findings in deciding custody. If petitioner instead chose to submit to litigation of custody in the Scottish courts, he would no longer have the disadvantage of the U.S. court order finding him to have wrongfully retained the child.

There would likewise be real-world consequences in the custody dispute if respondent prevailed on appeal. Although the Scottish court entered an initial order granting respondent temporary custody, that court has not taken any further action with respect to the custody dispute, perhaps because that court is awaiting the U.S. courts' final resolution of this case. If the return order were affirmed, respondent might rely on the finding that petitioner wrongfully retained the child in violation of her custody rights to support her request for custody. Moreover, she could ask the Scottish court to give weight to the district court's findings, as a matter of international comity, as it further adjudicates the custody dispute. See *Conflict of Laws*, R. 35(2) & cmt., at 575-576. And, of course, affirmance of the district court's order would make it unlikely that respondent would have to litigate custody in the Alabama courts. See UCCJEA § 201, 9 U.L.A. 671.

3. Finally, appellate resolution of this case would resolve the status of the judgment that has been entered against petitioner for fees and expenses. ICARA provides that, when a court orders the return of a child, the court "shall order" the parent who wrongfully removed or retained the child to pay "necessary expenses incurred by or on behalf of" the other parent, including "court costs," "legal fees," "foster home or other care during the course of proceedings," and "transportation costs related to the return of the child," unless the abducting parent establishes that such an award "would be clearly inappropriate." 42 U.S.C. 11607(b)(3).

The district court in this case entered a substantial award of fees and expenses to respondent. If the district court's return order were reversed on appeal, it would terminate respondent's entitlement to those amounts under ICARA. Conversely, if the return order were affirmed on appeal, respondent would retain her entitlement to payment of those amounts. Although it is well-established that a contingent "interest in attorney's fees is … insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) (internal quotation marks omitted), here the monetary award extends far beyond attorney's fees. The financial

consequences of an appellate decision provide yet another reason why this case is not moot. *Cf. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 313-318 (1999).

4. The court of appeals apparently based its mootness holding on a concern about practical obstacles to enforcing a judgment against a non-resident parent. But difficulties in enforcement do not render a case moot. See *Church of Scientology*, 506 U.S. at 12-13 (test for mootness is not whether a court can "return the parties to the status quo ante" or grant a "fully satisfactory remedy" to undo the effect of an erroneously entered injunction, but whether some remedy is "possible"); *Ratner v. Sioux Natural Gas Corp.*, 770 F.2d 512, 516 (5th Cir. 1985) ("Difficulties in formulating a remedy in an otherwise living case do not evidence the absence of a case or controversy). And here, quite aside from any questions concerning direct enforcement of such a judgment, its legal rulings might be given effect in other proceedings.

There are various events that plainly would moot a Hague Convention case on appeal. For example, there would be no dispute about return of the child if the child's age rendered the Convention no longer applicable, Convention Art. 4 (Convention "cease[s] to apply" when child turns 16); see *Gaudin v. Remis*, 334 Fed. Appx. 133 (9th Cir. 2009), cert. denied, 131 S. Ct. 109 (2010) (unpublished); see also *Camreta v. Greene*, 131 S. Ct. 2020, 2034 (2011) (case moot when child "is no longer in need of any protection from the challenged practice"), or the child died, see *Slagenweit v. Slagenweit*, 63 F.3d 719 (8th Cir. 1995). The case also would become moot if the parties conclusively settled their dispute about where the child should live, see *Leser v. Berridge*, 668 F.3d 1202, 1208 (10th Cir. 2011) (district court entered written order reflecting parents' "agreement the children would in fact return to the Czech Republic"), or the parent seeking relief under the Convention permanently moved to the country where the child and other parent live, see *Von Kennel Gaudin v. Remis*, 282 F.3d 1178, 1183 (9th Cir. 2002).

But those situations are all unlike this case, because in those instances, either there would be no adversity or the parties no longer would have rights under the Convention. Here, by contrast, the child has not reached age 16, there remains a live dispute between the parties about where the child should reside, and a federal appellate court's resolution of that dispute could have numerous consequences for the parties. Accordingly, the case is not moot under this Court's Article III jurisprudence.

C. The History And Purposes Of The Convention Support The Conclusion That An Appeal Of A Return Order Is Not Mooted By The Child's Return

1. The Convention's "central operating feature" is its "return remedy." *Abbott v. Abbott*, 130 S. Ct. 1983, 1989 (2010). A court must issue a return order when a child has been wrongfully removed or retained in a contracting State in violation of a parent's or other person's custody rights and none of the defenses to return apply. See Convention Arts. 1, 4, 12-13. But the Convention does not expressly address what should happen when an initial judicial or administrative authority enters a return order and the losing party appeals it. Instead, the Convention generally leaves the procedures for adjudicating return petitions in the first instance or on appeal to be determined as a matter of domestic law. See Explanatory Report 426, para. 63, at 444.

One thing that is clear under the Convention, however, is that a child should be returned to her country of habitual residence promptly. The Convention's primary object is "to secure the prompt return of children wrongfully removed to or retained in any Contracting State." Convention Art. 1(a). The Convention obligates States Parties to "use the most expeditious procedures available" to implement the Convention within their territories and provides that the judicial or administrative authorities in those States shall "act expeditiously in proceedings for

the return of children." Arts. 2, 11. The Convention sets an aspirational goal of reaching a decision on a petition for return within six weeks of its filing. Art. 11. The Convention further provides that once an administrative or judicial authority in a contracting State has determined that a child has been wrongfully removed or retained and no exception applies, it "shall order the return of the child forthwith." Art. 12.

Accordingly, once a district court has entered a return order under the Convention, it will be appropriate in many cases for the court to permit return pending appeal. That course will often enable children to be returned to familiar surroundings and established social and family networks. See Convention Introductory decls.; 51 Fed. Reg. at 10,504. The Hague Convention is premised on the principle that a decision regarding return should be swiftly rendered to avoid the possibility that the child will become settled in a new environment and subsequently uprooted. The longer the child remains in a country that a court has decided is not the child's habitual residence, the more disruptive it will be for the child if she eventually returns to her habitual residence, and the more difficult it will be for the courts of that country to adjudicate custody. See *Friedrich v. Friedrich*, 78 F.3d 1060, 1063 n.1 (6th Cir. 1996); see also *Abbott*, 130 S. Ct. at 1996 (noting the "trauma" a child suffers when one parent "separate[s] [the child] from the second parent and the child's support system"). By providing a remedy of swift return, the Convention helps to prevent abduction by removing an incentive a parent might have to "forum shop."

2. A rule that the return of a child in conformity with a return order moots an appeal of that order could have the unintended consequence of slowing cases down rather than speeding them up. If a case becomes moot when a child leaves the United States, then courts would be more likely to grant stays of return orders pending appeal. …

Indeed, delay in implementation of a return order pending appeal could take an older child outside of the Convention's scope of coverage entirely. See Convention Art. 4; see also 51 Fed. Reg. at 10,504 ("Even if a child is under sixteen at the time *** the Conven-tion is invoked, the Convention ceases to apply when the child reaches sixteen."). Similarly, a holding that return of the child moots an appeal would give the parent found to have wrongfully removed or retained a child a strong incentive to seek further review even in a weak case in order to increase the likelihood that the child would remain with that parent for the duration of the appeal.

Finally, a routine practice of imposing stays in Hague Convention cases would undermine efforts to obtain prompt return of children abducted from the United States. It is already difficult for U.S. courts to meet the Convention's aspirational time limits in providing an initial Hague Convention decision. If courts in the United States routinely issued stays barring return pending appeal, it would be difficult for the United States to encourage other countries to act promptly in adjudicating Hague Convention petitions, thereby stranding children abroad during lengthy appeal processes.

3. Under the court of appeals' decision, the alternative to requiring a child to remain in the United States to prevent mootness is to cut off the losing parent's appellate rights if the child is returned after the trial court's ruling and require the parties to start over in another country. No such result is required by the Convention or ICARA: "While it is true that the process for the adjudication of Hague Convention petitions should be as quick as possible, neither the Convention nor the U.S. implementing legislation restricts the appellate process." *Walsh v. Walsh*, 221 F.3d 204, 214 (1st Cir. 2000) (citation omitted), cert. denied, 531 U.S. 1159 (2001). Reading the Convention to extinguish a parent's right of appeal when the child departs the

United States would be an unwarranted intrusion into this country's domestic law, contrary to the Convention's approach of generally leaving procedural issues to be decided by each State Party.

This Court likewise should not assume that Congress, in enacting ICARA, decided *sub silento* to limit appellate review of Hague Convention orders in this manner. Federal law generally affords an aggrieved party an appeal as of right from a final district court decision. See 28 U.S.C. 1291; Fed. R. App. P. 3. If Congress had meant to curtail that right under the Convention by barring any appellate proceedings following return, it would have been expected to do so expressly. See *Greenlaw v. United States*, 554 U.S. 237, 250 (2008) (when Congress legislates against a backdrop of "solidly grounded rule[s] of appellate practice," the inference to be drawn from silence is that Congress intended for the new provision to "operate in harmony" with those rules); see also, *e.g.*, *Silva v. Di Vittorio*, 658 F.3d 1090, 1098 (9th Cir. 2011) (dismissal of a prisoner's case should not count as a "strike" for purposes of the Prison Litigation Reform Act's "three-strikes" rule until after the prisoner has waived or exhausted his opportunity to appeal). And in fact ICARA's legislative history suggests that Congress expected the losing parent would be able to appeal a return order. See H.R. Rep. No. 525, 100th Cong., 2d Sess. 12 (1988) (House Report) (stating that the "full faith and credit" provision of ICARA, 42 U.S.C. 11603(g) was "not intended to deny the possibility of appeal from a return order or a decision denying a return order").

Moreover, requiring a stay as a condition of appellate review would make it more difficult to achieve the "uniform international interpretation of the Convention" that Congress intended, 42 U.S.C. 11601(b)(3)(B), as it would terminate the full course of appellate proceedings except in cases in which stays had been obtained or where return was denied. See also House Report 10 (emphasizing "the need for uniformity in [the Convention's] interpretation in the United States"). In contrast, permitting appeals to go forward after a child has been returned will secure both the prompt return of the child and the full appellate review necessary to promote national uniformity in interpretation of the Convention.

4. We are aware of only one foreign court of last resort that has directly addressed the mootness issue. Its decision is consistent with the conclusion that this case is not moot.

In a 2002 decision, the Spanish Constitutional Court held that an appeal of a return order was not mooted by return of the child in accordance with the order. See S.T.C., May 20,2002 (B.O.E., No. 120, p. 47) (Spain). In that case, the mother and father of the child obtained a divorce in Poland, and the Polish court awarded custody to the father. The mother traveled to Spain with the child, and the father filed a Hague Convention petition in Spain to secure the child's return to Poland. The Spanish trial court ordered the child returned to Poland, and the child was returned. The mother filed an appeal, and the appellate court held that the "appeal is moot" because "the child ha[s] been returned to her country of origin."

The question before the Spanish Constitutional Court was whether the intermediate appellate court violated the mother's right under the Spanish Constitution "to obtain a decision, based on law, on the merits of the claim asserted." The court held that the case was not moot and thus that the mother had been denied her constitutional right to effective judicial protection. The court explained that, in enacting the domestic laws implementing the Convention, "[i]t was the intent of the Legislature" for an initial decision regarding return "to be subject to the right of review by the second-instance court." The court observed that domestic law provided a particular timeframe for such an appeal, and it "indicate[d] that the consideration of the appeal shall not stay execution of the first-instance decision." In the court's view, the "Spanish Legislature must have foreseen that one of the possible consequences" of its procedural rules would be "that at the

time the appeal is decided *** , the decision appealed may already have been executed," yet the legislature did not require the appellate court to "refrain *** from issuing a ruling on the merits of the issue placed before it."

The Spanish Constitutional Court further explained that, even though the child had been returned to Poland, "it was not meaningless for the Provincial Court to issue a determination on the issue of whether or not the appellant had illegally removed her daughter from Poland to Spain, especially since, throughout the proceeding, the mother had maintained that the father did not actually exercise custody rights to the child, who had always been in the care and company of her maternal grandparents." The court observed that "[a] determination on this issue, regardless of its effectiveness in the Spanish proceeding once the child had been returned via execution of the decision under appeal, could still be relevant to the interests" of the mother because "a decision favorable to [her] could be invoked before the courts of Poland hearing the divorce proceeding between the parents in order to support or strengthen the mother's rights to obtain custody of the child." The court therefore directed the appellate court to "decide the appeal as justice may require."

A 2006 survey of States Parties revealed that, although virtually all of the responding countries permitted appeal of a return order, a number of jurisdictions permitted immediate enforcement of the order, with the filing of an appeal sometimes, but not always, staying enforcement. See Hague Conference on Private Int'l Law, *Enforcement of Orders Made Under the 1980 Convention: A Comparative Legal Study*, Prelim. Doc. No. 6 of Oct. 2006, for 5th Meeting of Special Comm'n to review the operation of the Hague Convention 22-23, 31-33 & nn.95, 99. Although the surveyed States apparently did not specify whether enforcement of the order would moot an appeal, there is no indication that return typically would be a barrier to an appeal if no stay was granted. See also Hague Conference on Private Int'l Law, *Guide to Good Practice Under the Hague Convention of 25 Oct. 1980 on the Civil Aspects of International Child Abduction* 19-20 (2003) (making recommendations for expediting proceedings, apparently based on the premise that an appeal could go forward if a child is returned). Accordingly, there is no indication that the practice of the States Parties is inconsistent with the conclusion that this case is not moot under Article III.

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2. *Lozano*: equitable discretion and Article 12 defense

On August 20, 2012, the United States submitted a brief as *amicus curiae* at the invitation of the court in a case before the U.S. Court of Appeals for the Second Circuit involving the interpretation of Article 12 of the Hague Convention. *Lozano v. Montoya*, No. 11-2224 (2d. Cir. 2012). Article 12 provides that when a child has been "wrongfully removed" from a country, the judicial authority shall return the child unless more than one year has elapsed between the wrongful removal and the commencement of proceedings under the Hague Convention and the child is "now settled" in his or her new country. In other words, where more than one year has elapsed between the abduction and the time the petition is filed, the "taking parent" is entitled to argue that the child is "now settled" in his or her new environment as an affirmative defense to return. Lozano, the child's father in the case, asserted that the one-year period should be tolled, meaning the child's mother should not

be permitted to raise the "now settled" defense, due to his lack of knowledge as to the child's location and that the child should be returned to his residence in the United Kingdom. Montoya, the child's mother, asserted the defense to return under Article 12 of the Hague Convention, arguing that the child was "now settled" in the United States with her and her relatives. The district court rejected Lozano's argument that equitable tolling could apply to "toll" the one year period that triggers the right to raise the affirmative defense in the first place. After hearing arguments on the issue of whether the child was now settled in the United States, the court found that the child was "now settled" and denied Lozano's petition for return of his daughter. Lozano appealed.

On appeal, the Second Circuit requested the Secretary of State's views on two questions concerning the Article 12 "now settled" defense:

> (1) whether equitable tolling applies to the one-year period that triggers the availability of the "now settled" defense under Article 12 of the Convention; and (2) in determining whether a child is "now settled" within the meaning of Article 12, what significance should be given to a child's lack of legal immigration status in the United States.

The U.S. brief argues that (1) equitable tolling does not apply, but, rather, the court has equitable discretion, in appropriate circumstances, to decline to hear the affirmative defense; and (2) immigration status alone is not dispositive but is a factor in the determination of whether a child is now settled. The U.S. brief is excerpted below (with some footnotes and citations to the record omitted) and available in full at *www.state.gov/s/l/c8183.htm*.

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* * * *

POINT I
Equitable Tolling Does Not Apply to Article 12's One-Year Period, but the Court May Exercise Equitable Discretion at Any Time to Order the Child's Return, and in Appropriate Cases May Do So Without Determining Whether the Child Is Now Settled

Article 12's one-year period is not subject to "equitable tolling." Equitable tolling would have the effect—unintended by the Convention—of foreclosing a district court's analysis of whether a child is now settled in all cases where equitable tolling is applied, regardless of the length of time a child may have lived in her new environment. Instead, a district court retains equitable discretion at all times to consider all factors and order that a child who is now settled should nonetheless be returned. A court may also consider all equitable factors and determine it will decline to undertake the now-settled inquiry. In exercising that equitable discretion, however, the court should remain cognizant that the degree to which the child has become settled is relevant to whether she should be returned.

A. Equitable Tolling Principles

Because Article 12's one-year period is not a statute of limitations, it is not subject to equitable tolling. That doctrine "permits a plaintiff to avoid the bar of the statute of limitations if

despite all due diligence he is unable to obtain vital information bearing on the existence of his claim." *Cada v. Baxter Healthcare Corp*., 920 F.2d 446, 451 (7th Cir. 1990) (cited in *United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991)). …

But unlike a statute of limitations, Article 12's one-year period expiration does not preclude a petitioner from filing a claim or concern only the parties' rights. Rather, it determines whether a court should automatically order the return of a child without regard to her current circumstances, by setting a threshold criterion for whether a respondent may assert a defense that the child has become settled in her new environment. See *Hallstrom v. Tillamook Cnty*., 493 U.S. 20, 27 (1989) (60-day notice provision is not statute of limitations). Applying equitable tolling would entirely preclude district courts, once they have concluded that equitable tolling is appropriate, from considering whether the child is settled and would obligate those courts to order the child's return "forthwith." Foreclosing in all such cases consideration of a third party's interests would not serve the purposes of the equitable tolling doctrine, and, as explained below, would not comport with the text and history of the Convention.

B. Text of the Convention

"'The interpretation of a treaty, like the interpretation of a statute, begins with its text.'" *Abbott* [v. *Abbott*, 130 S. Ct. 1983 (2010)], … at 1990 (quoting *Medellín v. Texas*, 552 U.S. 491, 506 (2008)).

Article 12's text does not suggest that the one-year period is subject to equitable tolling. Article 12 provides that "[w]here a child has been wrongfully removed," if "a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith." It further states that "even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment." Nothing in the text indicates that the period can be extended. Given that the Convention addresses conduct that is by definition "wrongful" and often surreptitious, the drafters presumably considered the possibility of concealment by the abducting parent, yet they made no provision for an extension of the one-year period. In context, that silence is compelling.

The Convention's text, however, leaves a district court with equitable discretion that may, in appropriate cases, yield a similar result. As this Court has recognized, the "now settled" provision is an "exception" which "allows . . . but does not . . . require" a district court to refuse to order the child's return. *Blondin IV*, 238 F.3d at 164. Article 12 thus does not purport to limit the court's equitable discretion to order return, even in cases filed more than a year after the abduction, if the facts justify that remedy. Even when the court has concluded that the child is now settled in the new country, the court could ultimately hold that the abducting parent's conduct in concealing the child's whereabouts (and any other equitable factors) justify returning the child to her habitual residence. Nothing in Article 12, moreover, suggests that a court must perform the "now settled" inquiry before it decides that the child should be returned. Given that Article 12 contemplates that a finding of settlement could be outweighed by other equitable factors, it follows that Article 12 also permits the court to forgo the "settled" inquiry when the court concludes that the facts justify ordering return regardless of whether the child is "now settled." This interpretation is consistent with Article 18, which provides that "[t]he provisions of this Chapter [enumerating defenses] do not limit the power of a judicial or administrative authority to order the return of the child at any time." Convention, art. 18 (emphasis added). Accordingly, in an appropriate case, *e.g.*, where a parent's behavior is so egregious as to warrant

a return order irrespective of the child's degree of assimilation, a court may order a child's return without determining whether the child is now settled. The court thus possesses "equitable discretion" not simply to balance the various interests once they have all been explored, but to make the antecedent determination whether a "now settled" inquiry is necessary to its determination.

C. History of the Convention

The Convention's drafting history confirms that equitable tolling is inapplicable. "Because a treaty ratified by the United States is not only the law of this land, but also an agreement among sovereign powers, [courts] have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and the postratification understanding of the contracting parties." *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) (citation omitted); accord *Air France v. Saks*, 470 U.S. 392, 396, 400 (1985) ("In interpreting a treaty it is proper . . . to refer to the records of its drafting and negotiation."); see also Vienna Convention on the Law of Treaties, concluded on May 23, 1969, Art. 32, 1155 U.N.T.S. 331, 340.

The drafters recognized that after enough time elapses, it may not be prudent to return the child automatically. A preliminary report studying the problem of one-parent kidnapping indicated that "[t]ime is an important factor in the adjustment of the child to his new situation" and that a "court may find it more difficult to send back a child who has been forced to adjust to his new situation for a period of six months or more." Adair Dyer, *Report on International Child Abduction by One Parent*, in *3 Actes et Documents, Quatorzième Session* 12, 23-24 (1982). And the Special Commission formed to address the issue initially suggested that while a child should be returned to its home country immediately, if "an application has been made more than six months after the removal" of the child and the child has been "habitually resident" in the new country for more than one year, then the court will "assume jurisdiction to determine" the proper custody arrangement rather than simply returning the child. *Conclusions Drawn from the Discussions of the Special Commission of March 1979 on Legal Kidnapping*, in *3 Acts et Documents* 162, 164.

The drafting history also reflects an understanding that a parent who wrongfully removes a child may attempt to conceal the child's whereabouts. See, e.g., *Replies of the Governments to the Questionnaire*, in 3 Acts et *Documents* 61, 88 ("There is a sixth problem which is becoming all too common—the taking and concealment of a child by a parent before or after a custody decree."). The preliminary draft thus sets out a two-tier time-period for requiring immediate return, depending on whether the child's location was known. *Preliminary Draft Convention Adopted by the Special Commission and Report by Elisa Perez-Vera*. in *3 Actes et Documents* 166, 168 (providing that if fewer than six months had elapsed, the authority had to "order the return of the child forthwith"; if the child's location "was unknown," the six months would "run from the date of discovery," but the "total period" could not exceed one year).

In response to the preliminary draft, certain delegates expressed concern that determining when the parent discovered, or should have discovered, the child's location could cause "considerable difficulty." *Procès-verbal No. 7, Procèsverbaux et Documents de travail de la Première commission* in *3 Actes et Documents* 290, 291 (United Kingdom comment). After extensive debate about the structure and length of the time period, the delegates voted for a single, one-year period. See *Procès-verbal No. 7*, at 291-93. The United States urged a longer period in light of the difficulty of locating the child, see *Procès-verbal No. 7*, at 292, a suggestion that presupposes that the single period would not toll at least for that reason.

In response to "the consequences" of "a short time-limit of one year," Germany proposed that for two additional years after the one-year period elapsed, a country still be required to return a child, unless "the child was now settled in his new environment." *Id*. at 295. That proposal led to the "now settled" language of Article 12. As described by the United States, the Convention thus provided for a one-year period in which "no assimilation of the child was presumed to have occurred" and "return could be refused only on the grounds set forth" expressly, *e.g.*, severe risk to the child. *Procès-verbal No. 10, Procèsverbaux et Documents de travail de la Première commission* in *3 Actes et Documents* 312, 315. After this initial one-year period, "assimilation became an open question." *Id*.

The Convention's Explanatory Report describes this compromise and suggests that that the one-year period was not intended to toll. See Elisa Pérez-Vera, *Explanatory Report*, in *3 Actes et Documents* 426, ¶¶ 107-09, at 458. The Report explains the drafters' understanding of Article 12, that ordinarily "return of the child is regarded as being in its interests," but after "a child has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights." *Id*. ¶ 107. Because of "difficulties" in "stat[ing] this test of 'integration of the child' as an objective rule," the Convention's drafters used a one-year time limit to trigger whether a court may consider such matters. *Id*. In adopting that time limit, the drafters were cognizant of "the difficulties encountered in establishing the child's whereabouts," yet still chose a "single time-limit of one year" and thereby "eliminated" the "inherent difficulty in having to prove the existence of those problems which can surround the locating of the child." *Id*. ¶ 108.

More generally, the Report notes that the Convention "recognizes the need for certain exceptions to the general obligations assumed by the States to secure the prompt return of children who have been unlawfully removed or retained," as "concrete illustrations" of the principle that the child's interests are to be the "guiding criterion." *Id*. ¶ 25. Article 12 is one of those exceptions, constituting an acknowledgment that the interests of the child may be served by examining her settlement into her new environment if at least one year has passed before the petition is filed. *Id*. ¶¶ 107-09.[10] The rationale of permitting that examination related to the child's interests further suggests that tolling the one-year period due to the parent's actions would not be consistent with the Convention.

Due to these concerns, in the lead-up to the 2006 Special Commission meeting on the practical operation of the Convention, the United States' written response to the Questionnaire from the Hague Conference on Private International Law expressly stated that "[t]he [United States Central Authority] supports the concept of equitable tolling of the one-year filing deadline in order to prevent creating an incentive for a taking parent to conceal the whereabouts of a child from the other parent in order to prevent the timely filing of a Hague petition."[11] During the discussion of this issue in the Special Commission, no delegation disagreed.

D. Case Law of Other Signatory States

Other signatory countries have generally agreed that the one-year period is not subject to equitable tolling, but that courts have equitable discretion to return a child who is now settled

[10] The Convention's drafters understood that the examination of settlement would have an impact on achieving the prompt return of a wrongfully removed child. Article 12's first paragraph (regarding proceedings commenced before the one-year period) requires the court to "order the return of the child forthwith." But, as the Report notes, the Convention's omission of the word "forthwith" from the second paragraph of Article 12 results from the drafters' acknowledgment that the urgency of proceedings diminishes after a year has passed. Id. ¶ 109.

[11] Consistent with the discussion above, use of the phrase "equitable tolling" here should be understood in the sense of the availability of the exercise of equitable discretion.

and may consider an abducting parent's conduct when exercising that discretion. When interpreting the Hague Convention, the "views of other contracting states" are "entitled to considerable weight." *Abbott*, 130 S. Ct. at 1993 (quotation marks omitted). "The principle applies with special force" to the Hague Convention, "for Congress has directed that 'uniform international interpretation of the Convention' is part of the Convention's framework." *Id*. (quoting 42 U.S.C. § 11601(b)(3)(B)).

For example, in *Cannon v. Cannon*, the Court of Appeal for England and Wales stated that even where the "abductor may have caused or contributed to the period of delay that triggers [Article 12's 'now settled' defense]," it "would not support a tolling rule." [2004] EWCA (Civ) 1330 (Eng.) ¶¶ 39, 51. "[D]isregard[ing]" the "period gained by concealment," would be "too crude an approach which risks . . . produc[ing] results that offend what is still the pursuit of a realistic Convention outcome." *Id*. Instead, the court reasoned that because of the "emotional and psychological" effects of concealing a child, when there is concealment "the burden of demonstrating the necessary elements of emotional and psychological settlement were much increased." *Id*. ¶ 61. And "even if settlement is established," the court still could "order a return under the Convention." *Id*. ¶ 62; see also *In re M*, [2007] UKHL 55, [2008] 1 A.C. 1288; *In re C* (2005) 1 F.L.R. 938, 948-949 (Fam. 2004).

Courts in Canada, Hong Kong, and New Zealand have not tolled Article 12's one-year period but several have noted that concealment may nonetheless factor into a court's ultimate determination of whether to order a child's return. See *Kubera v. Kubera*, [2010] 2010 B.C.C.A. 118 (Court of Appeal for British Columbia) ¶¶ 64-69; *A. v. M.*, [2002] 209 N.S.R.2d 248 ¶¶ 74-82 (Nova Scotia Court of Appeal); *A.C. v. P.C.*, [2005] H.K.C. 839 (Hong Kong Court of First Instance); *Secretary for Justice (New Zealand Central Authority) v. H.J.*, [2006] N.Z.S.C. 97 (Supreme Court of New Zealand) ¶¶ 60-70, 86-88.12

E. Decisions of United States Courts

A number of courts in the United States have held that Article 12's one-year period may be tolled, including two federal courts of appeals in published decisions and one in an unpublished decision. See *Duarte v. Bardales*, 526 F.3d 563, 569-71 (9th Cir. 2008); *Furnes v. Reeves*, 362 F.3d 702, 723-24 (11th Cir. 2004); see also *Dietz v. Dietz*, 349 Fed. App'x 930, 933 (5th Cir. 2009). These courts did not have the Department of State's views. They also mistakenly began with the premise that Article 12's one-year period is a limitations period that is presumed to toll. See, *e.g.*, *Duarte*, 526 F.3d at 570; *Furnes*, 362 F.3d at 723.

Some of these courts reasoned that "awarding an abducting parent an affirmative defense if that parent hides the child from the parent seeking return" would "encourage child abductions" and "encourage hiding the child from the parent seeking return." *Duarte*, 536 F.3d at 570. However, a court's equitable discretion means that a parent who conceals a child will not necessarily be rewarded. Although incorrectly placing this discretion under the rubric of "equitable tolling," case law in the United States reaffirms the courts' discretion to order a child's immediate return even after the one-year period has elapsed.

F. Purposes of the Convention

Finally, it is consistent with the overriding purposes of the Convention to recognize that courts have equitable discretion to decide whether to consider the "now settled" defense. Otherwise, judges would have no discretion to decline to consider the defense, no matter what the particular facts of the case may be. Absent any kind of equitable authority to limit the impact of the one-year trigger period, the abducting parent's incentives to engage in bad behavior, such as concealing the child, to reach the one-year trigger could undermine the overarching purpose of

the Convention. Because "now settled" inquiries are often highly fact-intensive, undertaking that inquiry could turn what should be a swift examination under the Convention of whether there was a wrongful removal or retention into a drawn-out evidentiary proceeding. This is the type of delay that the Convention seeks to avoid, particularly where the equities of the case would dictate against providing the abducting parent with the possibility of such a time-consuming defense. The Convention is most effective if parents know they cannot benefit from abducting a child.

* * *

In sum, "equitable tolling," in the traditional sense, of Article 12's one-year period to preclude consideration of the child's settlement is not warranted. But the court considering a petition filed more than a year after the child's wrongful removal may still exercise equitable discretion to require the child's return. The court may exercise that discretion to forgo an inquiry into whether the child is now settled in her current environment.

POINT II

Immigration Status May Be Considered in the "Now Settled" Analysis as One of Several Factors, but Standing Alone Should Not Be Dispositive

A child's or parent's immigration status may be considered in determining whether the child is settled under Article 12, but the proper weight accorded to it rests with the court's discretion and varies from case to case. In general, however, the mere fact that the child or her parent lacks lawful immigration status should not be independently dispositive of the "now settled" question.

The text and history of the Convention are silent regarding immigration status. Neither the Convention nor ICARA defines "settled" or states how a child's settlement is to be proved, see Pérez-Vera Report ¶ 109, and the term itself suggests substantial discretion to consider the facts of each case. The Convention's overarching focus on a child's well-being suggests that this inquiry concerns a child's practical circumstances. Courts have accordingly looked to numerous factors pertaining to a child's attachments and stability.

The degree to which a child's immigration status affects whether the child is settled will necessarily vary. A child who does not currently have lawful immigration status may nonetheless soon obtain lawful status or, in any event, continue to live in the United States with little threat of removal. See *Plyler v. Doe*, 457 U.S. 202, 226 (1982); *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) ("[a] principal feature of the removal system is the broad discretion exercised by immigration officials" considering "immediate human concerns" and that "[i]f removal proceedings commence, aliens may seek asylum and other discretionary relief allowing them to remain in the country"). Conversely, some aliens may have permission to remain temporarily in the United States but nonetheless be at risk of being removed—for instance, an alien may be granted "deferred action," which may be terminated by the Government in its discretion at any time, or "temporary protected status," which must be terminated when country conditions improve.

Foreign courts have given varying weight to immigration status, depending on the circumstances of the case. See, *e.g.*, *A. v. M.* (2002), 209 N.S.R. 2d 248, ¶¶ 79-85 (Nova Scotia Ct. App. 2002) (child had lived in Canada for several years and established roots through friends, schooling, and activities, but mother's "illegal presence" "raises the question of whether she will be able to remain" in the country and "makes it difficult, if not impossible, to work"); *In Re C (A Child)* [2006] EWHC (Fam) 1229, 2006 2 F.L.R. 797 ¶¶ 54-57 (Eng.) (child living in England

for 5 years and integrated into a small community of friends, relatives, and school, is settled despite threat of deportation).

American courts have widely agreed that immigration status may be considered only as one factor in the broader "now settled" inquiry. The Ninth Circuit has expressly rejected the argument that immigration status alone is dispositive. *In re B. del C.S.B.*, 559 F.3d at 1009-14. District courts, including the one in this case, have agreed. See *Demaj v. Sakaj*, No. 09-cv-255, 2012 WL 476168, at *4-5 (D. Conn. Feb. 14, 2012); *Etienne v. Zuniga*, No. C10-5061, 2010 WL 4918791, at *3 (W.D. Wash. Nov. 24, 2010); *Edoho v. Edoho*, A. No. H-10-1881, 2010 WL 3257480, at *4 (S.D. Tex. Aug. 17, 2010).

Thus, immigration status may be considered by the court in the now-settled inquiry, but should not be independently dispositive. Particular immigration-related circumstances may cast doubt on the stability of the child's residence—for instance, as the Ninth Circuit has recognized, "an immediate, concrete threat of removal can . . . constitute a significant factor with respect to the question whether a child is 'settled.'" *In re B. del C.S.B.*, 559 F.3d at 1010. A court in weighing the evidence may consider other particular reasons to find that lack of lawful immigration status renders the child unsettled. However, standing alone, the child's lack of lawful immigration status should not be considered dispositive of the question whether a child is "now settled."

* * * *

D. INTERNATIONAL CIVIL LITIGATION

1. Cross-border Insolvency

On October 10, 2012, the United States filed a brief as *amicus curiae* in the U.S. Court of Appeals for the Fourth Circuit in a cross-border insolvency case. *Jaffé v. Samsung Electronics Co., Ltd., et al.*, No. 12-1802 (4th Cir. 2012). Appellant in the case, Dr. Jaffé, is the foreign administrator for the estate of Qimonda, AG, an insolvent German semiconductor manufacturer. Appellees are companies in the semiconductor industry who had entered into patent cross-licensing agreements with Qimonda. In bankruptcy proceedings in Germany, the foreign administrator determined that cancelling the cross-licensing agreements and re-licensing the patents would yield more value for the estate and notified the licensees accordingly.

The foreign administrator filed an ancillary proceeding pursuant to Chapter 15 of the U.S. Bankruptcy Code in U.S. bankruptcy court in Virginia for recognition of the German bankruptcy proceedings. In 2005 the United States adopted the 1997 UNCITRAL Model Law on Cross-Border Insolvency as Chapter 15 of the U.S. Bankruptcy Code. See *Digest 2005* at 808-9. Generally, Chapter 15 provides that U.S. bankruptcy courts should aid the foreign proceeding, afford comity to foreign law, and cooperate with the foreign court.

The licensees (who would become appellees in the case) sent letters to the foreign administrator asserting that under U.S. bankruptcy law, specifically 11 U.S.C. § 365(n), he could not cancel their licenses. The U.S. bankruptcy court had identified several provisions

of Chapter 11 of the Bankruptcy Code that would apply in the ancillary proceedings, including section 365. Section 365 generally allows rejection of contracts in bankruptcy but includes an exception relating to intellectual property rights in section 365(n), permitting licensees to retain their license rights. Congress's concern in enacting § 365(n) was that permitting debtors to "unilaterally cut off" their licensees through bankruptcy would "leave[] licensees in a precarious position and thus threaten the very flexible and beneficial system of intellectual property licensing which has developed in the United States."

After the bankruptcy court initially refused to apply § 365(n), the Fourth Circuit reversed and remanded, directing the bankruptcy court to consider the effect on U.S. semiconductor companies with licenses. The bankruptcy court decided on remand, after conducting hearings, to apply § 365(n). The foreign administrator then appealed to the Fourth Circuit in the case in which the U.S. filed its *amicus* brief. The U.S. *amicus* brief is excepted below (with footnotes and citations to the record omitted) and available at *www.state.gov/s/l/c8183.htm*. The U.S. brief describes the strong U.S. interest in upholding Chapter 15 of the Bankruptcy Code and the principles in the 1997 Model Law, including respect for the foreign bankruptcy proceedings. The U.S. brief argues that § 365(n) does not apply to ancillary cases brought under Chapter 15.

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* * * *

This appeal does not present the questions that the Court accepted this interlocutory appeal to resolve. The parties urge the Court to decide whether the bankruptcy court erred under Section 1506 or Section 1522(a) of Chapter 15 when it held that Section 365(n) applies to the Foreign Administrator's rejection of appellees' license agreements. Both of those questions, however, rest on the erroneous assumption that Section 365(n) could "apply" in this case at all. The decision of the bankruptcy court should instead be reversed on the threshold ground that Section 365(n) cannot constrain the operation of German insolvency law in Germany.

Nothing more is necessary to resolve this appeal. It would be neither practical nor prudent for the Court to decide here the difficult issues that may arise in future litigation over appellees' license rights under Qimonda's U.S. patents, such as whether a federal court presiding over a patent infringement action against appellees should give effect, as a matter of U.S. patent law, to the rejection of appellees' licenses in the German insolvency proceeding.

A. The Bankruptcy Court and the Parties Have Erroneously Assumed that Section 365(n) Could "Apply" To, and Thereby Void, the Rejection of Appellees' License Agreements Under German Law

1. The bankruptcy court ruled that the Foreign Administrator cannot terminate appellees' cross-license agreements in the German proceedings because "public policy, as well as the economic harm that would otherwise result to [appellees], requires that the protections of § 365(n) apply to Qimonda's U.S. patents." *In re Qimonda AG*, 462 B.R. 165, 185-186 (Bankr. E.D. Va. 2011). In his petition for interlocutory review and in his opening brief on appeal, the Foreign Administrator has challenged the bankruptcy court's ruling on essentially two grounds: applying German insolvency law rather than Section 365(n), he argues, would not violate a

fundamental "public policy of the United States" under 11 U.S.C. 1506, nor would it leave the appellees without "sufficient protect[ion]" under 11 U.S.C. 1522(a).

As that formulation of the issues illustrates, the parties and the courts below have approached this case as though it were potentially open to the bankruptcy court to superimpose Section 365(n) on the operation of German insolvency law in a German proceeding. Thus, the parties dispute whether the bankruptcy court applied the correct standard under the public-policy exception in Section 1506, or gave sufficient consideration to the Foreign Administrator's proposed relicensing terms when it decided to "apply" Section 365(n) in this case. But neither the bankruptcy court nor the parties appears to have examined the premise that Section 365(n) could "apply" in these circumstances at all.

That premise is flawed. Section 365(n) does not constrain the operation of German insolvency law in Germany. Section 365(n) establishes an exception in U.S. bankruptcy law to the exercise of a power created under U.S. bankruptcy law: it operates as a limit on the authority of trustees in domestic bankruptcy cases to assume or reject executor contracts under 11 U.S.C. 365. Section 365(n) does not create a freestanding prohibition on the termination of intellectual-property licenses, let alone authorize a U.S. bankruptcy court to forbid the termination of such licenses in foreign jurisdictions under foreign law.

Contrary to the bankruptcy court's view, Section 365(n) cannot "apply" in this case to prevent the Foreign Administrator from rejecting appellees' license agreements in the German insolvency proceeding. It is fundamental that United States bankruptcy law has no bearing on the operation of German law in Germany. Acting in Germany as the official administrator of a German insolvency proceeding, the Foreign Administrator did not require the blessing of the bankruptcy court—or any United States court—to reject contracts between appellees and the German debtor. Indeed, under Section 103 of the German Insolvency Code, a debtor's outstanding executory contracts become "automatically unenforceable unless the insolvency administrator elects to perform the contracts." 462 B.R. at 173. It is undisputed that the Foreign Administrator has not elected to perform appellees' license agreements. See id. at 174. Assuming the bankruptcy court's understanding of German law is correct, therefore, appellees' license agreements became invalid by operation of German law. No action or approval from the U.S. bankruptcy court was required.

The bankruptcy court here nevertheless approached this case as though it were empowered to decide whether the Foreign Administrator should be permitted to reject appellees' license agreements at all. After weighing the Foreign Administrator's reasons for rejecting the patent licenses against the anticipated consequences of that rejection for appellees and the American economy, see 462 B.R. at 180-183, the court concluded that the Foreign Administrator "should be subject to the constraints imposed by § 365(n)," *id*. at 183 (emphasis added), and that the "failure to apply § 365(n) under the circumstances of this case would . . . undermine a fundamental U.S. public policy promoting technological innovation," *id*. at 185 (emphasis added). The bankruptcy court accordingly issued an order declaring that "§ 365(n) applies with respect to Qimonda's U.S. patents," although the court added that nothing in its decision "affects the [F]oreign [A]dministrator's right, to the extent permitted under German insolvency law, to terminate licenses to non-U.S. patents." *Id*. at 185-186.

That approach reflects a fundamental misapprehension of the relationship between United States law and German law in this case. The fate of appellees' licenses in the German insolvency proceeding is entirely, and properly, a question of German law. As we explain below, a court in

the United States may have occasion to decide, in a future case, whether to give effect to the rejection of appellees' patent licenses as a matter of U.S. law. But the bankruptcy court had no authority, under Section 365(n) or otherwise, to dictate the results of the German insolvency proceeding.

2. That conclusion is not altered by the fact that the Foreign Administrator petitioned for recognition of the German proceedings in the United States under Chapter 15. A Chapter 15 ancillary case enables the administrator of a foreign insolvency proceeding to ensure an orderly disposition of the assets of the foreign debtor in the United States. But Chapter 15 does not expose the foreign proceedings themselves to supervision by United States courts, nor does it alter the operation of foreign insolvency law in its proper sphere.

Indeed, nothing required the Foreign Administrator to file a Chapter 15 ancillary case in the United States at all. By doing so, the Foreign Administrator secured a number of important advantages in administering the worldwide Qimonda estate, including an automatic stay under U.S. bankruptcy law to prevent creditors from executing on any Qimonda assets in the United States without awaiting the outcome of the German insolvency proceedings. See 11 U.S.C. 1520(a)(1). The Chapter 15 petition was not necessary, however, for the Foreign Administrator to effectuate his rejection of appellees' license agreements under Section 103 of the German Insolvency Code. And if the Foreign Administrator had never commenced an ancillary case in this country, it would have been apparent that Section 365(n) had no relevance to the Foreign Administrator's ability to reject appellees' license agreements.

It is possible for Section 365(n) to apply in an ancillary case under Chapter 15. But such a case would look nothing like this one. Ordinarily, the rejection or assumption of a foreign debtor's executory contracts will be decided in the context of the foreign insolvency proceeding itself, as occurred here. In an unusual case, however, the foreign representative in an ancillary case under Chapter 15 might request that the bankruptcy court permit the rejection or assumption of a contract under the terms of Section 365 of the U.S. Bankruptcy Code. *Cf.* 11 U.S.C. 1521(a)(7) (at request of the foreign representative, the court may "grant[] any additional relief that may be available to a trustee," subject to enumerated exceptions). In that circumstance, the foreign representative's actions under Section 365 would be subject to any relevant exceptions or limitations under the terms of that provision, including the protections for intellectual-property licensees in Section 365(n).

* * * *

B. Because Section 365(n) Is Irrelevant Here, the Parties' Arguments Concerning Sections 1506 and 1522 Are Misplaced

Because Section 365(n) cannot "apply" in this case to constrain the operation of German law in Germany, it is unnecessary for the Court to decide whether Section 365(n) embodies a fundamental public policy of the United States within the meaning of 11 U.S.C. 1506. Similarly, in this context, there is no reason to examine whether appellees would be "sufficiently protected" under 11 U.S.C. 1522(a) absent the protections of Section 365(n). Neither Section 1506 nor Section 1522 permits a U.S. bankruptcy court to dictate the outcome of a foreign insolvency proceeding.

1. Section 1506 provides an exception to the general rule under Chapter 15 that a U.S. bankruptcy court must "cooperate to the maximum extent possible" with a recognized foreign insolvency proceeding. 11 U.S.C. 1525(a). Section 1506 authorizes the bankruptcy court to

"refus[e] to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States." 11 U.S.C. 1506. It thus allows a bankruptcy court to refuse to provide affirmative assistance in the United States to a foreign representative when the particular form of assistance requested would contravene a fundamental public policy of the United States.

Section 1506 does not, however, purport to require the foreign insolvency proceeding itself to be conducted in accordance with "the public policy of the United States." Regardless of whether Section 365(n) embodies a sufficiently fundamental public policy to trigger Section 1506's public-policy exception, therefore, Section 1506 cannot support the bankruptcy court's order here. The Foreign Administrator did not need the bankruptcy court's approval before rejecting appellees' license agreements under Section 103 of the German Insolvency Code. Nor did the Foreign Administrator ask the bankruptcy court to take some affirmative action effectuating the rejection of the license agreements as a matter of United States law. There was, accordingly, no "action governed by this chapter" for the bankruptcy court to "refus[e] to take" under Section 1506.

Even where Section 1506 applies, moreover, the consequence of a bankruptcy court's refusal to take a particular action under Chapter 15 on public-policy grounds is exactly that: the court declines to take the requested action. Section 1506 does not permit a bankruptcy court affirmatively to require a foreign representative or foreign court to act in accordance with U.S. public policy. In this case, for example, if the Foreign Administrator had asked the bankruptcy court to take some affirmative action to invalidate appellees' cross-licenses as a matter of United States law, the bankruptcy court would have faced a question comparable to the one framed by the parties in this appeal: whether the congressional policy judgment embodied in Section 365(n) constitutes a sufficiently fundamental public policy of the United States that the court would be justified under Section 1506 in refusing to grant the requested relief. In no circumstance, however, would the bankruptcy court have been justified in entering the order that it did, which purported to forbid the rejection of appellees' licenses in the German insolvency proceeding. See 462 B.R. at 185-186.

2. The bankruptcy court's reliance on Section 1522(a) was misplaced for essentially the same reasons. Section 1522 concerns the authority of the bankruptcy court under Chapter 15 to ensure that the interests of creditors and other affected parties are "sufficiently protected" when the court grants a foreign representative's request for discretionary, affirmative relief under 11 U.S.C. 1521, or preliminary relief pending recognition of a foreign proceeding under 11 U.S.C. 1519. See 11 U.S.C. 1522(a). Section 1522 also provides that the court must consider the interests of creditors and interested parties whenever it modifies or terminates any discretionary relief that it previously granted to the foreign representative. See 11 U.S.C. 1522(a) and (c).

Like Section 1506, therefore, Section 1522(a) is only implicated when the bankruptcy court is asked to grant, modify, or terminate some affirmative relief in aid of the foreign insolvency proceeding. *Cf.* 11 U.S.C. 1521(a) (enumerating examples of affirmative relief the bankruptcy court may grant "at the request of the foreign representative"). Nothing in Section 1522 authorizes or imposes any limitation on the foreign insolvency proceeding itself, or on the conduct of the foreign representative under foreign law.

The parties' dispute over Section 1522 in this case is particularly beside the point. In the supplemental order that it issued when it granted recognition of the German insolvency proceeding, the bankruptcy court sua sponte listed Section 365 as among the "sections of title 11 [that] are also applicable in this proceeding." The Foreign Administrator then moved to modify

the supplemental order to omit the reference to Section 365. Appellees objected that the bankruptcy court could not do so under 11 U.S.C. 1522(a) because appellees would no longer be "sufficiently protected" without the benefit of Section 365(n).

Appellees, however, never had the benefit of Section 365(n). The Foreign Administrator rejected appellees' license agreements under German law in the German insolvency proceeding, not under Section 365 of the U.S. Bankruptcy Code. The fact that the bankruptcy court listed Section 365 as among the "sections of title 11" that would apply in the Chapter 15 ancillary case is therefore irrelevant to the fate of appellees' license agreements in the German insolvency proceeding, because neither Section 365(n) nor any other "section[] of title 11" has any bearing on the conduct of that proceeding.

C. The Court Should Not Attempt To Resolve in This Appeal the Issues That Might Arise Between the Parties in Future Litigation Over Qimonda's U.S. Patents

It is therefore not necessary or appropriate for the Court to decide in this case whether the bankruptcy court misinterpreted Section 1506 or misapplied Section 1522(a). The bankruptcy court's decision should instead be reversed on the threshold ground that nothing in Chapter 15 or Section 365(n) authorized the court to forbid the rejection of appellees' licenses under German law in the German insolvency proceeding. The
Court should not attempt to resolve in this appeal the issues that might arise between the parties in future litigation over appellees' license rights under Qimonda's U.S. patents. Depending on the posture in which the dispute arises, such litigation may implicate an array of novel and fact-dependent questions that it would be neither practical nor prudent to address here.

* * * *

2. Arbitration

a. Argentina v. BG Group*: arbitrability*

On January 17, 2012, the U.S. Court of Appeals for the D.C. Circuit issued its opinion in a case brought under the Federal Arbitration Act ("FAA"). *Argentina v. BG Group*, 665 F.3d 1363 (D.C. Cir. 2012). Argentina sought to vacate or modify an arbitral award rendered against it and in favor of a United Kingdom company for Argentina's alleged violation of the Argentina-U.K. bilateral investment treaty ("BIT"). The district court denied Argentina's petition and Argentina appealed.

The BIT provides that disputes between an investor and the host State will be resolved in the host State's courts and that resort to arbitration may occur only if no final court ruling is forthcoming within eighteen months or the dispute is unresolved after a court ruling. The U.K. company, BG Group, resorted to arbitration without waiting the requisite eighteen months. BG Group had invested in Argentine gas companies that were affected by Argentina's economic collapse and governmental measures that followed, including Emergency Law 25,561 of January 6, 2002, Resolution 308/02, Decree 1090/02, and Decree 214/02, which dramatically altered fiscal conditions in Argentina. BG Group obtained a favorable arbitral award from an arbitral panel established under the UNCITRAL Rules that sat in Washington, D.C.

The D.C. Circuit reversed the decision of the district court, finding that the court had improperly failed to make a determination of arbitrability. Because the dispute was not arbitrable under the terms of the BIT, the D.C. Circuit vacated the arbitral award. The D.C. Circuit's opinion is excerpted below with footnotes and citations to the record in the case omitted.

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* * * *

The "gateway" question in this appeal is arbitrability: when the United Kingdom and Argentina executed the Treaty, did they, as contracting parties, intend that an investor under the Treaty could seek arbitration without first fulfilling Article 8(1)'s requirement that recourse initially be sought in a court of the contracting party where the investment was made? That question raises the antecedent question of whether the contracting parties intended the answer to be provided by a court or an arbitrator.

The Supreme Court has held that the intent of the contracting parties controls whether the answer to the question of arbitrability is to be provided by a court or an arbitrator. See, *e.g.*, *First Options* [*First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)], 514 U.S. at 943, 115 S.Ct. 1920. "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id*. at 944, 115 S.Ct. 1920 (quoting *AT & T Techs., Inc. v. Commc'ns Workers of Am*., 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)) (alterations in original). This comports with the "basic objective" of arbitration, which the Court explained "is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms." *Id*. at 947, 115 S.Ct. 1920 (internal quotation marks and citations omitted). Thus, in "construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties.' " *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, —— U.S. ——, 130 S.Ct. 1758, 1773–74, 176 L.Ed.2d 605 (2010) (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stan-ford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)).

In *Howsam v. Dean Witter*, 537 U.S. 79, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002), the Court provided guidance on the circumstances in which a court, rather than the arbitrator, is to decide a "question of arbitrability," *id*. at 83, 123 S.Ct. 588. A court will decide the question

> in the kind of narrow circumstances where the contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.

Id. at 83–84, 123 S.Ct. 588. In such circumstances, where "the parties did not agree to submit the arbitrability question itself to arbitration, then the district court should decide that question ... independently." *First Options*, 514 U.S. at 943, 115 S.Ct. 1920 (emphasis in original). If, on the other hand, there is clear and unmistakable evidence that the parties intended for the arbitrator to decide the question of arbitrability, a district court's review of the arbitrator's decision on that matter "should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate.... That is to say, the court should give considerable leeway to the

arbitrator, setting aside his or her decision only in certain narrow circumstances." *Id*. (internal citations omitted).

The district court viewed Argentina as having conceded that the Treaty provided that the arbitrator would decide the question of arbitrability. It cited counsel's statement at the motions hearing that Argentina " 'acknowledge [s] that the Arbitral Tribunal has the principal power to rule upon its jurisdiction.' " *Republic of Argentina*, 764 F.Supp.2d at 33 & n. 8 …. The context in which counsel made this statement, and the subsequent colloquy with the district court, however, indicate that Argentina was conceding an altogether different point: once the Treaty's arbitration provision was properly triggered, after eighteen months' recourse to an Argentine court, any question of arbitrability then would be decided by the arbitrator. …

Any concession by Argentina was thus limited to stating that the parties agreed the issue of arbitrability would be decided by an arbitrator if the aggrieved party had first sought relief in an Argentine court, pursuant to Article 8(1) and (2) of the Treaty. …

A temporal analysis of the Treaty confirms this conclusion. Article 8(3) of the Treaty provides for the procedure to be followed once the possibility of arbitration is triggered, but only after an Argentine court first has an opportunity to resolve the dispute. Under Article 8(3), if the parties do not agree on an arbitration forum or procedure, the UNCITRAL Rules will govern resolution of the dispute; the UNCITRAL Rules grant the arbitrator the power to determine issues of arbitrability. Thus, once Article 8(3) of the Treaty is triggered, the Treaty's incorporation of the UNCITRAL Rules provides "clear[ ] and unmistakabl[e] evidence," *AT & T Techs*., 475 U.S. at 649, 106 S.Ct. 1415; see *First Options*, 514 U.S. at 944, 115 S.Ct. 1920, that the parties intended for the arbitrator to decide questions of arbitrability. See *Republic of Ecuador v. Chevron Corp*., 638 F.3d 384, 394 (2d Cir.2011). But the Treaty's incorporation of the UNCITRAL Rules has a temporal limitation: the Rules are not triggered until after an investor has first, pursuant to Article 8(1) and (2), sought recourse, for eighteen months, in a court of the contracting party where the investment was made.

The Treaty does not directly answer whether the contracting parties intended a court or the arbitrator to determine questions of arbitrability where the pre-condition of resort to a contracting party's court pursuant to Article 8(1) and (2) is disregarded by an investor. By comparison, the Treaty states in Article 9(2) that should a dispute arise between the contracting parties themselves, the United Kingdom and Argentina, and it is not resolved through diplomatic channels, the dispute will go directly to arbitration. Article 9(5) provides that "[t]he [arbitral] tribunal shall determine its own procedure." This provision indicates that the contracting parties were aware of how to provide an arbitrator with the authority to determine a "question of arbitrability," *cf. BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994), and suggests that the absence of such language in Article 8(1) and (2) was intentional, *cf. First Options*, 514 U.S. at 945, 115 S.Ct. 1920. It also underscores the importance the contracting parties ascribed to Article 8(1) and (2), counseling against a reading that would render its requirements inoperative.

Furthermore, the contracting parties likely never conceived of the need to specify that a court should decide whether Article 8(1) and (2)'s requirement that disputes first be brought to a court should be respected. The Treaty provides a prime example of a situation where the "parties would likely have expected a court" to decide arbitrability. *Howsam*, 537 U.S. at 83, 123 S.Ct. 588. It would be odd to assume that where the gateway provision itself is resort to a court, the parties would have been surprised to have a court, and not an arbitrator, decide whether the gateway provision should be followed. At the very least, there is no clear and unmistakable

evidence, see *First Options*, 514 U.S. at 944, 115 S.Ct. 1920, that the contracting parties intended an arbitrator to decide the gateway question.

Because the Treaty provides that a pre-condition to arbitration of an investor's claim is an initial resort to a contracting party's court, and the Treaty is silent on who decides arbitrability when that precondition is disregarded, we hold that the question of arbitrability is an independent question of law for the court to decide. See *id*. The district court therefore erred as a matter of law by failing to determine whether there was clear and unmistakable evidence that the contracting parties intended the arbitrator to decide arbitrability where BG Group disregarded the requirements of Article 8(1) and (2) of the Treaty to initially seek resolution of its dispute with Argentina in an Argentine court.

The Supreme Court's decision in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964), does not require the opposite conclusion. In *John Wiley*, the Court drew a distinction between "substantive" questions of arbitrability and "procedural" questions of arbitrability, assigning the former to courts and the latter to arbitrators. *Id*. at 557, 84 S.Ct. 909. It did so in the context of an industrial labor dispute under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. The premise underlying section 301 is a congressional policy favoring speedy arbitral resolution of labor disputes as an ongoing part of the collective bargaining process, to avoid the industrial strife that had historically led to labor strikes. …

The dispute between Argentina and BG Group arises in an entirely different context: an international investment treaty between two sovereigns. The provision at issue in the United Kingdom–Argentina Treaty, Article 8(1) and (2), illustrates why the reasoning in *John Wiley* is inapposite. The Treaty explicitly requires judicial proceedings prior to arbitration. That is, the contracting parties specifically desired "the delay attendant upon judicial proceedings preliminary to arbitration," *John Wiley*, 376 U.S. at 558, 84 S.Ct. 909, and the procedural/substantive arbitrability distinction drawn to accord with "the policy behind federal labor law," *id*. at 559, 84 S.Ct. 909, cannot be applied to a dispute over the operation of an international treaty provision that requires that which the Court in *John Wiley* sought to avoid. …

Because the Treaty provision at issue is explicit, the usual "emphatic federal policy in favor of arbitral dispute resolution," *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 631, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985), cannot function to override the intent of the contracting parties. … But where, as here, the contracting parties provided that an Argentine court would have eighteen months to resolve a dispute prior to resort to arbitration, a court cannot lose sight of the principle that led to a policy in favor of arbitral resolution of international trade disputes: enforcing the intent of the parties. " '[A]greeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.' " *Id*. at 630, 105 S.Ct. 3346 (quoting *M/S Bremen v. Zapata Off–Shore Co*., 407 U.S. 1, 13–14, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)). Therefore, "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes requires that we enforce the parties' agreement." *Id*. at 629, 105 S.Ct. 3346. Where the contracting parties agree to require dispute resolution in a court prior to arbitration, and the aggrieved party initiating the dispute disregards the requirement, a fundamentally different question of arbitrability arises than that of the ignored informal resolution steps in *John Wiley*. …[A] John Wiley assumption that the arbitrator is to determine the question of arbitrability cannot sensibly apply here.

Accordingly, "[b]ecause we conclude that there can be only one possible outcome on the [arbi-trability question] before us," *Stolt–Nielsen*, 130 S.Ct. at 1770, namely, that BG Group was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration pursuant to Article 8(3) if the dispute remained, we reverse the orders denying the motion to vacate and granting the cross-motion to confirm the Final Award, and we vacate the Final Award.

* * * *

b. ESAB Group, Inc. v. Zurich Insurance PLC*: relation of McCarran-Ferguson Act to the New York Convention and Federal Arbitration Act*

On July 9, 2012, the U.S. Court of Appeals for the Fourth Circuit issued its decision in *ESAB Group, Inc. v. Zurich Insurance PLC*, 685 F.3d. 376 (4th Cir. 2012). The court addressed the question whether, under the McCarran-Ferguson Act, state insurance law preempts the New York Convention or the Federal Arbitration Act, invalidating an international arbitration agreement. Other U.S. circuit courts of appeals have divided on the issue. The Fourth Circuit held that the Convention (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards or New York Convention) and Federal Arbitration Act (or the Convention Act) apply rather than state law. Excerpts from the court's opinion follow (with footnotes omitted).

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* * * *

ESAB Group is a South Carolina-based manufacturer of welding materials and equipment. During the time period relevant to this appeal, it has had several foreign corporate parents. … Throughout this time, ESAB Group has maintained its principal place of business in Florence, South Carolina, where it has a manufacturing plant, executive offices, and sales, engineering, and research development divisions.

Between 1989 and 1996, a Swedish insurer, Trygg–Hansa, issued seven global liability policies (the ZIP Policies or the Policies) to ESAB Group's Swedish parent, ESAB AB. Under these Policies, Trygg–Hansa agreed to provide coverage, either as direct primary coverage or in excess of primary policies, to ESAB AB and its subsidiaries. Special endorsements in the Policies specifically extended coverage to ESAB Group and its predecessors. And according to the Policy Territory clauses contained in each Policy, the Policies applied to occurrences "worldwide."

Five of the Policies, the 1989–1993 ZIP Policies, contain arbitration agreements, which mandate the resolution of disputes in Swedish arbitral tribunals in accordance with Swedish law. The other Policies, the 1994–1995 ZIP Policies, include Swedish choice-of-law provisions but omit arbitration clauses.

Trygg–Hansa transferred its obligations under the ZIP Policies to Zurich Insurance Company through a 1998 loss portfolio transfer agreement. Zurich Insurance Company then transferred these obligations to ZIP, an Irish insurer, in 2005.

B.

ESAB Group is currently facing numerous products liability suits arising from alleged personal injuries caused by exposure to welding consumables manufactured by ESAB Group or its predecessors. These suits presently are proceeding in numerous state and federal courts in the United States. As of June 12, 2009, ESAB Group had incurred more than $54 million in defense costs and suffered adverse verdicts in excess of $25 million.

ESAB Group requested that its insurers defend and indemnify it in these products liability actions. Several, including ZIP, refused coverage. As a result, ESAB Group brought suit against these insurers in South Carolina state court.

The defendant insurers removed the case to the United States District Court for the District of South Carolina pursuant to the Convention and the Convention Act's grant of removal jurisdiction. ESAB Group disputed the district court's subject-matter jurisdiction. ESAB Group maintained that the Convention Act implements the Convention, so the Convention is judicially enforceable only as incorporated into the Act. And, it continued, the McCarran–Ferguson Act permits South Carolina law, which would invalidate the arbitration clauses in the 1989–1993 ZIP Policies, to reverse preempt the Convention Act. ESAB Group therefore contended that the ZIP Policies did not contain valid arbitration agreements, so they did not fall under the Convention. Thus, according to ESAB Group, the claims were not removable.

ZIP, in turn, challenged the district court’s exercise of personal jurisdiction. ZIP emphasized its limited contacts with South Carolina. A ZIP representative attested that ZIP maintains no offices or other facilities in South Carolina, owns no property there, is not licensed as an insurer by South Carolina, and does not regularly conduct business in the state. Although the ZIP Policies extended coverage to ESAB Group, ZIP argued this was an insufficient basis for personal jurisdiction because the contracts were negotiated, drafted, and executed in Sweden by two Swedish companies, ESAB AB and Trygg–Hansa.

The district court rejected both parties' contentions. As to the issue of subject-matter jurisdiction, the district court acknowledged a split amongst our sister circuits concerning the interaction between the Convention, the Convention Act, and the McCarran–Ferguson Act. After considering the relevant precedent, the district court adopted the position of the Fifth Circuit, articulated in *Safety National*, 587 F.3d 714. Under this reasoning, it found that “the Convention, not the Convention Act, ... directs courts to enforce international arbitration agreements,” and because the McCarran–Ferguson Act's text limits its scope to federal statutes, McCarran–Ferguson could not disrupt the application of traditional preemption rules.

The district court then found that ZIP had the requisite minimum contacts with the forum to permit the exercise of personal jurisdiction and that the exercise of jurisdiction over ZIP was otherwise reasonable. After concluding it had jurisdiction over both the subject matter and parties to the action, the district court enforced the arbitration agreements. It referred claims pertaining to the 1989–1993 ZIP Policies to arbitration.

Because it had referred to arbitration all claims providing a basis for subject-matter jurisdiction, the district court declined to exercise supplemental jurisdiction over the remaining claims. It remanded the claims relating to the 1994–1995 ZIP Policies to state court.

ESAB Group timely appealed the district court's exercise of subject-matter jurisdiction. ZIP filed a cross-appeal, challenging the district court's exercise of personal jurisdiction and its authority to remand the nonarbitrable claims to state court.

III.

We first consider whether the federal courts have jurisdiction over the present action or whether, as ESAB Group claims, South Carolina law reverse preempts federal law and eliminates the basis for jurisdiction. Our review of questions of subject-matter jurisdiction is de novo. *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 815 (4th Cir.2004) (en banc).

ESAB Group asserts that the Convention is a non-self-executing treaty, i.e., one that requires implementing legislation to be given effect in domestic courts. According to ESAB Group, it follows from this that the Convention has legal effect only as incorporated into its implementing legislation—here, the Convention Act. And because the Convention Act is a federal statute that does not speak directly to insurance, ESAB contends, it is subject to reverse preemption under the McCarran–Ferguson Act.

* * * *

ZIP presents numerous arguments in support of its position that the McCarran–Ferguson Act does not authorize reverse preemption in this case. First, we quickly reject ZIP's contention that the South Carolina statute is not subject to McCarran–Ferguson because it is not a "law enacted ... for the purpose of regulating the business of insurance." The Supreme Court has instructed that this category of laws is a "broad" one, encompassing "laws that possess the end, intention, or aim of adjusting, managing, or controlling the business of insurance." *Fabe*, 508 U.S. at 505, 113 S.Ct. 2202 (quoting Black's Law Dictionary 1236, 1286 (6th ed. 1990)) (internal quotation marks omitted). We agree with the district court and the South Carolina Court of Appeals that South Carolina's law, which governs the manner in which disputes regarding coverage are resolved, falls within this category. See *Heyward*, 272 F.Supp.2d at 582–83; *Cox*, 556 S.E.2d at 399–402.

The parties also spill significant ink disputing whether Article II of the Convention is a self-executing treaty provision. Chief Justice Marshall first delineated the distinction between a self-executing and non-self-executing treaty in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314, 7 L.Ed. 415 (1829), overruled on other grounds by *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 8 L.Ed. 604 (1833). He wrote that, because the Constitution establishes that treaties are the supreme law of the land, a court should regard a treaty as "equivalent to an act of the legislature," provided that "it operates of itself, without the aid of any legislative provision" (i.e., it is self-executing). *Id.*; see also *Medellin v. Texas*, 552 U.S. 491, 505–06, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008) ("Only '[i]f the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, [will] they have the force and effect of a legislative enactment.' " (alterations in original) (quoting *Whitney v. Robertson*, 124 U.S. 190, 194, 8 S.Ct. 456, 31 L.Ed. 386 (1888))). But if "the treaty addresses itself to the political, not the judicial department," Chief Justice Marshall directed, it is non-self-executing, and "the legislature must execute the contract, before it can become a rule for the court." *Foster*, 27 U.S. at 314. It is well-established that a treaty may "contain both self-executing and non-self-executing provisions." *Lidas, Inc. v. United States*, 238 F.3d 1076, 1080 (9th Cir.2001); see also *United States v. Postal*, 589 F.2d 862, 884 n. 35 (5th Cir.1979).

ZIP asserts that Article II of the Convention is self-executing and, therefore, should be enforced and given preemptive effect independent of the Convention Act. There is much to recommend this position. Most notably, the starting point of treaty interpretation is the text, *Medellin*, 552 U.S. at 506, 128 S.Ct. 1346, and the text of Article II instructs domestic courts to

enforce foreign arbitral agreements. The Supreme Court has signaled that this sort of "directive to domestic courts" is indicative of a self-executing treaty provision. *Id*. at 508, 128 S.Ct. 1346. Judge Clement, in her *Safety National* concurrence, see 587 F.3d at 734–35, and the United States, in opposing the petition for certiorari in that case, see Brief for United States as Amicus Curiae at 9, *La. Safety Ass'n of Timbermen Self Insurers Fund v. Certain Underwriters at Lloyd's, London*, —— U.S. ——, 131 S.Ct. 65, 178 L.Ed.2d 22 (2010) (No. 09–945), 2010 WL 3375626, adopted the view that the instructive language in Article II rendered it self-executing.

But, as Judge Clement noted, there is an emerging presumption against finding treaties to be self-executing. See *Safety Nat'l*, 587 F.3d at 737. And the legislative history of the Convention Act indicates that Congress viewed the Act as implementing legislation, at least as to some of the Convention's provisions. See S. Exec. Rep. No. 90–10, at 5–6 (statement of Richard D. Kearney) (referring to the proposed changes to the FAA as "implementing legislation"); H.R.Rep. No. 91–1181, reprinted in 1970 U.S.C.C.A.N. 3601, 3603 (same). *Medellin*, furthermore, cited the Convention Act as an example of implementing legislation. 552 U.S. at 521, 128 S.Ct. 1346. Although Judge Clement urged that the Convention Act served to implement other provisions of the Convention (particularly Article III), see *Safety Nat'l*, 587 F.3d at 736–37, this is hardly clear because nothing in the Convention Act or legislative history differentiates between Article II and the remainder of the treaty.

Moreover, the question of what constitutes a self-executing treaty has long confused courts and commentators. See *Postal*, 589 F.2d at 876 ("The self-execution question is perhaps one of the most confounding in treaty law."); Curtis A. Bradley, Intent, Presumptions, and Non–Self–Executing Treaties, 102 Am. J. Int'l L. 540, 540 (2008) ("[B]oth the theory behind the self-execution doctrine and its mechanics have long befuddled courts and commentators."). Indeed, scholars and jurists continue to debate the proper means for determining a treaty's status. See, *e.g.*, *Igartua v. United States*, 626 F.3d 592, 623 (1st Cir.2010) (Torruella, J., concurring in part and dissenting in part) (urging a predominantly textual approach); David L. Sloss, Executing Foster v. Neilson: The Two–Step Approach to Analyzing Self–Executing Treaties, 53 Harv. Int'l L.J. 135 (2012); Carlos Manuel Vazquez, The Four Doctrines of Self–Executing Treaties, 89 Am. J. Int'l L. 695 (1995).

But we need not wade into these murky waters to resolve the question before us. To the contrary, we hold that, even assuming Article II of the Convention is non-self-executing, the Convention Act, as implementing legislation of a treaty, does not fall within the scope of the McCarran–Ferguson Act. Instead, as detailed below, Supreme Court precedent dictates that McCarran–Ferguson is limited to legislation within the domestic realm, and prior precedent of this court and our sister circuits supports a narrow reading of the Act.

Our aim in analyzing the McCarran–Ferguson Act, as in all matters of statutory interpretation, is to implement Congress's intent. *United States v. Abdel-shafi*, 592 F.3d 602, 607 (4th Cir.2010). We do so by examining the text of the statute, and absent clear congressional intent to the contrary, we will give the statute its plain meaning. *Id*.; see also *Stephens ex rel. R.E. v. Astrue*, 565 F.3d 131, 137 (4th Cir.2009) ("In interpreting the plain language of a statute, we give the terms their 'ordinary, contemporary, common meaning, absent an indication Congress intended [them] to bear some different import.' " (quoting *N.C. ex rel. Cooper v. Tenn. Valley Auth*., 515 F.3d 344, 351 (4th Cir.2008))).

Where a statute touches upon foreign relations and the United States' treaty obligations, we must proceed with particular care in undertaking this interpretive task. As the Supreme Court observed in considering a prior potential conflict between the Convention Act and a federal

statute, "[i]f the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995). We seek, when possible, to "construe ... statute [s] consistent with our obligations under international law." *Kofa v. U.S. INS*, 60 F.3d 1084, 1090 (4th Cir.1995) (en banc) (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804)).

ESAB Group urges that we must construe "Act of Congress," as that term is used in the McCarran–Ferguson Act, to apply to every federal statute, irrespective of the international implications. But the Supreme Court has recently explained that, in enacting the McCarran–Ferguson Act, Congress plainly did not intend the law to apply so broadly. In *Garamendi*, the Supreme Court specified that McCarran–Ferguson was "directed to implied preemption by domestic commerce legislation." 539 U.S. at 428, 123 S.Ct. 2374; see also *id*. ("As the text itself makes clear, the point of McCarran–Ferguson's legislative choice of leaving insurance regulation generally to the States was to limit congressional preemption under the commerce power, whether dormant or exercised.").

Although in *Garamendi* the Court was examining the interaction between state law and an executive agreement, the Court's statements regarding congressional intent guide our understanding of Congress's intent to limit the Act's scope. Specifically, that case demonstrated that Congress did not intend for the McCarran–Ferguson Act to permit state law to vitiate international agreements entered by the United States. Cf. *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 300, 80 S.Ct. 717, 4 L.Ed.2d 724 (1960) (stating that McCarran–Ferguson was not intended to permit a state to "regulate activities carried on beyond its own borders"), cited in *Garamendi*, 539 U.S. at 428, 123 S.Ct. 2374.

On several occasions, moreover, Courts of Appeals have refused to give the McCarran–Ferguson Act the broad scope urged by ESAB Group. For example, we have previously expressed our skepticism that Congress intended the McCarran–Ferguson Act to apply to statutes governing federal subject-matter jurisdiction. *Gross v. Weingarten*, 217 F.3d 208, 222 (4th Cir.2000). And several of our sister circuits have joined in this view or held that such statutes are not subject to reverse preemption. See *Safety Nat'l*, 587 F.3d at 724 n. 39 (expressing skepticism); *Hawthorne Sav. F.S.B. v. Reliance Ins. Co. of Ill*., 421 F.3d 835, 843–44 (9th Cir.2005) (holding that the diversity jurisdiction statute "is not reverse-preempted"), amended 433 F.3d 1089 (9th Cir.2006); *Martin Ins. Agency, Inc. v. Prudential Reinsurance Co*., 910 F.2d 249, 254 (5th Cir.1990) (holding that the McCarran–Ferguson Act "did not remove diversity jurisdiction from the federal courts in insurance matters"); *Grimes v. Crown Life Ins. Co*., 857 F.2d 699, 702–03 (10th Cir.1988) (finding no preemption of diversity jurisdiction statute).

The Second Circuit has found several substantive statutes outside of McCarran–Ferguson's reverse-preemption rule. It first held that the McCarran–Ferguson Act could not permit state law to exempt an insurer from compliance with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1064–66 (2d Cir.1982), vacated, 463 U.S. 1223, 103 S.Ct. 3565, 3566, 77 L.Ed.2d 1406, remanded to 735 F.2d 23 (2d Cir.1984). But see *Murff v. Prof'l Med. Ins. Co.*, 97 F.3d 289, 292 n. 4 (8th Cir.1996) (questioning Spirt's holding); *NAACP v. Am. Family Mut. Ins. Co*., 978 F.2d 287, 294–95 (7th Cir.1992) (same). It reasoned that Title VII's "broad and explicit pre-emptive provision" evinced congressional intent to displace all contrary state laws. *Spirt*, 691 F.2d at 1065.

Likewise, as noted previously, the Second Circuit subsequently held that McCarran–Ferguson's reverse-preemption rule was inapplicable to the FSIA. *Nat'l Distillers*, 69 F.3d at 1231. The "international-law origins of the FSIA," it declared, were "so different from the kind of congressional statutory action that the McCarran–Ferguson Act was enacted to deal with," that they "virtually compel[led] the conclusion" that the McCarran–Ferguson Act did not authorize state law to displace the FSIA. *Id*. In addition, it concluded that the McCarran–Ferguson Act did not alter the rules of preemption "so drastically as to force a federal law that clearly intends to preempt all other state laws to give way simply because the insurance industry is involved." *Id*. at 1233. And it found that the FSIA evidenced such an intent. *Id*. at 1232.

The Convention Act, which provides, without exception, that the Convention "shall be enforced in United States courts," 9 U.S.C. § 201, similarly intends to replace all contrary state laws. The Supreme Court has opined that the Convention and Convention Act demand that courts "subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 639, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). Thus, although the Court acknowledges that the Convention permits Congress to "specify categories of claims it wishes to reserve for decision by our own courts," it has "decline[d] to subvert the spirit of the United States' accession to the Convention by recog-nizing subject-matter exceptions where Congress has not expressly directed the courts to do so." *Id*. at 639 n. 21, 105 S.Ct. 3346.

The McCarran–Ferguson Act contains no such express direction. Indeed, the Supreme Court has told us that the aim of McCarran–Ferguson is not arbitration or treaties, but "domestic commerce legislation." *Garamendi*, 539 U.S. at 428, 123 S.Ct. 2374. We therefore hold that the Convention Act, as legislation implementing a treaty, is not subject to reverse preemption, so insurance disputes are not exempt from the Convention Act pursuant to McCarran–Ferguson's reverse-preemption rule.

As we have observed, the federal government must be permitted to "speak with one voice when regulating commercial relations with foreign governments." *Michelin Tire Corp.*, 423 U.S. at 285, 96 S.Ct. 535. With the Convention and Convention Act, the government has opted to use this voice to articulate a uniform policy in favor of enforcing agreements to arbitrate internationally, even when "a contrary result would be forthcoming in a domestic context." *Mitsubishi Motors*, 473 U.S. at 629, 105 S.Ct. 3346. To allow "parochial refusal[s]" to enforce foreign arbitration agreements would frustrate the very purposes for which the Convention was drafted: achieving the predictable and orderly resolution of disputes "essential to any international business transaction" and ensuring parties are not haled into hostile or inappropriate forums. *Scherk v. Alberto–Culver Co.*, 417 U.S. 506, 516–17, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974); see also *Mitsubishi Motors*, 473 U.S. at 639 n. 21, 105 S.Ct. 3346.

Congress might opt to exclude insurance disputes from the Convention. But it has not done so with the McCarran–Ferguson Act. Nothing in McCarran–Ferguson suggests that, by enacting that statute, Congress intended to delegate to the states the authority to abrogate international agreements that this country has entered into and rendered judicially enforceable. We will not read it to do so.

Because the Supreme Court has made clear that McCarran–Ferguson is limited to domestic affairs, we hold the Convention Act falls outside of its scope. Hence, we affirm the district court's exercise of subject-matter jurisdiction.

* * * *

c. Application of Consorcio Ecuatoriano*: judicial assistance in obtaining evidence for foreign private arbitral proceedings*

On June 25, 2012, the U.S. Court of Appeals for the Eleventh Circuit issued its decision in *Application of Consorcio Ecuatoriano de Telecommunicaciones S.A. ("CONECEL")*, 685 F.3d. 987 (11th Cir. 2012). The Eleventh Circuit held that 28 U.S.C. § 1782, which authorizes U.S. courts to provide assistance in obtaining evidence for use in a "foreign or international tribunal," applies to foreign private arbitral proceedings. U.S. courts of appeals that have addressed the question are divided, although, as the Eleventh Circuit explained, there is a relevant Supreme Court decision, *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), asserting a broad definition of "tribunal" under the statute. Excerpts from the opinion of the court of appeals in *CONECEL* appear below (with footnotes omitted).

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* * * *

This appeal arises out of a foreign shipping contract billing dispute between Consorcio Ecuatoriano de Telecomunicaciones S.A. ("CONECEL") and Jet Air Service Equador S.A. ("JASE"). CONECEL filed an application in the Southern District of Florida under 28 U.S.C. § 1782 to obtain discovery for use in foreign proceedings in Ecuador. According to CONECEL, the foreign proceedings include both a pending arbitration brought by JASE against CONECEL for non-payment under the contract, and contemplated civil and private criminal suits CONECEL might bring against two of its former employees who, CONECEL claims, may have violated Ecuador's collusion laws in connection with processing and approving JASE's allegedly inflated invoices. CONECEL's application seeks discovery from JASE's United States counterpart, JAS Forwarding (USA), Inc. ("JAS USA"), which does business in Miami and was involved in the invoicing operations at issue in the dispute. The district court granted the application and authorized CONECEL to issue a subpoena. Thereafter, JASE intervened and moved to quash the subpoena and vacate the order granting the application. The district court denied the motion, as well as a subsequent motion for reconsideration. JASE now appeals the denial of both.

After thorough review and having had the benefit of oral argument, we affirm the orders of the district court. We hold that the arbitral tribunal before which JASE and CONECEL's dispute is now pending is a foreign tribunal for purposes of the statute. The arbitral panel acts as a first-instance decisionmaker; it permits the gathering and submission of evidence; it resolves the dispute; it issues a binding order; and its order is subject to judicial review. The discovery statute requires nothing more. …

* * * *

A district court has the authority to grant an application for judicial assistance under section 1782 if four statutory requirements are met:

> (1) the request must be made "by a foreign or international tribunal," or by "any interested person"; (2) the request must seek evidence, whether it be the "testimony or statement" of a person or the production of "a document or other thing"; (3) the evidence must be "for use in a proceeding in a foreign or international tribunal"; and (4) the person

> from whom discovery is sought must reside or be found in the district of the district court ruling on the application for assistance.

In re Clerici, 481 F.3d at 1331–32 (footnote omitted) (quoting 28 U.S.C. § 1782(a)). JASE does not dispute that requirements (1), (2), and (4) have been met here. As a party to the dispute, CONECEL plainly is an "interested person"; CONECEL's application seeks evidence in the form of document production and deposition testimony; and the application seeks discovery from JAS USA, which has an office and does business in Miami and is therefore "found in the district of the district court ruling on the application for assistance"—namely, the Southern District of Florida.

At issue is the third requirement—that the evidence sought must be for use in a proceeding in a foreign or international tribunal. JASE claims that there is no such proceeding. CONECEL advances two independent theories for why there is: that the arbitration between the parties is a proceeding already pending in a foreign tribunal; and that CONECEL also wants the evidence for use in reasonably contemplated civil collusion proceedings that it may file against two of its former employees. Because we now hold that the pending arbitration proceeding is a "proceeding in a foreign or international tribunal," 28 U.S.C. § 1782(a), we have no occasion to address the second theory.

Although an issue of first impression in this Circuit, the determination of whether a foreign arbitration falls within the scope of section 1782 is guided in substantial measure by the Supreme Court's seminal decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 124 S.Ct. 2466, 159 L.Ed.2d 355 (2004). Most significantly for our purposes, the Court in *Intel* emphasized the breadth of the statutory term "tribunal." In discussing the legislative history of section 1782, Justice Ginsburg, writing for the Court, observed that Congress in 1964 introduced the word "tribunal" into the statute to replace the previous version's term "judicial proceeding," quoting with approval from a Senate Report "explain[ing] that Congress introduced the word 'tribunal' to ensure that 'assistance is not confined to proceedings before conventional courts,' but extends also to 'administrative and quasi-judicial proceedings.' " *Id*. at 248–49, 124 S.Ct. 2466 (quoting S.Rep. No. 88–1580, at 7 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3788). And then, in determining whether the Directorate–General for Competition of the European Commission was a "tribunal" under the statute, the Supreme Court reiterated that the legislative change from the phrase "any judicial proceeding" to the current phrase—"a proceeding in a foreign or international tribunal"—was intended to "provide the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad." *Id*. at 258, 124 S.Ct. 2466 (alterations and internal quotation marks omitted). As the Supreme Court noted, "[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Id*. at 258–59, 124 S.Ct. 2466 (quoting *Stone v. INS*, 514 U.S. 386, 397, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995)).

Moreover, the Court quoted with approval the following broad definition of "tribunal" set forth by a leading scholar on international procedure: "[t]he term 'tribunal' ... includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts." *Id*. at 258, 124 S.Ct. 2466 (alterations in original) (emphasis added) (quoting Hans Smit, International Litigation Under the United States Code, 65 Colum. L.Rev. 1015, 1026 n.71 (1965)). Applying this broad definition to the case, the Supreme Court concluded that because the European Commission acted as a "proof-taking" body and a "first-instance decisionmaker," the Court had "no warrant to exclude the European Commission ... from § 1782(a)'s ambit." *Id*. at 257–58, 124 S.Ct. 2466;

accord *id*. at 246–47, 124 S.Ct. 2466 ("[T]he Commission is a § 1782(a) 'tribunal' when it acts as a first-instance decisionmaker ...."); *id*. at 255 & n. 9, 124 S.Ct. 2466 (noting that a European Commission proceeding "leads to a dispositive ruling, i.e., a final administrative action both responsive to the complaint and reviewable in court," and observing that the European Commission has the "authority to determine liability and impose penalties, dispositions that will remain final unless overturned by the European courts").

Thus, while the Supreme Court in *Intel* was not tasked with specifically deciding whether a private arbitral tribunal falls under the statute, its broad functional construction of the term "tribunal" provides us with substantial guidance. Consistent with this functional approach, we examine the characteristics of the arbitral body at issue, in particular whether the arbitral panel acts as a first-instance adjudicative decisionmaker, whether it permits the gathering and submission of evidence, whether it has the authority to determine liability and impose penalties, and whether its decision is subject to judicial review. See *id*. at 255 & n. 9, 257–58, 124 S.Ct. 2466; see also *In re Winning (HK) Shipping Co*., 2010 WL 1796579, *7 (S.D.Fla. April 30, 2010) (" Intel suggests that courts should examine the nature of the arbitral body at issue to determine whether it functions as a 'foreign tribunal' for purposes of section 1782."); *In re Roz Trading Ltd.*, 469 F.Supp.2d 1221, 1228 (N.D.Ga.2006) ("Where a body makes adjudicative decisions responsive to a complaint and reviewable in court, it falls within the widely accepted definition of 'tribunal,' the reasoning of Intel, and the scope of § 1782(a) ....").

The pending arbitration between JASE and CONECEL meets the functional criteria articulated in *Intel*. In connection with its section 1782 application, CONECEL submitted declarations from its Ecuadorian counsel explaining that the arbitral panel has the "authority to receive evidence, resolve the dispute, and award a binding decision." The declaration further states that after the conclusion of the arbitration proceedings,

> the parties will be able to appeal the decision before an ordinary court of the Ecuadorian state for causes related to procedural defects during the proceedings, for example, for the lack of service of the complaint to the defendant or lack of notification relating to some relevant decision that prevented one of the parties to exercise its defense rights, or a violation of the rules regarding designation of arbitrators or the selection of the tribunal, etc. The nullification action is resolved by the Provincial Court in the jurisdiction in which the arbitral award is rendered. Against the decision of the Provincial Court, an appeal can be made before the National Court of Justice.

The declaration also opined that "another possible option is to attack an arbitral award through an extraordinary action of protection provided for in the new Constitution of 2008." This kind of constitutional attack on the arbitral award is "made before the Constitutional Court," and the action would be viable if "a guaranteed right under the Constitution has been violated, whether by act or omission."

Notably, JASE does not contest that the arbitral tribunal at issue is a first-instance decisionmaking body that can receive evidence and bind the parties with its ruling; it only contests whether the arbitral tribunal's decision is subject to judicial review. JASE submitted in the district court its own declaration from Ecuadorian counsel stating only that "[t]he sum and substance of [arbitrators'] rulings, including determinations of fact and law are not reviewable by appeal."

The parties' declarations are in no way inconsistent. JASE's declaration does not dispute that the award of the arbitral panel is subject to nullification based on procedural defects in the arbitration proceeding and to constitutional attack if the constitutional rights of one of the parties

has been violated. The opposing declarations read together demonstrate that judicial review of arbitration awards in Ecuador, much like a federal court's review of an arbitration award, is focused primarily on addressing defects in the arbitration proceeding, not on providing a second bite at the substantive apple that would defeat the purpose of electing to pursue arbitration in the first instance. Cf. 9 U.S.C. § 10(a) (providing that a district court may vacate an arbitration award where the award was procured by corruption or fraud, where the arbitrators were partial or corrupt, where misbehavior by the arbitrators prejudiced the rights of any party, or where the arbitrators exceeded their powers); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008) (holding that "the statutory grounds" for judicial review in the Federal Arbitration Act "are exclusive," and may not be supplemented by contract); *White Springs Agric. Chems., Inc. v. Glawson Invs. Corp.*, 660 F.3d 1277, 1280 (11th Cir.2011) ("Because these Sections [9 U.S.C. §§ 10–11] are the exclusive means for upsetting an arbitration award, a panel's incorrect legal conclusion is not grounds for vacating or modifying the award.").

One could not seriously argue that, because domestic arbitration awards are only reviewable in court for limited reasons (notably excluding a second look at the substance of the arbitral determination), this amounts to no judicial review at all. As the Supreme Court has expressly recognized, the Federal Arbitration Act provides the exclusive statutory grounds for "expedited judicial review." *Hall St.*, 552 U.S. at 578, 128 S.Ct. 1396 (emphasis added). Yet JASE urges us, for section 1782 purposes, to conclude that the functional requirement of being subject to judicial review is only satisfied when the sum and substance of the arbitral body's decision is subject to full judicial reconsideration on the merits. This definition is far too stringent, and we can discern no sound reason to depart from the common sense understanding that an arbitral award is subject to judicial review when a court can enforce the award or can upset it on the basis of defects in the arbitration proceeding or in other limited circumstances. Based on the undisputed record before this Court, the arbitral panel in Ecuador, after receiving evidence from the parties, will render a first-instance binding decision on the merits that is subject to judicial review. This arbitral panel is, in the words of the Supreme Court, "a first-instance decisionmaker" whose judgment is subject to judicial review, and we therefore "have no warrant to exclude [it] ... from § 1782(a)'s ambit." *Intel*, 542 U.S. at 258, 124 S.Ct. 2466. In short, CONECEL's application satisfied the prima facie requirements of 28 U.S.C. § 1782(a).

* * * *

Cross References

Child abduction, **Chapter 2.B.2.**
Guiding Principles on business and human rights, **Chapter 6.A.3.b.**
Foreign Sovereign Immunities Act, **Chapter 10.A.**
Voluntary Principles on Security and Human Rights, **Chapter 11.G.4.**
SEC rules implementing Dodd Frank, **Chapter 11.G.5.**

Chapter 16

Sanctions, Export Controls, and Certain Other Restrictions

This chapter discusses selected developments during 2012 relating to sanctions, export controls, and certain other restrictions relating to travel or U.S. government assistance. It does not cover developments in many of the United States' longstanding financial sanctions regimes, which are discussed in detail at *www.treasury.gov/resource-center/sanctions/Pages/default.aspx*. It also does not cover comprehensively developments relating to the export control programs administered by the Commerce Department or the defense trade control programs administered by the State Department. Detailed information on the Commerce Department's activities relating to export controls is provided in the U.S. Department of Commerce, Bureau of Industry and Security's Annual Report to the Congress for Fiscal Year 2012, available at *www.bis.doc.gov/news/2013/BIS_annual_report_2012.pdf*. Details on the State Department's defense trade control programs are available at *www.pmddtc.state.gov*.

A. IMPOSITION, IMPLEMENTATION, AND MODIFICATION OF SANCTIONS AND CERTAIN OTHER RESTRICTIONS

1. Syria

The United States took several steps in 2012 to protect civilians in Syria and target the Asad regime. U.S. actions were coordinated with the international community, including the Arab League and the United Nations. International and U.S. sanctions are discussed below. Chapter 6 discusses the Human Rights Council's actions with regard to Syria. Chapter 9 discusses recognition of the Syrian opposition. Chapter 17 excerpts a speech on the situation in Syria by U.S. State Department Legal Adviser Harold H. Koh.

a. Meetings of Friends of the Syrian People

The United States actively participated in the group "Friends of the Syrian People," which met on several occasions in 2012. At the February 2012 meeting, U.S. Secretary of State Hillary Rodham Clinton encouraged all present to increase the pressure on the Asad regime through sanctions:

> We all need to look hard at what more we can do. It's time for everyone here to place travel bans on senior members of the regime—as the Arab League has done—freeze their assets, boycott Syrian oil, suspend new investments, and consider closing embassies and consulates. For nations that have already imposed sanctions, we must vigorously enforce them.

Intervention at the Friends of the Syrian People meeting, February 24, 2012, available at *www.state.gov/secretary/rm/2012/02/184606.htm*.

The United States hosted the second meeting of the Friends of the Syrian People International Working Group on Sanctions in Washington on June 6. The meeting, which the United States co-chaired with the governments of Turkey and Qatar, focused on ways to further strengthen international sanctions against the Syrian regime.

b. U.S. sanctions and other controls

(1) Sanctions imposed under executive orders issued prior to 2012

The president first exercised authority under the International Emergency Economic Powers Act ("IEEPA") to declare a national emergency based on the threat to the United States presented by the actions of the government of Syria in 2004. The president has issued additional executive orders since that initial determination. Each year, the finding of a national emergency must be renewed in order for sanctions programs under executive orders related to that emergency to be maintained. In the 2012 determination to continue the national emergency with respect to Syria, the president summarized the current posture of the Syrian regime, justifying the maintenance of sanctions:

> While the Syrian regime has reduced the number of foreign fighters bound for Iraq, the regime's own brutality and repression of its citizens who have been calling for freedom and a representative government endangers not only the Syrian people themselves, but could yield greater instability throughout the region. The Syrian regime's actions and policies, including obstructing the Lebanese government's ability to function effectively, pursuing chemical and biological weapons, and supporting terrorist organizations, continue to pose an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States. As a result, the national emergency declared on May 11, 2004, and the measures adopted on that date in Executive Order 13338; on April 25, 2006, in Executive Order 13399; on February 13, 2008, in Executive Order 13460; on April 29, 2011, in Executive Order 13572; on May 18, 2011, in Executive Order 13573; on August 17, 2011, in Executive Order 13582; on April 22, 2012, in Executive Order 13606; and on May 1, 2012, in Executive Order 13608, to deal with that emergency must continue in effect beyond May 11, 2012. Therefore, in accordance with section 202(d) of the National Emergencies Act, 50 U.S.C. 1622(d), I am continuing for 1 year the national emergency declared with respect to the actions of the Government of Syria.

77 Fed. Reg. 27,559 (May 10, 2012).

On February 16, 2012, the Department of the Treasury's Office of Foreign Assets Control ("OFAC") designated the Iranian Ministry of Intelligence and Security ("MOIS") pursuant to E.O. 13572 of April 29, 2011, "Blocking Property of Certain Persons With Respect to Human Rights Abuses in Syria." 77 Fed. Reg. 10,808 (Feb. 23, 2012). MOIS was simultaneously designated pursuant to E.O. 13553 (for its support for human rights abuses in Iran) and E.O. 13224 (for its support for terrorist groups). See State Department media note, available at *www.state.gov/r/pa/prs/ps/2012/02/184079.htm*; see also Treasury Department press release, available at *www.treasury.gov/press-center/press-releases/Pages/tg1424.aspx*. On July 18, 2012, OFAC designated an additional entity (Drex Technologies S.A.) pursuant to E.O. 13572. 77 Fed. Reg. 43,658 (July 25, 2012)

On March 30, 2012, OFAC designated three individuals (Munir Adanov, Dawood Rajiha, and Zuhayr Shalish) pursuant to Executive Order 13573 of May 18, 2011, "Blocking Property of Senior Officials of the Government of Syria." 77 Fed. Reg. 20,693 (Apr. 5, 2012). On July 18, 2012, OFAC designated 29 additional individuals pursuant to E.O. 13573. 77 Fed. Reg. 43,658 (July 25, 2012). On August 14, OFAC removed one individual from the list of those designated under E.O. 13573: Riyad Hijab, Syria's prime minister, who defected and pledged allegiance to the Syrian opposition. 77 Fed. Reg. 50,210 (Aug. 20, 2012).

On March 5, 2012, OFAC designated one entity (the General Organization of Radio and TV) pursuant to Executive Order 13582 of August 17, 2011, "Blocking Property of the Government of Syria and Prohibiting Certain Transactions with Respect to Syria." 77 Fed. Reg. 14,592 (Mar. 12, 2012). On August 13, 2012, OFAC designated Hizballah pursuant to E.O. 13582 based on its support for the Asad regime. 77 Fed. Reg. 49,864 (Aug. 17, 2012); see also August 10 special briefing on the designation, available at *www.state.gov/r/pa/prs/ps/2012/08/196335.htm*.

The United States also imposed sanctions on Syrian entities pursuant to E.O. 13382 relating to proliferation, which is discussed generally in section A.3.d, below. On May 30, 2012, OFAC designated one entity, Syria International Islamic Bank, under E.O. 13382. 77 Fed. Reg. 35,114 (June 12, 2012). As explained in a May 30, 2012 press release by the Treasury Department, available at *www.treasury.gov/press-center/press-releases/Pages/tg1596.aspx*, OFAC designated the Syria International Islamic Bank ("SIIB") pursuant to E.O. 13382 for acting for or on behalf of the Commercial Bank of Syria and providing services to the Syrian Lebanese Commercial Bank. Both Syrian banks had previously been designated under E.O. 13382 based on their support to entities related to Syrian and North Korean proliferation of weapons of mass destruction. The designation of SIIB was also intended to further isolate and pressure the Asad regime in Syria by closing off its access to the international financial system.

On July 18, 2012, OFAC designated five additional Syrian entities pursuant to E.O. 13382: Business Lab, Handasieh (aka General Organization for Engineering Industries), Industrial Solutions, Mechanical Construction Factory (MCF), and Syrian Arab Company for Electronic Industries (Syronics). 77 Fed. Reg. 43,659 (July 25, 2012). These same five Syrian entities were also designated on July 18 by the State Department under E.O. 12938 for engaging in proliferation activities. 77 Fed. Reg. 43,413 (July 24, 2012).

(2) New executive order aimed at malign use of information technology in Iran and Syria

On April 22, 2012, President Barack Obama issued Executive Order 13606, "Blocking the Property and Suspending Entry into the United States of Certain Persons With Respect to Grave Human Rights Abuses by the Governments of Iran and Syria Via Information Technology." (Sometimes referred to as the "GHRAVITy" executive order.) Daily Comp. Pres. Docs. 2012 DCPD No. 00294 p. 1 (Apr. 22, 2012); 77 Fed. Reg. 24,571 (Apr. 24, 2012). The order addresses "the commission of serious human rights abuses against the people of Iran and Syria by their governments, facilitated by computer and network disruption, monitoring, and tracking by those governments, and abetted by entities in Iran and Syria that are complicit in their governments' malign use of technology for those purposes." Section 1 of E.O. 13606 appears below, identifying the persons whose property may be blocked under the order. Section 4 imposes visa restriction on such persons. One individual (Ali Mamluk) and six entities (Datak Telecom, Iranian Ministry of Intelligence and Security, Islamic Revolutionary Guard Corps, Law Enforcement Forces of the Islamic Republic of Iran, Syrian General Intelligence Directorate, and Syriatel) are listed in the annex to E.O. 13606. Additional identifying information for the persons listed in the annex to the order was published in the Federal Register on May 24, 2012. 77 Fed. Reg. 31,068 (May 24, 2012).

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Section 1. (a) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch, of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

(i) the persons listed in the Annex to this order; and

(ii) any person determined by the Secretary of the Treasury, in consultation with or at the recommendation of the Secretary of State:

(A) to have operated, or to have directed the operation of, information and communications technology that facilitates computer or network disruption, monitoring, or tracking that could assist in or enable serious human rights abuses by or on behalf of the Government of Iran or the Government of Syria;

(B) to have sold, leased, or otherwise provided, directly or indirectly, goods, services, or technology to Iran or Syria likely to be used to facilitate computer or network disruption, monitoring, or tracking that could assist in or enable serious human rights abuses by or on behalf of the Government of Iran or the Government of Syria;

(C) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, the activities described in subsections (a)(ii)(A) and (B) of this section or any person whose property and interests in property are blocked pursuant to this order; or

(D) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order.

(b) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order.

* * * *

(3) New executive order aimed at curtailing evasion of sanctions relating to Iran and Syria

On May 1, 2012, President Obama issued Executive Order 13608, "Prohibiting Certain Transactions With and Suspending Entry Into the United States of Foreign Sanctions Evaders With Respect to Iran and Syria." Daily Comp. Pres. Docs. 2012 No. 00328 p. 1 (May 1, 2012); 77 Fed. Reg. 26,409 (May 3, 2012). Section 1 of E.O. 13608 is set forth below, and identifies those persons who are subject to sanction to include those who violate existing sanctions relating to Iran or Syria and those who facilitate deceptive transactions for persons subject to sanctions relating to Iran or Syria. E.O. 13608 subjects those designated thereunder to a prohibition on all transactions or dealings in or intended for the United States or provided by or to U.S. persons, wherever located. Section 4 imposes visa restrictions on such persons.

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Section 1. (a) The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to impose on a foreign person the measures described in subsection (b) of this section upon determining that the foreign person:

(i) has violated, attempted to violate, conspired to violate, or caused a violation of any license, order, regulation, or prohibition contained in, or issued pursuant to:

(A) any Executive Order relating to the national emergencies declared in Executive Order 12957 of March 15, 1995, or in Executive Order 13338 of May 11, 2004, as modified in scope in subsequent Executive Orders; or

(B) to the extent such conduct relates to property and interests in property of any person subject to United States sanctions concerning Iran or Syria, Executive Order 13382 of June 28, 2005, any Executive Order subsequent to Executive Order 13382 of June 28, 2005, that relates to the national emergency declared in Executive Order 12938 of November 14, 1994, or any Executive Order relating to the national emergency declared in Executive Order 13224 of September 23, 2001;

(ii) has facilitated deceptive transactions for or on behalf of any person subject to United States sanctions concerning Iran or Syria; or

(iii) is owned or controlled by, or is acting or purporting to act for or on behalf of, directly or indirectly, any person determined to meet the criteria set forth in subsection (a) of this section.

(b) With respect to any foreign person determined to meet the criteria set forth in subsection (a) of this section, the Secretary of the Treasury may prohibit all transactions or dealings, whether direct or indirect, involving such person, including any exporting, reexporting, importing, selling, purchasing, transporting, swapping, brokering, approving, financing, facilitating, or guaranteeing, in or related to (i) any goods, services, or technology in or intended

for the United States, or (ii) any goods, services, or technology provided by or to United States persons, wherever located.

(c) The prohibitions in subsection (b) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the date of this order.

* * * *

(4) Syria-related designations under other executive orders

See section A.4.b. and A.3.d, *infra* for additional designations of Syria-related entities and individuals pursuant to executive orders relating to terrorism and proliferation, respectively. Of particular note, as discussed in section A.4.b., the State Department amended the designation of al-Qaida in Iraq ("AQI") to include the al-Nusrah Front, an entity which has claimed responsibility for hundreds of attacks in Syria. 77 Fed. Reg. 73,732 (Dec. 11, 2012).

2. Iran

In 2012, the United States continued to pursue its dual-track approach to preventing Iran from gaining nuclear weapons capabilities. See *Digest 2009* at 585–90 and 773–74. Together with its international partners, the United States reaffirmed its commitment to engaging Iran diplomatically while imposing extensive new sanctions to respond to Iran's continued inflexibility. In January, Secretary Clinton and Treasury Secretary Timothy Geithner issued a joint statement welcoming additional European Union sanctions on Iran that are consistent with sanctions imposed by the United States, including new sanctions signed into law by President Obama on December 31, 2011.[*] Their joint statement, excerpted below, is also available at *www.state.gov/r/pa/prs/ps/2012/01/182350.htm*.

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We welcome today's decision by the European Union to ban imports of Iranian crude oil and petroleum products, freeze the assets of the Iranian central bank, and take additional action against Iran's energy, financial, and transport sectors.

The measures agreed to today by the EU Foreign Affairs Council are another strong step in the international effort to dramatically increase the pressure on Iran. They are consistent with steps the U.S. previously has taken and with new U.S. sanctions on Iran that the President signed into law on December 31. These new U.S. sanctions intensify the ongoing pressure on Iran and strengthen the impact of existing measures by targeting transactions with the Central Bank of

[*] Editor's note: On December 31, 2011, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81 ("NDAA"), which included in Section 1245 provisions for sanctions on foreign financial institutions engaging in significant transactions with the Central Bank of Iran and other designated financial institutions. Actions taken to implement the NDAA are discussed in sections A.2.b. *infra*.

Iran and by providing strong incentives to reduce Iran's ability to earn revenue from its oil exports. Taken in combination with the many other sanctions on Iran that continue to be implemented by the United States and the international community, this new, concerted pressure will sharpen the choice for Iran's leaders and increase their cost of defiance of basic international obligations.

The United States and our international partners are committed to preventing Iran from acquiring nuclear weapons. That is why we have pursued a dual-track policy that puts pressure on Iran to engage seriously in discussions with the international community on its nuclear program. To date, Iran has failed to take advantage of the offer of engagement described in EU High Representative Ashton's October 2011 letter. Instead, Iran has refused to address the international community's serious and well-founded concerns about its nuclear program. These concerns have only been heightened by Iran's inability to explain how its nuclear program is, as it claims, exclusively peaceful in nature or to provide any credible response to the IAEA's November 2011 report that detailed the potential military dimensions of Iran's nuclear program.

* * * *

On March 4, 2012, in remarks at the American Israel Public Affairs Committee ("AIPAC") policy conference, President Obama summarized the impact of U.S. and international sanctions on Iran:

> Because of our efforts, Iran is under greater pressure than ever before. Some of you will recall, people predicted that Russia and China wouldn't join us to move towards pressure. They did. And in 2010, the U.N. Security Council overwhelmingly supported a comprehensive sanctions effort. Few thought that sanctions could have an immediate bite on the Iranian regime. They have, slowing the Iranian nuclear program and virtually grinding the Iranian economy to a halt in 2011. Many questioned whether we could hold our coalition together as we moved against Iran's Central Bank and oil exports. But our friends in Europe and Asia and elsewhere are joining us. And in 2012, the Iranian Government faces the prospect of even more crippling sanctions.

Daily Comp. Pres. Docs. 2012 DCPD No. 00153 p. 1 (Mar. 4, 2012).

a. Implementation of UN Security Council Resolutions

The UN Security Council has adopted four resolutions under Article 41 of Chapter VII of the UN Charter imposing sanctions targeting those providing support to Iran's nuclear and ballistic missile programs, as well as those assisting designated persons and entities in sanctions evasion and violations: Resolution 1929 (2010), Resolution 1803 (2008), Resolution 1747 (2007), and Resolution 1737 (2006). U.N. Docs. S/RES/1929, S/RES/1803, S/RES/1747, and S/RES/1737. See *Digest 2010* at 632-45, *Digest 2008* at 969–75, *Digest 2007* at 1031–36, and *Digest 2006* at 1280–84 for discussions of the Security Council's Iran resolutions. In Resolution 1929 (2010), the Council established, for an initial period of one

year, a Panel of Experts to assist the Committee in carrying out its mandate and undertake the tasks, as specified. The Panel's mandate has been renewed yearly, most recently in Resolution 2049 (2012).

In 2012, the United States continued to demonstrate strong support for full implementation of the Security Council resolutions on Iran through statements at the Security Council and actions taken to implement the resolutions. In September, the State Department released a fact sheet, excerpted below and available at *http://usun.state.gov/briefing/statements/198010.htm*, about implementation of resolution 1929 and U.S. support for the work of the Iran Sanctions Committee and Iran Panel of Experts.

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In June 2010, the Security Council imposed new sanctions in response to Iran's continuing failure to comply with its obligations and resolve international concerns about its nuclear program. These sanctions, imposed in resolution 1929, were the fourth and most robust round of Security Council sanctions against Iran and an essential element of the unprecedented and far-reaching sanctions regime spearheaded by the United States since 2009. These sanctions under 1929 have made it harder for Iran to smuggle weapons, acquire nuclear-sensitive materials and access the funds it needs to continue its illicit nuclear and ballistic missile programs.

Since their adoption, the United States has vigorously ensured that these sanctions are effectively implemented. In particular, the United States has supported the work of the Security Council's Iran Sanctions Committee, which is mandated to monitor and improve sanctions enforcement. The United States has also assisted the work of the Iran Panel of Experts, an eight-person independent team created in resolution 1929 to investigate sanctions violations, assist the Committee in carrying out its mandate and advise states on how best to implement the sanctions.

Since the adoption of resolution 1929, the Committee and Panel have been continuously active to promote better enforcement of the UN sanctions.

Over the last two years, the Committee has significantly increased its pace of work, reviewing 309 draft documents, including correspondence with UN Member States, reports from the Panel, proposed appointments for the Panel and drafts of regular briefs to the Security Council.

The Panel of Experts has undertaken more than forty-five trips to visit Member States and raise awareness about the sanctions. During these visits, the Panel often consults with States regarding their "best practices" to implement the sanctions and inspects facilities that could be exposed to the risks of Iran's illicit transfer and procurement.

The Security Council has released publicly the Panel's May 2012 final report (*http://www.un.org/sc/committees/1737/panelexperts.shtml*), which contained extensive analysis of and information about Iran's sanctions evasion, as well as eleven specific recommendations to improve sanctions implementation.

The Committee has received and reviewed implementation reports from ninety-five Member States regarding steps these states taken to enforce the new sanctions imposed in resolution 1929.

The Committee has investigated and taken action to respond to sanctions violations.

Since the adoption of resolution 1929, the Committee has received twelve reports of alleged sanctions violations. The Committee, with the support of the Panel, has investigated or is in the process of investigating each case.

Six of these reported violations involved Iran's smuggling of conventional arms. Four of these violations were linked to illicit transfers involving Syria.

The Panel has conducted six site inspections to inspect seized Iranian cargo in other countries.

In April 2012, the Committee imposed targeted sanctions (asset freeze/travel ban) on two individuals and one company responsible for an illicit Iranian arms shipment that was seized by Nigeria in 2010.

The Committee is now reviewing a recommendation by the Panel to impose additional targeted sanctions on three other companies involved in Iranian arms smuggling.

The Committee has engaged directly with seventeen countries that may have information regarding these violations, as well as with those countries alleged to have violated the sanctions (including Iran).

The Panel has also retroactively investigated two sanctions violations that occurred prior to its establishment in 2010.

The Committee and Panel have given States advice and assistance on how to implement effectively the UN sanctions.

The Committee has approved and posted on its website fact sheets outlining the responsibilities of countries that encounter sanctions violations (*http://www.un.org/sc/committees/1737/selecdocs.shtml*).

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(1) Statements in the Security Council

On March 21, 2012, Ambassador Rosemary DiCarlo, U.S. Deputy Permanent Representative to the UN, delivered remarks at the Security Council on Iran and implementation of Resolution 1737. The portion of her remarks calling for further action by the 1737 Committee appears below. Her remarks about efforts to engage diplomatically with Iran are excerpted in Chapter 18. The full text of her remarks is available at *http://usun.state.gov/briefing/statements/186576.htm*.

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The [IAEA[Director General's latest report illustrates Iran's continued disregard for the Council's clear demands, most notably that it suspend all enrichment-related and reprocessing activities and heavy-water related activities. This Council therefore must take the necessary steps to hold Iran accountable.

The 1737 Committee and the Panel of Experts are critically important to this effort. Both the Committee and the Panel must fully and robustly carry out their mandates, including by implementing the Panel's recommendations and responding to reported sanctions violations.

Better implementation of existing sanctions can help slow down Iran's nuclear progress, affording the world more time to resolve our concerns.

We therefore welcome the 1737 Committee's meeting last month to discuss sanctions violations and to receive a briefing on certain Iranian ballistic-missile-related activities that are being conducted in violation of Resolution 1929. We are pleased to see that there has been some progress on the Committee's response to reported sanctions violations over the past 90 days, although more needs to be done. We are alarmed that a majority of the violations reported to the Committee involved illicit transfers of arms and related material from Iran to Syria, where the Asad regime is using them to violently repress the Syrian people. We urge the Committee to impose targeted sanctions on individuals and entities found to be involved in sanctions violations.

We appreciate the Panel's ongoing efforts and look forward to its upcoming Final report and recommendations. My government remains seriously concerned that the Panel's 2011 Final Report has not yet been released to the full UN membership. Ten months have passed since the report was submitted. There is simply no excuse for members to continue to delay and obstruct its release. We strongly urge that this issue be resolved before our next session.

* * * *

In 2012, for the first time since the creation of the UN's Iran sanction regime, the 1737 Sanctions Committee designated additional individuals and entities for sanctions. See *www.un.org/News/Press/docs//2012/sc10615.doc.htm*; *www.un.org/News/Press/docs//2012/sc10871.doc.htm*. The 1737 Sanctions Committee also expanded the list of items subject to UN sanctions on two occasions. See *www.un.org/sc/committees/1737/selecdocs.shtml*.

On April 30, 2012, Ambassador Rice issued a statement, available at *usun.state.gov/briefing/statements/188246.htm*, welcoming new designations by the Iran Sanctions (1737) Committee. Her statement is excerpted below.

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The United States welcomes the April 18 decision by the UN Security Council's Iran Sanctions (1737) Committee to impose sanctions on two individuals and one company involved in Iranian arms smuggling. The individuals listed today helped plan a weapons shipment—intercepted by Nigeria in 2010—in violation of existing UN sanctions. Both individuals and this company are tied to the Qods Force of the Islamic Revolutionary Guard Corps (IRGC), the group that directs Iranian support for terrorism and extremism worldwide.

These designations reflect the Security Council's unified commitment to using and enforcing the sanctions adopted by the Council, in conjunction with a constructive process of engagement, to compel Iran to meet its international obligations. This action underscores the international community's resolve to continue its call on Iran to demonstrate the exclusively peaceful nature of the Iranian nuclear program.

In addition to targeting the IRGC, the UN Security Council has imposed stringent sanctions on Iran by banning ballistic missile launches, providing for rigorous inspection of suspect cargo in the air or on the sea, prohibiting the sale of many heavy weapons to Iran,

severely constraining financial transactions with Iran, and highlighting the oil sector's role in financing Iran's nuclear program. We encourage the Committee and its Panel of Experts (POE) to take additional steps to strengthen implementation of these sanctions.

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On December 20, 2012, Ambassador Rice issued a statement, available at *http://usun.state.gov/briefing/statements/202332.htm*, welcoming further designations by the Iran Sanctions (1737) Committee. Her statement is excerpted below.

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The United States welcomes the decision by the UN Security Council's Iran Sanctions Committee (the "1737 Committee") to impose sanctions on two companies significantly involved in Iranian arms smuggling, including smuggling to Syria. These companies—Yas Air and SAD Import Export Company—were responsible for shipping ammunition, assault rifles, machine guns, mortar shells and other arms from Iran to Syria. We congratulate the Committee for demonstrating its commitment to imposing and enforcing sanctions as long as Iran refuses to meet its international obligations.

The Committee's decision underscores the growing international concern over Iran's use of the transportation and shipping sectors as a means to export arms and conduct other illicit activities in violation of UN sanctions. The Security Council highlighted this concern in resolution 1929 when it called on states to inspect Iranian cargo to prevent proliferation, including by Iran Air and the Islamic Republic of Iran Shipping Lines. We have long known that Iran smuggles weapons and provides military assistance to terrorists and extremist groups worldwide. Iran has also repeatedly been caught providing weapons and military assistance to Syria, where the Assad regime has used them against Syrian civilians. Today's sanctions add to those already imposed by the UN Security Council on Iran's transportation sector to further erode Iran's ability to exploit transportation and shipping means for its illicit uses. It is incumbent on all states to redouble their efforts to detect, prevent, inspect, and seize any Iranian arms shipments, whether by land, sea or air and to share information with the Committee and its Panel of Experts (POE) to enforce the sanctions against Iran.

While we continue to seek to resolve the international community's concerns about Iran's nuclear program through a comprehensive negotiated solution, we urge the Committee and its POE to take additional steps to improve enforcement of UN sanctions.

* * * *

(2) Communication to the Committee established pursuant to Resolution 1737

In a letter dated 28 February 2012, four Member States submitted a report regarding a violation of paragraph 9 of resolution 1929 (2010) on the launch of the Navid satellite into space using Iran's Safir space launch vehicle as announced by Iran on 3 February 2012. See *www.un.org/ga/search/view_doc.asp?symbol=S/PV.6737*.

b. U.S. sanctions and other controls

In 2012, President Obama again continued the national emergency under IEEPA with respect to Iran (77 Fed. Reg. 15,229 (Mar. 14, 2012)), thereby maintaining the existing sanctions program. The United States also implemented additional sanctions intended to pressure Iran to comply with its international obligations. Two new executive orders relating to Iran—E.O. 13606 and E.O. 13608—are discussed in section A.1. *supra* because they also relate to Syria. Additional sanctions specific to Iran are described below. Further information on Iran sanctions is available at *www.state.gov/e/eb/tfs/spi/iran/index.htm* and *www.treasury.gov/resource-center/sanctions/Programs/Pages/iran.aspx*.

(1) Executive Order 13599

On February 5, 2012, President Obama issued Executive Order 13599, "Blocking Property of the Government of Iran and Iranian Financial Institutions," in response to "the deceptive practices of the Central Bank of Iran and other Iranian banks to conceal transactions of sanctioned parties, the deficiencies in Iran's anti-money laundering regime and the weaknesses in its implementation, and the continuing and unacceptable risk posed to the international financial system by Iran's activities." Daily Comp. Pres. Docs. 2012 DCPD No. 00083, p. 1 (Feb. 5, 2012); 77 Fed. Reg. 6659 (Feb. 8, 2012). E.O. 13599 also implements, in part, section 1245 of the National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81 ("NDAA"), signed into law on December 31, 2011, which directs the President to, pursuant to IEEPA, block and prohibit all transactions in all property and interests in property of an Iranian financial institution if such property and interests in property are in the United States, come within the United States, or are or come within the possession or control of a U.S. person. Section 1 of E.O. 13599 appears below, describing the persons subject to the new sanctions, including, *inter alia*, the Government of Iran, the Central Bank of Iran, those specified in the NDAA, and those owned or controlled by them.

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Section 1. (a) All property and interests in property of the Government of Iran, including the Central Bank of Iran, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.

(b) All property and interests in property of any Iranian financial institution, including the Central Bank of Iran, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.

(c) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch, of the following persons are blocked and

may not be transferred, paid, exported, withdrawn, or otherwise dealt in: any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order.

* * * *

On July 12, 2012, the Treasury Department designated 110 entities pursuant to E.O. 13599 and the Iranian Transaction and Sanctions Regulations. 78 Fed. Reg. 11,950 (Feb. 20, 2013). Among those designated on the basis that they are owned or controlled by, or acting for or on behalf of, the Government of Iran, were: Petro Suisse Intertrade Company SA (Petro Suisse), an entity incorporated in Switzerland; Hong Kong Intertrade Company, a Hong Kong-based entity; Noor Energy Ltd (Malaysia), an entity incorporated in Malaysia; and Petro Energy Intertrade Company, an entity operating out of Dubai. All of these entities are front companies for the National Iranian Oil Company ("NIOC"), Naftiran Intertrade Company Ltd. ("NICO"), or Naftiran Intertrade Co. ("NICO") Sarl ("NICO Sarl"). In addition, 20 Iranian financial institutions and 58 National Iranian Tanker Company ("NITC") vessels, as well as NITC and 27 of its affiliated entities, were designated.

A State Department media note, excerpted below and available at *www.state.gov/r/pa/prs/ps/2012/07/194923.htm*, explained how these designations work in concert with other sanctions on Iran.

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The Treasury Department is also acting today to prevent the circumvention of international sanctions on Iran—including sanctions on oil trade with Iran—by publicly exposing numerous Iranian front companies, ships and banks and that are part of the Government of Iran. The specific entities identified in today's action are described in the accompanying Fact Sheet [available at *www.state.gov/r/pa/prs/ps/2012/07/194924.htm*].

Treasury is identifying these Government of Iran entities pursuant to E.O. 13599, which blocks all property and interests in property within U.S. jurisdiction of the Government of Iran and of all Iranian financial institutions, and prohibits U.S. persons or those within U.S. jurisdiction from having dealings with them. To assist U.S. persons in complying with their obligation to freeze the assets of, and not to deal with, any such entities, the Treasury Department from time to time identifies entities that are owned or controlled by, or acting for or on behalf of, the Government of Iran.

Today's identifications include four front companies for the Naftiran Intertrade Company (NICO) or the National Iranian Oil Company (NIOC)—Petro Suisse Intertrade Company SA; Hong Kong Intertrade Company; Noor Energy (Malaysia) Ltd.; and Petro Energy Intertrade Company. NICO intended to use Petro Energy Intertrade to evade western sanctions. The Treasury Department identified in NICO and NIOC, both of which are centrally involved in the sale of Iranian oil, in 2008 as entities that are owned or controlled by the Government of Iran.

The Treasury Department is also identifying today the National Iranian Tanker Company (NITC) as a Government of Iran entity and, for the first time, the NITC fleet and various front companies belonging to NITC. In addition, the Treasury Department is also identifying 20 Iranian financial institutions for inclusion on its List of Specially Designated Nationals and Blocked Persons (SDN List).

These identifications highlight Iran's attempts to evade sanctions through the use of front companies, as well as its attempts to conceal its tanker fleet by repainting, reflagging, or disabling GPS devices. They will assist U.S. persons in complying with E.O. 13599, and will also assist persons and entities around the world in complying [with] U.S. and international sanctions, including the EU's prohibition on the import of Iranian oil that went into effect on July 1.

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Effective October 22, 2012, the Treasury Department renamed the Iranian Transactions Regulations as the Iranian Transactions and Sanctions Regulations ("ITSR") and reissued the regulations in order to implement E.O. 13599 and other new actions on Iran. 77 Fed. Reg. 64,663 (Oct. 22, 2012).

(2) Further actions implementing the NDAA of 2012

In addition to E.O. 13599, the Obama administration took further steps to implement Section 1245 of the NDAA of 2012. Section 1245(d) of the NDAA requires regular reporting on the availability of petroleum and petroleum products in countries other than Iran and a periodic determination by the President, based on those reports, of whether price and supply permit purchasers of petroleum and petroleum products from Iran to "reduce significantly in volume their purchases from Iran." Sanctions shall not be imposed on foreign financial institutions in countries that are determined to have made such significant reductions. The president made the determination that there was sufficient supply to permit reductions in purchases from Iran on each of the three opportunities that arose in 2012 in accordance with the statute. 77 Fed. Reg. 21,387 (Apr. 10, 2012); 77 Fed. Reg. 36,387 (June 19, 2012); 77 Fed. Reg. 76,213 (Dec. 26, 2012).

The Secretary of State, acting pursuant to a delegation of authority, made and renewed the determination of significant reductions by several countries in 2012. The first determination was announced in a March 20, 2012 press statement, available at *www.state.gov/secretary/rm/2012/03/186086.htm* (conveying determinations of significant reductions by Belgium, the Czech Republic, France, Germany, Greece, Italy, Japan, the Netherlands, Poland, Spain, and the United Kingdom). See also March 20, 2012 special briefing, available at *www.state.gov/r/pa/prs/ps/2012/03/186122.htm* (explaining that approximately 23 countries have been importers of Iranian crude oil and could be considered for an exception to the NDAA sanctions if they significantly reduce imports). See also June 11, 2012 press statement, available at *www.state.gov/secretary/rm/2012/06/192078.htm* (conveying determinations of significant reductions by India, Malaysia, Republic of Korea, South Africa, Sri Lanka, Turkey and

Taiwan). On June 28, 2012, in a press statement available at *www.state.gov/secretary/rm/2012/06/194200.htm*, Secretary Clinton reported that she had made the determination that two additional countries, China and Singapore, had significantly reduced their volume of crude oil purchases from Iran such that sanctions under Section 1245(d)(1) of the NDAA would not apply to their financial institutions, at least until the next reporting period. Secretary Clinton's press statement further related that 20 world economies had qualified for the determination of significant reductions as of June 28. And the Secretary warned that "any foreign financial institution based in a country that has not received an NDAA exception is subject to U.S. sanctions if it knowingly conducts a significant transaction with the Central Bank of Iran for the sale or purchase of petroleum or petroleum products to or from Iran."

Secretary Clinton again found that Belgium, the Czech Republic, France, Germany, Greece, Italy, Japan, the Netherlands, Poland, Spain, and the United Kingdom qualified for the exception for the next 180-day period. See September 14, 2012 press statement, available at *www.state.gov/secretary/rm/2012/09/197777.htm*. And she likewise found that China, India, Malaysia, Republic of Korea, Singapore, South Africa, Sri Lanka, Turkey, and Taiwan again qualified for the exception at the end of the first 180-day period after their previous qualification. See December 7, 2012 press statement, available at *www.state.gov/secretary/rm/2012/12/201683.htm*.

(3) Executive Order 13622

President Obama issued Executive Order 13622, "Authorizing Additional Sanctions With Respect to Iran," on July 30, 2012. Daily Comp. Pres. Docs. 2012 DCPD No. 00607 p. 1 (July 30, 2012); 77 Fed. Reg. 45,897 (Aug. 2, 2012). E.O. 13622 responds to "the Government of Iran's use of revenues from petroleum, petroleum products, and petrochemicals for illicit purposes, Iran's continued attempts to evade international sanctions through deceptive practices, and the unacceptable risk posed to the international financial system by Iran's activities." Section 1 authorizes sanctions by the Treasury Secretary on foreign financial institutions that, *inter alia*, knowingly conduct or facilitate significant financial transactions with the National Iranian Oil Company ("NIOC") or Naftiran Intertrade Company ("NICO"). Section 2 authorizes sanctions by the Secretary of State on persons determined to knowingly, on or after July 31, 2012, engage in a significant transaction for the purchase or acquisition of petroleum or petroleum products from Iran or for the purchase or acquisition of petrochemical products from Iran, and also authorizes sanctions to be imposed on certain affiliated persons. Certain exceptions are made for transactions for the purchase of petroleum or petroleum products where the Secretary of State has granted exceptions to sanctions under section 1245(d)(4)(D) of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112–81), as amended (see discussion of these exceptions in section A.2.b(2), *supra*). See State Department Sanctions Information and Guidance, 77 Fed. Reg. 67,726 (Nov. 13, 2012). Sections 1 and 2 of E.O. 13622 are set forth below.

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Section 1. (a) The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to impose on a foreign financial institution the sanctions described in subsection (b) of this section upon determining that the foreign financial institution has knowingly conducted or facilitated any significant financial transaction:

(i) with the National Iranian Oil Company (NIOC) or Naftiran Intertrade Company (NICO), except for a sale or provision to NIOC or NICO of the products described in section 5(a)(3)(A)(i) of the Iran Sanctions Act of 1996 (Public Law 104–172), as amended, provided that the fair market value of such products is lower than the applicable dollar threshold specified in that provision;

(ii) for the purchase or acquisition of petroleum or petroleum products from Iran; or

(iii) for the purchase or acquisition of petrochemical products from Iran.

(b) With respect to any foreign financial institution determined by the Secretary of the Treasury in accordance with this section to meet the criteria set forth in subsection (a)(i), (a)(ii), or (a)(iii) of this section, the Secretary of the Treasury may prohibit the opening, and prohibit or impose strict conditions on the maintaining, in the United States of a correspondent account or a payable-through account by such foreign financial institution.

(c) Subsections (a)(i) and (ii) of this section shall apply with respect to a significant financial transaction conducted or facilitated by a foreign financial institution only if:

(i) the President determines under subparagraphs (4)(B) and (C) of subsection 1245(d) of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81) (NDAA) that there is a sufficient supply of petroleum and petroleum products from countries other than Iran to permit a significant reduction in the volume of petroleum and petroleum products purchased from Iran by or through foreign financial institutions; and

(ii) an exception under subparagraph 4(D) of subsection 1245(d) of the NDAA from the imposition of sanctions under paragraph (1) of that subsection does not apply with respect to the country with primary jurisdiction over the foreign financial institution.

(d) Subsection (a) of this section shall not apply with respect to any person for conducting or facilitating a transaction for the sale of food, medicine, or medical devices to Iran or when the underlying transaction has been authorized by the Secretary of the Treasury.

(e) The prohibitions in subsection (b) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order.

Sec. 2. (a) The Secretary of State, in consultation with the Secretary of the Treasury, the Secretary of Commerce, and the United States Trade Representative, and with the President of the Export-Import Bank, the Chairman of the Board of Governors of the Federal Reserve System, and other agencies and officials as appropriate, is hereby authorized to impose on a person any of the sanctions described in section 3 or 4 of this order upon determining that the person:

(i) knowingly, on or after the effective date of this order, engaged in a significant transaction for the purchase or acquisition of petroleum or petroleum products from Iran;

(ii) knowingly, on or after the effective date of this order, engaged in a significant transaction for the purchase or acquisition of petrochemical products from Iran;

(iii) is a successor entity to a person determined by the Secretary of State in accordance with this subsection to meet the criteria in subsection (a)(i) or (a)(ii) of this section;

(iv) owns or controls a person determined by the Secretary of State in accordance with this subsection to meet the criteria in subsection (a)(i) or (a)(ii) of this section, and had knowledge that the person engaged in the activities referred to in that subsection; or

(v) is owned or controlled by, or under common ownership or control with, a person determined by the Secretary of State in accordance with this subsection to meet the criteria in subsection (a)(i) or (a)(ii) of this section, and knowingly participated in the activities referred to in that subsection.

(b) Subsection (a)(i) of this section shall apply with respect to a person only if:

(i) the President determines under subparagraphs (4)(B) and (C) of subsection 1245(d) of the NDAA that there is a sufficient supply of petroleum and petroleum products from countries other than Iran to permit a significant reduction in the volume of petroleum and petroleum products purchased from Iran by or through foreign financial institutions; and

(ii) an exception under subparagraph 4(D) of subsection 1245(d) of the NDAA from the imposition of sanctions under paragraph (1) of that subsection does not apply with respect to the country with primary jurisdiction over the person.

* * * *

(4) Iran Sanctions Act, as amended by the TRA

In 2012, the Iran Sanctions Act ("ISA"), previously amended by the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 ("CISADA"), was amended further by the Iran Threat Reduction and Syria Human Rights Act of 2012 ("TRA") (Pub. L. 112–158). The State Department published guidance regarding ISA, as amended, on November 13, 2012, excerpted below. 77 Fed. Reg. 67,726 (Nov. 13, 2012).

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[ISA, as amended] requires that the President impose or waive sanctions on persons, and certain affiliated persons, that are determined to have knowingly engaged in specified activities. The President has delegated the responsibility to make these determinations to the Secretary of State. As such, the Secretary of State is required to impose or waive sanctions on persons, including certain affiliated persons, that the Secretary of State determines have: (1) Made certain investments in Iran's energy sector; (2) provided to Iran certain goods, services, or technology for Iran's refined petroleum sector; (3) provided certain refined petroleum products to Iran or provided goods, services, technology, information, or support for refined petroleum imports into Iran; (4) entered into certain types of joint ventures involving the development of petroleum resources outside of Iran; (5) contributed to the maintenance or enhancement of Iran's development of petroleum resources and refined petroleum products; (6) contributed to the maintenance or expansion of Iran's production of petrochemical products; (7) been connected in

certain ways with a vessel used to transport crude oil from Iran (with certain exceptions made for transactions related to the transportation of crude oil from Iran to countries that the Secretary of State has determined qualified for an exception to sanctions under section 1245(d)(4)(D) of the National Defense Authorization Act for Fiscal Year 2012, Public Law 112–81, as amended); or (8) been connected in certain ways with a vessel that conceals the Iranian origin of the crude oil or refined petroleum products.

There is an exception, outlined in section 5(a)(9) of ISA, as amended, to sanctions applicable to categories (7) and (8) above for persons that provide underwriting services or insurance or reinsurance if the Secretary of State determines that the person has exercised due diligence in establishing and enforcing official policies, procedures, and controls to ensure that the person does not provide underwriting services or insurance or reinsurance for the transportation of crude oil or refined petroleum products from Iran in a manner for which sanctions may be imposed under either of those sections. …

Section 5(b) of ISA, as amended, requires the Secretary of State to impose or waive sanctions on persons, and certain affiliated persons, that are determined to have: (1) Exported or transferred goods, services, technology, or other items that would contribute materially to Iran's ability to acquire or develop chemical, biological, or nuclear weapons, or destabilizing numbers and types of advanced conventional weapons, or facilitated such activities; or (2) entered into a joint venture involving Iran and activity relating to the mining, production, or transportation of uranium.

In addition to expanding the types of sanctionable activities under ISA, the TRA added new sanctions that can be imposed under ISA. For activities commenced on or after August 10, 2012, section 6 of ISA, as amended, now permits the Secretary to choose from a list of 12 possible sanctions; section 5(a) requires selection of at least five of these sanctions. In addition, new section 5(a)(8)(B) of ISA, as amended, which relates to concealing the Iranian origin of crude oil and refined petroleum products, authorizes an additional sanction: prohibiting a vessel owned, operated, or controlled by a person, including a controlling beneficial owner, with respect to which the Secretary of State has imposed sanctions, from landing at a port in the United States for a period of not more than two years after the date on which the Secretary of State imposes the sanction. If this sanction is chosen by the Secretary of State, the Department of State would provide the relevant information on sanctioned persons and vessels to the United States Coast Guard's Office of Commercial Vessel Compliance and the Captains of the Ports would inform the vessel that it is prohibited from entering the United States for the prescribed period consistent with the Secretary of State's decision under ISA, as amended.

The other new sanctions, which are applicable to all sanctionable activities outlined in ISA, as amended, and occurring on or after August 10, 2012, are: (1) Prohibiting any U.S. person from investing in or purchasing significant amounts of equity or debt instruments of a sanctioned person; (2) denying a visa to and excluding from the United States any alien determined to be a corporate officer or principal of, or a shareholder with a controlling interest in, a sanctioned person; and (3) imposing on the principal executive officer or officers of any sanctioned person, or on persons performing similar functions and with similar authorities as such officer or officers, any of the sanctions outlined in section 6(a) of ISA, as amended.

Potential ISA sanctions that were already in place before the enactment of TRA include: (1) Denying Export-Import Bank financing assistance in connection with the export of goods or services to the sanctioned person; (2) denying issuance of export licensing or other authority to

export any goods or technology to the sanctioned person; (3) prohibiting U.S. financial institutions from making certain loans or providing certain credits to the sanctioned person; (4) prohibiting a sanctioned financial institution from acting as a primary dealer in U.S. government debt instruments or serving as a repository of U.S. government funds; (5) prohibiting U.S. government agencies from procuring or entering into contracts for the procurement of any goods or services from a sanctioned person; (6) prohibiting any transactions in foreign exchange that are subject to the jurisdiction of the United States and in which the sanctioned person has any interest; (7) prohibiting transfers of credit or payments between financial institutions or by, through, or to any financial institution if the transactions are within the jurisdiction of the United States and involve any interest of the sanctioned person; (8) blocking all property and interests in the property of the sanctioned person that are within the jurisdiction of the United States, and providing that such property and interests in property may not be transferred, paid, or otherwise dealt in; and (9) restricting or prohibiting imports of goods, technology, or services into the United States from the sanctioned person. In addition, section 5(b)(3) of ISA, as amended, provides for additional sanctions relating to the transfer of nuclear technology.

The President initially delegated the authorities associated with these sanctions to the Secretary of State, in consultation with various other agencies, in 1996 …. The most recent Presidential delegation memorandum was issued on October 9, 2012, to address the changes to ISA made by TRA (see 77 FR 62139 (Oct. 12, 2012)), along with Executive Order 13628, issued on October 9, 2012 (see 77 FR 62139 (Oct. 12, 2012)). This most recent Presidential delegation memorandum also delegated to the Secretary of State the President's authority under section 212 of TRA, which draws on ISA authorities, to sanction persons that knowingly provide underwriting services or insurance or reinsurance for the National Iranian Oil Company, the National Iranian Tanker Company, or a successor entity to either company.

There is authority to not impose sanctions under this provision with respect to persons exercising due diligence in establishing and enforcing official policies, procedures, and controls to ensure that such insurance is not provided. There is also authority, under section 312(d) of the TRA, to not impose sanctions with respect to transactions that are solely for the purchase of petroleum or petroleum products and for which sanctions may be imposed solely as a result of the involvement of NIOC or NITC in the transactions, where the country receiving the petroleum or petroleum products has been determined by the Secretary of State to qualify for an exception to sanctions under section 1245(d)(4)(D) of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112–81), as amended.

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(i) Energy-related sanctions

On January 12, 2012, the State Department announced sanctions on three companies under section 5(a) of the ISA, as amended by CISADA, for conducting business with Iran's energy sector. 77 Fed. Reg. 4389 (Jan. 27, 2012). See *Digest 2010* at 646-53 for a discussion of the energy-related sanctions provisions under ISA as amended by CISADA. A State Department media note, available at *www.state.gov/r/pa/prs/ps/2012/01/180552.htm*, explained the

basis for imposing sanctions on Zhuhai Zhenrong Company ("Zhenrong"), Kuo Oil (S) Pte. Ltd. ("Kuo"), and FAL Oil Company Limited ("FAL"):

> Zhenrong is based in China, and is the largest supplier of refined petroleum product to Iran. The United States has determined that Zhenrong brokered the delivery of over $500 million in gasoline to Iran between July 2010 and January 2011, with individual deals entered into worth significantly more than the $1 million threshold under U.S. law and the total value of the transactions well above the $5 million threshold for sanctionable activities within a 12-month period.
>
> Kuo is an energy trading firm based in Singapore. The United States has determined that Kuo provided over $25 million in refined petroleum to Iran between late 2010 and early 2011, worth significantly more than the $1 million threshold under U.S. law and the total value of the transactions well above the $5 million threshold for sanctionable activities within a 12-month period.
>
> FAL is a large independent energy trader based in the UAE. The United States has determined that FAL provided over $70 million in refined petroleum to Iran over multiple shipments in late 2010, with individual deliveries worth significantly more than the $1 million threshold under U.S. law and the total value of the transactions well above the $5 million threshold for sanctionable activities within a 12-month period.
>
> Under the sanctions imposed today, all three companies are barred from receiving U.S. export licenses, U.S. Export Import Bank financing, and loans over $10 million from U.S. financial institutions. These sanctions apply only to the sanctioned companies, and not to their governments or countries.

On July 6, 2012, the State Department issued a press statement welcoming the decision by Italian firm, Edison International S.P.A., to withdraw from a contract it had in Iran's energy sector. The press statement, available at *www.state.gov/r/pa/prs/ps/2012/07/194650.htm*, further explained that Edison had a contract to explore Iran's Dayyer natural gas field that it would not pursue and had also pledged not to engage in any sanctionable activity with Iran in the future. Edison's decision permitted the Secretary of State to apply the Special Rule under ISA, as amended by CISADA, so that Edison would not be subject to an investigation into past Iran-based activities. The press statement summarized the application of ISA's energy sector sanctions thus far:

> Edison is the sixth company to withdraw from its investment in Iran under this provision in the ISA, joining companies Total (France), Royal Dutch Shell (UK/Netherlands), Statoil (Norway), ENI (Italy), INPEX (Japan), all of which continue to abide by their commitments to refrain from sanctionable activity that could benefit Iran. These companies have recognized the risks of doing business in Iran's energy sector given Iran's proliferation activities, support for terror networks around the world, and other destabilizing actions.

On August 10, 2012, the State Department imposed sanctions under section 5(a) of the ISA on an additional entity—the Syrian state-run oil company, Sytrol—for engaging in Iran's energy sector. 77 Fed. Reg. 59,034 (Sep. 25, 2012); see also August 10 press statement, available at *www.state.gov/r/pa/prs/ps/2012/08/196258.htm*, and August 10 special briefing, available at *www.state.gov/r/pa/prs/ps/2012/08/196339.htm*. The notice in the Federal Register listed all 15 persons on whom energy-related sanctions had been imposed pursuant to ISA as of the date of the determination with regard to Sytrol.

Section 205 of the TRA, discussed above, modified the ISA waiver for sanctions relating to the energy sector of Iran for sanctions relating to the development of weapons of mass destruction or other military capabilities such that waivers can be issued if essential to the national security of the United States or if vital to the national security interests of the United States, respectively.

(ii) Financial sanctions

On July 31, 2012, OFAC imposed sanctions on the Bank of Kunlun and Elaf Islamic Bank under CISADA due to their facilitation of significant transactions on behalf of Iranian banks that have previously been sanctioned for their links to Iran's illicit proliferation activities. On that day, President Obama issued a statement on additional sanctions on Iran including the CISADA measures and new Executive Order 13622. Daily Comp. Pres. Docs. 2012 No. 00609 (July 31, 2012). President Obama stated: "By cutting off these financial institutions from the United States, today's action makes it clear that we will expose any financial institution, no matter where they are located, that allows the increasingly desperate Iranian regime to retain access to the international financial system." The Treasury Department also issued a press release, available at *www.treasury.gov/press-center/press-releases/Pages/tg1661.aspx*, which provides further background on the two banks and their actions that triggered action under CISADA.

(iii) Human rights sanctions

Executive Order 13553, "Blocking Property of Certain Persons With Respect to Serious Human Rights Abuses by the Government of Iran and Taking Certain Other Actions authorizes sanctions on Iranian officials determined to be responsible for or complicit in serious human rights abuses involving Iran and carries out Section 105(b) of the CISADA. 76 Fed. Reg. 7695 (Feb. 11, 2011); see also *Digest 2010* at 656-60. On February 16, 2012, OFAC designated one entity pursuant to E.O. 13553, the Iranian Ministry of Intelligence and Security ("MOIS"). 77 Fed. Reg. 10,807 (Feb. 23, 2012). MOIS was also designated pursuant to E.O. 13224 at the same time. 77 Fed. Reg. 10,806 (Feb. 23, 2012).

(5) Executive Order 13628

On October 9, 2012, President Obama signed Executive Order 13628, "Authorizing the Implementation of Certain Sanctions Set Forth in the Iran Threat Reduction and Syria Human Rights Act of 2012 and Additional Sanctions With Respect to Iran." 77 Fed. Reg. 62,139 (Oct. 12, 2012). Section 1 of E.O. 13628 relates to implementation of sanctions under the ISA, as amended by CISADA and TRA. Section 2 of the order authorizes sanctions on those who provide goods, technology, or services that are likely to be used by the government of Iran in committing human rights abuses against the people of Iran. And Section 3 of the order authorizes sanctions on those who engage in censorship or similar activities or provide support for those engaging in such activities in Iran.

On November 8, 2012, OFAC designated four individuals and five entities pursuant to section 3 of E.O. 13628. 77 Fed. Reg. 68,820 (Nov. 16, 2012). The individuals are: Ismail Ahmadi Moghadam, the Head of Iranian Police; Ali Fazli, a commander in the Basij; Jalili Rasool, a professor of computer engineering; and Reza Taghipour, Minister of Communications and Information Technology. The entities are: Amnafzar Gostar-E Sharif; the Center to Investigate Organized Crime; the Ministry of Culture and Islamic Guidance; Peykasa; and Press Supervisory Board. A State Department press statement on November 8, available at *www.state.gov/r/pa/prs/ps/2012/11/200338.htm* and excerpted below, briefly describes the activities of these individuals and entities that formed the basis for their designation under E.O. 13628.

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Today, the U.S. Department of State reported to the Congress the designations of four Iranian individuals and five Iranian entities for having engaged in censorship or other activities that prohibit, limit, or penalize freedom of expression or assembly by citizens of Iran, or that limit access to print or broadcast media, including by jamming international satellite broadcasts into Iran, and related activities. These actions were taken pursuant to Section 403 of the Iran Threat Reduction and Syria Human Rights Act of 2012, signed by the President on August 10, 2012, and Executive Order 13628, which the President signed into effect on October 9, 2012. As a result of this action, U.S. persons are prohibited from engaging in transactions involving the designated individuals or entities, and all designated individuals and members of designated entities are subject to a ban on travel to the United States. This action also blocks, or freezes, the property and interests in property of designated individuals or entities.

These actions underscore the Administration's ongoing commitment to hold Iranian government officials and entities responsible for the abuses carried out against their own citizens. Those designated today include Minister of Communication and Information Technology, Reza Taghipour, who has been found responsible for ordering the jamming of satellite television broadcasts and restricting internet connectivity. Also sanctioned are Iran's Ministry of Culture and Islamic Guidance and its Press Supervisory Board, which have limited freedom of expression through their censorship and closure of numerous newspapers and detention of journalists. In addition, we are designating key individuals and entities responsible for assisting the regime in its crackdown on and censorship of the Iranian people.

Such abuses demonstrate the Iranian Government's ongoing campaign to censor its own citizens, curtail their freedoms, and to prevent the free flow of information both in to and out of Iran. Countless activists, journalists, lawyers, students, and artists have been detained, censured, tortured, or forcibly prevented from exercising their human rights. With the measures we are taking today, we draw the world's attention to the scope of the regime's insidious actions, which oppress its own people and violate Iran's own laws and international obligations. We will continue to stand with the Iranian people in their quest to protect their dignity and freedoms and prevent the Iranian Government from creating an "electronic curtain" to cut Iranian citizens off from the rest of the world.

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(6) Sanctions under Executive Order 13382

During 2012, the United States imposed targeted financial sanctions on Iranian entities, Iranian individuals, and other entities linked to previously designated Iranian entities under Executive Order 13382, "Blocking Property of Weapons of Mass Destruction Proliferators and their Supporters." 70 Fed. Reg. 38,567 (July 1, 2005); see also *Digest 2005* at 1125–31. The United States relies in part on the authorities in Executive Order 13382 to implement its obligations under the Security Council's resolutions concerning Iran.

On January 23, 2012, OFAC designated two entities, Bank Tejarat and Bank Torgovoy Kapital ZAO ("Trade Capital Bank"), under E.O. 13382. 77 Fed. Reg. 4399 (Jan. 27, 2012). Bank Tejarat is the third largest bank in Iran and Trade Capital Bank is registered in Belarus. Both banks were designated for providing financial services to Iranian banks or entities subject to sanctions for their involvement in Iran's WMD proliferation activities. See Treasury Department press release, available at *www.treasury.gov/press-center/press-releases/Pages/tg1397.aspx*.

On March 28, 2012, OFAC designated four entities (Deep Offshore Technology Company PJS, Iran Marine Industrial Company, Malship Shipping Agency Ltd., and Modality Limited) and two individuals (Ali Ezati and Seyed Alaeddin Sadat Rasool) under E.O. 13382. 77 Fed. Reg. 27,280 (May 9, 2012). As explained in a Treasury Department press release, available at *www.treasury.gov/press-center/press-releases/Pages/tg1509.aspx*, the individuals and entities were designated for their relationships to either the Islamic Republic of Iran Shipping Line ("IRISL") or the Iranian Revolutionary Guard Corps ("IRGC"), both of which had previously been designated under E.O. 13382.

On July 12, 2012, the State Department announced new designations under E.O. 13382 by OFAC and the State Department of a total of 11 entities and four individuals. See State Department media note, available at *www.state.gov/r/pa/prs/ps/2012/07/194923.htm*. As explained in a State Department fact sheet, available at *www.state.gov/r/pa/prs/ps/2012/07/194924.htm*, those designated are affiliated with previously designated entities, including the Ministry of Defense for Armed Forces Logistics ("MODAFL"), MODAFL subsidiary, Aerospace Industries Organization ("AIO"), IRISL, and IRGC. The State Department designations included two Iranian entities (Center for

Innovation and Technology Cooperation or CITC and Pentane Chemistry Industries or PCI, with their aliases) and one individual (Hossein Tanideh). 77 Fed. Reg. 43,131 (July 23, 2012).The entities and individuals designated by OFAC are: Electronic Components Industries Co. (ECI); Information Systems Iran (ISIRAN); Advanced Information and Communication Technology Center; Hamid Reza Rabiee; Digital Media Lab (DML); Value-Added Services Laboratory (VASL); Ministry of Defense Logistics Export (MODLEX); Daniel Frosch; International General Resourcing FZE; Malek Ashtar University; Good Luck Shipping; Ali Fadavi. See Treasury Department fact sheet, available at *www.treasury.gov/press-center/press-releases/Documents/Fact%20Sheet%20-%20Increasing%20Sanctions%20Against%20Iran.pdf*. The State Department also announced at the same time that Treasury had made numerous designations pursuant to the new E.O. 13599, as discussed in section 2.b.(1), *supra*.

On September 14, 2012, the State Department designated Amr Armanazi pursuant to E.O. 13382. 78 Fed. Reg. 13,140 (Feb. 26, 2013). On September 19, 2012, OFAC designated 70 aircraft in which Iran Air, a previously-designated entity, has an interest. 78 Fed. Reg. 9992 (Feb. 12, 2013). On November 8, 2012, OFAC designated four additional Iranian entities under E.O. 13382: Baqiyattallah University of Medical Sciences; National Iranian Oil Company ("NIOC"); Imam Hossein University; and Tehran Gostaresh Company. 78 Fed. Reg. 9996 (Feb. 12, 2013)

On December 13, 2012, the State Department and Treasury Department imposed sanctions on a total of seven Iranian companies and five individuals pursuant to E.O. 13382. 78 Fed. Reg. 13,142 (Feb. 26, 2013). A State Department media note, available at *www.state.gov/r/pa/prs/ps/2012/12/202023.htm*, identified the designated entities and individuals:

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The individuals and entities being designated by the Department of the Treasury pursuant to E.O. 13382 today are:

Fereidoun Abbasi-Davani

Iranian President Mahmoud Ahmadinejad issued an order appointing Fereidoun Abassi-Davani ("Abbasi-Davani") as the Chief of AEOI in February 2011. Abbassi-Davani is being designated for acting or purporting to act for or on behalf of, directly or indirectly, the AEOI.

Abbasi-Davani has been involved in the development and acceleration of activities related to uranium mining and the production of yellowcake, the material needed as feed for the process of uranium conversion, and ultimately uranium enrichment.

Prior to his current appointment, Abbasi-Davani officially worked as a professor at Shahid Beheshti University. He holds a PhD in nuclear physics and is a laser specialist. Abbasi-Davani is an expert in nuclear isotope separation.

Abbasi-Davani was identified in Annex I to UNSCR 1747, adopted on March 24, 2007, which included individuals and entities involved in Iran's nuclear or ballistic missile activities. Abbasi-Davani was described in the Annex to UNSCR 1747 as a Senior Ministry of Defense and

Armed Forces Logistics (MODAFL) scientist with links to the Institute of Applied Physics. MODAFL was designated by the Treasury Department's Office of Foreign Assets Control (OFAC) under E.O. 13382 on October 25, 2007.

Morteza Ahmadali Behzad

Morteza Ahmadali Behzad ("Behzad") is being designated for providing or attempting to provide financial, material, technological or other support for, or goods or services in support of AEOI. Behzad is the Managing Director and Deputy Chairman of the Board of Directors of the Iran Enrichment Company (IEC).

As a scientist with a specialization in the manufacture and testing of centrifuges, Behzad has held various positions at AEOI's subordinate and front companies. Behzad is former manager of TESA.

Additionally, Behzad was identified in Annex I to UNCR 1803, adopted on March 3, 2008, identifying individuals and entities involved in Iran's nuclear or ballistic missile activities. Behzad is listed in Annex I in UNCR1803 for his involvement in making centrifuge components. On April 23, 2007, the European Union designated Behzad pursuant to the European Union Common Position 2007/140/CFSP concerning actions on Iran. Behzad was noted for his role in making complex and sensitive centrifuge components.

Seyed Jaber Safdari

Seyed Jaber Safdari ("Safdari") is being designated for acting or purporting to act for or on behalf of, directly or indirectly, the AEOI. At AEOI, Safdari is head of the Department of Advanced Technologies and the Deputy for Advanced Technologies at Novin Energy Company. Novin Energy Company was designated by the Treasury Department under E.O. 13382 on January 4, 2006 for being owned or controlled by, or acting or purporting to act for or on behalf of, AEOI and is an entity that has transferred millions of dollars on behalf of AEOI entities associated with Iran's nuclear program.

Previously at AEOI, Safdari was the deputy of research at the Nuclear Science and Technology Research Institute, head of the uranium enrichment facility at Natanz and managing director of the Kalaye Electric Company. The Kalaye Electric Company (KEC) was designated by OFAC under E.O. 13382 on February 16, 2007. KEC has been linked to Iran's centrifuge research and development efforts.

Safdari was identified in Annex II to UNSCR 1803 and Annex I to UNSCR 1747, adopted on March 3, 2008, and March 24, 2007, respectively, identifying individuals and entities involved in Iran's nuclear or ballistic missile activities. The resolutions identified Safdari as the Manager of the Natanz Enrichment Facilities. The Natanz Enrichment Facilities are overseen by AEOI.

Aria Nikan Marine Industry

Aria Nikan Marine Industry ("Aria Nikan") has provided, or attempted to provide, financial, material, technological, or other support for, or goods or services in support of, TESA.

Aria Nikan has undertaken procurement for TESA. Aria Nikan has supplied TESA with magnetic tape which can be used in P1 centrifuges. This magnetic tape has been a choke point item for the Iranian nuclear program.

Aria Nikan was a specialist provider and consultancy in the engineering and purchasing of alloyed steels, super alloys and specialist metals. Aria Nikan sources goods for the Iranian nuclear program.

Aria Nikan's customers include Khatam-al-Anbiya, an Islamic Republic Guards Corps ("IRGC") affiliated construction company, and Malek Ashtar University (MUT), a Ministry of

Defense affiliated academic and research institution. MUT was designated by OFAC under E.O. 13382 on July 12, 2012 because it is owned and controlled by, or purporting to act for or on behalf of, MODAFL. Khatam-al-Anbiya was designated by the Treasury Department pursuant to E.O. 13382 on October 25, 2007 for its affiliation to the IRGC.

Iran Pooya

Iran Pooya is being designated for having provided, attempted to provide, financial, material, technological, or other support for, or goods or services in support of TESA. Iran Pooya is an Iranian government-owned company that operates the biggest extruder of aluminum in Iran and supplied material for use in the production of casings for the IR-1 and IR-2 centrifuges. Iran Pooya was identified in the Annex to European Union Implementing Regulation (EU) No 1245/2011 of December 1, 2011, because it is a major manufacturer of aluminum cylinders for centrifuges whose customers include AEOI and TESA.

Pouya Control (a.k.a. Tejerat Gostar Nikan Iranian Company)

Pouya Control is being designated for providing, or attempting to provide, goods or services in the support of activities or transactions materially contributing to, or posing a risk of materially contributing to, Iran's uranium enrichment nuclear program.

Pouya Control is known to design and manufacture inverters. Since the Iranian uranium enrichment program requires large numbers of inverters to regulate power supply to centrifuges, in order to meet demand, Iran has produced its own indigenous version but is also interested in foreign inverters to fulfill its nuclear program needs.

Tejerat Gostar Nikan Iranian Company has previously been provided as a consignee name for Pouya Control.

The Individuals and Entities being Designated by the Department of State Pursuant to E.O. 13382 are:

Amir Hossein Rahimyar

Amir Hossein Rahimyar is associated with the Nuclear Reactors Fuel Company (a.k.a. SUREH), and in late 2009 was involved in the procurement of equipment for Iran's nuclear program. The State Department designated SUREH on November 21, 2011, pursuant to E.O. 13382 because it is responsible for the production of fuel for Iran's nuclear reactors – including the 40-megawatt heavy water research reactor (IR-40) – and has sought commodities for the reactors fuel assemblies.

Mohammad Reza Rezvanianzadeh

Mohammad Reza Rezvanianzadeh as of 2010 was the managing director of SUREH and oversaw Iran's uranium conversion and fuel fabrication activities at Esfahan. Rezvanianzadeh worked extensively with various companies supporting the facilities at Esfahan such as the Uranium Conversion Facility (UCF), the Fuel Manufacturing Plant (FMP), and the Zirconium Production Plant (ZPP).

Faratech

Faratech has likely been involved in efforts to advance water purification at Iran's IR-40 heavy water research reactor, in collaboration with Iran's Modern Industries Technique Company (MITEC). MITEC has been linked to the Iranian heavy water program since at least 2001 and has played a key role in the production of the IR-40 project in Arak, Iran. MITEC was designated pursuant to E.O. 13382 on November 21, 2011, and in UNSCR 1929 on June 9, 2010.

Neda Industrial Group

Neda Industrial Group (Neda) is an Iranian entity with strong links to the Iranian nuclear program, including the manufacture and procurement of proscribed equipment and material for

use at Iran's Natanz Uranium Enrichment Facility. Since at least 2011, Neda has attempted to procure from foreign entities sensitive centrifuge-related components that have direct application in Iran's nuclear program.

Tarh O Palayesh

Tarh O Palayesh is a producer of design documents for various elements of Iran's IR-40 heavy water research reactor. U.S.-designated Pentane Chemistry Industries was working on distillation columns for the IR-40 in Arak, utilizing data sheets and complete architectural and engineering information associated with Tarh O Palayesh.

Towlid Abzar Boreshi Iran

Towlid Abzar Boreshi Iran (TABA) is an Iranian entity with strong links to the Iranian nuclear program, including the manufacture and procurement of proscribed equipment and material for TESA and KEC. Since at least 2011, TABA has manufactured or procured for TESA and KEC a significant number of components associated with Iran's uranium enrichment operations.

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On December 20, 2012, OFAC designated four Iranian entities (Chemical Industries & Development of Materials Group, Marine Industries Organization, Sad Import Export Company, and Doostan International Company) and one Iranian individual (Mostafa Esbati) under E.O. 13382. 78 Fed. Reg. 9995 (Feb. 12, 2013).

(7) Executive Order 13224 designations

OFAC designated the Iranian Ministry of Intelligence and Security ("MOIS") pursuant to E.O. 13224 "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism," at the same time as it was designated pursuant to E.O. 13572 (relating to human rights abuses in Syria) and E.O. 13553 (relating to human rights abuses in Iran). 77 Fed. Reg. 14,597 (Mar. 12, 2012).

For additional discussion of Executive Order 13224, see A.4.b. below.

3. Nonproliferation

a. Democratic People's Republic of Korea

(1) Committee established pursuant to Resolution 1718

The UN Security Council has adopted two resolutions under Article 41 of Chapter VII of the UN Charter imposing sanctions targeting those providing support to North Korea's nuclear, WMD-related, and ballistic missile programs, as well as those assisting designated persons and entities in sanctions evasion and violations: Resolution 1874 (2009) and Resolution

1718 (2006).** See *Digest 2009* and *Digest 2006* for discussions of the Security Council's North Korea resolutions. In Resolution 1874 (2009), the Council established, for an initial period of one year, a Panel of Experts to assist the Committee in carrying out its mandate and undertake the tasks, as specified. The Panel's mandate has been renewed yearly, most recently in Resolution 2050 (2012).

After North Korea's April 13, 2012 missile launch in violation of UN Security Council resolutions, the Security Council responded on April 16, 2012 with the adoption of a Presidential Statement (PRST) to condemn North Korea's recent launch using ballistic missile technology. U.N. Doc. S/PRST/2012/13. In that PRST, the Security Council directed the DPRK Sanctions Committee ("1718 Committee") to impose new sanctions and tighten enforcement of existing sanctions on North Korea. On May 2, the Sanctions Committee announced a package of new measures to implement this PRST. The Sanctions Committee decision had three principal components: identifying new North Korean companies for sanctions, updating information on the Committee's lists of prohibited nuclear and ballistic missile technology and updating the Committee's annual work plan.

The State Department issued a fact sheet on May 2, 2012 on the new 1718 Committee sanctions, available at *http://usun.state.gov/briefing/statements/189172.htm*, and excerpted below.

* * * *

A) Designations

The Sanctions Committee has designated three North Korean companies to be subject to a freeze of funds, other financial assets and economic resources. These companies all play a critical role in facilitating North Korea's prohibited activities. As a result of these designations, all UN Member States are obligated to freeze the assets of these companies and prohibit all financial transactions with them.

The three entities are:

1. Amroggang Development Banking Corporation: Amroggang is a company managed by the Tanchon Commercial Bank. Tanchon plays a role in financing North Korea's ballistic missiles sales and has been involved in ballistic missile transactions with Iran. Tanchon is the main North Korean financial entity for sales of conventional arms, ballistic missiles and goods related to the assembly and manufacture of such weapons. The Sanctions Committee designated Tanchon for sanctions in April 2009 after North Korea's missile launch that year.

2. Green Pine Associated Corporation: Green Pine is responsible for approximately half of the arms and related materiel exported by North Korea. Green Pine specializes in the production of maritime military craft and armaments, such as submarines, military boats and missiles systems, and has exported torpedoes and technical assistance to Iranian defense-related firms. Green Pine has taken over many of the activities of the Korea Mining and Development Trading Corporation (KOMID), North Korea's primary arms dealer and main exporter of goods

** Editor's note: The Security Council adopted two new resolutions on the DPRK in the first half of 2013, which will be discussed in *Digest 2013*.

and equipment related to ballistic missiles and conventional weapons. The Sanctions Committee designated KOMID for sanctions in April 2009 after North Korea's last missile launch.

3. The Korea Heungjin Trading Company: The Korea Heungjin Trading Company is used by KOMID for trading purposes. Heungjin has been associated with KOMID, and, more specifically, KOMID's procurement office. Heungjin has been used to procure an advanced digital controller with applications in missile design.

B) Update information contained on the Committee's list

The Committee updated two major existing lists of technical items that are prohibited for transfer to and from North Korea. These updates will make it harder for North Korea to acquire the technology it needs to proceed with its prohibited ballistic missile and nuclear programs.

First, the Committee updated a control list of sensitive ballistic missile technology (S/2012/235) based on the Missile Technology Control Regime, a multilateral association of states that harmonize their export control systems. This new control list will add additional items and update technical specifications in order to capture the latest items, materials, equipment, goods and technology that could be used to advance North Korea's ballistic missile program.

Second, the Committee updated a control list of sensitive nuclear technology (INFCIRC/254/Rev.10/Part1) based on the so-called "trigger list" of the Nuclear Suppliers Group, a multilateral group of states that coordinate their nuclear-related export controls. This new control list will add additional items and update technical specifications for technology that North Korea could use to advance its nuclear program.

The Committee will update these and other control lists on an annual basis in order to capture the latest advances in sensitive nuclear and ballistic missile technology.

C) Work Plan

The Committee has updated its annual work plan so as to intensify its efforts to monitor and improve sanctions implementation. This work plan includes specific action items to investigate alleged sanctions violations, update information on the Committee's list of designated entities, individuals and items, promote better understanding of Member State obligations under the sanctions and assist states to implement and enforce these measures. For example, the Committee will take additional steps to help states enhance and report on the measures they are taking to enforce the sanctions; to engage with relevant UN organizations and agencies to ensure that their activities are consistent with the sanctions; and to review and facilitate the release of reports from the UN's DPRK Panel of Experts (POE), a UN sanctions monitoring body.

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Ambassador Rice issued a statement on May 2, 2012 welcoming the response by the Security Council, available in full at *http://usun.state.gov/briefing/statements/189143.htm*, which included the following:

> … The Committee's package of new measures constitutes a serious and credible response to North Korea's provocation. We particularly welcome the Committee's decisions to update lists of sensitive nuclear and ballistic missile technology prohibited for transfer to or from North Korea, to impose an asset freeze on three critical North Korean entities responsible for North Korea's illicit activities, and to update the Committee's annual work plan. These measures will increase North Korea's isolation

and make it harder for Pyongyang to move forward with its illicit programs. The Committee's strong and united response shows that the Security Council is determined that there be consequences for this provocation and any future North Korean violation.

b. Iran

See A.2. *supra*.

c. Executive Order 13382

On September 19, 2012, OFAC designated two entities pursuant to E.O. 13382: Army Supply Bureau and Belvneshpromservice. 78 Fed. Reg. 9995 (Feb. 12, 2013).

OFAC also removed some entities and vessels from its list of designations under E.O. 13382 in 2012. On July 12, 2012, OFAC removed Oasis Freight Agencies, Great Ocean Shipping Services, Pearl Ship Management L.L.C., and seven vessels from its list of specially designated nationals ("SDNs") under E.O. 13382. 77 Fed. Reg. 47,164 (Aug. 7, 2012)

All other E.O. 13382 designations in 2012 relate to Iran or Syria and are described in Sections A.1.b.(1) and A.2.b.(6) above.

d. Resolution 1540 Sanctions

On May 10, 2012, Ambassador DiCarlo delivered remarks at a UN Security Council debate on the Security Council's counter-terrorism committees. Her remarks also touched on implementation of Resolution 1540 and the work of the 1540 committee to implement sanctions relating to proliferation. Her remarks relating to the counterterrorism committees appear in section A.4.A., *infra*. Her comments on Resolution 1540 appear below. The full text of Ambassador DiCarlo's remarks is available at *http://usun.state.gov/briefing/statements/189640.htm*.

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Mr. President, this year the United States has promoted the implementation of resolution 1540 through our presidency of the G8 in both the Global Partnership and the Nonproliferation Directors Group. The G8 continues to work closely with the 1540 Committee to find meaningful ways to respond to requests for assistance from Member States, including by engaging with international governmental organizations which are able to provide programs and training.

In September 2011, the United States hosted the first country visit by the Committee and its Group of Experts to review our whole-of-government approach to preventing the proliferation of chemical, biological, and nuclear weapons. We are pleased to see that other states have similarly invited the Committee to conduct such visits and share their best practices for implementing resolution 1540 and hope that this trend continues.

To ensure continued progress, the United States strongly encourages other Member States and regional organizations to contribute to the UNODA Trust Fund for Global and Regional Disarmament. Implementation of resolution 1540 does more than address proliferation issues. It also benefits Member States by focusing on broader security concerns such as border controls, trafficking in drugs and weapons, maritime security, and public health—all of which contributes to the maintenance of international peace and security.

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4. Terrorism

a. Security Council counter-terrorism committees

In 2011, the Security Council separated the committee that had designated persons for sanctions based on their affiliation with al-Qaida and the Taliban into two separate committees: the 1267/1989 (al-Qaida) committee and the 1988 (Afghanistan) committee. See *Digest 2011* at 502-3. On May 10, 2012, Ambassador DiCarlo delivered remarks at a UN Security Council debate on the Security Council's counter-terrorism committees. Her remarks, excerpted below, are available at *http://usun.state.gov/briefing/statements/189640.htm*.

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* * * *

Thank you, Mr. President. The United States would like to commend the work of the respective Committee Chairs for their exceptional efforts and strong leadership. As we look back on the past decade, the Council's sustained commitment to promote the implementation of resolutions 1267, 1373, and 1540 has helped cement a global consensus against terrorism in all its forms. As a result, we now have stronger legal and policy tools to fight terrorism at both the national and regional levels.

Mr. President, even though Osama bin-Laden no longer directs the al-Qaeda organization, we remain gravely concerned that al-Qaeda and its affiliates continue to carry out unconscionable acts of terrorism in diverse regions of the world. The 1267 Committee must continue to be vigilant and adapt to this evolving threat. We particularly encourage the Committee, with the support of the 1267 Monitoring Team, to rededicate itself to ensuring full implementation of the 1267 asset freeze, arms embargo, and travel ban. We envision swift and credible responses to reported non-compliance, as well as providing training and capacity-building support. We also welcome recent major improvements to the fairness and transparency of the Committee's work and once again commend the Ombudsperson for her hard work and diligence.

Mr. President, we continue to strongly support the work of the CTC and its Counter-Terrorism Executive Directorate to monitor and promote the implementation of resolutions 1373 and 1624. We are particularly pleased that CTED's work has evolved in recent years to become more "hands-on" and practical in its focus. In a spirit of innovation and collaboration, CTED

should continue to strengthen its work at the bilateral, sub-regional, and regional levels to facilitate capacity-building assistance.

We believe the new UN Centre for Counter-Terrorism is already helping focus the UN system on improving coordination on CT issues. We also think that the appointment of a UN Counter-Terrorism coordinator, as proposed by the Secretary-General, can help foster a more strategic and coordinated UN approach to these issues. In this environment, we hope there will be further opportunities for the CTC and CTED to address some of the critical civilian CT challenges of today. For example, more work remains to be done in countering the increase in kidnapping for ransom as a means of financing terrorism and other criminal activity, which poses a threat to all nations and their citizens. As a first step to eradicating this practice, we need to help ensure that terrorist hostage takers cannot enjoy the benefits of ransoms.

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Information about the status of cases considered by the ombudperson is available at *www.un.org/en/sc/ombudsperson/status.shtml*.

During 2012, both the 1267/1989 Committee and the 1988 Committee updated their lists by adding new names of individuals and entities subject to the sanctions regimes and removing others pursuant to the procedures and criteria established by the Security Council. The United States continued to express its strong support for both the Al-Qaida and Afghanistan sanctions regimes. For example, in response to one addition to the Taliban (1988) list on November 5, 2012, Ambassador Rice stated:

> The United States welcomes the November 5 decision by the UN Security Council's Afghanistan Sanctions (1988) Committee to impose powerful worldwide sanctions on the Haqqani Network and its chief of suicide operations, Qari Zakir. Zakir is an operational commander who has been involved in many of the Haqqani Network's highest-profile suicide attacks and has trained individuals to use small arms, heavy weapons and improvised explosive devices (IEDs). Personnel selected from Zakir's training program attacked coalition force bases Salerno and Chapman in 2010, the Intercontinental Hotel in Kabul in June 2011, which killed 11 civilians and two Afghan policemen, and the U.S. Embassy in Kabul in September 2011, which killed 16 Afghans, including at least six children.
>
> These sanctions oblige all UN member states to implement an asset freeze, travel ban, and arms embargo against Zakir and the Haqqani Network. In September 2012, the United States designated the Haqqani Network as a Foreign Terrorist Organization and as a Specially Designated Global Terrorist entity. Today's action by the Security Council expands upon these sanctions and confirms the international community's resolve to end the Haqqani Network's ability to execute violent attacks in Afghanistan. It also reflects the Security Council's commitment to use and enforce sanctions against those who threaten peace in Afghanistan, in conjunction with a strong commitment to support Afghan-led peace and reconciliation.

Remarks available at *http://usun.state.gov/briefing/statements/200178.htm*.

On December 17, 2012, the Security Council adopted resolution 2083 as a follow-on to resolutions 1267 and 1989 and other resolutions relating to al-Qaida. U.N. Doc. S/RES/2083. Resolution 2083 urges all states to take the measures directed at al-Qaida imposed by previous resolutions, encourages submission of additional names for the al-Qaida sanctions list, and extends the mandates of the ombudsperson and monitoring team, among other things.

At the same time, the Security Council adopted resolution 2082 as a follow-on to resolution 1988 creating the Afghanistan sanctions regime and other resolutions relating to the Taliban. U.N. Doc. S/RES/2082. Resolution 2082 similarly urges compliance with the previously imposed sanctions targeting those associated with the Taliban in constituting a threat to the peace, stability and security of Afghanistan and eases the process for the Government of Afghanistan to request exemptions from the application of the UN travel ban for persons participating in peace and reconciliation efforts.

b. U.S. targeted financial sanctions implementing Security Council resolutions on terrorism

(1) Overview

The United States implements its counterterrorism obligations under UN Security Council Resolution 1267 (1999), subsequent UN Security Council resolutions concerning al-Qaida/Afghanistan sanctions including Resolution 1988 (2011) and 1989 (2011), and Resolution 1373 (2001) through Executive Order 13224 of September 24, 2001. Executive Order 13224 imposes financial sanctions on persons who have been designated in the annex to the executive order; persons designated by the Secretary of State for having committed or for posing a significant risk of committing acts of terrorism; and persons designated by the Secretary of the Treasury for working for or on behalf of, providing support to, or having other links to, persons designated under the executive order. See 66 Fed. Reg. 49,079 (Sept. 25, 2001); see also *Digest 2001* at 881–93 and *Digest 2007* at 155–58.

The United States had previously made some Taliban-related sanctions designations pursuant to a separate executive order (E.O. 13129) and accompanying OFAC-administered sanctions regulations. For a discussion of E.O. 13129, see *Digest 1991-99* at 1964-67. However, Executive Order 13268, issued by President George W. Bush in 2002, terminated E.O. 13129 and amended E.O. 13224 to include references to those sanctioned under E.O. 13129. See *Digest 2002* at 882-84. In 2011, OFAC revoked the Taliban Sanctions Regulations, leaving Taliban sanctions to be covered by its Global Terrorism Sanctions Regulations and E.O. 13224. 76 Fed. Reg. 31,470 (June 1, 2011).

(2) Department of State

In 2012, the Department of State announced the Secretary of State's designation of five entities and fourteen individuals (including their known aliases) pursuant to E.O. 13224. On

January 5, 2012, the Department announced the designation of the al-Qaida Kurdish Battalions ("AQKB"), an entity with sworn allegiances to other terrorist organizations including al-Qaida. 77 Fed. Reg. 2118 (Jan. 13, 2012); see also media note available at www.state.gov/r/pa/prs/ps/2012/01/180166.htm. On January 20, 2012, the Department designated three individuals, Yassin Chouka, Monir Chouka, and Mevlut Kar, who had all been listed by the UN 1267/1989 Committee for their links to al-Qaida and who work for previously designated terrorist organizations—the Chouka brothers for the Islamic Movement of Uzbekistan ("IMU") and Kar for the Islamic Jihad Union ("IJU"). 77 Fed. Reg. 5291 (Feb. 2, 2012); see also media note available at www.state.gov/r/pa/prs/ps/2012/01/182550.htm.

On February 23, 2012, the Department designated Jemmah Anshorut Tauhid ("JAT"), an entity responsible for multiple coordinated attacks against civilians, police, and military personnel in Indonesia whose leaders were designated by OFAC in the same day. 77 Fed. Reg. 14,855 (Mar. 13, 2012) ; see also media note, available at www.state.gov/r/pa/prs/ps/2012/02/184509.htm.

On May 3, 2012, the Department designated Abdallah Azzam Brigades, a militant organization based in both Lebanon and the Arabian Peninsula whose leader, Saleh al-Qar'awi, was designated previously. 77 Fed. Reg. 31,909 (May 30, 2012); see also media note available at www.state.gov/r/pa/prs/ps/2012/05/190810.htm. On June 14, 2012, the Department designated one individual, Aitzol Iriondo Yarza, a leader of ETA, a previously designated terrorist entity. 77 Fed. Reg. 38,126 (June 26, 2012); see also media note available at www.state.gov/r/pa/prs/ps/2012/06/193579.htm. On June 18, 2012, the Department designated three individuals, Abubakar Adam Kambar, Khalid al-Barnawi, and Abubakar Shekau, who have ties to the Nigeria-based militant group Jama'atu Ahlis Sunna Lidda'awati Wal-Jihad, commonly referred to as Boko Haram. 77 Fed. Reg. 38,126 & 38,127 (June 26, 2012); see also media note available at www.state.gov/r/pa/prs/ps/2012/06/193574.htm.

On July 18, 2012, the Department designated Ahmed Abdulrahman Sihab Ahmed Sihab, an individual charged with planning terrorist attacks as a member of al-Qaida. 77 Fed. Reg. 42,546 (July 19, 2012); see also media note available at www.state.gov/r/pa/prs/ps/2012/07/195140.htm. On July 18, 2012, the Department designated another individual, Azzam Abdullah Zureik Al-Maulid Al-Subhi (better known as Mansur al-Harbi), a trainer and senior member of al-Qaida . 77 Fed. Reg. 47,691 (Aug. 9, 2012); see also media note available at www.state.gov/r/pa/prs/ps/2012/08/196105.htm.

On September 7, 2012, the Department designated the Haqqani Network. 77 Fed. Reg. 58,205 (Sep. 19, 2012). On September 20, 2012, the Department designated Qari Zakir, also known as Abdul Rauf, an individual who acts as chief of suicide operations for the Haqqani Network. 77 Fed. Reg. 68, 882 (Nov. 16, 2012). On September 17, the Department amended the designation of al-Qa'ida in the Arabian Peninsula to include the new alias, Ansar al-Shari'a ("AAS"). 77 Fed. Reg. 61,046 (Oct. 5, 2012); see also media note available at www.state.gov/r/pa/prs/ps/2012/10/198659.htm (describing the activities of AAS).

On November 20, 2012, the Department amended the designation of al-Qaida in Iraq ("AQI") to include additional aliases, including the al-Nusrah Front, an entity established in

2011 at the direction of the leader of AQI which has claimed responsibility for hundreds of attacks in Syria. 77 Fed. Reg. 73,732 (Dec. 11, 2012); see also December 11, 2012 special briefing with senior administration officials, available at *www.state.gov/r/pa/prs/ps/2012/12/201797.htm*.

On December 4, 2012, the Department designated two more individuals and the entity for which they act as leaders: Hamad el Khairy (77 Fed. Reg. 74,265 (Dec. 13, 2012)); Ahmed el Tilemsi (77 Fed. Reg. 74,266 (Dec. 13, 2012)); and the Movement for Unity and Jihad in West Africa ("MUJWA") (77 Fed. Reg. 74,265 (Dec. 13, 2012)); see also media note, available at *www.state.gov/r/pa/prs/ps/2012/12/201660.htm* (providing background on MUJWA, which is an offshoot from al-Qa'ida in the Islamic Maghreb (AQIM) responsible for multiple terrorist attacks and kidnappings, and the roles of founding leaders, Khairy and Tilemsi).

On December 18, 2012, the Department designated two more individuals: Mohamed Makawi Ibrahim Mohamed and Abdelbasit Alhaj Alhassan Haj Hamad. 78 Fed. Reg. 1299 (Jan. 8, 2013).

Many of these U.S. designated entities and individuals are also listed by the Security Council's 1267/1989 Committee. Yassin Chouka, Monir Chouka, Mevlut Kar, and MUJWA are listed by the United Nations 1267/1989 al-Qa'ida Sanctions Committee. See *www.un.org/sc/committees/1267/index.shtml*. The new 1988 Committee also lists many of the same individuals and entities that have been designated by the United States, including Qari Zakir, the Haqqani Network. See *www.un.org/sc/committees/1988/*.

The State Department also delisted two entities in 2012 that had been designated under E.O. 13224. On September 6, 2012, the State Department announced that it had revoked the designation of the Communist Party of Nepal (Maoist) ("CPN(M)") and its aliases under Executive Order 13224, and as a "terrorist organization" from the Terrorist Exclusion List (TEL) under the Immigration and Nationality Act (INA). 77 Fed. Reg. 54,944 (Sep. 6, 2012); see also media note available at *www.state.gov/r/pa/prs/ps/2012/09/197411.htm*. On September 28, 2012, the State Department announced that Secretary Clinton had made the determination to revoke the designation of the Mujahedin-e Khalq ("MEK") and its aliases as a Foreign Terrorist Organization ("FTO") under the Immigration and Nationality Act and to delist the MEK as a Specially Designated Global Terrorist under E.O. 13224. 77 Fed. Reg. 60,741 (Oct. 4, 2012). See Chapter 3.B.1.c. for further discussion of the delisting of the MEK. The Department of State media note announcing the delisting is available at *www.state.gov/r/pa/prs/ps/2012/09/198443.htm* and a special briefing on the subject is available at *www.state.gov/r/pa/prs/ps/2012/09/198470.htm*.

(3) OFAC

(i) OFAC designations

OFAC designated numerous individuals (including their known aliases) and entities pursuant to Executive Order 13224 during 2012. The designated individuals and entities typically are owned or controlled by, act for or on behalf of, or provide support for or services to

individuals or entities the United States has designated as terrorist organizations pursuant to the order. See 77 Fed. Reg. 12,370 (Feb. 29, 2012) (three individuals—Mochammad Achwan, Abdul Ba'Asyir, and Son Bin Muhadjir— and one entity, Jemmah Anshorut Tauhid); 77 Fed. Reg. 10,806 (Feb. 23, 2012) (one entity, Iranian Ministry of Intelligence and Security or MOIS); 77 Fed. Reg. 14,597 (Mar. 12, 2012) (one individual, Abdul Samad Achekzai); 77 Fed. Reg. 20,124 (Apr. 3, 2012) (four individuals—Hosein Aghajani, Sayyid Ali Akbar Tabatabaei, Esmail Ghani, and Ali Abbas Usman Jega—and two entities—Yas Air and Benineh Trading); 77 Fed. Reg. 31,067 (May 24, 2012) (two individuals, Abdul Baqi Bari and Bakht Gul); 77 Fed. Reg. 40,702 (July 10, 2012) (one individual, Ali Mohamad Saleh); 77 Fed. Reg. 41,477 (July 13, 2012) (two individuals—Haji Abdul Sattar Barakzai and Haji Khairullah Barakzai—and two entities—Roshan Money Exchange and Haji Khairullah Haji Sattar Money Exchange); 77 Fed. Reg. 55,901 (Sep. 11, 2012) (eight individuals, Amir Hamza, Sajjid Mir, Abdullah Mujahid, Abdullah Muntazir, Talha Saeed, Qari Muhammad Yaqoob Sheikh, Hafiz Khalid Walid, and Ahmed Yaqub); 77 Fed. Reg. 62,618 (Oct. 15, 2012) (two entities, Waqfiya Ri'aya al-Usra al-Filistinya Wa al-Lubnanya, and Al-Quds International Foundation); 77 Fed. Reg. 64,847 (Oct. 23, 2012) (three individuals, ACHEKZAI, Maulawi Adam Khan Achekzai, Aamir Ali Chaudhry, and Qari Ayyub Bashir); 77 Fed. Reg. 65,055 (Oct. 24, 2012) (one individual, Adel Radi Saqr Al-Wahabi Al-Harbi); 77 Fed. Reg. 68,207 (Nov. 15, 2012) (four individuals, Karim Ja'Far Muhsin Al-Ghanimi, Sayyid Salah Mahdi Al-Maksusi, Riyad Yunis Jasim Al-Hamidawi, and Mohammad Mina'i); 77 Fed. Reg. 70,548 (Nov. 26, 2012) (one individual, Ali Mussa Daqduq Al-Musawi); 77 Fed. Reg. 70,876 (Nov. 27, 2012) (two individuals—Musa Kalim and Mohammed Qasim—and one entity, Rahat Ltd.); 77 Fed. Reg. 74,916 (Dec. 18, 2012) (two individuals, Maysar Ali Musa Abdallah Al-Juburi and Anas Hasan Khattab);

During 2012 the Security Council's 1267/1989 and 1988 Committee added some individuals to its lists who had been designated by the United States. See *www.un.org/sc/committees/1267/index.shtml* and *www.un.org/sc/committees/1988/*.

(ii) OFAC de-listings

In 2012, OFAC determined that six individuals, who had been designated pursuant to E.O. 13224, should be removed from the Treasury Department's list of Specially Designated Nationals and Blocked Persons. 77 Fed. Reg. 25,234 (Apr. 27, 2012) (one individual, Tarek Charaabi,); 76 Fed. Reg. 63,352 (Oct. 12, 2011 (three individuals); 76 Fed. Reg. 69,318 (Nov. 8, 2011) (one individual); 76 Fed. Reg. 73,781 (Nov. 29, 2011) (one individual).

c. Countries not cooperating fully with antiterrorism efforts

On May 8, 2012, William J. Burns, Deputy Secretary of State, acting on delegated authority, determined and certified to Congress pursuant to § 40A of the Arms Export Control Act, 22 U.S.C. § 2781, and Executive Order 11958, as amended, that Cuba, Eritrea, Iran, the Democratic People's Republic of Korea ("DPRK" or "North Korea"), Syria, and Venezuela

were not cooperating fully with U.S. counterterrorism efforts. 77 Fed. Reg. 31,909 (May 30, 2012). For information concerning the prohibition on U.S. assistance and the export controls that these designations trigger, see *Cumulative Digest 1991-99* at 508 or *Digest 2003* at 167.

d. Foreign terrorist organizations

In 2012, the Secretary of State continued to designate additional entities as Foreign Terrorist Organizations ("FTOs") under § 219 of the Immigration and Nationality Act, as amended. See Chapter 3.B.1.c.(2) for a discussion of the designations and other related developments in 2012. Many of the organizations the Secretary of State has designated as FTOs also have been designated pursuant to Executive Order 13224. Designated FTOs and their agents are subject to a variety of measures, including financial sanctions. See *www.state.gov/j/ct/rls/other/des/123085.htm* for background on the applicable sanctions and other legal consequences of designation as an FTO.

5. Armed Conflict: Restoration of Peace and Security

a. Democratic Republic of the Congo

On February 8, 2012, OFAC issued a final rule amending the Democratic Republic of the Congo sanctions regulations to add a definition for the term "financial, material, or technological support," as used in E.O. 13413. 77 Fed. Reg. 6463 (Feb. 8, 2012). The rule also amends the Côte d'Ivoire and Darfur sanctions regulations, inserting the identical definition for the term in all three programs' regulations. The specific amendment to the DRC sanctions regulations is the addition of the following to 31 CFR part 547:

> **§ 547.313 Financial, material, or technological support.**
> The term *financial, material, or technological support,* as used in § 547.201(a)(2)(vi) of this part, means any property, tangible or intangible, including but not limited to currency, financial instruments, securities, or any other transmission of value; weapons or related materiel; chemical or biological agents; explosives; false documentation or identification; communications equipment; computers; electronic or other devices or equipment; technologies; lodging; safe houses; facilities; vehicles or other means of transportation; or goods. "Technologies'" as used in this definition means specific information necessary for the development, production, or use of a product, including related technical data such as blueprints, plans, diagrams, models, formulae, tables, engineering designs and specifications, manuals, or other recorded instructions.

On November 13, 2012 OFAC designated one individual pursuant to Executive Order 13413, of October 27, 2006, "Blocking Property of Certain Persons Contributing to the Conflict in the Democratic Republic of the Congo." 77 Fed. Reg. 69,547 (Nov. 19, 2012); see

also 71 Fed. Reg. 64,105 (Oct. 31, 2006); *Digest 2006* at 996–98. The individual was identified as Sultani Makenga, Colonel.

b. Iraq

On January 9, 2012, OFAC removed from its SDN list one individual (Dr. Safa Haji Al-Habobi, former minister of oil) designated pursuant to E.O. 13315, "Blocking Property of the Former Iraqi Regime, Its Senior Officials and Their Family Members, and Taking Certain Other Actions." 77 Fed. Reg. 2777 (Jan. 19, 2012). On July 17, 2012, OFAC removed from its list one individual (Nabil Victor Karam) and two entities (Alfa Company Limited for International Trading and Marketing and Trading and Transport Services Company) previously designated under E.O. 13315. 77 Fed. Reg. 43,429 (July 24, 2012).

c. Darfur

As discussed in Section A.5.a., *supra*, OFAC amended the sanctions regulations for several sanctions programs that authorize sanctions on those who provide "financial, material, or technological support" for sanctioned persons or specified activities. The specific amendment to the Darfur sanctions regulations is the addition of the definition for the term "financial, material, or technological support," (quoted *supra* in relation to the DRC sanctions regulations) in 31 CFR part 546. 77 Fed. Reg. 6463 (Feb. 8, 2012).

d. Yemen

On May 16, 2012, President Obama issued Executive Order 13611, "Blocking Property of Persons Threatening the Peace, Security, or Stability of Yemen." 77 Fed. Reg. 29,533 (May 18, 2012). The order included President Obama's finding that:

> the actions and policies of certain members of the Government of Yemen and others threaten Yemen's peace, security, and stability, including by obstructing the implementation of the agreement of November 23, 2011, between the Government of Yemen and those in opposition to it, which provides for a peaceful transition of power that meets the legitimate demands and aspirations of the Yemeni people for change, and by obstructing the political process in Yemen.

Section 1 of E.O. 13611 appears below. OFAC published regulations implementing E.O. 13611 on November 9, 2012. 77 Fed. Reg. 67,276 (Nov. 9, 2012).

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* * * *

Section 1. All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch, of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in: any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, to:

(a) have engaged in acts that directly or indirectly threaten the peace, security, or stability of Yemen, such as acts that obstruct the implementation of the agreement of November 23, 2011, between the Government of Yemen and those in opposition to it, which provides for a peaceful transition of power in Yemen, or that obstruct the political process in Yemen;

(b) be a political or military leader of an entity that has engaged in the acts described in subsection (a) of this section;

(c) have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, the acts described in subsection (a) of this section or any person whose property and interests in property are blocked pursuant to this order; or

(d) be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order.

* * * *

The UN Security Council adopted Resolution 2051 on Yemen on June 12, 2012. U.N. Doc. S/RES/2051. The State Department press release on Resolution 2051, available at *www.state.gov/r/pa/prs/ps/2012/06/192204.htm*, describes the resolution in a manner that demonstrates its common purpose with E.O. 13611. Like E.O. 13611, Resolution 2051 aims to stop actions that would disrupt the political transition in Yemen and reaffirms the need for implementation of the democratic reforms laid out in the Gulf Cooperation Council Initiative and Implementation Mechanism signed on November 23, 2011. While the resolution does not authorize sanctions, it does express the Council's readiness to consider further measures available under Article 41 of the UN Charter to deter any actions in Yemen aimed at undermining the Government of National Unity and the political transition, either through violent or politically divisive means.

e. Somalia

(1) Security Council

On February 22, 2012, acting under Chapter VII of the UN Charter, the Security Council adopted Resolution 2036. U.N. Doc. S/RES/2036. Among other things, the resolution imposes a ban on the export of charcoal from Somalia:

> Decides that Somali authorities shall take the necessary measures to prevent the export of charcoal from Somalia and that all Member States shall take the necessary measures to prevent the direct or indirect import of charcoal from Somalia, whether or not such charcoal originated in Somalia; further decides that all Member States shall report to

> the Security Council Committee established pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea ("the Committee") within 120 days of the adoption of this resolution on the steps they have taken towards effective implementation of this paragraph; and requests the Monitoring Group re-established pursuant to resolution 2002 (2011) to assess the impact of the charcoal ban in its Final Report;

U.N. Doc S/RES/2036, Para. 22. See Section A.5.e(2) below for a discussion of U.S. actions to implement the charcoal ban; see also explanation of vote by the United States delivered by Ambassador Rice and available at *http://usun.state.gov/briefing/statements/184352.htm*.

(2) Executive Order 13620

On July 20, 2012, President Obama issued Executive Order 13620, "Taking Additional Steps to Address the National Emergency With Respect to Somalia." 77 Fed. Reg. 43,481 (July 24, 2012). As stated in the order, President Obama issued the order, in part, to implement UN Security Council Resolution 2036 to address exports of charcoal from Somalia, "which generate significant revenue for al-Shabaab." The order also responds to "the misappropriation of Somali public assets; and certain acts of violence committed against civilians in Somalia, all of which contribute to the deterioration of the security situation and persistence of violence in Somalia." Section 1 of E.O. 13620 amends existing sanctions relating to Somalia imposed through E.O. 13536. Section 2 of E.O. 13620 relates specifically to the charcoal ban. Both sections 1 and 2 appear below.

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* * * *

Section 1. Section 1(a) of Executive Order 13536 is hereby amended to read as follows:

"(a) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch, of the following persons are blocked and may not be transferred, paid, exported, withdrawn or otherwise dealt in:

(i) the persons listed in the Annex to this order; and

(ii) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:

(A) to have engaged in acts that directly or indirectly threaten the peace, security, or stability of Somalia, including but not limited to: (1) acts that threaten the Djibouti Agreement of August 18, 2008, or the political process; (2) acts that threaten the Transitional Federal Institutions or future Somali governing institutions, the African Union Mission in Somalia (AMISOM), or other future international peacekeeping operations related to Somalia; or (3) acts to misappropriate Somali public assets;

(B) to have obstructed the delivery of humanitarian assistance to Somalia, or access to, or distribution of, humanitarian assistance in Somalia;

(C) to have directly or indirectly supplied, sold, or transferred to Somalia, or to have been the recipient in the territory of Somalia of, arms or any related materiel, or any technical advice, training or assistance, including financing and financial assistance, related to military activities;

(D) to be responsible for or complicit in, or responsible for ordering, controlling, or otherwise directing, or to have participated in, the commission of acts of violence targeting civilians in Somalia, including killing and maiming, sexual and gender-based violence, attacks on schools and hospitals, taking hostages, and forced displacement;

(E) to be a political or military leader recruiting or using children in armed conflict in Somalia;

(F) to have engaged, directly or indirectly, in the import or export of charcoal from Somalia on or after February 22, 2012;

(G) to have materially assisted, sponsored, or provided financial, material, logistical or technical support for, or goods or services in support of, the activities described in subsections (a)(ii)(A) through (F) of this section or any person whose property and interests in property are blocked pursuant to this order; or

(H) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order."

Sec. 2. (a) The importation into the United States, directly or indirectly, of charcoal from Somalia is prohibited.

(b) The prohibition in subsection (a) of this section applies except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order.

* * * *

(3) Executive Order 13536

On July 5, 2012, OFAC designated six individuals pursuant to Executive Order 13536, "Blocking Property of Certain Persons Contributing to the Conflict in Somalia." 77 Fed. Reg. 40,948 (July 11, 2012). The individuals were identified as Suhayl Salim Abd El-Rahman, Abubaker Shariff Ahmed, Taeme Abraham Goitom, Aboud Rogo Mohammed, Tewolde Habte Negash, and Omar Awadh Omar. Ambassador Rice issued a statement on July 5, 2012, available at *http://usun.state.gov/briefing/statements/194597.htm*, explaining that all six of these individuals have links to al-Shabaab.

6. Threats to Democratic Processes

a. Libya

See *Digest 2011* at 463-74 for a discussion of UN Security Council and U.S. sanctions relating to Libya. Some additional measures relating to Libya were taken in 2012.

On February 17, 2012, the UN Panel of Experts established by UN Security Council Resolution 1973 issued its final report comprehensively assessing implementation of the UN sanctions imposed in Resolutions 1970 and 1973. U.N. Doc. S/2012/163 (Annex). The UN Panel's report addresses implementation of the arms embargoes, travel ban, flight ban, no fly zone, and asset freeze provisions of the resolutions. The report also documents compliance, including known transfers of military items to Libya, both those that were properly notified to the Security Council and those that were not. The report concludes with recommendations, including greater regional cooperation and heightened vigilance to ensure compliance with arms embargoes.

On March 12, 2012, the Security Council adopted Resolution 2040 regarding Libya, which extends the mandate of the UN political and assistance mission, terminates the authorization to use force to enforce the arms embargo, and modifies the mandate of the UN panel of experts. U.N. Doc. S/RES/2040(2012).

On February 14, 2012, OFAC designated one individual (Humayd 'Abd-Al-Salam) pursuant to Executive Order 13566 of February 25, 2011, "Blocking Property and Prohibiting Certain Transactions Related to Libya." 77 Fed. Reg. 10,036 (Feb. 21, 2012). On October 18, 2012, OFAC designated another individual (Dalene Sanders) pursuant to E.O. 13566. 77 Fed. Reg. 65,604 (Oct. 29, 2012).

b. Mali

On March 21, 2012, Captain Amadou Sanogo and the National Committee for the Restoration of Democracy seized power from democratically elected President Amadou Toumani Touré. The United States imposed visa restrictions in response to the overthrow of the democratically elected government after the Economic Community of West African States and the African Union imposed similar sanctions. On April 3, 2012, the United States imposed travel restrictions on persons and the immediate family of persons who block Mali's return to civilian rule and a democratically elected government. See State Department media note, available at *www.state.gov/r/pa/prs/ps/2012/04/187383.htm*.

Sanctions relating to the conflict in Mali were also imposed pursuant to E.O. 13224. As discussed in section A.4.b(2) *supra*, the State Department designated the MUJWA and its founding leaders, all located in Mali, on December 4, 2012. 77 Fed. Reg. 74,265 & 74,266 (Dec. 13, 2012)). The UN Security Council passed several resolutions relating to the conflict in Mali in 2012. U.N. Doc. S/RES/2085 (2012); U.N. Doc. S/RES/2056 (2012); and U.N. Doc. S/RES/2071 (2012). And the UN Security Council's 1267/1989 (al-Qaida) sanctions committee also listed MUJWA.

c. Côte d'Ivoire

As discussed in Section A.5.a., *supra*, OFAC amended the sanctions regulations for several sanctions programs that authorize sanctions on those who provide "financial, material, or technological support" for sanctioned persons or specified activities. The specific

amendment to the Côte d'Ivoire sanctions regulations is the addition of the definition for the term "financial, material, or technological support," (quoted in Section A.5.a. *supra* in relation to the DRC sanctions regulations) in 31 CFR part 543. 77 Fed. Reg. 6463 (Feb. 8, 2012).

d. Modification of Sanctions and Related Actions

(1) Cuba

On December 3, 2012, OFAC amended the Cuban Asset Control Regulations ("CACR") to add a new general license authorizing the processing of funds transfers for the operating expenses or other official business of third-country diplomatic or consular missions in Cuba. 77 Fed. Reg. 71,530 (Dec. 3, 2012). At the same time, OFAC also amended the CACR to authorize by general license certain payments for services rendered by Cuba to United States aircraft that previously required the issuance of a specific license. *Id*.

(2) Burma

In 2012, the United States continued to take steps to respond to the government of Burma's progress in implementing democratic reforms. On January 13, 2012, Secretary Clinton delivered remarks, available at *www.state.gov/secretary/rm/2012/01/180667.htm*, in which she praised the government of Burma for releasing additional political prisoners, entering into a ceasefire agreement with the Karen National Union, and making other reforms. Secretary Clinton also announced in her January 13 remarks that the United States would begin the process of exchanging ambassadors with Burma. On February 6, 2012, Secretary Clinton signed a partial waiver of restrictions imposed on Burma under the Trafficking Victims Protection Act, allowing U.S. support for assessment missions and limited technical assistance by international financial institutions ("IFIs"), such as the World Bank, the Asian Development Bank, and the International Monetary Fund, in Burma. See February 6, 2012 media note, available at *www.state.gov/r/pa/prs/ps/2012/02/183463.htm*.

On April 4, 2012, Secretary Clinton again publicly hailed progress in Burma, in particular the results of the April 1, 2012 parliamentary by-elections which included the election of Aung San Suu Kyi to the parliament. See remarks available at *www.state.gov/secretary/rm/2012/04/187439.htm*. Secretary Clinton's April 4 remarks also included the following summary of the actions the United States was preparing to take in response to Burma's progress:

> The United States is committed to taking steps alongside the Burmese Government and people as they move down the road of reform and development. In light of the by-election and the other progress of recent months, we are consulting actively with the Congress as well as our allies and friends in Europe and Asia on our response to these recent developments. We are prepared to take steps toward: first, seeking agreement

for a fully accredited ambassador in Rangoon in the coming days, followed by a formal announcement of our nominee; second, establishing an in-country USAID mission and supporting a normal country program for the United Nations Development Program; third, enabling private organizations in the United States to pursue a broad range of nonprofit activities from democracy building to health and education; fourth, facilitating travel to the United States for select government officials and parliamentarians; and fifth, beginning the process of a targeted easing of our ban on the export of U.S. financial services and investment as part of a broader effort to help accelerate economic modernization and political reform. Sanctions and prohibitions will stay in place on individuals and institutions that remain on the wrong side of these historic reform efforts.

On May 17, 2012, President Obama announced the nomination of Derek Mitchell as the first U.S. ambassador to Burma in 22 years. Daily Comp. Pres. Docs. 2012 DCPD No. 00391, p. 1 (May 17, 2012). On July 11, 2012, the Department of State issued a fact sheet outlining the specific steps being implemented by the U.S. government to ease restrictions and sanctions relating to Burma, which had been announced previously. The fact sheet is excerpted below and available at *www.state.gov/r/pa/prs/ps/2012/07/194868.htm*. As summarized in the fact sheet, the new policy on Burma entails multiple measures. First, OFAC issued General License 16 (authorizing export of financial services) and General License 17 (authorizing new investment) under the Burma sanctions program on July 11, 2012. 77 Fed. Reg. 47,922 (Aug. 10, 2012); see also Daily Comp. Pres Docs. 2012 No. 00547 p. 1 (July 11, 2012). Second, General License 17 includes proposed new requirements for U.S. investors in Burma to report to the State Department on certain aspects of their investments. Third, President Obama issued Executive Order 13619 of July 11, 2012, "Blocking Property of Persons Threatening the Peace, Security, or Stability of Burma" authorizing targeted sanctions on those who impede Burma's reform process. 77 Fed. Reg. 41,243 (July 13, 2012); see also President Obama's Message to the Congress on Blocking Property of Persons Threatening the Peace, Security, or Stabilization of Burma, Daily Comp. Pres. Docs. 2012 DCPD No. 00549 p. 1 (July 11, 2012). Administration officials provided multiple background briefings on the process of easing restrictions on Burma, including one on April 4, 2012, available at *www.state.gov/r/pa/prs/ps/2012/04/187446.htm*, and one on May 17, 2012, available at *www.state.gov/r/pa/prs/ps/2012/05/190271.htm*.

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President Obama and Secretary of State Clinton announced in May that the United States would ease certain financial and investment sanctions on Burma in response to the historic reforms that have taken place in that country over the past year. Today, the U.S. Government has implemented these changes to permit the first new U.S. investment in Burma in nearly 15 years, and to broadly authorize the exportation of financial services to Burma. The United States supports the Burmese Government's ongoing reform efforts, and believes that the participation of U.S. businesses in the Burmese economy will set a model for responsible investment and

business operations as well as encourage further change, promote economic development, and contribute to the welfare of the Burmese people.

As these vital economic and political reform efforts move forward, the United States will continue to support and monitor Burma's progress. We have and will continue to urge the Burmese Government to continue its reform process and we expect the Burmese Government to implement measures that increase socio-economic development and safeguard the human rights of all its people, including political rights and civil liberties.

The United States remains concerned about the protection of human rights, corruption, and the role of the military in the Burmese economy. Consequently, the policy we are announcing today is carefully calibrated and aimed at supporting democratic reform and reconciliation efforts while aiding in the development of an economic and business environment that provides benefits to all Burma's people. A key element of this policy is that we are not authorizing new investment with the Burmese Ministry of Defense, state or non-state armed groups (which includes the military), or entities owned by the foregoing. Moreover, the core authorities underlying our sanctions remain in place. U.S. persons are still prohibited from dealing with blocked persons, including both listed Specially Designated Nationals (SDNs) as well as any entities 50 percent or more owned by an SDN. The Treasury Department's Office of Foreign Assets Control (OFAC) publishes a list of SDNs available here [*www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx*].

Also today, the President issued a new Executive Order that will allow the U.S. Government to sanction individuals or entities that threaten the peace, security, or stability of Burma, including those who undermine or obstruct the political reform process or the peace process with ethnic minorities, those who are responsible for or complicit in the commission of human rights abuses in Burma, and those who conduct certain arms trade with North Korea. Individual or entities engaging in such activities would be subject to Treasury action that would cut them off from the U.S. financial system.

OFAC General License No. 16 Authorizes the Exportation of Financial Services to Burma

OFAC has issued General License No. 16 (GL 16) authorizing the exportation of U.S. financial services to Burma, subject to certain limitations. Reflecting particular human rights risks with the provision of security services, GL 16 does not authorize, in connection with the provision of security services, the exportation of financial services to the Burmese Ministry of Defense, state or non-state armed groups (which includes the military), or entities owned by the foregoing. GL 16 also does not authorize the exportation of financial services to any person blocked under the Burma sanctions program. Transfers of funds to or from an account of a financial institution that is blocked under the Burma sanctions program are authorized, however, provided that the account is not on the books of a U.S. financial institution.

Because the transactions authorized by GL 16 include activities formerly authorized by other general licenses (such as financial transactions in support of humanitarian, religious, and other not-for-profit activities in Burma, and noncommercial, personal remittances to Burma), General License No. 14-C and General License No. 15 are replaced and superseded by GL 16.

OFAC General License No. 17 Authorizes New Investment in Burma

The Secretary of State, pursuant to a delegation of authority from the President, has waived the ban on new U.S. investment in Burma set forth in the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997.[***]

[***] Editor's note: Notice of this waiver was published in the Federal Register. 77 Fed. Reg. 62,596 (Oct. 15, 2012).

Consistent with this waiver, OFAC has issued General License No. 17 (GL 17) authorizing new investment in Burma, subject to certain limitations and requirements. GL 17 does not authorize new investment pursuant to an agreement, or pursuant to the exercise of rights under such an agreement, that is entered into with the Burmese Ministry of Defense, state or non-state armed groups (which includes the military), or entities owned by the foregoing, or any person blocked under the Burma sanctions program.

Reporting Requirements on Responsible Investment in Burma

Any U.S. person (both individuals and entities) engaging in new investment in Burma pursuant to GL 17 whose aggregate new investment exceeds $500,000 must provide to the State Department the information set forth in the State Department's "Reporting Requirements on Responsible Investment in Burma," available here [*www.humanrights.gov/wp-content/uploads/2012/07/Burma-Responsible-Investment-Reporting-Reqs.pdf*.].

These reporting requirements will undergo public notice and comment in accordance with the Paperwork Reduction Act of 1995. The Department of State expects to issue its 60-day Federal Register notice of proposed information collections in the coming days.

There are several components to these new reporting requirements, which will apply to investors with more than $500,000 in aggregate new investment in Burma. Investors will be required to file reports with the State Department on an annual basis, and will include a version that the Department will make publicly available, consistent with relevant U.S. law. Key information that companies will report on include information regarding policies and procedures with respect to human rights, workers' rights, environmental stewardship, land acquisitions, arrangements with security service providers, and, aggregate annual payments exceeding $10,000 to Burmese government entities, including state-owned enterprises. The purpose of the public report is to promote greater transparency and encourage civil society to partner with our companies toward responsible investment. The above reporting requirements apply to any new investment, whatever corporate form it might take.

In addition, individuals or entities undertaking new investment pursuant to an agreement, or pursuant to the exercise of rights under such an agreement, that is entered into with the Myanma Oil and Gas Enterprise (MOGE) must notify the State Department within 60 days of their new investment.

New Executive Order Targeting Persons Threatening the Peace, Security, or Stability of Burma

In signing this Executive Order, the President has provided the United States Government with additional tools to respond to threats to the peace, security, or stability of Burma, and to encourage further reform in Burma. The order provides new authority to impose blocking sanctions on persons determined by the Secretary of the Treasury, in consultation with or at the recommendation of the Secretary of State: to have engaged in acts that directly or indirectly threaten the peace, security, or stability of Burma, such as actions that have the purpose or effect of undermining or obstructing the political reform process or the peace process with ethnic minorities in Burma; to be responsible for or complicit in, or responsible for ordering, controlling, or otherwise directing, or to have participated in, the commission of human rights abuses in Burma; to have, directly or indirectly, imported, exported, reexported, sold or supplied arms or related materiel from North Korea or the Government of North Korea to Burma or the Government of Burma; to be a senior official of an entity that has engaged in the foregoing acts; to have materially assisted any of the foregoing acts, or a person whose property and interests in

property are blocked pursuant to the order; or to be owned or controlled by, or to have acted for or on behalf of, such a person.

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As mentioned in the fact sheet above, the president issued a new executive order, E.O. 13619, "Blocking Property of Persons Threatening the Peace, Security, or Stability of Burma" ("E.O. 13619"), on July 11, 2012. 77 Fed. Reg. 41,243 (July 13, 2012). OFAC designated one entity, Directorate of Defence Industries, pursuant to E.O. 13169 on July 11, 2012. 77 Fed. Reg. 61,658 (Oct. 10, 2012).

On October 10, 2012 the president delegated to the Secretary of State his functions under section 1 of H.R. 6431, 112th Congress (2012), an act to "provide flexibility with respect to United States support for assistance provided by international financial institutions for Burma, and for other purposes," Pub. L. 112-192, which he signed into law on October 5, 2012. 77 Fed. Reg. 65,455 (Oct. 29, 2012). Under the delegation, the Secretary of State may make a determination that it is in the national interest of the United States to support assistance for Burma, then the Treasury Secretary may direct U.S. Executive Directors to the international financial institutions to vote in favor of such assistance by those institutions to Burma, notwithstanding any other provision of law. On October 12, 2012, the Secretary of State determined that it is in the national interest of the United States to support assistance to Burma, paving the way for the United States to vote in favor of support for assistance to Burma through international financial institutions. See October 18, 2012 State Department media note, available at www.state.gov/r/pa/prs/ps/2012/10/199332.htm.

On November 16, 2012, the U.S. Departments of the Treasury, after consulting with the U.S. Department of State, issued a general license authorizing Burmese-origin goods to enter the United States for the first time in almost a decade. (Prior to the issuance of the general license, the Department of State had waived section 3(a) of the Burmese Freedom and Democracy Act of 2003, which had required the President to ban the importation of any article that is a product of Burma.) State and Treasury issued a joint statement, available at *www.state.gov/r/pa/prs/ps/2012/11/200639.htm*, explaining that easing the ban on imports from Burma is "intended to support the Burmese government's ongoing reform efforts and to encourage further change, as well as to offer new opportunities for Burmese and American businesses." The November 16 joint statement is excerpted below.

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In light of these positive changes, the United States is issuing a waiver and general license to ease the ban on imports into the United States of products from Burma required by section 3(a) of the Burmese Freedom and Democracy Act of 2003 (BFDA) and implemented by Executive Order 13310 of July 28, 2003. However, as concerns about some areas of trade with respect to Burma remain, this waiver and license do not affect the existing prohibitions and restrictions on the importation of jadeite and rubies mined or extracted from Burma, and on articles of jewelry containing them, imposed by the Tom Lantos Block Burmese JADE (Junta's Anti-Democratic

Efforts) Act of 2008, which amended the BFDA. We are committed to working with the Government of Burma to address these concerns.

The U.S. government is closely monitoring and supporting Burma's progress on reform, and the core authorities underlying our sanctions remain in place. Despite positive changes, the United States remains concerned about corruption, remaining political prisoners, continued military ties to the Democratic People's Republic of Korea, and ethnic conflict. U.S. policy remains calibrated, and through the Treasury Department's Specially Designated Persons (SDN) list, the United States will take steps to exclude those who continue to perpetrate the violence, oppression, and corrupt practices of the past from participating in our countries' growing bilateral diplomatic and economic ties. U.S. persons are still prohibited from engaging in transactions with persons included on the SDN list, as well as any entity in which such a person owns, directly or indirectly, a 50 percent or greater interest and we will remain vigilant with respect to those who engage in violence, oppression, and corruption The SDN list is available at www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx.

The United States is committed to supporting positive political and economic reforms in Burma, and we urge the Burmese Government to continue this progress by implementing measures that increase socio-economic development, promote government transparency and accountability, protect human rights, and advance ethnic reconciliation across the country.

General License No. 18 Authorizes the Importation of Products of Burma

The Department of State, pursuant to a delegation of authority from the President, has waived the ban on the importation of products of Burma set forth in section 3(a) of the BFDA.

Consistent with this waiver, Treasury Department has issued General License No. 18 (GL 18) authorizing the importation into the United States of any article that is a product of Burma, subject to certain limitations. GL 18 does not authorize the importation into the United States of jadeite or rubies mined or extracted from Burma, or of articles of jewelry containing jadeite or rubies mined or extracted from Burma or any other activity prohibited by Section 3A of the BFDA, an amendment added by the Tom Lantos Block Burmese JADE (Junta's Anti-Democratic Efforts) Act of 2008. GL 18 also does not authorize transactions with any person blocked under the Burma sanctions program.

Changes to the List of Specially Designated Nationals and Blocked Persons

Today, the Treasury Department is designating seven entities and updating an additional alias to an already-sanctioned entity. The seven newly-designated entities that have been added to the SDN List include front companies owned or controlled by Steven Law and Tay Za.

Gold Ocean Pte Ltd., Great Success Pte. Ltd., Green Luck Trading Company, and Gold Energy Co. Ltd. are front companies controlled by Steven Law, a crony of the former regime designated on February 25, 2008. Gold Ocean Pte Ltd is the primary front company used to transfer money between Steven Law's companies, foreign companies, and Burmese state-run organizations. China Focus Development Ltd. is the new name for Golden Aaron Pte. Ltd., a company identified as blocked property on February 25, 2008 and owned by Cecilia Ng, the wife of Steven Law.

Asia Pioneer Impex Pte. Ltd., Terrestrial Pte. Ltd., and Asia Green Development Bank are companies owned or controlled by Tay Za, a crony of the former regime who was sanctioned on October 18, 2007. Tay Za uses his Singapore-based companies, Asia Pioneer Impex Pte. Ltd. and Terrestrial Pte. Ltd., to conduct business transactions. He began trading under the name Terrestrial Pte. Ltd. following financial sanctions against Pavo Trading in 2008.

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As noted in the joint statement above, OFAC designated seven entities pursuant to E.O. 13448 or E.O. 13464 relating to Burma on November 16, 2012 based on their relationship to cronies of the former regime. 77 Fed. Reg. 70,209 (Nov. 23, 2012). On July 11, 2012, OFAC designated another entity pursuant to E.O. 13464, Innwa Bank Ltd. 77 Fed. Reg. 61,658 (Oct. 10, 2012). OFAC also delisted two individuals who had been designated pursuant to E.O. 13310: Thein Sein and Thura Shwe Mann. 77 Fed. Reg. 60,177 (Oct. 2, 2012).

7. Transnational Crime

In 2012, the United States government made additional designations pursuant to Executive Order 13581, "Blocking Property of Transnational Criminal Organizations." See *Digest 2011* at 518-19 for a discussion of the issuance of this executive order in 2011. On February 23, 2012, the Treasury Department announced its first designations under E.O. 13581, the Transnational Criminal Organizations ("TCO") program, nine individuals and one entity: Vasily Khristoforov, Kamchybek Asanbekovich Kolbayev, Vladislav Leontyev, Aleksandr Manuylov, Gafur Rakhimov, Lazar Shaybazian, Kenichi Shinoda, Kiyoshi Takayama, Aleksey Zaytsev, and the Yamaguchi-gumi. See press release, available at *www.treasury.gov/press-center/press-releases/Pages/tg1430.aspx*, explaining that seven of the individuals are affiliated with the Brother's Circle group and two individuals and the entity are part of the Yakuza (both the Brother's Circle and the Yakuza were listed in the annex to E.O. 13581).

On June 6, 2012, OFAC designated five more individuals: Temuri Suleimanovic Mirzoyev, Koba Shalvovich Shemazashvili, Kakhaber Pavolovich Shushanashvili, Lasha Pavlovich Shushanashvili, and Vladimir Viktorovich Vagin. 77 Fed. Reg. 54,946 (Sep. 6, 2012). On August 1, 2012, OFAC added the following five individuals to the list of specially designated nationals in the TCO category: Mario Caterino, Giuseppe Dell'Aquila, Paolo Di Mauro, Antonio Iovine, Michele Zagaria. 77 Fed. Reg. 54,946 (Sep. 6, 2012). On December 20, 2012, the following three individuals were designated under E.O. 13581: Zakhary Knyazevich Kalashov, Almanbet Anapiyaev, Adilet Zhakypovich Kasenov. 78 Fed. Reg. 148 (Jan. 2, 2013).

OFAC issued regulations implementing E.O. 13581 on January 12, 2012. 77 Fed. Reg. 1864 (Jan. 12, 2012).

B. LITIGATION RELATING TO SANCTIONS

1. Opposition to certiorari in case challenging application of Cuba Assets Control Regulations

In 2012, Cuban company Cubaexport sought final review in the U.S. Supreme Court of its claims that, in 2006, OFAC had improperly denied it a license authorizing payment of renewal fees for its trademark for HAVANA CLUB rum. The district court and court of appeals previously rejected Cubaexport's legal challenges to OFAC's decision. For earlier developments in the case, see *Digest 2011* at 519-20, *Digest 2009* at 648–49, *Digest 2007* at 828–30, and *Digest 2006* at 1006–

15. Cubaexport filed a petition for *certiorari* in the Supreme Court on January 27, 2012. *Empresa Cubana Exportadora de Alimentos y Productos varios, dba Cubaexport v. Department of the Treasury*, No. 11-945. The United States brief opposing certiorari, filed on April 2, 2012, is excerpted below with footnotes and citations to the record omitted. On May 14, 2012, the Supreme Court issued an order denying *certiorari*, bringing to a close litigation over Cubaexport's challenge to OFAC's 2006 decision.

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1. In 1962, in response to the expropriation of United States property in Cuba and other acts by the Castro regime deemed antagonistic to the interests of this country, President Kennedy imposed an embargo on trade with Cuba. See Proclamation No. 3447, 3 C.F.R. 26-27 (1962), 22 U.S.C. 2370 note. "[O]ver the years," the terms of the embargo and related restrictions "have waxed and waned." *Emergency Coal. to Defend Educ. Travel v. United States Dep't of the Treasury*, 545 F.3d 4, 6 (D.C. Cir. 2008). The current terms and restrictions are reflected in the Cuban Assets Control Regulations (CACR), 31 C.F.R. Pt. 515, which were promulgated by the Treasury Department under Section 5(b) of the Trading With the Enemy Act (TWEA), 50 U.S.C. App. 1 *et seq.*

The CACR were first promulgated in 1963 and are administered by the Treasury Department's Office of Foreign Assets Control (OFAC). See *United States v. Brodie*, 403 F.3d 123, 127 (3d Cir. 2005); *Empresa Cubana del Tabaco v. Culbro Corp.*, 399 F.3d 462, 465 (2d Cir. 2005), cert. denied, 547 U.S. 1205 (2006). The CACR broadly prohibit transactions involving property in which Cuba or any Cuban national has "any interest of any nature whatsoever, direct or indirect," "except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him)." 31 C.F.R. 515.201(b). The property and property interests governed by those restrictions include interests in intellectual property. See 31 C.F.R. 515.311.

Notwithstanding that broad prohibition, the regulations permit the Secretary of the Treasury (Secretary) to authorize certain transactions, including by issuing a general or specific license. See 31 C.F.R. 515.201. A general license sets forth the terms of the authorization in an OFAC publication or regulation. See 31 C.F.R. 515.317. A specific license is an individualized authorization granted to a particular applicant or relating to a particular transaction. See 31 C.F.R. 515.318. All licenses "may be amended, modified or revoked at any time." 31 C.F.R. 501.803; see *Regan v. Wald*, 468 U.S. 222, 234 (1984).

As first promulgated in 1963, the CACR included a general license authorizing "[t]he filing in the United States Patent Office of applications for *** trademarks registration." 31 C.F.R. 515.527(a)(1) (1964); see 28 Fed. Reg. 6982 (July 9, 1963). As amended in 1995, the CACR included a general license authorizing "[t]ransactions related to the registration and renewal" of trademarks. 31 C.F.R. 515.527(a) (1996); see 60 Fed. Reg. 54,196 (Oct. 20, 1995). In 1998, Congress modified that regulatory authorization by enacting the following provision:

> Notwithstanding any other provision of law, no transaction or payment shall be authorized or approved pursuant to [31 C.F.R. 515.527] with respect to a mark, trade name, or commercial name that is the same as or substantially similar to a mark, trade name, or commercial name that was used in connection with a business or assets that

> were confiscated unless the original owner of the mark, trade name, or commercial name, or the bona fide successor-in-interest has expressly consented.

Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 211(a)(1), 112 Stat. 2681-88 (Section 211 or 1998 Act). Section 211(c) of the 1998 Act required the Secretary to amend the CACR to conform to the new legislative requirement, 112 Stat. 2681-88, and the Secretary complied by adding Subsection (a)(2) to 31 C.F.R. 515.527. See 64 Fed. Reg. 25,813 (May 13, 1999). OFAC retains the authority to issue a specific license in appropriate circumstances, even when the general license is unavailable. See 31 C.F.R. 501.801(b)(1).

2. Petitioner is a Cuban state-owned export corporation chartered by the Cuban Ministry of Foreign Commerce. In 1976, under the general license provided by 31 C.F.R. 515.527, petitioner sought and obtained from the United States Patent and Trademark Office (USPTO) a certificate of registration for a United States trademark that included the name HAVANA CLUB. Under a general trademark statute then in effect, the certificate of registration was scheduled to "remain in force for twenty years." 15 U.S.C. 1058(a) (1976). When that registration was set to expire in 1996, one of petitioner's affiliates sought to renew it for an additional ten-year period, invoking the general authorization then provided by 31 C.F.R. 515.527(a). See Pet. App. 5a, 34a. "[U]pon payment of the prescribed fee and the filing of a verified application," 15 U.S.C. 1059(a) (1994), the USPTO granted the renewal application. During the ten-year renewal period, there was extensive litigation between petitioner's affiliate, the purported assignee of the HAVANA CLUB registration, and Bacardi-Martini USA, Inc. (and related entities), which distributed its own "Havana Club" rum in the United States.

Beginning in 2005, petitioner attempted to tender payment for, and obtain from the USPTO, a second renewal of its HAVANA CLUB registration, which was scheduled to expire in 2006. Under the OFAC regulation implementing the 1998 Act, however, "[n]o transaction or payment" was authorized by the general license in 31 C.F.R. 515.527(a)(1) (1999) if the "mark" was "the same as or substantially similar to a mark *** that was used in connection with a business or assets that were confiscated," absent express consent of the original owner or a successor-in-interest. See 31 C.F.R. 515.527(a)(2) (1999). That description covers the HAVANA CLUB trademark.

In seeking renewal of the HAVANA CLUB trademark registration, petitioner did not initially rely on the general license provision. Instead, petitioner's counsel sought a specific license from OFAC to authorize payment of the registration renewal fee. After consulting with the Department of State, OFAC denied petitioner's application for such a specific license. OFAC noted that "renewal of the HAVANA CLUB trademark [registration] *** would be prohibited unless specifically licensed." OFAC declined to grant that specific license in accordance with guidance provided by the State Department, the provisions of the CACR, and OFAC's own considerations of the facts underlying the application. Petitioner's request to renew the trademark registration was accordingly denied by the USPTO.

* * * *

ARGUMENT

The court of appeals correctly held that Section 211(a)(1) applies both to new trademark registrations and to subsequent renewals of registrations; that the statute applies, in particular, to post-1998 renewals of trademarks that were first registered before the law's enactment; and that the statute, so construed, does not violate petitioner's substantive due process rights. The court's decision does not conflict with any decision of this Court or any other court of appeals. Indeed, no other court has considered the meaning or validity of Section 211(a)(1) since it was enacted more than a decade ago. Further review is not warranted.

1. The court of appeals correctly held that the 1998 Act applies to petitioner's attempt, which began in 2005, to renew the HAVANA CLUB trademark registration. As the court explained, application of the statute to post-enactment renewals does not constitute retroactive operation and therefore does not implicate the presumption against retroactive legislation. "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994) (internal citation omitted). Rather, "the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280. That determination requires a "commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment,"' *Martin v. Hadix*, 527 U.S. 343, 357-358 (1999) (quoting *Landgraf*, 511 U.S. at 270), and a court should be guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations," *Landgraf*, 511 U.S. at 270.

In 1976, when petitioner first registered the HAVANA CLUB trademark in the United States, it did so pursuant to a general license that authorized the transaction, notwithstanding the general prohibition embodied in the Cuban embargo. The registration was expressly conditioned on obtaining authorization from the Secretary. At that time, a general license codified at 31 C.F.R. 515.527(a)(1) (1976) authorized trademark registrations. The regulatory scheme then in effect made clear, however, that the license (like all licenses) could be "amended, modified, or revoked at any time." 31 C.F.R. 515.805 (1976). In 1996, the registration was renewed pursuant to the general authorization then codified in 31 C.F.R. 515.527(a) (1996), which included the same reservation of rights, see 31 C.F.R. 515.805 (1996). By the time petitioner sought a second renewal in 2005, however, the 1998 Act prohibited any "transaction or payment" with respect to petitioner's mark from being "authorized or approved" under that general license. § 211(a)(1), 112 Stat. 2681-88. Application of that statutory bar to petitioner's post-1998 renewal application was not retroactive in any legally relevant sense.

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Here, one of the legal prerequisites to renewal of the HAVANA CLUB registration was authorization from the Secretary. In both 1976 and 1996, that authorization was conferred through a general license, but that license remained "expressly revocable at any time." As this Court recognized in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), when a general license can be "amended, modified, or revoked at any time," *id.* at 673 (quoting 31 C.F.R. 535.805 (1980)), the recipient is "on notice of the contingent nature of its interest," *ibid.* Any expectation petitioner may have had regarding renewal of its trademark registration was always dependent on

the Secretary's authorization; it was never "more substantial than [an] inchoate expectation[] [or an] unrealized opportunit[y]." *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 44 n.10 (2006); see *Landgraf*, 511 U.S. at 270 (explaining that courts should be guided by "considerations of fair notice, reasonable reliance, and settled expectations"). Accordingly, when petitioner registered the HAVANA CLUB trademark in 1976 and when the registration was renewed in 1996, petitioner had no cognizable right to any renewal—let alone perpetual renewal.

b. The court of appeals also recognized that a statute may operate retroactively if it "increase[s] a party's liability for past conduct, or impose[s] new duties with respect to transactions already completed." The court stated, however, that it did not "understand" petitioner "to [have] advance[d]" such an argument. Although petitioner now seeks to invoke that aspect of retroactivity doctrine, it does not explain how the 1998 Act "imposes a 'new disability' or 'new legal consequences' in respect to past events."

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2. The presumption against retroactivity is a "judicial default rule []" that applies only when Congress has not prescribed the temporal reach of a statute. *Landgraf*, 511 U.S. at 280; see *Fernandez-Vargas*, 548 U.S. at 37 ("We first look to 'whether Congress has expressly prescribed the statute's proper reach,' and, in the absence of language as helpful as that we try to draw a comparably firm conclusion about the temporal reach specifically intended by applying 'our normal rules of construction.' ") (quoting *Landgraf*, 511 U.S. at 280; *Lindh v. Murphy*, 521 U.S. 320, 326 (1997)). "[W]here the congressional intent is clear, it governs." *Landgraf*, 511 U.S. at 264 (citation omitted). Even if application of Section 211(a)(1) to this case were deemed to be retroactive, Congress's intent to apply the statute to post-1998 renewal applications is sufficiently clear to rebut the presumption against retroactivity.

As the court of appeals recognized, Section 211(a)(1) applies by its terms to "both new trademark registrations and renewals of previously registered trademarks." The statute provides that, under the conditions specified, "no transaction or payment shall be authorized or approved pursuant to [31 C.F.R. 515.527]." § 211(a)(1), 112 Stat. 2681-88. The regulation cited in the statute authorized persons subject to U.S. jurisdiction (such as USPTO) to engage in specified "[t]ransactions related to the registration and renewal" of trademarks, notwithstanding the general ban on transactions in property in which Cuba or Cuban nationals have an interest. 31 C.F.R. 515.527(a) (1998); see 31 C.F.R. 515.201(b)(1) (1998) (defining "transaction" to include "dealings" in "any property"); 31 C.F.R. 515.311(a) (1998) (defining "property" to include trademarks). And a trademark registration cannot be renewed without a "payment." 15 U.S.C. 1059(a) (Supp. IV 1998). By its plain terms, the 1998 Act barred the Secretary from thereafter invoking the general license in 31 C.F.R. 515.527 to authorize or approve any transaction or payment relating to the "registration and renewal" of trademarks, under the conditions specified.

Petitioner identifies no plausible contrary interpretation of the statutory text. Petitioner conceded below that Section 211(a)(1) bars use of the general license to authorize initial registration of any trademark previously used in connection with a confiscated business or asset, even if the confiscation occurred before the statute's enactment. That appropriate concession reflects the fact that the 1998 Act regulates the transactions and payments associated with trademark registration, not the prior confiscatory acts. It also reflects an awareness that the 1998 Act could not have achieved its intended purpose if it had been limited to trademarks associated with property confiscated after the law's enactment. Petitioner identifies no textual basis,

however, for construing Section 211(a)(1) to distinguish between initial trademark registrations and registration renewals, both of which involve "transaction[s]" and "payment[s]," and both of which are "authorized or approved pursuant to" the same general license.

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3. The court of appeals' interpretation of Section 211(a)(1) does not conflict with any decision of this Court or any other court of appeals. Indeed, no other court has considered the meaning or validity of Section 211(a)(1) since the statute was enacted more than a decade ago. …

b. The court of appeals' ruling does not conflict with any decision of another court of appeals. In the 14 years since Section 211(a)(1) was enacted, no other court has considered its meaning or validity, and the only civil litigation relating to any aspect of Section 211 has apparently involved the HAVANA CLUB trademark. …

c. Petitioner's invocation of foreign-policy interests is also misplaced. "[T]he nuances of foreign policy 'are much more the province of the Executive Branch and Congress than of th[e] Court.' " *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 76 (1993) (quoting *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 196 (1983)). The United States' economic relationship with Cuba is a bilateral issue, and the United States has the sovereign right to carry out its economic relationships with other countries in accordance with its own national interests and values. Section 211(a)(1) embodies a policy decision made by Congress about the circumstances under which the general license should be unavailable. And, when asked by OFAC for foreign-policy guidance on petitioner's application for a specific license, the State Department made an independent determination that issuing the license would be inconsistent with U.S. foreign policy. Thus, contrary to petitioner's contention, the Executive Branch did "exercise its independent foreign policy judgment."

4. Finally, petitioner contends that the court of appeals erred in rejecting petitioner's substantive due process challenge. That argument lacks merit and does not warrant further review.

Petitioner's due process argument is premised on the assertion that the 1998 Act operates retroactively by barring petitioner's attempt to rely on the general licence to renew its trademark registration in 2005. And petitioner faults the court of appeals for failing to apply the "test[]" for determining the constitutionality of "retroactive legislation." But the court of appeals concluded that Section 211(a)(1) was not "retroactive legislation" at all. Although petitioner disagrees with that conclusion, it does not explain how the court's constitutional analysis was flawed under that view of the 1998 Act.

In any event, the court of appeals correctly explained why Section 211(a)(1)'s application to petitioner's trademark registration renewal request would be constitutional even if the statute's operation were viewed as retroactive. As the court explained, "[i]f a statute applies retroactively," then "the 'retroactive aspects of [the] legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." "[T]hat burden," however, "is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." …

In this case, "[t]he [1998] Act reinforces the Castro regime's isolation by denying Cuban-affiliated entities the use of U.S. trademarks related to businesses and assets confiscated by the Cuban government." As the court of appeals explained, "by barring renewal of trademarks that

had previously been registered (not just new registrations), the 1998 Act applies to a greater number of such trademarks." Thus, "both in its substance and its application to renewal of pre-1998 trademarks," the 1998 Act "is rationally related to a legitimate government interest."

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2. U.S. filing in Hausler regarding why Cuba was designated a state sponsor of terrorism

On May 10, 2012, the United States responded to an order from the U.S. District Court for the Southern District of Florida in a case a private party brought against Cuba. *Hausler v. Cuba*, 08-20197 (S.D. Fla.). The court's order invited U.S. views on two issues: (1) the reason or reasons Cuba was designated a state sponsor of terrorism; and (2) whether a Florida state court had jurisdiction under the Foreign Sovereign Immunity Act ("FSIA") to issue the underlying judgment. The U.S. statement of interest in the case, available at *www.state.gov/s/l/c8183.htm*, attached the Declaration of Peter M. Brennan, Coordinator for Cuban Affairs, Department of State, in response to the first issue and declined to address the second issue. The Brennan Declaration, also available at *www.state.gov/s/l/c8183.htm*, is excerpted below.

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3. As reflected in detail in the March 12, 1982, testimony of Ambassador Thomas Enders, Assistant Secretary of State for Inter-American Affairs, before the Subcommittee on Security and Terrorism of the Senate Judiciary Committee (attached at Exhibit 1), the Department's major concern in the late 1970s and early 1980s with respect to Cuban involvement in terrorism was Cuba's promotion of violent revolution in Latin America and the Caribbean. At the time, the Cuban approach to exporting terrorism and armed revolution combined support for armed forces to develop strong paramilitary forces in target countries with propaganda. youth training courses, scholarships, and bilateral economic and tactical assistance. "The Castro regime ha[d] made a business of violent revolution." Exhibit 1, p. 147. For example, beginning in 1978, Cuba assisted the Sandinistas in Nicaragua, and it later utilized a similar strategy of providing external support to unify movements on the left and promote the violent overthrow of existing governments in El Salvador, in Guatemala, and in Colombia. Cuba also provided support to terrorist cells operating in Costa Rica that were seeking to undermine the country's democratic institutions. As Ambassador Enders stated, "Cuba's readiness to foment violence to exploit such situations imposes serious obstacles to economic progress, democratic development, and self-determination." Exhibit 1, p. 143.

4. Based upon the information available to me in the course of my official duties, I submit the following:

In 1982, the Secretary of State designated Cuba a state sponsor of terrorism under Section 6(j) of the Export Administration Act of 1979, Pub. L. No. 96-72, codified at 50 U.S.C. App. § 2405(j). The Department concluded that Cuba belonged in the category of states that have repeatedly provided support for acts of international terrorism, specifically because of Cuba's clear support for organizations and groups abroad that used terrorism and revolutionary violence

as a policy instrument to undermine existing governments. This reason was reflected in the testimony and prepared statement of Ernest Johnston, Jr., Deputy Assistant Secretary for Economic Affairs before the Subcommittee on Near Eastern and South Asian Affairs of the Senate Foreign Relations Committee on March 18, 1982. Exhibit 2, pp. 10, 13.

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3. Designation of Foreign Terrorist Organizations and related issues

See Chapter 3.B.1.c.(2).

C. EXPORT CONTROLS

1. Commerce Department Entity List

During 2012 the Department of Commerce, Bureau of Industry and Security ("BIS"), amended the Export Administration Regulations ("EAR") to add 193 persons, located in Afghanistan, Belize, Canada, Cyprus, Estonia, Finland, France, Germany, Greece, Hong Kong, Iran, Jordan, Kazakhstan, Pakistan, Russia, Sweden, the United Arab Emirates, and the United Kingdom to the Entity List. 77 Fed. Reg. 23,114 (Apr. 18, 2012); 77 Fed. Reg. 24,587 (Apr. 25, 2012); 77 Fed. Reg. 25,055 (Apr. 27, 2012); 77 Fed. Reg. 58,006 (Sep. 19, 2012); 77 Fed. Reg. 61,249 (Oct. 9, 2012); 77 Fed. Reg. 71,097 (Nov. 29, 2012). As BIS explained in the preambles to the final rules, "[t]he persons that are added to the Entity List have been determined by the U.S. Government to be acting contrary to the national security or foreign policy interests of the United States." Once a person is placed on the Entity List, "[a] BIS license is required for the export or reexport of any item subject to the EAR" to that person.

BIS also removed 17 persons, located in China, Egypt, Germany, Hong Kong, Kuwait, Pakistan, and South Korea from the Entity List. 77 Fed. Reg. 24,587 (Apr. 25, 2012); 77 Fed. Reg. 58,006 (Sep. 19, 2012). BIS also periodically made corrections and amendments to its Entity List to provide more accurate identifying information for previously listed persons. See, *e.g.*, 77 Fed. Reg. 24, 587 (Apr. 25, 2012) (making amendments to "clarify the relationship between listed persons and/or provide alternate addresses, alternate spellings and acronyms and/or aliases").

2. Nonproliferation-related Changes

a. Australia Group

On July 2, 2012, the Department of Commerce, Bureau of Industry and Security ("BIS") issued a final rule revising the EAR to implement changes the Australia Group adopted in 2011 to its "List of Biological Agents for Export Control," its "Control List of Dual-Use Chemical Manufacturing Facilities and Equipment and Related Technology and Software," and its "Control List of Dual-Use Biological Equipment and Related Technology and Software." 77 Fed. Reg. 39,162 (July 2, 2012).

b. Wassenaar Arrangement

Also on July 2, 2012, BIS issued a final rule amending the EAR to implement certain changes that governments participating in the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies agreed in 2011 to make to the Wassenaar Arrangement's List of Dual-Use Goods and Technologies ("Wassenaar List"). 77 Fed. Reg. 39,354 (July 2, 2012). The rule also adds Mexico as the 41st Participating State in the list of Wassenaar Arrangement members in the EAR.

Cross References

Temporary Protected Status for Syria, **Chapter 1.D.1.**
Russia adoption agreement, **Chapter 2.B.1.a.**
Designation of Foreign Terrorist Organizations, **Chapter 3.B.1.c.**
Trafficking in persons, **Chapter 3.B.3.**
Money laundering, **Chapter 3.B.5.**
Organized crime, **Chapter 3.B.6.**
Actions to counter piracy, **Chapter 3.B.8.**
Human rights resolutions at the UNGA on Iran, DPRK, and Syria, **Chapter 6.A.2.**
HRC actions on Syria, **Chapter 6.A.3.c.**
HRC actions on Mali, **Chapter 6.A.3.g.**
WIOP assistance to countries subject to UN sanctions, **Chapter 7.A.5.**
Diplomatic relations, **Chapter 9.A.**
Recognition of Syrian opposition, **Chapter 9.B.1.**
Attachment of assets blocked by OFAC, **Chapter 10.A.2.**
UN actions on Syria, Somalia, *Mali*, **Chapter 17.B.1.**, **17.B.2., and 17.B.4.**
Nuclear nonproliferation issues in the DPRK and Iran, **Chapter 18.B.2.e.**
Implementation of UNSCR 1540, **Chapter 18.B.4.**

Chapter 17

International Conflict Resolution and Avoidance

A. MIDDLE EAST PEACE PROCESS

On April 11, 2012, the Middle East Quartet (representatives of the United Nations, the European Union, the Russian Federation, and the United States) issued a statement. The Quartet's statement appears below, and is available at *www.state.gov/r/pa/prs/ps/2012/04/187723.htm*

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The Quartet—United Nations Secretary General Ban Ki-moon, Russian Foreign Minister Sergey Lavrov, United States Secretary of State Hillary Rodham Clinton and European Union High Representative for Foreign Affairs and Security Policy Catherine Ashton — met in Washington, DC on 11 April 2012. They were joined by Quartet Representative Tony Blair and by Foreign Minister of Jordan Nasser Judeh, who briefed the Quartet on Jordan's engagement. The Quartet underscored its support for the positive efforts by King Abdullah of Jordan and Foreign Minister Judeh.

Following its consultation in New York on 12 March 2012, the Quartet reaffirmed its commitment to all elements of its statement of 23 September 2011 and renewed its call on the parties to meet those objectives. The Quartet welcomed plans for dialogue between the parties, and discussed ways to support these efforts.

The Quartet took particular note of the 21 March 2012 Ad Hoc Liaison Committee (AHLC) meeting in Brussels, and underscored the need for continued international support for the Palestinian Authority's important institution-building efforts. The Quartet encouraged the Palestinian Authority to continue working toward this end. In this regard, the Quartet called on the international community to ensure the contribution of $1.1 billion in assistance to meet the Palestinian Authority's 2012 recurrent financing requirements. The Quartet welcomed the efforts by the parties to resolve outstanding issues related to tax and customs revenue collection and urged their conclusion as soon as possible.

The Quartet noted with concern the increasing fragility of developments on the ground and called on the parties to work constructively together to take concrete steps to address the Palestinian Authority's fiscal challenges, preserve and build on the Palestinian Authority's institutional gains, and expand economic opportunities for the Palestinian people.

In this respect, the Quartet reaffirmed its commitment, as expressed in its 23 September 2011 statement, to examine possible mechanisms it can actively support going forward,

individually and together, to advance peace efforts and strengthen the Palestinian Authority's ability to meet the full range of civil and security needs of the Palestinian people both now and in a future state. The Quartet encouraged the parties, in this context, to cooperate to facilitate the social and economic development of Area C, which is of critical importance for the viability of a future Palestinian state as well as for its Palestinian inhabitants to be enabled to lead a normal life. The Quartet asked Quartet Representative Blair to continue his intensive work with the parties toward this end.

Noting the significant progress on security achieved by the Palestinian Authority in the West Bank, the Quartet calls on the Palestinian Authority to continue to make every effort to improve law and order, to fight violent extremism, and to end incitement. The Quartet emphasized the need to continue assisting the Palestinian Authority in building its law enforcement capacity. The Quartet also expressed its concern over ongoing settler violence and incitement in the West Bank and calls on Israel to take effective measures, including bringing the perpetrators of such acts to justice.

The Quartet condemned rocket attacks from Gaza and stressed the need for calm and security for both peoples. The Quartet underscored the importance of continued steps to address the needs of Gaza's residents, and welcomed the Israeli Government's approval at the AHLC meeting of UN priority infrastructure projects in Gaza. Reaffirming its previous positions, the Quartet considers that the situation in and around Gaza remains fragile and unsustainable as long as the West Bank and Gaza are not reunited under the legitimate Palestinian Authority adhering to the PLO commitments.

Reminding both parties of their obligations under the roadmap, the Quartet reiterated its call for them to avoid actions that undermine trust and to focus on positive efforts that can strengthen and improve the climate for a resumption of direct negotiations on the basis of the Quartet's September 23 statement.

The Quartet expressed concern about unilateral and provocative actions by either party, including continued settlement activity, which cannot prejudge the outcome of negotiations, the only way to a just and durable solution to the conflict.

The Quartet underscored its commitment to remain actively engaged in the coming period.

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B. PEACEKEEPING AND CONFLICT RESOLUTION

1. Syria

Throughout 2012, the Asad regime continued its violent suppression of the opposition in Syria. On March 30, 2012, at the annual meeting of the American Society of International Law, U.S. State Department Legal Adviser Harold H. Koh spoke on the situation in Syria, the U.S. government response, and legal principles relevant to the crisis in Syria. Mr. Koh's remarks are excerpted below and available in full at *www.state.gov/s/l/releases/remarks/187163.htm*.

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… How can the United States best respond to the situation in Syria, consistent with domestic and international law as well as our values and interests? There are no easy answers, and there is no single tool capable of solving all the problems. The country sits at the hub of a geopolitically sensitive area, bounded by Turkey, Iraq, Jordan, Israel, and Lebanon. Its rulers have had powerful protectors in Russia and China, as evidenced by their vetoes of not one but two Security Council resolutions. Syria is home to a complex mix of ethnic and religious communities. The opposition is still coalescing and faces enormous challenges. People are concerned and uncertain about what comes after Assad. There is no denying that this is an enormously challenging moment for all of us who are committed to international human rights and to the rule of law.

Many in our government, and in the State Department, have been working around the clock to evaluate options and facilitate a resolution. President Obama and Secretary Clinton have devoted themselves to an all-out diplomatic effort to help bring increasing pressure to bear on the Assad regime. Secretary Clinton led our efforts at the Friends of Syria Conference in Tunis in February, and has spoken out about the crisis and engaged behind the scenes on a daily basis. Ambassador Susan Rice has led our efforts at the United Nations, tirelessly working to build a unified position. And from the beginning of the crisis, my colleague Ambassador Robert Ford has displayed extraordinary heroism by risking his own personal safety to engage directly with the Syrian people, including through his travels to Jassim and Hama. He has also used social media to establish channels of communication with the Syrian people, encouraging them to embrace nonviolent protest and calling the world's attention to the urgency of the human rights and humanitarian situation.

While our efforts have not yet resulted in a resolution to the Syrian crisis, neither have we stood idly by. To the contrary, the U.S. government, together with our partners, has been actively pushing on numerous fronts. We have engaged in ceaseless diplomacy in the Security Council, General Assembly, Human Rights Council, Friends of the Syrian People, and numerous other venues to build international consensus around the Arab League plan and further isolate the Assad regime. We are providing over $17 million in humanitarian assistance through the UN and other organizations to support the people of Syria, and we are pursuing every available avenue to get that assistance to those in need. We have helped the Syrian opposition prepare to participate in the Syrian-led transition process that the Security Council has endorsed. We have redoubled our efforts to put financial pressure on those responsible for human rights abuses in Syria, including through three executive orders in the past year imposing increasingly severe sanctions. We have sought to ensure that Syrian nationals present in the United States are not forced to return to unsafe conditions, most notably by designating Syria for Temporary Protected Status under the federal immigration laws. We have strongly supported the work of the Human Rights Council and the Office of the High Commission for Human Rights in documenting and publicizing human rights abuses through the Commission of Inquiry for Syria. And we have begun to discuss issues of accountability with our Arab and international partners. I am particularly proud of the contributions that dozens of lawyers from my own office—what we call the "L-Syria team" of the Office of the Legal Adviser—have made to these efforts.

It is our firm hope that the UN Security Council's Presidential Statement of last Wednesday, March 21, will mark a step forward toward a more unified international approach. Like our regional and global partners, the United States has made clear that Assad must immediately end his campaign of savagery against his own people, allow humanitarian aid to enter, and make way for a political transition that protects the rights of all Syrians. At the same time, we have made clear that now is the time for all nations to stand behind these demands. The Security Council's statement last week expressed strong support for the six-point plan put forward by the UN and Arab League Joint Special Envoy and former UN Secretary-General, Kofi Annan. Most critically, the Council echoed Annan's call for all sides to end the violence, with the onus on the government to take the first steps. The statement calls for immediate implementation of a daily pause in hostilities for the delivery of humanitarian assistance, and also for political dialogue and the release of detained persons. The statement further expresses support for a Syrian-led political transition to a democratic, plural political system. And the statement closes by indicating that the Council "will consider further steps as appropriate." Without speculating on how exactly events might unfold in the weeks ahead, I know the administration will constantly assess what is happening inside Syria and adjust its tactics accordingly.

What international legal principles and other guidelines should govern our actions going forward? Let me close by suggesting three.

First, we must recognize that the primary responsibility for international peace and security in the United Nations system continues to rest with the Security Council. Under the UN Charter, only the Security Council can make certain decisions, such as sanctions determinations, that all UN member states are under a legal obligation to carry out. The General Assembly has already played a very important role in this crisis, as have regional organizations such as the Arab League, a role that Chapter VIII of the UN Charter expressly recognizes. We both support and applaud the constructive steps that have been taken by the General Assembly and particularly the Arab League, which has been a leader in seeking to resolve this crisis. But we will also continue to press ahead in the Security Council to build on the advances made in the March 21st Presidential Statement, with its unanimous endorsement of a UN-supervised cessation of violence, humanitarian access to all areas in need, and the beginning of a Syrian-led political transition.

Second, as international lawyers charged with dealing with complexity, we should avoid the trap of seeing this dynamic and multifaceted situation in one-dimensional terms. For that reason, I do not agree with those who insist upon viewing our commitment to solving the Syrian crisis solely through the lens of military intervention. The international community's commitment to solving a problem should not be measured so narrowly. As we have seen throughout the Arab Awakening, different circumstances call for different responses. In addressing the Arab Awakening in Tunisia, Egypt, Libya, Bahrain, and elsewhere, this administration has carefully and consistently applied a smart power approach to foreign policy that rejects "one-size-fits-all" thinking.

In so saying, we specifically see no inconsistency between the U.S. approach to Syria and the U.S. approach to Libya. Neither our legal theories, nor our strategic objectives, nor our moral commitments have changed. What is different are the facts. As President Obama observed several weeks ago, in Libya we had "a UN Security Council mandate …and we knew that we could execute very effectively in a relatively short period of time." As difficult as Libya was, the President added, "[t]his is a much more complicated situation. … [T]he notion that the way to

solve every one of these problems is to deploy our military, that hasn't been true in the past and it won't be true now." With respect to Libya, the Security Council of course adopted two important Resolutions, 1970 and 1973. The proposed Security Council resolutions on Syria have differed substantially from 1970 and 1973 in their terms. Moreover, from a practical perspective, it is by no means clear that the type of actions taken to protect Libyan civilians would have the same effect in Syria.

But that does not mean that the international community has turned away from the Syrian people or ignored the responsibility of the Syrian government to protect its civilian population. The Syrian government has been condemned for committing human rights violations by the General Assembly and the Human Rights Council; it has been placed under sanctions by the Arab League, the United States, and the European Union; and it has been the subject of a searching report by a UN Commission of Inquiry—which found credible evidence that it has committed crimes against humanity. As I alluded to earlier, the United Nations and the Arab League appointed Kofi Annan as a Special Envoy to seek both a cessation of hostilities and political reform. And on Sunday, Secretary Clinton will join the next Friends of Syria meeting in Istanbul, which will endorse the Syrian opposition's plan for a peaceful political transition. I recite this list not to suggest that we are satisfied with where things stand in Syria: Of course we aren't. But the principle of a "Responsibility to Protect" vulnerable civilians, or R2P, itself recognizes the importance of pursuing such options. This list of actions does give a sense of how—consistent with the principle of R2P—we and our international partners have been continually seeking out, developing, and using the tools that are available to us and appropriate to the situation to advance the protection of the Syrian population.

Third and finally, a commitment to ensuring that the Assad regime cedes power and a commitment to denying impunity for gross human rights violations can and should be maintained simultaneously. Like so many aspects of the situation, this issue is a delicate one. But as I have already noted, the United States has strongly encouraged efforts to use emerging technologies to document and expose human rights abuses in Syria. In addition to the information that Ambassador Ford has shared on his own Facebook page, the State Department has set up a dedicated page on the "Humanrights.gov" website where we are posting satellite imagery of the Syrian Army's attacks on civilian areas, alongside policy statements from U.S. officials. We have co-sponsored resolutions in the General Assembly and the Human Rights Council stressing the need for accountability. At the State Department last week, I met with Paulo Pinheiro, Chair of the UN's Commission of Inquiry on Syria, which has forthrightly stated that crimes against humanity have occurred and that the Syrian people will need to have a leading voice on issues of accountability. The international community must continue to work to uncover and tell the truth about what Assad and his thugs are doing, and ultimately, as Secretary Clinton has said, "there must be accountability for senior figures of the regime." While it is critical that a political transition occurs, the anticipation of certain forms of post-transition accountability may help to facilitate that process—for example, by opening up space for the regime's opponents and encouraging defections by those officials who want to distance themselves from its crimes. We think it of the utmost importance that, we work with governments and NGOs alike to continue documenting human rights violations and collecting evidence to keep shining a light on the inexcusable actions the Assad regime is taking against its people, and so the international community can uncover and tell the truth about what is occurring.

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In February, a proposed Security Council resolution on Syria co-sponsored by the United States was vetoed by China and Russia. The U.S. explanation of vote is available at *http://usun.state.gov/briefing/statements/183334.htm* and additional remarks by Ambassador Susan E. Rice, U.S. Permanent Representative to the UN, on the U.S. efforts to achieve consensus on the proposed resolution are available at *http://usun.state.gov/briefing/statements/183336.htm*. On April 5, 2012, during the month when the United States held the presidency of the UN Security Council, the Security Council issued a presidential statement on Syria, set forth below and available at *http://usun.state.gov/briefing/statements/187451.htm*.

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The Security Council recalls its Presidential Statements of 3 August 2011 and 21 March 2012 and its Press Statement of 1 March 2012.

The Security Council reaffirms its strong commitment to the sovereignty, independence, unity, and territorial integrity of Syria, and to the purposes and principles of the Charter.

The Security Council expresses its appreciation for the 2 April 2012 briefing of the Joint Special Envoy of the United Nations and the League of Arab States, Kofi Annan. The Security Council notes that the Syrian government committed on 25 March 2012 to implement the Envoy's six-point proposal.

The Security Council calls upon the Syrian government to implement urgently and visibly its commitments, as it agreed to do in its communication to the Envoy of 1 April, to (a) cease troop movements towards population centres, (b) cease all use of heavy weapons in such centres, and (c) begin pullback of military concentrations in and around population centres, and to fulfil these in their entirety by no later than 10 April 2012.

The Security Council calls upon all parties, including the opposition, to cease armed violence in all its forms within 48 hours of the implementation in their entirety by the Syrian government of measures (a), (b), (c) above. The Security Council further calls upon the opposition to engage with the Envoy in this regard.

The Security Council reiterates its call for the Syrian authorities to allow immediate, full and unimpeded access of humanitarian personnel to all populations in need of assistance, in accordance with international law and guiding principles of humanitarian assistance. The Security Council calls upon all parties in Syria, in particular the Syrian authorities, to cooperate fully with the United Nations and relevant humanitarian organizations to facilitate the provision of humanitarian assistance. To this end, the Security Council calls on all parties to immediately implement a daily two hour humanitarian pause as called for in the Envoy's six-point proposal.

The Security Council underscores the importance of an effective and credible United Nations supervision mechanism in Syria to monitor a cessation of armed violence in all its forms by all parties and relevant aspects of the Envoy's six-point proposal. The Security Council requests the Secretary-General to provide proposals for such a mechanism as soon as appropriate, after consultations with the government of Syria. The Security Council stands ready

to consider these proposals and to authorise an effective and impartial supervision mechanism upon implementation of a cessation of armed violence in all its forms by all parties.

The Security Council underscores the central importance of a peaceful political settlement to the Syrian crisis and reiterates its call for the urgent, comprehensive, and immediate implementation of all aspects of the Envoy's six-point proposal. The Security Council reiterates its full support for the Envoy's six-point proposal aimed at bringing an immediate end to all violence and human rights violations, securing humanitarian access and facilitating a Syrian-led political transition leading to a democratic, plural political system, in which citizens are equal regardless of their affiliations, ethnicities or beliefs, including through commencing a comprehensive political dialogue between the Syrian government and the whole spectrum of the Syrian opposition.

The Security Council requests the Envoy to update the Council on the cessation of violence in accordance with the above timeline, and progress towards implementation of his six-point proposal in its entirety. In the light of these reports, the Security Council will consider further steps as appropriate.

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On April 14, 2012, the Security Council adopted a resolution approving UN-Arab League Joint Special Envoy Kofi Annan's plan for Syria and authorizing a team of observers to monitor its implementation. U.N. Doc. S/RES/2042. Ambassador Rice delivered the U.S. explanation of vote, available at *http://usun.state.gov/briefing/statements/187914.htm*, in which she summarized the main points of Resolution 2042:

> The resolution just adopted reaffirms the Council's support for all elements of the Envoy's plan, including an immediate end to violence, securing humanitarian access, and a Syrian-led political transition that meets the democratic aspirations of the Syrian people. The resolution stresses that the Syrian government must immediately fulfill its remaining obligations to bring about a full cessation of violence. It emphasizes the necessity of the Syrian government immediately withdrawing all its troops and heavy weapons from population centers and returning its soldiers and their equipment to their barracks. It authorizes the Secretary-General to send an initial team of up to 30 observers to verify that the Syrian government is doing what it is obliged to do, including ensuring that the full monitoring mission can do its job, unimpeded, with full freedom of movement, full access to people and institutions, and unobstructed communications. The resolution also expresses the Council's intention to establish a larger observer mission once the Secretary General presents a blueprint and if it is clear that the cease-fire is holding and the government is cooperating.

Resolution 2043, adopted by the Security Council on April 21, 2012, established the UN Supervision Mission in Syria ("UNSMIS"), initially for a 90-day period, to monitor a cease-fire and implementation of the Joint Special Envoy's six-point plan to end the conflict. Ambassador Rice delivered the U.S. explanation of vote on resolution 2043, available at *http://usun.state.gov/briefing/statements/188268.htm*, expressing concern for the risks

faced by the UNSMIS observers due to resumed violence in Syria. UNSMIS suspended its activities in June due to increased armed violence across the country. In July 2012, the Security Council extended the mission for 30 days and said that any further extension could be possible only "in the event that the Secretary-General reports and the Security Council confirms the cessation of the use of heavy weapons and a reduction in the level of violence sufficient by all sides" to allow the UNSMIS monitors to implement their mandate. U.N. Doc. S/RES/2059. When those conditions were not met, the mandate of UNSMIS ended on August 19, 2012.

On July 19, 2012, Russia and China again prevented the Security Council from adopting a stronger resolution on Syria. The U.S. explanation of vote appears below and is available at *http://usun.state.gov/briefing/statements/195246.htm*.

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This is the third time in ten months that two members, Russia and China, have prevented the Security Council from responding credibly to the Syrian conflict. The first two vetoes they cast were very destructive. This veto is even more dangerous and deplorable. The resolution just vetoed demanded all parties to cease violence. It invoked Chapter VII to make more binding on the parties their obligation to implement the Joint Special Envoy's six-point plan and effect the political transition plan agreed by the Action Group in Geneva on June 30. And, it threatened the only party with heavy weapons—the Syrian regime—with sanctions if it continued to use these weapons brutally against its own cities and citizens.

But it would not even impose sanctions at this stage. And despite paranoid, if not disingenuous, claims by some to the contrary, it would in no way authorize nor even pave the way for foreign military intervention. What this resolution would have done was to provide the political support to the UN mission that might have given it a fighting chance to accomplish its mandate. It is a shame this Council was unwilling to do so.

There should be no doubt about this: the only way that unarmed United Nations observers could ever deter violence is if their reports of the Syrian regime's persistent violations of the Annan plan and of their own commitments led this Security Council to impose swift and meaningful consequences for non-compliance, as requested, indeed demanded, by our Joint Special Envoy. As the United States explained when voting for UNSMIS's establishment three months ago, we were and remain deeply skeptical of the Syrian regime's intentions and thus the efficacy of the observer mission.

Week after week, the Secretary-General, the Joint Special Envoy, the Head of UNSMIS, General Mood, and others have told this Council that the Assad regime continued to fire heavy weapons in population centers, in contravention of resolutions 2042 and 2043. Week after week, they told us that the Syrian government continued to detain and torture citizens and to maintain a horrific posture of intimidation and harassment. They reported recently that the Syrian regime had escalated its crackdown, employing tanks and helicopter gun-ships. They reported on various occasions that the Syrian-backed Shabiha militia were terrorizing entire communities, including sexually assaulting women and children.

The escalation of the regime's attacks against its own people is even more troubling because of their large stockpiles of chemical weapons. We have made it clear that these weapons

must remain secure and that the regime will be held accountable for their use. Because as the situation deteriorates, the potential that this regime could consider using chemical weapons against its own people should be a concern for us all.

On July 13th, UN Secretary-General Ban Ki-moon wrote a letter reiterating his call on Council members to "insist on the implementation of the Council's resolutions and to exercise their common responsibilities by taking necessary collective action under the United Nations Charter." Yet the UN mission's reports of persistent and flagrant violations and the Secretary-General's appeals and those of the Joint Special Envoy have been met only with intensified violence and Security Council inaction. The blame for this unacceptable situation does not lie with UN Secretary General Ban Ki-moon, Joint Special Envoy Annan or the UN monitors. The unarmed UN military observers and civilian staff have performed their tasks bravely under very dangerous conditions, and we thank them profoundly and the troop contributing countries for their dedicated service.

Rather, the fault lies squarely with the heinous Assad regime and those member states that refuse to join the international community and their fellow Council members in taking firm action against the regime. Their position is at odds with the majority of this Council that voted for this resolution. It is at odds with the League of Arab States. It is at odds with over 100 countries in the Group of Friends of the Syrian People that called for decisive action under Chapter VII to stop the killing and start a process of transition to post-Assad Syria. And, it is at odds with the wishes and aspirations of the vast majority of the Syrian people, who deserve so much better from this Security Council.

We have missed yet another critical opportunity to work together. We, and especially the people of Syria, cannot afford to miss any more.

Yesterday's dramatic attack in Damascus is indicative of how the situation in Syria will continue to deteriorate in the face of this Council's inaction. The perpetuation of the status quo is in no way static. It is in fact a recipe for intensified conflict, increased terrorism and a proxy war that could engulf the region.

It is simply not credible to argue that the mere continuation of an unarmed observer mission in the midst of these threats and spiraling violence can or will fundamentally change anything. Everyone in this room knows that. The United States has not and will not pin its policy on an unarmed observer mission that is deployed in the midst of such widespread violence and that cannot even count on the most minimal support of this Security Council. Instead, we will intensify our work with a diverse range of partners outside the Security Council to bring pressure to bear on the Assad regime and to deliver assistance to those in need. The Security Council has failed utterly in its most important task on its agenda this year. This is another dark day in Turtle Bay.

One can only hope that one day, before too many thousands more die, that Russia and China will stop protecting Assad and allow this Council to play its proper role at the center of the international response to the crisis in Syria.

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On August 3, 2012, by a vote of 133 in favor to 12 against, with 31 abstentions, the UN General Assembly adopted a resolution expressing its concern about the Syrian Government's systematic attacks against civilians, and the increasing use of "heavy weapons, armour and the air force against populated areas." U.N. Doc. A/RES/66/253B. The

August resolution built upon the resolution on the situation in Syria adopted by the General Assembly in February. U.N. Doc. A/RES/66/253A. The General Assembly resolution also followed after Kofi Annan resigned as special envoy. Ambassador Rice delivered the following statement on the resolution, available at *http://usun.state.gov/briefing/statements/196036.htm*.

> The United States welcomes the strong message that the United Nations General Assembly delivered today both to the Syrian regime and to the Syrian people. Today's General Assembly resolution, supported by an overwhelming majority of UN member states, strongly condemns the Syrian authorities' increasing use of heavy weapons and its ongoing and intensifying human rights abuses. The General Assembly demanded once more that the first step in the cessation of violence be made by the Assad regime. Importantly, the resolution also welcomes the Arab League's July 22nd decision, which calls for Assad to step down and for a transitional government to be formed. The United States is pleased that the General Assembly has made it abundantly clear that Syria's chemical weapons must remain secure and that members of the regime will be held accountable in the event such weapons are used.
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> Despite the continued opposition of an increasingly isolated minority, the overwhelming majority of UN members clearly stands resolutely with the Syrian people as they seek to fulfill their legitimate aspirations. The United States will continue to work with like-minded partners both at the United Nations and elsewhere, including with the over 130 countries who supported today's resolution, to advance Syria's transition, provide humanitarian support to those in need, and unify and strengthen the political opposition.

Without further action by the Security Council, the United States has worked unilaterally to impose sanctions and provide humanitarian assistance and also with partners in other contexts, such as in the Group of Friends of the Syrian People. For a discussion of activity by the UN Human Rights Council relating to Syria, see Chapter 6. See Chapter 9 for a discussion of U.S. recognition of the Syrian Opposition Council as the legitimate representative of the Syrian people. See Chapter 16 for a discussion of U.S. sanctions relating to Syria.

For further information on U.S. involvement in the meetings of the Friends of the Syrian People in 2012, see *www.state.gov/r/pa/prs/ps/2012/02/184642.htm* (regarding outcomes of the meeting in Tunis in February); *www.state.gov/secretary/rm/2012/04/187295.htm* (Secretary Clinton's intervention at the meeting in Istanbul); *www.state.gov/secretary/rm/2012/07/194628.htm* (Secretary Clinton's remarks at the meeting in France in July); *www.state.gov/secretary/rm/2012/09/198455.htm* (Secretary Clinton's remarks at the ad hoc ministerial in New York in September). For information on the assistance the United States is providing to Syria, see *www.usaid.gov/crisis/syria*.

2. Somalia

See Chapter 16.A.5.e. for a discussion of sanctions imposed relating to Somalia in 2012. The Security Council adopted several resolutions on Somalia in 2012. U.N. Doc. S/RES/2036; U.N. Doc. S/RES/2060, U.N. Doc. S/RES/2067, U.N. Doc. S/RES/2072, U.N. Doc. S/RES/2073, U.N. Doc. S/RES/2077. Somalia made significant progress in its transition to political stability in 2012, as summarized in a State Department fact sheet issued December 27, 2012 and available at *www.state.gov/r/pa/ei/bgn/2863.htm*:

> In 2012, Somalia completed its political transition with the election of a new federal parliament and speaker, the national constituent assembly's adoption of a provisional constitution, the election of a new president, President Hassan Sheikh Mahamud, and the naming of a new prime minister and cabinet.
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> …The United States also has welcomed the African Union Mission in Somalia's (AMISOM) success in driving the al-Shabaab terrorist organization out of strategically important population centers, and has underscored the continued U.S. commitment to support AMISOM and the Somali national forces in their responsibility of extending security throughout Somalia.

Excerpted below are some of the statements made by the United States in 2012 in support of the work of AMISOM to bring stability to Somalia.

On January 11, 2012, U.S. Alternate Representative to the UN for Special Political Affairs, Jeffrey DeLaurentis, addressed a Security Council Briefing on Somalia. His remarks, excerpted below and available at *http://usun.state.gov/briefing/statements/180493.htm*, include praise for AMISOM and encouragement to all parties to live up to the Kampala Accord and Roadmap to End the Transition.

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…[W]e have a moment of opportunity to turn the tide of violence, poverty, and despair in Somalia. The remarkable courage of AMISOM and its Ugandan and Burundian troops has helped liberate Mogadishu from Al-Shabaab's occupation. We welcome Djibouti's deployment and urge the African Union and Djibouti promptly to resolve any remaining questions about how best to integrate Djboutian troops into the mission. Kenya and Ethiopia have thrown their weight behind the effort to defeat Al-Shabaab, and we welcome their contributions as well. And the Kampala Accord, the Roadmap, and the Garowe conference outcome all create momentum for critical political reforms that must complement early security gains.

As difficult as it is for all of us in a time of severe resource austerity, it is imperative that the international community seize the moment in Somalia: we must come together and rise to meet these new challenges. It would be foolish to turn our backs on our collective successes thus far. That is our responsibility.

We have listened carefully to the African Union's calls to increase AMISOM's troop ceiling beyond the current mandated strength and to the various proposals to expand the use of

UN-assessed funding to support AMISOM. We await further details from the AU, particularly concerning the command-and-control architecture, as well as the Secretariat's report, including its cost analysis for the AU's recommendations, and UNSOA's assessment of support needs for the AU's operations outside of Mogadishu. We will give these proposals thorough consideration and call for a follow-on discussion as soon as practical.

The United States intends to continue its strong bilateral support to AMISOM troop contributing countries (TCCs). … We urge other member states to provide in-kind support or contributions to the UN Trust Fund for AMISOM without caveats to fund urgently needed projects, including reimbursements for contingent owned equipment. As AMISOM expands its footprint, it is imperative that it have predictable and uncaveated funding to sustain its operations.

While AMISOM plays a critical role, a coherent and achievable political strategy must be in place. The Kampala Accord and Roadmap to End the Transition are key to achieving long lasting peace and stability in Somalia. We call upon all Transitional Federal Institutions, including Parliament, as well as other signatories, to meet their obligations and responsibilities for Roadmap implementation.

Let me be absolutely clear on this point: we will hold the Roadmap signatories to account. They are responsible for achieving the tasks outlined in the Roadmap, including an agreed upon constitution, parliamentary reform, and credible and transparent elections.

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Finally, … let me reiterate our strong support of the United Nations' efforts in Somalia. The historic visit last month by the Secretary General and the President of the General Assembly is evidence of his commitment to restoring peace and stability in Somalia. The United States commends and fully supports the decision to move the UNPOS headquarters to Mogadishu this month. We thank Special Representative Mahiga for his efforts and urge him to remain focused on compliance with the benchmarks and timelines set by the Roadmap signatories in accordance with the Kampala Accord.

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Ambassador DeLaurentis again addressed the Security Council on Somalia on March 11, 2012. Ambassador DeLaurentis praised the steps taken by the international community, including passage of UN Security Council resolution 2036. His remarks are excerpted below and are also available at *http://usun.state.gov/briefing/statements/185247.htm*.

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Mr. President, Somalia stands at a critical moment. The international community has an important but limited window of opportunity. AMISOM and Somali forces have driven al Shabaab out of Mogadishu and other areas. The mandate of the Transitional Federal Government—the TFG—comes to an end in August 2012, and Somalia now has a blueprint for a state after twenty years without a functional government. At the same time, Somalia is emerging from the worst humanitarian crisis in the world.

The TFG and the international community have already taken important steps. The unanimous adoption of Security Council resolution 2036 on February 22, immediately followed by the London Conference on Somalia, show the international community is united in its commitment to Somalia's future. I would like to thank the United Kingdom for hosting this important conference, and commend members of the Council for giving unanimous support to AMISOM's expansion. AMISOM troop levels are now increasing and its funding needs have been established. The "Garowe II" constitutional conference has shown the way to more inclusive governance, with clear benchmarks, and UNPOS is established in Mogadishu.

We have accomplished much, but this is no time to lose momentum. A number of critical tasks lie ahead before the Roadmap's August deadline. We have six months, and we need to use them wisely.

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…[T]o maximize the pressure on al Shabaab, we must implement fully and swiftly the expansion mandated in UN Security Council 2036. The sacrifices made by AMISOM and the Somali National Security Forces testify to their dedication to bringing peace and stability to Somalia. We call on additional troop contributors to respond quickly to enable AMISOM to be fully staffed. We also urge member states to increase their voluntary support for AMISOM troop-contributing countries, particularly in the form of equipment and funding for the UN Trust Fund for AMISOM. The United States has a long and strong tradition of support for this. Now support for AMISOM must become a truly international effort. Maritime assets will be critical to AMISOM's mission, and we hope that providing sustainable and reliable funding for the maritime component will be addressed in the coming months.

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On May 15, 2012, Ambassador Rice addressed a Security Council briefing on Somalia. Her remarks, available at *http://usun.state.gov/briefing/statements/189955.htm*, are excerpted below. Ambassador Rice noted significant progress in the political transition and in the efforts of AMISOM to secure the country from al-Shabaab.

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Somalia stands at a critical moment in its history. One year ago, al-Shabaab controlled and terrorized large swaths of Somalia, millions were at risk of starvation, and the country's leaders focused more on feuding amongst themselves than working to improve the condition of the Somali people. One year ago, in Nairobi, this Council delivered a blunt message to the TFG that it risked losing international support, if it did not get its act together and resolve its differences.

Today, Somalia is in a different and better place. But significant challenges lie ahead. The mandate of the Transitional Federal Government (TFG) comes to an end in August 2012. Any delay or backsliding in implementing the transition is totally unacceptable. Somalia and the wider region cannot afford to revert to the endless cycles of violence and suffering that have plagued the country and threatened the region for decades.

There are, encouragingly, signs of promise for the country and its people. For the first time in a generation, Somalia has a solid plan for creating a functional state, and the conditions for its implementation continue to ripen. In the last few months, the TFG as well as other Roadmap signatories and the international community have taken important steps to implement the Roadmap to End the Transition, as defined by the Garowe Principles. A draft constitution has been circulated to the Roadmap signatories. Elders have been selected to appoint delegates to the Constituent Assembly and are meeting now to do so.

The security situation across the country has also improved. Areas on the outskirts of Mogadishu and the key cities of Beledweyne, Baidoa, and Huddur in southwestern Somalia have recently been liberated from al-Shabaab. The United States commends AMISOM and the Somali National Security forces for their significant military achievements and security gains. The sacrifices made by AMISOM and Somali troops are testament to their will and dedication to bring peace and stability to Somalia. Reflecting the improved security situation, the UN Political Office for Somalia has returned to Mogadishu. And though the humanitarian situation remains extremely fragile, thanks to the actions of UN humanitarian agencies and NGOs and the generosity of the international community, the famine has substantially abated.

The unanimous adoption of UN Security Council Resolution 2036 on February 22 this year, followed by the London Conference on Somalia, demonstrated the strong and unified commitment of the international community to Somalia's future. The United States welcomes the upcoming Second Istanbul Conference on Somalia, which should push the political transition process further towards completion.

While Somalis, with international support, have made progress, we cannot afford to lose momentum. Critical and difficult work remains and the Somali people will hold the TFG, Roadmap signatories, and other stakeholders accountable for meeting the transition timetable. As the London Conference declared in February, the Kampala Accord deadline is firm: there must be no extension of the TFG's mandate beyond August 20. The Constituent Assembly should convene to consider and adopt the interim constitution, setting the stage for other important steps, including the appointment of a new, smaller parliament and indirect elections of a speaker and president. Informing Somalis about the draft constitution and the Roadmap implementation process is fundamental to their ultimate success. But, as the Secretary General observes in his report, approval of the interim constitution by the Constituent Assembly will be the beginning, not the end, of the process.

Having noted some of the important progress achieved since this Council visited the region, let me now turn to the significant challenges ahead for Somalia. As we were tragically reminded only two weeks ago by the suicide attack against a parliamentary delegation in Dhusamareb and last month by the suicide bombing at the National Theater, al-Shabaab remains a major threat to the stability of Somalia. Its shocking and ruthless attacks on innocent civilians and its ongoing ban on 17 humanitarian organizations demonstrate its total disregard for the Somali people and disregard for human life. The United States condemns all al-Shabaab terrorist attacks that kill government officials and innocent civilians alike.

Because al-Shabaab will continue to perpetrate terrorism and exploit any opening to sow instability and derail progress in Somalia, expanding security and preventing al-Shabaab from regaining a foothold in stabilized areas is paramount. This requires AMISOM to be fully staffed so that it can fulfill its mandate. The African Union and additional troop contributors should quickly reach agreement on AMISOM's Concept of Operations. Failure to do so will not only reflect negatively on AMISOM and the African Union, but worse, undermine the security of the

Somali people. Moreover, Somali National Security Forces will figure prominently in expanded AMISOM operations, but are hampered by supply shortages and gaps in logistics capacity. Since 2007, the United States has contributed over $106 million to strengthen the Somali security sector. We urge all member states, especially new donors, to help the Somali people take the lead in providing for their own security and to coordinate bilateral support through the TFG-UN-AU co-chaired Joint Security Committee.

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3. Sierra Leone

In April 2012, when the United States held the presidency of the UN Security Council, the Security Council issued a presidential statement on Sierra Leone, excerpted below and available in full at *http://usun.state.gov/briefing/statements/187713.htm*.

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The Security Council welcomes the latest report of the Secretary-General dated 14 March 2012 (S/2012/160) on the situation in Sierra Leone and the activities of the United Nations Integrated Peacebuilding Office in Sierra Leone (UNIPSIL). The Council welcomes the briefing provided by the Executive Representative of the Secretary-General (ERSG) in Sierra Leone, Mr. Michael von der Schulenburg on 22 March 2012. The Council reaffirms its support for continuing efforts to consolidate peace in that country.

The Security Council emphasizes that the Government of Sierra Leone bears primary responsibility for peacebuilding, security and long-term development in the country. The Council notes the steady progress achieved so far by the national authorities and people of Sierra Leone in a number of areas including national reconciliation, the promotion of gender equality and the preparation for national and local elections on 17 November 2012. The Council emphasises the importance of these elections for consolidation of peace and security in Sierra Leone.

The Security Council calls upon all political parties to engage constructively in an honest and open dialogue aimed at furthering national cohesion. The Council calls on the Government of Sierra Leone, all political parties as well as other stakeholders to intensify their efforts to foster an environment that is conducive to the holding of peaceful, transparent, free and fair elections. The Council calls on the leadership of the political parties to undertake cross-party confidence building measures, promote political participation and non-violence among their membership and ensure the full adherence to due process of law and to the recommendations of the 2 April 2009 Joint Communiqué, which inter alia calls for the establishment of the Independent Police Complaints Committee to reinforce the neutrality and professionalism of the Police, and the Political Parties Code of Conduct. The Council believes that these steps are essential to ensure public and international confidence in Sierra Leone's democratic process.

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The Security Council commends the contribution of UNIPSIL and the UN Country Team to the peacebuilding and development priorities of Sierra Leone, and in particular through the integrated UN Joint Vision. The Council commends the achievements of ERSG von der Schulenburg in Sierra Leone and urges the Secretary General to promptly appoint a successor.

The Security Council continues to emphasize the important role of the regional organisations such as the African Union, the Economic Community of West African States and the Mano River Union in supporting Sierra Leone to achieve its peacebuilding, security and long-term development goals. The Council acknowledges the work of the Transnational Organised Crime Unit and calls on Sierra Leone's authorities to work with its neighbours and regional partners in order to intensify their joint efforts to consolidate regional peace and security, including through tackling the challenges posed by drug trafficking and organised crime.

The Security Council acknowledges the role of the Peacebuilding Commission (PBC) in supporting peacebuilding efforts in Sierra Leone, including in addressing the priority area of youth employment. The Council urges the PBC to continue working in support of UNIPSIL and the UN Country Team.

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4. Sudan

In 2012, problems in implementation of the Comprehensive Peace Agreement of 2005 ("CPA") persisted in Sudan and South Sudan. The UN Security Council adopted several resolutions on Sudan in response to the ongoing conflict with South Sudan. U.N. Doc. S/RES/2035, U.N. Doc. S/RES/2046, U.N. Doc. S/RES/2047, U.N. Doc. S/RES/2057, U.N. Doc. S/RES/2063, U.N. Doc. S/RES/2075. The United States supported continuing the UN Mission in South Sudan ("UNMISS") and an ongoing role for the UN in protecting civilians in Sudan, as stated by Ambassador Rice in remarks delivered on January 30, 2012, excerpted below and available at *http://usun.state.gov/briefing/statements/182723.htm*.

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…[W]e just completed a briefing by Assistant Secretary-General Edmund Mulet on South Sudan and the UNMISS mission. He made the recommendation that the force strength be maintained at the mandated level of 7,000 through at least 2013. That is a recommendation that the United States strongly supports based on the deteriorating security situation, the incidents of violence that we've seen in Jonglei and elsewhere, and the importance we attach to the UN's role in protection of civilians as well as support for the process of DDR [disarmament, demobilization, and reintegration] and SSR [security sector reform]. In the course of that discussion, we expressed also our grave concern, which you have heard us repeat, about the deteriorating situation in Southern Kordofan and Blue Nile, the humanitarian crisis there, which his becoming more and more urgent, as well as the ongoing dispute between Sudan and South Sudan over oil revenues—the flow of oil—the fact that the north has captured and held Sudanese oil. We

believe that four of the ships have now just been released, which is an overdue and important step. And we hope that conditions can quickly be created so that the parties can sit at the table and finalize, as swiftly as possible, a permanent arrangement with respect to the oil and revenue sharing, without which both sides will suffer and the loss of oil revenue will be crippling to all.

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On May 2, 2012, the UN Security Council adopted resolution 2046. Ambassador Rice delivered the explanation of vote for the United States, excerpted below and available at *http://usun.state.gov/briefing/statements/189198.htm*.

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The United States welcomes today's adoption of resolution 2046, which underscores the Security Council's strong and unanimous support for the Roadmap for peace between Sudan and South Sudan, as laid out by the African Union's Peace and Security Council.

The current conflict between Sudan and South Sudan is on the verge of becoming a full-scale and sustained war. It poses a clear and present threat to international peace and security. Both countries are on the brink of returning to the horrors of the past and threaten to take the entire region with them. To avoid untold devastation and suffering, the fighting must stop and stop now.

This conflict did not begin last week or last month or even last year. The tensions underlying this conflict have long roots, most recently in the unresolved issues of the Comprehensive Peace Agreement. For months, the Security Council, the African Union, my government and many others in the international community have sent strong warnings to the parties to resolve these issues peacefully. To date, the parties have both failed to do so. In the history of this conflict, there is a long litany of promises made and promises broken. So, as this resolution indicates, we will judge the parties by their actions, not simply their words.

With this vote, the Council has clearly imposed tight deadlines for concrete action, in line with the African Union decision. This Council, especially those members with particular influence, including my own, must continue to press both parties to implement the African Union Roadmap by ending hostilities, ceasing cross-border attacks and movements, halting aerial bombardments, withdrawing all their forces from the border areas including Abyei, activating the necessary border security mechanisms, and ending support to rebel groups working against the other state.

It is also essential that both parties return at once to the negotiating table under the auspices of the African Union High-level Implementation Panel to reach agreement on critical outstanding issues. We support the plans of the African Union to travel to Khartoum and Juba in the coming days to begin the process. This is ultimately the only way that further conflict can be avoided.

If the parties fail to take these steps promptly, this Council is united in its determination to hold both sides accountable. We stand ready to impose Chapter VII sanctions on either or both parties, as necessary.

This resolution also directs the Government of Sudan and the Sudan People's Liberation Movement-North to return to the negotiating table to resolve the outstanding political and

security issues that are substantially fueling the current conflict. And it strongly urges the Government of Sudan to accept the Tripartite proposal and immediately allow urgently needed humanitarian access to all of the affected areas of Southern Kordofan and Blue Nile states. If they do not, untold more thousands will die needlessly.

The United States welcomes the stated commitment of South Sudan to honor the Roadmap of the African Union and to abide by the decisions of this Security Council. We welcome its announced intention as well as the beginning of the implementation of its determination to pull its police forces out of Abyei. The Government of Sudan should clarify its statement of today, to indicate its acceptance of the AU Roadmap in full and without conditions. The reports of Sudan's continued deadly bombing campaign against South Sudan, documented again firsthand on the front page of today's Washington Post, are deeply alarming and profoundly disturbing, especially following South Sudan's recent steps towards peace. The Government of Sudan must immediately halt cross-border attacks, particularly the aerial bombardments that have killed scores of civilians. Equally, South Sudan should refrain from any retaliation, especially any additional cross-border attacks. The occupation of Heglig was illegal, unacceptable and must not be repeated.

Finally, the United States calls upon both parties to implement fully and without delay all elements of the AUPSC Communiqué, starting with an immediate and unconditional ceasefire. If either or both parties fail to do so, this Council stands ready to act and to impose consequences.

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5. Mali

On March 21, 2012, Captain Amadou Sanogo and the National Committee for the Restoration of Democracy seized power from democratically elected President Amadou Toumani Touré of Mali. The UN Security Council passed several resolutions relating to the conflict in Mali in 2012. U.N. Doc. S/RES/2085 (2012); U.N. Doc. S/RES/2056 (2012); and U.N. Doc. S/RES/2071 (2012). The United States supported the resolutions and the work of the Africa Union and Economic Community of West African States ("ECOWAS") to respond to the crisis in Mali. On October 12, 2012, the State Department issued a press statement on the passage of resolution 2085 on Mali, available at *www.state.gov/r/pa/prs/ps/2012/10/199106.htm*, and excerpted below. See Chapter 16.A.6.b. for discussion of sanctions and other restrictions imposed by the United States in response to the crisis in Mali, including those targeting al-Qaida in the Islamic Magreb ("AQIM").

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This resolution today accomplishes a number of important objectives: it imposes targeted sanctions against AQIM individuals and entities in Mali, supports a negotiation process to seek a sustainable political solution with the North, provides support and assistance from the UN and member states to bolster planning efforts by ECOWAS and the African Union, and expresses the

readiness of the Security Council to respond to the request from the Transitional authorities of Mali regarding a potential force to assist the Malian armed forces.

The United States believes that ECOWAS and the AU should play a prominent role in planning and implementing any such response, with strong and active support from the international community. Both military and civilian elements will be essential in responding to the emerging threats in Mali and the Sahel. The U.S. government's objectives to address the situation in Mali include restoring the authority of the State of Mali over its entire national territory, upholding the unity and territorial integrity of Mali, and confronting the threat posed by AQIM and affiliated groups.

Strengthening democratic institutions must be at the heart of combating extremism and political upheaval. Accordingly, we believe that restoration of democratically-elected government in Mali by April 2013, as called for by ECOWAS, is a crucial component of the overall long-term solution to Mali's current crises.

Finally, we welcome the appointment of Special Envoy Romano Prodi. The Secretary General should empower the envoy to marshal U.N. resources to help Bamako hold elections by April 2013, and to engage with Malian, Tuareg and regional stakeholders to promote a negotiated settlement to the Tuareg rebellion. In addition, the envoy should support U.N. [Office for the Coordination of Humanitarian Affairs] OCHA's ongoing efforts to improve the international response to the humanitarian crisis in the Sahel region.

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6. Nagorno-Karabakh

On March 22, 2012, Secretary Clinton, Foreign Minister of the Russian Federation Sergey Lavrov, and Foreign Minister of France Alain Juppé issued a joint statement regarding the Nagorno-Karabakh conflict. The United States, the Russian Federation, and France are co-chairs of the Organization for Security and Cooperation in Europe ("OSCE") Minsk Group. For background on the conflict and the OSCE Minsk Group, see *Digest 2008* at 830-32. The joint statement appears below and is available at *www.state.gov/r/pa/prs/ps/2012/03/186622.htm*.

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On the occasion of the 20th anniversary of the formal request to convene a conference on the Nagorno-Karabakh conflict, we, the Foreign Ministers of the OSCE Minsk Group Co-Chair countries, call upon the sides to demonstrate the political will needed to achieve a lasting and peaceful settlement. As Presidents Medvedev, Obama, and Sarkozy reiterated in their joint statement at Deauville on May 24, 2011, only a negotiated settlement can lead to peace, stability, and reconciliation, and any attempt to use force to resolve the conflict would bring only more suffering to a region that has known uncertainty and insecurity for too long.

We recall that the peoples of the region have suffered most from the consequences of war, and any delay in reaching a settlement will only prolong their hardships. A new generation has come of age in the region with no first-hand memory of Armenians and Azeris living side by

side, and prolonging these artificial divisions only deepens the wounds of war. For this reason, we urge the leaders of the sides to prepare their populations for peace, not war.

Progress toward peace has been made. The joint statements of our three Presidents at L'Aquila in 2009, Muskoka in 2010, and Deauville in 2011 outlined elements of a framework for a comprehensive peace settlement. Recently, the January 23, 2012, joint statement in Sochi, Russia, by Presidents Aliyev, Sargsian, and Medvedev expressed the commitment of the two sides to accelerate reaching agreement on the Basic Principles. We urge the leaders of the sides to complete work as soon as possible on the framework agreement and subsequent final settlement—based on the Helsinki Final Act principles of non-use or threat of force, territorial integrity, and self-determination and equal rights of peoples; the United Nations Charter; and norms and principles of international law—which will allow the entire region to move beyond the status quo toward a more secure and prosperous future.

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7. Timor-Leste

On December 31, 2012, the mandate of the UN Integrated Mission in Timor-Leste ("UNMIT") concluded successfully and UN peacekeepers withdrew from the country. Secretary Clinton issued a press statement, available at *www.state.gov/secretary/rm/2013/01/202420.htm*, congratulating the Timorese Government and people as well as UNMIT:

> When UNMIT was first mandated in 2006, Timor-Leste had experienced an intense period of internal disorder and the future of the young country seemed uncertain. Six years later—as a result of the hard work of the Timorese people, the United Nations, and other partners—Timor-Leste has shown the world how fragile states can stabilize and become productive members of the international community. The orderly conclusion of UNMIT can serve as a model for future peacekeeping operations.

In April, when the United States held the presidency of the Security Council, the Council issued a press statement on Timor-Leste, available at *http://usun.state.gov/briefing/statements/188517.htm*. The presidential statement welcomed the orderly conclusion of two rounds of presidential elections in Timor-Leste in March and April and reaffirmed resolution 2037. UN Security Council Resolution 2037 set the mandate of UNMIT to end on December 31, 2012. U.N. Doc. S/RES/2037.

C. CONFLICT AVOIDANCE

1. United States Atrocities Prevention Board

In 2012, the United States took steps to launch the Atrocities Prevention Board announced in 2011. See *Digest 2011* at 546-47. Ambassador Rice delivered a statement on the launch of the Atrocities Prevention Board at the United Nations in April. Her April 23, 2012 statement, excerpted below, is available at *http://usun.state.gov/briefing/statements/188284.htm*.

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Nearly nine months ago, President Obama declared the prevention of mass atrocities and genocide "a core national security interest and core moral responsibility" of the United States in the 21st century and set in motion an unprecedented review of our national capacity to foresee, prevent, and respond to them. In doing so, the President expressed his determination to ensure an end to history's bitter succession of mass killings and to make "never again" not just a reminder to future generations, but a hallmark of American policy.

Today, at the Holocaust Memorial Museum in Washington, DC, an institution dedicated to the imperatives of memory and action, President Obama announced sweeping initiatives generated by his directive. The President ordered steps—including the establishment of an Atrocity Prevention Board—that will lay the foundation for a stronger, better-organized U.S. and international response to early warnings of mass atrocities and genocide, presenting policymakers with better prevention options before the costs of action rise.

Atrocities are not inevitable. They are perpetrated by those who choose cruelty, preach hate, and seek power through division and death. They need not—and should not—happen anywhere. Not in Cote d'Ivoire, nor Libya, nor Syria. Yet, as the President has said, "History has taught us that our pursuit of a world where states do not systematically slaughter civilians will not come to fruition without concerted and coordinated effort." Today and every day, let us work together to apply the lessons of the past and to strengthen the world's will and capacity to make "never again" an enduring reality.

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2. Responsibility to Protect

The United States maintained its commitment in 2012 to further elaboration on the responsibility to protect populations from genocide, ethnic cleansing, crimes against humanity, and war crimes ("R2P"), which was endorsed in the Outcome Document of the UN World Summit in 2005. A/RES/60/1, para. 138-140; see discussion in *Digest 2005* at 375, 458-60; see also *Digest 2008* at 856-57. In its statements on the subject, U.S. representatives at the UN identified the launch of the Atrocities Prevention Board, discussed above, as one way in which the United States aims to promote R2P. The U.S. participated in an informal discussion at the UN on February 21, 2012, organized by the

Permanent Mission of Brazil on the concept of "responsibility while protecting" ("RwP"), a concept presented by Brazil that seeks to address concerns regarding the use of force in the R2P framework, emphasizing that prevention is the "best policy." The U.S. submission in the informal discussion is excerpted below and available in full at *http://usun.state.gov/briefing/statements/184487.htm*.

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… While aspects of this principle would need to be elaborated further, we embraced a principle of protection anchored in the essential responsibility of States to protect their own citizens, our shared responsibility to take appropriate steps to assist States in exercising that solemn duty, and our preparedness to take timely and decisive action where national authorities manifestly failed to do so. The consensus agreement in 2005 reflected a recognition of our common humanity and a new clarity in our collective conscience that certain actions could not be allowed to stand.

The United States was then and is now a strong supporter of the concept of Responsibility to Protect.

R2P raises complex issues both in the abstract, as we are speaking today, and in specific situations, particularly when violence is escalating, good choices are narrowing, and tough judgments about collective action need to be made. Brazil's contribution to this debate can help us refine and advance our shared commitment to R2P.

There is much in the spirit of Brazil's paper with which we agree. We agree that "violence against civilian populations must be repudiated wherever it takes place;" that "prevention is always the best policy" and preventive diplomacy needs to be strengthened; and that it is always preferable when States live up to their sovereign responsibilities to protect their own populations. We believe that force should only be resorted to when peaceful means are inadequate, and that the use of force has costs and risks that must be weighed judiciously, including against the costs and risks of inaction or different actions. And, we appreciate the paper's acknowledgment that all three pillars of R2P are integral to the concept.

There are also important elements with which we disagree, two of which we would highlight here. We believe it is a grave error to equate "manifest failure" with strict chronological sequence. Appropriate decision-making in this area requires not just "temporal" considerations but a comprehensive assessment of risks and costs and the balance of consequences, as the paper calls for elsewhere. We further regret any implication that in those circumstances where collective action is necessary, diplomacy should be considered "exhausted." We should not eliminate the possible role of diplomacy, even—perhaps especially—in situations where forceful action is required.

The United States is committed to working with international partners to advance the concept of R2P.

We are also looking at how to improve our own capacity to address situations at risk. Last August, President Obama affirmed that "preventing mass atrocities and genocide is a core national security interest and a core moral responsibility of the United States." He directed a government-wide review of U.S. ability to prevent and respond to mass atrocities and mandated creation of a new Atrocity Prevention Board to coordinate our internal efforts, with priority on prevention. This initiative emphasizes the need to mobilize a full and diverse range of tools. It

also puts a premium on enhanced cooperation with international partners, including the United Nations.

Situations where the risk of mass atrocity is high can be volatile, unpredictable, and fast-moving. In the early 1990s, the civil war in Rwanda had so few casualties that it wasn't even counted by the annual reports that track armed conflicts. Yet in just four months in 1994, nearly a million people were slaughtered, according to deliberate plans for their extermination. At any point in a swiftly moving catastrophe, we will need to ask ourselves when events are approaching a threshold of enormity that warrants collective action and assess the balance of cost and consequence between action and inaction. We all have to carry in our conscience the stain of collective failure in the spring of 1994. We will also always have to make judgments in the absence of certain answers.

There are no easy solutions when we confront the gravest of threats to innocents. But we cannot bind ourselves to inaction based on an unrealistic prerequisite of assured success. We welcome the opportunity for ongoing dialogue and continued work together with Brazil and other international partners to fulfill the Responsibility to Protect that we embraced in 2005.

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On September 5, 2012, the UN General Assembly held an interactive dialogue on the responsibility to protect. The dialogue followed the UN Secretary-General's presentation of his report on "The responsibility to protect: timely and decisive response." A/66/874-S/2012/578. The United States was among the 58 Member States and one regional organization that contributed to the dialogue. The remarks of Ambassador Elizabeth M. Cousens, U.S. Representative to ECOSOC and Alternate Representative to the UN General Assembly, are excerpted below and available in full at *http://usun.state.gov/briefing/statements/197407.htm*.

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Seven years ago, all member states of the United Nations came together to endorse and accept a shared responsibility to protect populations from genocide, ethnic cleansing, crimes against humanity, and war crimes. The United States remains a strong supporter of the Responsibility to Protect and is committed to working with international partners to advance this concept and put it into practice.

The recent report of the Secretary-General makes a valuable contribution. It reminds us that all States at all times have "an inherent responsibility to protect." The report also clarifies that R2P's three pillars are mutually reinforcing, not strictly sequential, and reaffirms the idea that "an informed and calibrated response can serve prevention goals as well." We all agree that our goal is for states to live up to their sovereign responsibilities to protect their own populations. However, if they cannot, or will not, we need to rely on a full panoply of tools, and as the Secretary-General's report underscores "coercive measures should neither be left out of our comprehensive strategy nor relegated to use only after other measures have been tried and found inadequate."

Last August, in establishing the new U.S. Atrocities Prevention Board, President Obama affirmed that "preventing mass atrocities and genocide is a core national security interest and a core moral responsibility of the United States." Through this initiative, the United States seeks to increase our own capacity to prevent and respond to mass atrocities through better coordination at home and stronger partnership abroad. A core goal of this initiative is to strengthen the capacity of the UN itself. For example, we will update U.S. training programs for UN peacekeepers to focus on enhanced techniques for civilian protection, including prevention of sexual and gender-based violence, and we will work to help strengthen the UN's capacity for conflict prevention and crisis management, including through preventive diplomacy and mediation.

Mr. Chair, we would like to note several recent actions undertaken by the international community, with active U.S. support, where we did prevent atrocities, we did protect civilians, and we are holding perpetrators accountable.

Last year, the international community prevented the Qadhafi regime from carrying out threats to massacre Libya's citizens through the passage of UN Security Council Resolutions 1970 and 1973, and by mobilizing a coalition that prevented imminent slaughter, saving countless lives.

In Cote d'Ivoire, regional and international partners—including UN peacekeepers—collaborated to protect civilians during a post-elections crisis that turned violent. While the international community's work is not finished in Cote d'Ivoire, these common efforts were essential in preventing a more dangerous outcome.

And in Libya, Cote d'Ivoire, and also Syria, the Human Rights Council established commissions of inquiry to investigate alleged abuses and violations of human rights.

Unfortunately, today, throughout Syria, civilian deaths continue to mount as the regime pursues an unrelenting campaign of violence against its own people. Regional and international partners are continuing their efforts to increase pressure on the Asad regime to hasten an end to the senseless bloodshed. These efforts include the United States' own national sanctions, European Union sanctions, and those levied by the Arab League against members of the Syrian regime. Our responsibility to protect is clear as we encourage all parties to focus on a peaceful transition of power. Moreover, those responsible for committing crimes against the Syrian people must understand they will be held to account.

There are no easy solutions, and no two situations are the same. Difficult judgments will always need to be made about options, actions, and consequences. What we cannot do however is condone inaction in the face of atrocity or mass violence. We welcome the opportunity for ongoing dialogue and intensified work together with all partners so that the international community can fulfill our responsibility to protect, and when necessary and appropriate, to take timely and decisive action to protect the most vulnerable from the gravest crimes.

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3. Implementation of the National Action Plan on Women, Peace, and Security

As discussed in *Digest 2011*, President Obama issued Executive Order 13595 along with the U.S. National Action Plan on Women, Peace and Security ("NAP") in December 2011. *Digest 2011* at 166-73. On August 14, 2012, the Department of State released its plan for

implementation of the NAP, available at *www.state.gov/documents/organization/196726.pdf*. As explained in a State Department August 15, 2012 media note, available at *www.state.gov/r/pa/prs/ps/2012/08/196530.htm*, the plan provides guidance for how the Department can advance the NAP's goals of ensuring that "women participate equally in preventing conflict and building peace in countries threatened and affected by war, violence, and insecurity." The media note also provides this summary of the implementation plan:

> The Department of State's implementation plan outlines commitments to accelerate, institutionalize, and better coordinate efforts to advance women's participation in peace negotiations, peacebuilding, conflict prevention, and decision-making institutions; protect women from gender-based violence; and ensure equal access to relief and recovery assistance in areas of conflict and insecurity. For example, the Department is taking concrete steps, through diplomatic and programmatic efforts, to empower women to participate in national and community level dialogues in Afghanistan, South Sudan, and Burma; to engage politically and in the reform of the security sector as Arab Spring countries transition; and to promote access to justice for survivors of gender-based violence from the Democratic Republic of the Congo to Nepal to El Salvador. The Department will continue to promote Women, Peace, and Security in our bilateral relationships, engagement with civil society and the private sector, and in the United Nations Security Council and other multilateral forums.

Cross References

Temporary Protected Status for Syria and Somalia, **Chapter 1.D.**
Combating piracy in Somalia, **Chapter 3.B.8.**
International Criminal Tribunals, **Chapter 3.C.**
HRC actions on Syria, *Sri Lanka*, **Chapter 6.A.3.**
Women's participation in conflict resolution, **Chapter 6.B.2.a.**
Right to peace, **Chapter 6.O.**
UN relationship with the AU, **Chapter 7.A.6.**
Palestinians' membership efforts in the UN system, **Chapter 7.B.**
Diplomatic relations and status of Syria, **Chapter 9.A. and 9.B.**
SEC rules implementing Dodd-Frank (conflict minerals), **Chapter 11.G.5.**
Sanctions relating to Syria, **Chapter 16.A.1.**
Sanctions to restore peace and security, **Chapter 16.A.5.**
Protection of civilians in armed conflict, **Chapter 18.A.1.c.(3)**

Chapter 18

Use of Force, Arms Control and Disarmament, and Nonproliferation

A. USE OF FORCE

1. General

a. Use of force issues related to U.S. counterterrorism efforts

Several leaders in the Obama administration delivered remarks in 2012 to explain the standards and process of review applicable to certain actions taken by the United States in its efforts to counter terrorism, and, in particular, to prevent further attacks on the United States by al-Qaida and its affiliates. Speeches by Defense Department General Counsel Jeh Johnson, Attorney General Eric Holder, and Assistant to the President John Brennan are discussed and excerpted in this section.

(1) Legal basis for activities directed at al-Qaida and "associated forces"

Jeh Charles Johnson, General Counsel of the Department of Defense, gave a speech on "National security law, lawyers and lawyering in the Obama Administration" at Yale Law School on February 22, 2012. His remarks, available at *www.cfr.org/national-security-and-defense/jeh-johnsons-speech-national-security-law-lawyers-lawyering-obama-administration/p27448*, are excerpted below. In the portion of his remarks that follows, Mr. Johnson described the legal basis for certain U.S. counterterrorism activities directed at al-Qaida and its "associated forces." In a portion of his remarks not excerpted here, Mr. Johnson referenced the 2010 speech of State Department Legal Adviser Harold Koh, excerpted in *Digest 2010* at 715-19, for its discussion of U.S. targeting practices.

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Tonight I want to summarize for you, in this one speech, some of the basic legal principles that form the basis for the U.S. military's counterterrorism efforts against Al Qaeda and its associated forces. These are principles with which the top national security lawyers in our Administration broadly agree. My comments are general in nature about the U.S. military's legal authority, and I do not comment on any operation in particular.

First: in the conflict against an *unconventional* enemy such as al Qaeda, we must consistently apply *conventional* legal principles. We must apply, and we have applied, the law of armed conflict, including applicable provisions of the Geneva Conventions and customary international law, core principles of distinction and proportionality, historic precedent, and traditional principles of statutory construction. Put another way, we must not make it up to suit the moment.

Against an unconventional enemy that observes no borders and does not play by the rules, we must guard against aggressive interpretations of our authorities that will discredit our efforts, provoke controversy and invite challenge. As I told the Heritage Foundation last October, over-reaching with military power can result in national security setbacks, not gains. Particularly when we attempt to extend the reach of the military on to U.S. soil, the courts resist, consistent with our core values and our American heritage—reflected, no less, in places such as the Declaration of Independence, the Federalist Papers, the Third Amendment, and in the 1878 federal criminal statute, still on the books today, which prohibits willfully using the military as a posse comitatus unless expressly authorized by Congress or the Constitution.

Second: in the conflict against al Qaeda and associated forces, the bedrock of the military's domestic legal authority continues to be the Authorization for the Use of Military Force passed by the Congress one week after 9/11. "The AUMF," as it is often called, is Congress' authorization to the President to:

> use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Ten years later, the AUMF remains on the books, and it is still a viable authorization today.

In the detention context, we in the Obama Administration have interpreted this authority to include:

> those persons who were part of, or substantially supported, Taliban or al-Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners.[3]

This interpretation of our statutory authority has been adopted by the courts in the habeas cases brought by Guantanamo detainees,[4] and in 2011 Congress joined the Executive and Judicial branches of government in embracing this interpretation when it codified it almost word-for-word in Section 1021 of this year's National Defense Authorization Act, 10 years after enactment of the original AUMF.[5] (A point worth noting here: contrary to some reports, neither

[3] *See* Respondent's Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, *In re: Guantanamo Bay Detainee Litig*., Misc. No. 08-0442, at 1 (D.D.C. March 13, 2009).
[4] *See e.g.*, *Al-Adahi v. Obama*, 613 F.3d 1102, 1103 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1001 (2011); *Awad v. Obama*, 608 F.3d 1, 11-12 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).
[5] Section 1021 of the National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81 (December 31, 2011).

Section 1021 nor any other detainee-related provision in this year's Defense Authorization Act creates or expands upon the authority for the military to detain a U.S. citizen.)

But, the AUMF, the statutory authorization from 2001, is not open-ended. It does not authorize military force against anyone the Executive labels a "terrorist." Rather, it encompasses only those groups or people with a link to the terrorist attacks on 9/11, or associated forces.

Nor is the concept of an "associated force" an open-ended one, as some suggest. This concept, too, has been upheld by the courts in the detention context,[6] and it is based on the well-established concept of co-belligerency in the law of war. The concept has become more relevant over time, as al Qaeda has, over the last 10 years, become more de-centralized, and relies more on associates to carry out its terrorist aims.

An "associated force," as we interpret the phrase, has two characteristics to it: (1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners. In other words, the group must not only be aligned with al Qaeda. It must have also entered the fight against the United States or its coalition partners. Thus, an "associated force" is not any terrorist group in the world that merely embraces the al Qaeda ideology. More is required before we draw the legal conclusion that the group fits within the statutory authorization for the use of military force passed by the Congress in 2001.

Third: there is nothing in the wording of the 2001 AUMF or its legislative history that restricts this statutory authority to the "hot" battlefields of Afghanistan. Afghanistan was plainly the focus when the authorization was enacted in September 2001, but the AUMF authorized the use of necessary and appropriate force against the organizations and persons connected to the September 11th attacks—al Qaeda and the Taliban—without a geographic limitation.

The legal point is important because, in fact, over the last 10 years al Qaeda has not only become more decentralized, it has also, for the most part, migrated away from Afghanistan to other places where it can find safe haven.

However, this legal conclusion too has its limits. It should not be interpreted to mean that we believe we are in any "Global War on Terror," or that we can use military force whenever we want, wherever we want. International legal principles, including respect for a state's sovereignty and the laws of war, impose important limits on our ability to act unilaterally, and on the way in which we can use force in foreign territories.

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(2) Trying suspected terrorists who can be captured and use of legal force to target others

On March 5, 2012, Attorney General Eric Holder spoke at Northwestern University School of Law on the interagency and inter-branch coordination in the U.S. government on certain U.S. counterterrorism activities. Attorney General Holder addressed in particular the use of both military commissions and federal courts to try suspected terrorists. He also explained the legal basis for using lethal force to target individuals, including U.S. citizens, who pose an imminent threat to the United States. His remarks, available at

[6] *See, e.g.*, *Barhoumi v. Obama*, 609 F.3d 416, 432 (D.C. Cir. 2010); *Hamlily v. Obama*, 616 F. Supp. 2d 63, 74-75 (D.D.C. 2009); *Gherebi v. Obama*, 609 F. Supp. 2d 43, 69 (D.D.C. 2009).

www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html, are excerpted below.

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… [T]he Justice Department plays a key role in conducting oversight to ensure that the intelligence community's activities remain in compliance with the law, and, together with the Foreign Intelligence Surveillance Court, in authorizing surveillance to investigate suspected terrorists. We must—and will continue to—use the intelligence-gathering capabilities that Congress has provided to collect information that can save and protect American lives. At the same time, these tools must be subject to appropriate checks and balances—including oversight by Congress and the courts, as well as within the Executive Branch—to protect the privacy and civil rights of innocent individuals. This Administration is committed to making sure that our surveillance programs appropriately reflect all of these interests.

Let me give you an example. Under section 702 of the Foreign Intelligence Surveillance Act, the Attorney General and the Director of National Intelligence may authorize annually, with the approval of the Foreign Intelligence Surveillance Court, collection directed at identified categories of foreign intelligence targets, without the need for a court order for each individual subject. This ensures that the government has the flexibility and agility it needs to identify and to respond to terrorist and other foreign threats to our security. But the government may not use this authority intentionally to target a U.S. person, here or abroad, or anyone known to be in the United States.

The law requires special procedures, reviewed and approved by the Foreign Intelligence Surveillance Court, to make sure that these restrictions are followed, and to protect the privacy of any U.S. persons whose non-public information may be incidentally acquired through this program. The Department of Justice and the Office of the Director of National Intelligence conduct extensive oversight reviews of section 702 activities at least once every sixty days, and we report to Congress on implementation and compliance twice a year. This law therefore establishes a comprehensive regime of oversight by all three branches of government. Reauthorizing this authority before it expires at the end of this year is the top legislative priority of the Intelligence Community.

But surveillance is only the first of many complex issues we must navigate. Once a suspected terrorist is captured, a decision must be made as to how to proceed with that individual in order to identify the disposition that best serves the interests of the American people and the security of this nation.

Much has been made of the distinction between our federal civilian courts and revised military commissions. The reality is that both incorporate fundamental due process and other protections that are essential to the effective administration of justice—and we should not deprive ourselves of any tool in our fight against al Qaeda.

Our criminal justice system is renowned not only for its fair process; it is respected for its results. We are not the first Administration to rely on federal courts to prosecute terrorists, nor will we be the last. Although far too many choose to ignore this fact, the previous Administration consistently relied on criminal prosecutions in federal court to bring terrorists to justice. John Walker Lindh, attempted shoe bomber Richard Reid, and 9/11 conspirator Zacarias Moussaoui

were among the hundreds of defendants convicted of terrorism-related offenses—without political controversy—during the last administration.

Over the past three years, we've built a remarkable record of success in terror prosecutions. For example, in October, we secured a conviction against Umar Farouk Abdulmutallab for his role in the attempted bombing of an airplane traveling from Amsterdam to Detroit on Christmas Day 2009. He was sentenced last month to life in prison without the possibility of parole. While in custody, he provided significant intelligence during debriefing sessions with the FBI. He described in detail how he became inspired to carry out an act of jihad, and how he traveled to Yemen and made contact with Anwar al-Aulaqi, a U.S. citizen and a leader of al Qaeda in the Arabian Peninsula. Abdulmutallab also detailed the training he received, as well as Aulaqi's specific instructions to wait until the airplane was over the United States before detonating his bomb.

In addition to Abdulmutallab, Faizal Shahzad, the attempted Times Square bomber, Ahmed Ghailani, a conspirator in the 1998 U.S. embassy bombings in Kenya and Tanzania, and three individuals who plotted an attack against John F. Kennedy Airport in 2007, have also recently begun serving life sentences. And convictions have been obtained in the cases of several homegrown extremists, as well. For example, last year, United States citizen and North Carolina resident Daniel Boyd pleaded guilty to conspiracy to provide material support to terrorists and conspiracy to murder, kidnap, maim, and injure persons abroad; and U.S. citizen and Illinois resident Michael Finton pleaded guilty to attempted use of a weapon of mass destruction in connection with his efforts to detonate a truck bomb outside of a federal courthouse.

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Simply put, since 9/11, hundreds of individuals have been convicted of terrorism or terrorism-related offenses in Article III courts and are now serving long sentences in federal prison. Not one has ever escaped custody. No judicial district has suffered any kind of retaliatory attack. These are facts, not opinions. There are not two sides to this story. Those who claim that our federal courts are incapable of handling terrorism cases are not registering a dissenting opinion — they are simply wrong.

But federal courts are not our only option. Military commissions are also appropriate in proper circumstances, and we can use them as well to convict terrorists and disrupt their plots. This Administration's approach has been to ensure that the military commissions system is as effective as possible, in part by strengthening the procedural protections on which the commissions are based. With the President's leadership, and the bipartisan backing of Congress, the Military Commissions Act of 2009 was enacted into law. And, since then, meaningful improvements have been implemented.

It's important to note that the reformed commissions draw from the same fundamental protections of a fair trial that underlie our civilian courts. They provide a presumption of innocence and require proof of guilt beyond a reasonable doubt. They afford the accused the right to counsel—as well as the right to present evidence and cross-examine witnesses. They prohibit the use of statements obtained through torture or cruel, inhuman, or degrading treatment. And they secure the right to appeal to Article III judges—all the way to the United States Supreme Court. In addition, like our federal civilian courts, reformed commissions allow for the protection of sensitive sources and methods of intelligence gathering, and for the safety and security of participants.

A key difference is that, in military commissions, evidentiary rules reflect the realities of the battlefield and of conducting investigations in a war zone. For example, statements may be admissible even in the absence of Miranda warnings, because we cannot expect military personnel to administer warnings to an enemy captured in battle. But instead, a military judge must make other findings—for instance, that the statement is reliable and that it was made voluntarily.

I have faith in the framework and promise of our military commissions, which is why I've sent several cases to the reformed commissions for prosecution. There is, quite simply, no inherent contradiction between using military commissions in appropriate cases while still prosecuting other terrorists in civilian courts. Without question, there are differences between these systems that must be—and will continue to be—weighed carefully. Such decisions about how to prosecute suspected terrorists are core Executive Branch functions. In each case, prosecutors and counterterrorism professionals across the government conduct an intensive review of case-specific facts designed to determine which avenue of prosecution to pursue.

Several practical considerations affect the choice of forum.

First of all, the commissions only have jurisdiction to prosecute individuals who are a part of al Qaeda, have engaged in hostilities against the United States or its coalition partners, or who have purposefully and materially supported such hostilities. This means that there may be members of certain terrorist groups who fall outside the jurisdiction of military commissions because, for example, they lack ties to al Qaeda and their conduct does not otherwise make them subject to prosecution in this forum. Additionally, by statute, military commissions cannot be used to try U.S. citizens.

Second, our civilian courts cover a much broader set of offenses than the military commissions, which can only prosecute specified offenses, including violations of the laws of war and other offenses traditionally triable by military commission. This means federal prosecutors have a wider range of tools that can be used to incapacitate suspected terrorists. Those charges, and the sentences they carry upon successful conviction, can provide important incentives to reach plea agreements and convince defendants to cooperate with federal authorities.

Third, there is the issue of international cooperation. A number of countries have indicated that they will not cooperate with the United States in certain counterterrorism efforts—for instance, in providing evidence or extraditing suspects—if we intend to use that cooperation in pursuit of a military commission prosecution. Although the use of military commissions in the United States can be traced back to the early days of our nation, in their present form they are less familiar to the international community than our time-tested criminal justice system and Article III courts. However, it is my hope that, with time and experience, the reformed commissions will attain similar respect in the eyes of the world.

Where cases are selected for prosecution in military commissions, Justice Department investigators and prosecutors work closely to support our Department of Defense colleagues. Today, the alleged mastermind of the bombing of the U.S.S. Cole is being prosecuted before a military commission. I am proud to say that trial attorneys from the Department of Justice are working with military prosecutors on that case, as well as others.

And we will continue to reject the false idea that we must choose between federal courts and military commissions, instead of using them both. If we were to fail to use all necessary and available tools at our disposal, we would undoubtedly fail in our fundamental duty to protect the Nation and its people. That is simply not an outcome we can accept.

This Administration has worked in other areas as well to ensure that counterterrorism professionals have the flexibility that they need to fulfill their critical responsibilities without diverging from our laws and our values. Last week brought the most recent step, when the President issued procedures under the National Defense Authorization Act. This legislation, which Congress passed in December, mandated that a narrow category of al Qaeda terrorist suspects be placed in temporary military custody.

Last Tuesday, the President exercised his authority under the statute to issue procedures to make sure that military custody will not disrupt ongoing law enforcement and intelligence operations—and that an individual will be transferred from civilian to military custody only after a thorough evaluation of his or her case, based on the considered judgment of the President's senior national security team. As authorized by the statute, the President waived the requirements for several categories of individuals where he found that the waivers were in our national security interest. These procedures implement not only the language of the statute but also the expressed intent of the lead sponsors of this legislation. And they address the concerns the President expressed when he signed this bill into law at the end of last year.

Now, I realize I have gone into considerable detail about tools we use to identify suspected terrorists and to bring captured terrorists to justice. It is preferable to capture suspected terrorists where feasible—among other reasons, so that we can gather valuable intelligence from them—but we must also recognize that there are instances where our government has the clear authority—and, I would argue, the responsibility—to defend the United States through the appropriate and lawful use of lethal force.

This principle has long been established under both U.S. and international law. In response to the attacks perpetrated—and the continuing threat posed—by al Qaeda, the Taliban, and associated forces, Congress has authorized the President to use all necessary and appropriate force against those groups. Because the United States is in an armed conflict, we are authorized to take action against enemy belligerents under international law. The Constitution empowers the President to protect the nation from any imminent threat of violent attack. And international law recognizes the inherent right of national self-defense. None of this is changed by the fact that we are not in a conventional war.

Our legal authority is not limited to the battlefields in Afghanistan. Indeed, neither Congress nor our federal courts has limited the geographic scope of our ability to use force to the current conflict in Afghanistan. We are at war with a stateless enemy, prone to shifting operations from country to country. Over the last three years alone, al Qaeda and its associates have directed several attacks—fortunately, unsuccessful—against us from countries other than Afghanistan. Our government has both a responsibility and a right to protect this nation and its people from such threats.

This does not mean that we can use military force whenever or wherever we want. International legal principles, including respect for another nation's sovereignty, constrain our ability to act unilaterally. But the use of force in foreign territory would be consistent with these international legal principles if conducted, for example, with the consent of the nation involved—or after a determination that the nation is unable or unwilling to deal effectively with a threat to the United States.

Furthermore, it is entirely lawful—under both United States law and applicable law of war principles—to target specific senior operational leaders of al Qaeda and associated forces. This is not a novel concept. In fact, during World War II, the United States tracked the plane flying Admiral Isoroku Yamamoto—the commander of Japanese forces in the attack on Pearl

Harbor and the Battle of Midway—and shot it down specifically because he was on board. As I explained to the Senate Judiciary Committee following the operation that killed Osama bin Laden, the same rules apply today.

Some have called such operations "assassinations." They are not, and the use of that loaded term is misplaced. Assassinations are unlawful killings. Here, for the reasons I have given, the U.S. government's use of lethal force in self defense against a leader of al Qaeda or an associated force who presents an imminent threat of violent attack would not be unlawful—and therefore would not violate the Executive Order banning assassination or criminal statutes.

Now, it is an unfortunate but undeniable fact that some of the threats we face come from a small number of United States citizens who have decided to commit violent attacks against their own country from abroad. Based on generations-old legal principles and Supreme Court decisions handed down during World War II, as well as during this current conflict, it's clear that United States citizenship alone does not make such individuals immune from being targeted. But it does mean that the government must take into account all relevant constitutional considerations with respect to United States citizens—even those who are leading efforts to kill innocent Americans. Of these, the most relevant is the Fifth Amendment's Due Process Clause, which says that the government may not deprive a citizen of his or her life without due process of law.

The Supreme Court has made clear that the Due Process Clause does not impose one-size-fits-all requirements, but instead mandates procedural safeguards that depend on specific circumstances. In cases arising under the Due Process Clause—including in a case involving a U.S. citizen captured in the conflict against al Qaeda—the Court has applied a balancing approach, weighing the private interest that will be affected against the interest the government is trying to protect, and the burdens the government would face in providing additional process. Where national security operations are at stake, due process takes into account the realities of combat.

Here, the interests on both sides of the scale are extraordinarily weighty. An individual's interest in making sure that the government does not target him erroneously could not be more significant. Yet it is imperative for the government to counter threats posed by senior operational leaders of al Qaeda, and to protect the innocent people whose lives could be lost in their attacks.

Any decision to use lethal force against a United States citizen—even one intent on murdering Americans and who has become an operational leader of al-Qaeda in a foreign land—is among the gravest that government leaders can face. The American people can be—and deserve to be—assured that actions taken in their defense are consistent with their values and their laws. So, although I cannot discuss or confirm any particular program or operation, I believe it is important to explain these legal principles publicly.

Let me be clear: an operation using lethal force in a foreign country, targeted against a U.S. citizen who is a senior operational leader of al Qaeda or associated forces, and who is actively engaged in planning to kill Americans, would be lawful at least in the following circumstances: First, the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles.

The evaluation of whether an individual presents an "imminent threat" incorporates considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks

against the United States. As we learned on 9/11, al Qaeda has demonstrated the ability to strike with little or no notice—and to cause devastating casualties. Its leaders are continually planning attacks against the United States, and they do not behave like a traditional military—wearing uniforms, carrying arms openly, or massing forces in preparation for an attack. Given these facts, the Constitution does not require the President to delay action until some theoretical end-stage of planning—when the precise time, place, and manner of an attack become clear. Such a requirement would create an unacceptably high risk that our efforts would fail, and that Americans would be killed.

Whether the capture of a U.S. citizen terrorist is feasible is a fact-specific, and potentially time-sensitive, question. It may depend on, among other things, whether capture can be accomplished in the window of time available to prevent an attack and without undue risk to civilians or to U.S. personnel. Given the nature of how terrorists act and where they tend to hide, it may not always be feasible to capture a United States citizen terrorist who presents an imminent threat of violent attack. In that case, our government has the clear authority to defend the United States with lethal force.

Of course, any such use of lethal force by the United States will comply with the four fundamental law of war principles governing the use of force. The principle of necessity requires that the target have definite military value. The principle of distinction requires that only lawful targets—such as combatants, civilians directly participating in hostilities, and military objectives—may be targeted intentionally. Under the principle of proportionality, the anticipated collateral damage must not be excessive in relation to the anticipated military advantage. Finally, the principle of humanity requires us to use weapons that will not inflict unnecessary suffering.

These principles do not forbid the use of stealth or technologically advanced weapons. In fact, the use of advanced weapons may help to ensure that the best intelligence is available for planning and carrying out operations, and that the risk of civilian casualties can be minimized or avoided altogether.

Some have argued that the President is required to get permission from a federal court before taking action against a United States citizen who is a senior operational leader of al Qaeda or associated forces. This is simply not accurate. “Due process” and “judicial process” are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.

The conduct and management of national security operations are core functions of the Executive Branch, as courts have recognized throughout our history. Military and civilian officials must often make real-time decisions that balance the need to act, the existence of alternative options, the possibility of collateral damage, and other judgments—all of which depend on expertise and immediate access to information that only the Executive Branch may possess in real time. The Constitution’s guarantee of due process is ironclad, and it is essential—but, as a recent court decision makes clear, it does not require judicial approval before the President may use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war—even if that individual happens to be a U.S. citizen.

That is not to say that the Executive Branch has—or should ever have—the ability to target any such individuals without robust oversight. Which is why, in keeping with the law and our constitutional system of checks and balances, the Executive Branch regularly informs the appropriate members of Congress about our counterterrorism activities, including the legal

framework, and would of course follow the same practice where lethal force is used against United States citizens.

Now, these circumstances are sufficient under the Constitution for the United States to use lethal force against a U.S. citizen abroad—but it is important to note that the legal requirements I have described may not apply in every situation—such as operations that take place on traditional battlefields.

The unfortunate reality is that our nation will likely continue to face terrorist threats that—at times—originate with our own citizens. When such individuals take up arms against this country—and join al Qaeda in plotting attacks designed to kill their fellow Americans—there may be only one realistic and appropriate response. We must take steps to stop them—in full accordance with the Constitution. In this hour of danger, we simply cannot afford to wait until deadly plans are carried out—and we will not.

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(3) Use of remotely piloted aircraft, or drones

On April 30, 2012, John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, delivered a speech at the Wilson Center on "The Ethics and Efficacy of the President's Counterterrorism Strategy." Mr. Brennan's speech, excerpted below, is available in full at *www.state.gov/s/l/c8183.htm*. Mr. Brennan focused on the U.S. use of remotely piloted aircraft, or drones, to target members of al-Qaida or its associated forces.

* * * *

Now, I want to be very clear. In the course of the war in Afghanistan and the fight against al-Qa'ida, I think the American people expect us to use advanced technologies, for example, to prevent attacks on U.S. forces and to remove terrorists from the battlefield. We do, and it has saved the lives of our men and women in uniform. What has clearly captured the attention of many, however, is a different practice, beyond hot battlefields like Afghanistan, identifying specific members of al-Qa'ida and then targeting them with lethal force, often using aircraft remotely operated by pilots who can be hundreds, if not thousands, of miles away. This is what I want to focus on today.

Jack Goldsmith—a former assistant attorney general in the administration of George W. Bush and now a professor at Harvard Law School—captured the situation well. He wrote:

> The government needs a way to credibly convey to the public that its decisions about who is being targeted—especially when the target is a U.S. citizen—are sound… First, the government can and should tell us more about the process by which it reaches its high-value targeting decisions… The more the government tells us about the eyeballs on the issue and the robustness of the process, the more credible will be its claims about the accuracy of its factual determinations and the soundness of its legal ones. All of this information can be disclosed in some form without endangering critical intelligence.

Well, President Obama agrees. And that is why I am here today.

I stand here as someone who has been involved with our nation's security for more than thirty years. I have a profound appreciation for the truly remarkable capabilities of our counterterrorism professionals—and our relationships with other nations—and we must never compromise them. I will not discuss the sensitive details of any specific operation today. I will not, nor will I ever, publicly divulge sensitive intelligence sources and methods. For when that happens, our national security is endangered and lives can be lost. At the same time, we reject the notion that any discussion of these matters is to step onto a slippery slope that inevitably endangers our national security. Too often, that fear can become an excuse for saying nothing at all—which creates a void that is then filled with myths and falsehoods. That, in turn, can erode our credibility with the American people and with foreign partners, and it can undermine the public's understanding and support for our efforts. In contrast, President Obama believes that—done carefully, deliberately and responsibly—we can be more transparent and still ensure our nation's security.

So let me say it as simply as I can. Yes, in full accordance with the law—and in order to prevent terrorist attacks on the United States and to save American lives—the United States Government conducts targeted strikes against specific al-Qa'ida terrorists, sometimes using remotely piloted aircraft, often referred to publicly as drones. And I'm here today because President Obama has instructed us to be more open with the American people about these efforts.

Broadly speaking, the debate over strikes targeted at individual members of al-Qa'ida has centered on their legality, their ethics, the wisdom of using them, and the standards by which they are approved. With the remainder of my time today, I would like to address each of these in turn.

First, these targeted strikes are legal. Attorney General Holder, Harold Koh, and Jeh Johnson have all addressed this question at length. To briefly recap, as a matter of domestic law, the Constitution empowers the president to protect the nation from any imminent threat of attack. The Authorization for Use of Military Force, the AUMF, passed by Congress after the September 11th attacks authorizes the President "to use all necessary and appropriate force" against those nations, organizations, and individuals responsible for 9/11. There is nothing in the AUMF that restricts the use of military force against al-Qa'ida to Afghanistan.

As a matter of international law, the United States is in an armed conflict with al-Qa'ida, the Taliban, and associated forces, in response to the 9/11 attacks, and we may also use force consistent with our inherent right of national self-defense. There is nothing in international law that bans the use of remotely piloted aircraft for this purpose or that prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat.

Second, targeted strikes are ethical. Without question, the ability to target a specific individual—from hundreds or thousands of miles away—raises profound questions. Here, I think it's useful to consider such strikes against the basic principles of the law of war that govern the use of force.

Targeted strikes conform to the principle of necessity, the requirement that the target have definite military value. In this armed conflict, individuals who are part of al-Qa'ida or its associated forces are legitimate military targets. We have the authority to target them with lethal force just as we targeted enemy leaders in past conflicts, such as German and Japanese commanders during World War II.

Targeted strikes conform to the principle of distinction—the idea that only military objectives may be intentionally targeted and that civilians are protected from being intentionally targeted. With the unprecedented ability of remotely piloted aircraft to precisely target a military objective while minimizing collateral damage, one could argue that never before has there been a weapon that allows us to distinguish more effectively between an al-Qa'ida terrorist and innocent civilians.

Targeted strikes conform to the principle of proportionality—the notion that the anticipated collateral damage of an action cannot be excessive in relation to the anticipated military advantage. By targeting an individual terrorist or small numbers of terrorists with ordnance that can be adapted to avoid harming others in the immediate vicinity, it is hard to imagine a tool that can better minimize the risk to civilians than remotely piloted aircraft.

For the same reason, targeted strikes conform to the principle of humanity which requires us to use weapons that will not inflict unnecessary suffering. For all these reasons, I suggest to you that these targeted strikes against al-Qa'ida terrorists are indeed ethical and just.

Of course, even if a tool is legal and ethical, that doesn't necessarily make it appropriate or advisable in a given circumstance. This brings me to my next point.

Targeted strikes are wise. Remotely piloted aircraft in particular can be a wise choice because of geography, with their ability to fly hundreds of miles over the most treacherous terrain, strike their targets with astonishing precision, and then return to base. They can be a wise choice because of time, when windows of opportunity can close quickly and there may be just minutes to act.

They can be a wise choice because they dramatically reduce the danger to U.S. personnel, even eliminating the danger altogether. Yet they are also a wise choice because they dramatically reduce the danger to innocent civilians, especially considered against massive ordnance that can cause injury and death far beyond its intended target.

In addition, compared against other options, a pilot operating this aircraft remotely—with the benefit of technology and with the safety of distance—might actually have a clearer picture of the target and its surroundings, including the presence of innocent civilians. It's this surgical precision—the ability, with laser-like focus, to eliminate the cancerous tumor called an al-Qa'ida terrorist while limiting damage to the tissue around it—that makes this counterterrorism tool so essential.

There's another reason that targeted strikes can be a wise choice, the strategic consequences that inevitably come with the use of force. As we've seen, deploying large armies abroad won't always be our best offense.

Countries typically don't want foreign soldiers in their cities and towns. In fact, large, intrusive military deployments risk playing into al-Qa'ida's strategy of trying to draw us into long, costly wars that drain us financially, inflame anti-American resentment and inspire the next generation of terrorists. In comparison, there is the precision of targeted strikes.

I acknowledge that we, as a government, along with our foreign partners, can and must do a better job of addressing the mistaken belief among some foreign publics that we engage in these strikes casually, as if we are simply unwilling to expose U.S forces to the dangers faced every day by people in those regions. For, as I'll describe today, there is absolutely nothing casual about the extraordinary care we take in making the decision to pursue an al-Qa'ida terrorist, and the lengths to which we go to ensure precision and avoid the loss of innocent life.

Still, there is no more consequential a decision than deciding whether to use lethal force against another human being—even a terrorist dedicated to killing American citizens. So in order

to ensure that our counterterrorism operations involving the use of lethal force are legal, ethical and wise, President Obama has demanded that we hold ourselves to the highest possible standards and processes.

This reflects his approach to broader questions regarding the use of force. In his speech in Oslo accepting the Nobel Peace Prize, the President said that "all nations, strong and weak alike, must adhere to standards that govern the use of force." And he added:

> Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. And even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is a source of our strength.

The United States is the first nation to regularly conduct strikes using remotely piloted aircraft in an armed conflict. Other nations also possess this technology. Many more nations are seeking it, and more will succeed in acquiring it. President Obama and those of us on his national security team are very mindful that as our nation uses this technology, we are establishing precedents that other nations may follow, and not all of them will be nations that share our interests or the premium we put on protecting human life, including innocent civilians.

If we want other nations to use these technologies responsibly, we must use them responsibly. If we want other nations to adhere to high and rigorous standards for their use, then we must do so as well. We cannot expect of others what we will not do ourselves. President Obama has therefore demanded that we hold ourselves to the highest possible standards—that, at every step, we be as thorough and deliberate as possible.

This leads me to the final point I want to discuss today, the rigorous standards and process of review to which we hold ourselves today when considering and authorizing strikes against a specific member of al-Qa'ida outside the hot battlefield of Afghanistan. What I hope to do is to give you a general sense, in broad terms, of the high bar we require ourselves to meet when making these profound decisions today. That includes not only whether a specific member of al-Qa'ida can legally be pursued with lethal force, but also whether he should be.

Over time, we've worked to refine, clarify, and strengthen this process and our standards, and we continue to do so. If our counterterrorism professionals assess, for example, that a suspected member of al-Qa'ida poses such a threat to the United States as to warrant lethal action, they may raise that individual's name for consideration. The proposal will go through a careful review and, as appropriate, will be evaluated by the very most senior officials in our government for decision.

First and foremost, the individual must be a legitimate target under the law. Earlier, I described how the use of force against members of al-Qa'ida is authorized under both international and U.S. law, including both the inherent right of national self-defense and the 2001 Authorization for Use of Military Force, which courts have held extends to those who are part of al-Qa'ida, the Taliban, and associated forces. If, after a legal review, we determine that the individual is not a lawful target, end of discussion. We are a nation of laws, and we will always act within the bounds of the law.

Of course, the law only establishes the outer limits of the authority in which counterterrorism professionals can operate. Even if we determine that it is lawful to pursue the terrorist in question with lethal force, it doesn't necessarily mean we should. There are, after all,

literally thousands of individuals who are part of al-Qa'ida, the Taliban, or associated forces—thousands. Even if it were possible, going after every single one of these individuals with lethal force would neither be wise nor an effective use of our intelligence and counterterrorism resources.

As a result, we have to be strategic. Even if it is lawful to pursue a specific member of al-Qa'ida, we ask ourselves whether that individual's activities rise to a certain threshold for action, and whether taking action will, in fact, enhance our security.

For example, when considering lethal force we ask ourselves whether the individual poses a significant threat to U.S. interests. This is absolutely critical, and it goes to the very essence of why we take this kind of exceptional action. We do not engage in lethal action in order to eliminate every single member of al-Qa'ida in the world. Most times, and as we have done for more than a decade, we rely on cooperation with other countries that are also interested in removing these terrorists with their own capabilities and within their own laws. Nor is lethal action about punishing terrorists for past crimes; we are not seeking vengeance. Rather, we conduct targeted strikes because they are necessary to mitigate an actual ongoing threat—to stop plots, prevent future attacks, and save American lives.

And what do we mean by a significant threat? I am not referring to some hypothetical threat—the mere possibility that a member of al-Qa'ida might try to attack us at some point in the future. A significant threat might be posed by an individual who is an operational leader of al-Qa'ida or one of its associated forces. Or perhaps the individual is himself an operative—in the midst of actually training for or planning to carry out attacks against U.S. interests. Or perhaps the individual possesses unique operational skills that are being leveraged in a planned attack. The purpose of a strike against a particular individual is to stop him before he can carry out his attack and kill innocents. The purpose is to disrupt his plots and plans before they come to fruition.

In addition, our unqualified preference is to only undertake lethal force when we believe that capturing the individual is not feasible. I have heard it suggested that the Obama Administration somehow prefers killing al-Qa'ida members rather than capturing them. Nothing could be further from the truth. It is our preference to capture suspected terrorists whenever feasible.

For one reason, this allows us to gather valuable intelligence that we might not be able to obtain any other way. In fact, the members of al-Qa'ida that we or other nations have captured have been one of our greatest sources of information about al-Qa'ida, its plans, and its intentions. And once in U.S. custody, we often can prosecute them in our federal courts or reformed military commissions, both of which are used for gathering intelligence and preventing terrorist attacks.

You see our preference for capture in the case of Ahmed Warsame, a member of al-Shabaab who had significant ties to al-Qa'ida in the Arabian Peninsula. Last year, when we learned that he would be traveling from Yemen to Somalia, U.S. forces captured him in route and we subsequently charged him in federal court.

The reality, however, is that since 2001 such unilateral captures by U.S. forces outside of "hot" battlefields, like Afghanistan, have been exceedingly rare. This is due in part to the fact that in many parts of the world our counterterrorism partners have been able to capture or kill dangerous individuals themselves.

Moreover, after being subjected to more than a decade of relentless pressure, al-Qa'ida's ranks have dwindled and scattered. These terrorists are skilled at seeking remote, inhospitable terrain—places where the United States and our partners simply do not have the ability to arrest

or capture them. At other times, our forces might have the ability to attempt capture, but only by putting the lives of our personnel at too great a risk. Often times, attempting capture could subject civilians to unacceptable risks. There are many reasons why capture might not be feasible, in which case lethal force might be the only remaining option to address the threat and prevent an attack.

Finally, when considering lethal force we are of course mindful that there are important checks on our ability to act unilaterally in foreign territories. We do not use force whenever we want, wherever we want. International legal principles, including respect for a state's sovereignty and the laws of war, impose constraints. The United States of America respects national sovereignty and international law.

Those are some of the questions we consider; the high standards we strive to meet. And in the end, we make a decision—we decide whether a particular member of al-Qa'ida warrants being pursued in this manner. Given the stakes involved and the consequence of our decision, we consider all the information available to us, carefully, responsibly.

We review the most up-to-date intelligence, drawing on the full range of our intelligence capabilities. And we do what sound intelligence demands—we challenge it, we question it, including any assumptions on which it might be based. If we want to know more, we may ask the Intelligence Community to go back and collect additional intelligence or refine its analysis so that a more informed decision can be made.

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In some cases, such as senior al-Qa'ida leaders who are directing and planning attacks against the United States, the individual clearly meets our standards for taking action. In other cases, individuals have not met our standards. Indeed, there have been numerous occasions where, after careful review, we have, working on a consensus basis, concluded that lethal force was not justified in a given case.

Finally, as the President's counterterrorism advisor, I feel that it is important for the American people to know that these efforts are overseen with extraordinary care and thoughtfulness. The President expects us to address all of the tough questions I have discussed today. Is capture really not feasible? Is this individual a significant threat to U.S. interests? Is this really the best option? Have we thought through the consequences, especially any unintended ones? Is this really going to help protect our country from further attacks? Is it going to save lives?

Our commitment to upholding the ethics and efficacy of this counterterrorism tool continues even after we decide to pursue a specific terrorist in this way. For example, we only authorize a particular operation against a specific individual if we have a high degree of confidence that the individual being targeted is indeed the terrorist we are pursuing. This is a very high bar. Of course, how we identify an individual naturally involves intelligence sources and methods, which I will not discuss. Suffice it to say, our Intelligence Community has multiple ways to determine, with a high degree of confidence, that the individual being targeted is indeed the al-Qa'ida terrorist we are seeking.

In addition, we only authorize a strike if we have a high degree of confidence that innocent civilians will not be injured or killed, except in the rarest of circumstances. The unprecedented advances we have made in technology provide us greater proximity to targets for a longer period of time, and as a result allow us to better understand what is happening in real

time on the ground in ways that were previously impossible. We can be much more discriminating and we can make more informed judgments about factors that might contribute to collateral damage.

I can tell you today that there have indeed been occasions when we have decided against conducting a strike in order to avoid the injury or death of innocent civilians. This reflects our commitment to doing everything in our power to avoid civilian casualties—even if it means having to come back another day to take out that terrorist, as we have done. And I would note that these standards—for identifying a target and avoiding the loss of innocent civilians—exceed what is required as a matter of international law on a typical battlefield. That's another example of the high standards to which we hold ourselves.

Our commitment to ensuring accuracy and effectiveness continues even after a strike. In the wake of a strike, we harness the full range of our intelligence capabilities to assess whether the mission in fact achieved its objective. We try to determine whether there was any collateral damage, including civilian deaths. There is, of course, no such thing as a perfect weapon, and remotely piloted aircraft are no exception.

As the President and others have acknowledged, there have indeed been instances when—despite the extraordinary precautions we take—civilians have been accidently injured, or worse, killed in these strikes. It is exceedingly rare, but it has happened. When it does, it pains us, and we regret it deeply, as we do any time innocents are killed in war. And when this happens we take it seriously. We go back and review our actions. We examine our practices. And we constantly work to improve and refine our efforts so that we are doing everything in our power to prevent the loss of innocent life. This too is a reflection of our values as Americans.

Ensuring the ethics and efficacy of these strikes also includes regularly informing appropriate members of Congress and the committees who have oversight of our counterterrorism programs. Indeed, our counterterrorism programs—including the use of lethal force—have grown more effective over time because of congressional oversight and our ongoing dialogue with Members and staff.

This is the seriousness, the extraordinary care, that President Obama and those of us on his national security team bring to this weightiest of questions—whether to pursue lethal force against a terrorist who is plotting to attack our country.

When that person is a U.S. citizen, we ask ourselves additional questions. Attorney General Holder has already described the legal authorities that clearly allow us to use lethal force against an American citizen who is a senior operational leader of al-Qa'ida. He has discussed the thorough and careful review, including all relevant constitutional considerations, that is to be undertaken by the U.S. government when determining whether the individual poses an imminent threat of violent attack against the United States.

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(4) Issues associated with the end of the conflict against al-Qaida

On November 30, 2012, Department of Defense General Counsel Jeh Johnson addressed the Oxford Union on "The Conflict Against Al Qaeda and its Affiliates: How Will It End?" After briefly reviewing the legal principles discussed by himself and Attorney General Holder and Mr. Brennan in the remarks excerpted above, Mr. Johnson turned to the question of how the conflict with al-Qaida could come to an end. Mr. Johnson's Oxford Union address is

excerpted below (with some endnotes omitted) and is available in full at *www.state.gov/s/l/c8183.htm*.

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I am aware of studies that suggest that many "terrorist" organizations eventually denounce terrorism and violence, and seek to address their grievances through some form of reconciliation or participation in a political process.

Al Qaeda is not in that category.

Al Qaeda's radical and absurd goals have included global domination through a violent Islamic caliphate, terrorizing the United States and other western nations from retreating from the world stage, and the destruction of Israel. There is no compromise or political bargain that can be struck with those who pursue such aims.

In the current conflict with al Qaeda, I can offer no prediction about when this conflict will end, or whether we are, as Winston Churchill described it, near the "beginning of the end."

I do believe that on the present course, there will come a tipping point—a tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed.

At that point, we must be able to say to ourselves that our efforts should no longer be considered an "armed conflict" against al Qaeda and its associated forces; rather, a counterterrorism effort against individuals who are the scattered remnants of al Qaeda, or are parts of groups unaffiliated with al Qaeda, for which the law enforcement and intelligence resources of our government are principally responsible, in cooperation with the international community—with our military assets available in reserve to address continuing and imminent terrorist threats.

At that point we will also need to face the question of what to do with any members of al Qaeda who still remain in U.S. military detention without a criminal conviction and sentence. In general, the military's authority to detain ends with the "cessation of active hostilities."[22] For this particular conflict, all I can say today is that we should look to conventional legal principles to supply the answer, and that both our Nations faced similar challenging questions after the cessation of hostilities in World War II, and our governments delayed the release of some Nazi German prisoners of war.[23]

For now, we must continue our efforts to disrupt, dismantle and ensure a lasting defeat of al Qaeda. Though severely degraded, al Qaeda remains a threat to the citizens of the United

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[22] *See* Geneva Convention Relative to the Treatment of Prisoners of War, art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Prisoners of War shall be released and repatriated without delay after the cessation of active hostilities.").

[23] Regarding post-hostilities detention during the conclusion of World War II, *see Ludecke v. Watkins* 335 U.S. 160 (1948) (holding that the President's authority to detain German nationals continued for over six years after the fighting with Germany had ended); *See also* Alien Enemy Act of 1798 50 U.S.C. §§21-24 (2000). *See* James Richards, British Broadcasting Corporation, Life in Britain for German Prisoners of War, (noting that by the end of 1947, 250,000 of the prisoners of war were repatriated, and the last repatriation took place in November 1948); available at: *http://www.bbc.co.uk/history/british/britain_wwtwo/german_pows_01.shtml*.

States, the United Kingdom and other nations. We must disrupt al Qaeda's terrorist attack planning before it gets anywhere near our homeland or our citizens. We must counter al Qaeda in the places where it seeks to establish safe haven, and prevent it from reconstituting in others. To do this we must utilize every national security element of our government, and work closely with our friends and allies like the United Kingdom and others.

Finally, it was a warfighting four-star general who reminded me, as I previewed these remarks for him, that none of this will ever be possible if we fail to understand and address what attracts a young man to an organization like al Qaeda in the first place. Al Qaeda claims to represent the interests of all Muslims. By word and deed, we must stand with the millions of people within the Muslim world who reject Al Qaeda as a marginalized, extreme and violent organization that does not represent the Muslim values of peace and brotherhood. For, if al Qaeda can recruit new terrorists to its cause faster than we can kill or capture them, we fight an endless, hopeless battle that only perpetuates a downward spiral of hate, recrimination, violence and fear.

"War" must be regarded as a finite, extraordinary and unnatural state of affairs. War permits one man—if he is a "privileged belligerent," consistent with the laws of war — to kill another. War violates the natural order of things, in which children bury their parents; in war parents bury their children. In its 12th year, we must not accept the current conflict, and all that it entails, as the "new normal." Peace must be regarded as the norm toward which the human race continually strives.

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b. Bilateral agreements and arrangements

(1) Afghanistan

On May 2, 2012, President Obama and President Karzai signed the Enduring Strategic Partnership Agreement between the United States of America and the Islamic Republic of Afghanistan ("SPA"). The text of the agreement, as signed, is available on the White House website at *www.whitehouse.gov/sites/default/files/2012.06.01u.s.-afghanistanspasignedtext.pdf*. The agreement, which sets out a framework for cooperation on a wide range of shared interests, includes commitments by Afghanistan to strengthen its democratic institutions and by the United States to designate Afghanistan as a Major Non-NATO Ally ("MNNA") and to support the training of sustainable Afghan National Security Forces ("ANSF"). Both sides commit to cooperating in defense and security matters, and specifically to negotiate a Bilateral Security Agreement. The SPA entered into force in accordance with its terms on July 4, 2012.

On July 6, President Obama signed the designation of Afghanistan as a Major Non-NATO Ally under the Foreign Assistance Act and the Arms Export Control Act. Daily Comp. Pres. Docs., 2012 DCPD No. 00540, p.1. The State Department released a fact sheet on July 7, 2012, available at *www.state.gov/r/pa/prs/ps/2012/07/194662.htm*, explaining the significance of the designation:

MNNA designation provides a long-term framework for our security and defense cooperation. It reinforces the strong bilateral defense relationship between the United States and Afghanistan by helping support aligned defense planning, procurement, and training. Only a limited number of countries have this special status. MNNA qualifies a country for certain privileges supporting defense and security cooperation but does not entail any security commitment to that country.

Some of the privileges of MNNA status include eligibility for training, loans of equipment for cooperative research and development, and ultimately Foreign Military Financing for commercial leasing of certain defense articles. While the United States and the international community already provide significant security assistance to Afghanistan, in the long-term as Afghanistan takes on greater financial responsibility for its own security, MNNA status will be a critical catalyst for maintaining effective Afghan National Security Forces and building a robust peace-time security relationship between Afghanistan and the United States.

(2) Iraq

In 2012, NATO opened a temporary Transition Cell in Iraq to further assist Iraq in developing its security capabilities and to advance the NATO-Iraq partnership. The United States and NATO discussed arrangements for U.S. support to the Transition Cell in an exchange of letters dated May 15, 2012 and May 16, 2012, and subsequently concluded an agreement concerning the provision of services and commodities on an advance-of-funds or reimbursable basis. The exchange of letters and the agreement are both available at *www.state.gov/s/l/c8183.htm*. In November 2012, NATO and the United States agreed to extend their agreement concerning the provision of services and commodities until July 1, 2013. That extension agreement is also available at *www.state.gov/s/l/c8183.htm*.

On September 24, 2012, NATO and the Government of Iraq signed the Individual Partnership and Cooperation Programme ("IPCP") agreement, a cooperation agreement to foster closer security ties and help Iraq build its security institutions. More information about the NATO-Iraq partnership is available at *www.nato.int/cps/en/natolive/news_90142.htm*.

c. International humanitarian law

(1) Applicability of international law to hostilities in cyberspace

On September 18, 2012, State Department Legal Adviser Harold Koh addressed an inter-agency legal conference at USCYBERCOM in Fort Meade, Maryland on the subject of international law in cyberspace. Mr. Koh's remarks are excerpted below and available in full at *www.state.gov/s/l/releases/remarks/197924.htm*.

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Everyone here knows that cyberspace presents new opportunities and new challenges for the United States in every foreign policy realm, including national defense. But for international lawyers, it also presents cutting-edge issues of international law, which go to a very fundamental question: how do we apply old laws of war to new cyber-circumstances, staying faithful to enduring principles, while accounting for changing times and technologies?

Many, many international lawyers here in the U.S. Government and around the world have struggled with this question, so today I'd like to present an overview of how we in the U.S. Government have gone about meeting this challenge. At the outset, let me highlight that the entire endeavor of applying established international law to cyberspace is part of a broader international conversation. We are not alone in thinking about these questions; we are actively engaged with the rest of the international community, both bilaterally and multilaterally, on the subject of applying international law in cyberspace.

With your permission, I'd like to offer a series of questions and answers that illuminate where we are right now—in a place where we've made remarkable headway in a relatively short period of time, but are still finding new questions for each and every one we answer. In fact, the U.S. Government has been regularly sharing these thoughts with our international partners. Most of the points that follow we have not just agreed upon internally, but made diplomatically, in our submissions to the UN Group of Governmental Experts (GGE) that deals with information technology issues.

I. International Law in Cyberspace: What We Know

So let me start with the most fundamental questions:

Question 1: *Do established principles of international law apply to cyberspace?*

Answer 1: **Yes, international law principles do apply in cyberspace**. Everyone here knows how cyberspace opens up a host of novel and extremely difficult legal issues. But on this key question, this answer has been apparent, at least as far as the U.S. Government has been concerned. Significantly, this view has not necessarily been universal in the international community. At least one country has questioned whether existing bodies of international law apply to the cutting edge issues presented by the internet. Some have also said that existing international law is not up to the task, and that we need entirely new treaties to impose a unique set of rules on cyberspace. But the United States has made clear our view that established principles of international law do apply in cyberspace.

Question 2: *Is cyberspace a law-free zone, where anything goes?*

Answer 2: **Emphatically no. Cyberspace is not a "law-free" zone where anyone can conduct hostile activities without rules or restraint.**

Think of it this way. This is not the first time that technology has changed and that international law has been asked to deal with those changes. In particular, because the tools of conflict are constantly evolving, one relevant body of law—international humanitarian law, or the law of armed conflict—affirmatively anticipates technological innovation, and contemplates that its existing rules will apply to such innovation. To be sure, new technologies raise new issues and thus, new questions. Many of us in this room have struggled with such questions, and we will continue to do so over many years. But to those who say that established law is not up to the task, we must articulate and build consensus around how it applies and reassess from there whether and what additional understandings are needed. Developing common understandings about how these rules apply in the context of cyberactivities in armed conflict will promote stability in this area.

That consensus-building work brings me to some questions and answers we have offered

to our international partners to explain how both the law of going to war (*jus ad bellum*) and the laws that apply in conducting war (*jus in bello*) apply to cyberaction:

Question 3: *Do cyber activities ever constitute a use of force?*

Answer 3: **Yes. Cyber activities may in certain circumstances constitute uses of force within the meaning of Article 2(4) of the UN Charter and customary international law.** In analyzing whether a cyber operation would constitute a use of force, most commentators focus on whether the direct physical injury and property damage resulting from the cyber event looks like that which would be considered a use of force if produced by kinetic weapons. Cyber activities that proximately result in death, injury, or significant destruction would likely be viewed as a use of force. In assessing whether an event constituted a use of force in or through cyberspace, we must evaluate factors: including the context of the event, the actor perpetrating the action (recognizing challenging issues of attribution in cyberspace), the target and location, effects and intent, among other possible issues. Commonly cited examples of cyber activity that would constitute a use of force include, for example: (1) operations that trigger a nuclear plant meltdown; (2) operations that open a dam above a populated area causing destruction; or (3) operations that disable air traffic control resulting in airplane crashes. Only a moment's reflection makes you realize that this is common sense: if the physical consequences of a cyber attack work the kind of physical damage that dropping a bomb or firing a missile would, that cyber attack should equally be considered a use of force.

Question 4: *May a State ever respond to a computer network attack by exercising a right of national self-defense?*

Answer 4: **Yes. A State's national right of self-defense, recognized in Article 51 of the UN Charter, may be triggered by computer network activities that amount to an armed attack or imminent threat thereof.** As the United States affirmed in its 2011 International Strategy for Cyberspace, "when warranted, the United States will respond to hostile acts in cyberspace as we would to any other threat to our country."

Question 5: *Do* jus in bello *rules apply to computer network attacks?*

Answer 5: **Yes. In the context of an armed conflict, the law of armed conflict applies to regulate the use of cyber tools in hostilities, just as it does other tools. The principles of necessity and proportionality limit uses of force in self-defense and would regulate what may constitute a lawful response under the circumstances.** There is no legal requirement that the response to a cyber armed attack take the form of a cyber action, as long as the response meets the requirements of necessity and proportionality.

Question 6: *Must attacks distinguish between military and nonmilitary objectives?*

Answer 6: **Yes. The *jus in bello* principle of distinction applies to computer network attacks undertaken in the context of an armed conflict.** The principle of distinction applies to cyber activities that amount to an "attack"—as that term is understood in the law of war—in the context of an armed conflict. As in any form of armed conflict, the principle of distinction requires that the intended effect of the attack must be to harm a legitimate military target. We must distinguish military objectives—that is, objects that make an effective contribution to military action and whose destruction would offer a military advantage—from civilian objects, which under international law are generally protected from attack.

Question 7: *Must attacks adhere to the principle of proportionality?*

Answer 7: **Yes. The *jus in bello* principle of proportionality applies to computer network attacks undertaken in the context of an armed conflict.** The principle of proportionality prohibits attacks that may be expected to cause incidental loss to civilian life,

injury to civilians, or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated. Parties to an armed conflict must assess what the expected harm to civilians is likely to be, and weigh the risk of such collateral damage against the importance of the expected military advantage to be gained. In the cyber context, this rule requires parties to a conflict to assess: (1) the effects of cyber weapons on both military and civilian infrastructure and users, including shared physical infrastructure (such as a dam or a power grid) that would affect civilians; (2) the potential physical damage that a cyber attack may cause, such as death or injury that may result from effects on critical infrastructure; and (3) the potential effects of a cyber attack on civilian objects that are not military objectives, such as private, civilian computers that hold no military significance, but may be networked to computers that are military objectives.

Question 8: *How should States assess their cyber weapons?*

Answer 8: **States should undertake a legal review of weapons, including those that employ a cyber capability.** Such a review should entail an analysis, for example, of whether a particular capability would be *inherently indiscriminate, i.e.*, that it could not be used consistent with the principles of distinction and proportionality. The U.S. Government undertakes at least two stages of legal review of the use of weapons in the context of armed conflict—first, an evaluation of new weapons to determine whether their use would be *per se* prohibited by the law of war; and second, specific operations employing weapons are always reviewed to ensure that each particular operation is also compliant with the law of war.

Question 9: *In this analysis, what role does State sovereignty play?*

Answer 9: **States conducting activities in cyberspace must take into account the sovereignty of other States, including outside the context of armed conflict.** The physical infrastructure that supports the internet and cyber activities is generally located in sovereign territory and subject to the jurisdiction of the territorial State. Because of the interconnected, interoperable nature of cyberspace, operations targeting networked information infrastructures in one country may create effects in another country. Whenever a State contemplates conducting activities in cyberspace, the sovereignty of other States needs to be considered.

Question 10: *Are States responsible when cyber acts are undertaken through proxies?*

Answer 10: **Yes. States are legally responsible for activities undertaken through "proxy actors," who act on the State's instructions or under its direction or control.** The ability to mask one's identity and geography in cyberspace and the resulting difficulties of timely, high-confidence attribution can create significant challenges for States in identifying, evaluating, and accurately responding to threats. But putting attribution problems aside for a moment, established international law does address the question of proxy actors. States are legally responsible for activities undertaken through putatively private actors, who act on the State's instructions or under its direction or control. If a State exercises a sufficient degree of control over an ostensibly private person or group of persons committing an internationally wrongful act, the State assumes responsibility for the act, just as if official agents of the State itself had committed it. These rules are designed to ensure that States cannot hide behind putatively private actors to engage in conduct that is internationally wrongful.

II. International Law in Cyberspace: Challenges and Uncertainties

These ten answers should give you a sense of how far we have come in doing what any good international lawyer does: applying established law to new facts, and explaining our positions to other interested lawyers. At the same time, there are obviously many more issues where the questions remain under discussion. Let me identify three particularly difficult

questions that I don't intend to answer here today. Instead, my hope is to shed some light on some of the cutting-edge legal issues that we'll all be facing together over the next few years:

Unresolved Question 1: **How can a use of force regime take into account all of the novel kinds of effects that States can produce through the click of a button?**

As I said above, the United States has affirmed that established *jus ad bellum* rules do apply to uses of force in cyberspace. I have also noted some clear-cut cases where the physical effects of a hostile cyber action would be comparable to what a kinetic action could achieve: for example, a bomb might break a dam and flood a civilian population, but insertion of a line of malicious code from a distant computer might just as easily achieve that same result. As you all know, however, there are other types of cyber actions that do not have a clear kinetic parallel, which raise profound questions about exactly what we mean by "force." At the same time, the difficulty of reaching a definitive legal conclusion or consensus among States on when and under what circumstances a hostile cyber action would constitute an armed attack does not automatically suggest that we need an entirely new legal framework specific to cyberspace. Outside of the cyber-context, such ambiguities and differences of view have long existed among States.

To cite just one example of this, the United States has for a long time taken the position that the inherent right of self-defense potentially applies against any illegal use of force. In our view, there is no threshold for a use of deadly force to qualify as an "armed attack" that may warrant a forcible response. But that is not to say that any illegal use of force triggers the right to use any and all force in response—such responses must still be necessary and of course proportionate. We recognize, on the other hand, that some other countries and commentators have drawn a distinction between the "use of force" and an "armed attack," and view "armed attack"—triggering the right to self-defense—as a subset of uses of force, which passes a higher threshold of gravity. My point here is not to rehash old debates, but to illustrate that States have long had to sort through complicated *jus ad bellum* questions. In this respect, the existence of complicated cyber questions relating to *jus ad bellum* is not in itself a new development; it is just applying old questions to the latest developments in technology.

Unresolved Question 2: **What do we do about "dual-use infrastructure" in cyberspace?**

As you all know, information and communications infrastructure is often shared between State militaries and private, civilian communities. The law of war requires that civilian infrastructure not be used to seek to immunize military objectives from attack, including in the cyber realm. But how, exactly, are the *jus in bello* rules to be implemented in cyberspace? Parties to an armed conflict will need to assess the potential effects of a cyber attack on computers that are not military objectives, such as private, civilian computers that hold no military significance, but may be networked to computers that are valid military objectives. Parties will also need to consider the harm to the civilian uses of such infrastructure in performing the necessary proportionality review. Any number of factual scenarios could arise, however, which will require a careful, fact-intensive legal analysis in each situation.

Unresolved Question 3: **How do we address the problem of attribution in cyberspace?**

As I mentioned earlier, cyberspace significantly increases an actor's ability to engage in attacks with "plausible deniability," by acting through proxies. I noted that legal tools exist to ensure that States are held accountable for those acts. What I want to highlight here is that many of these challenges—in particular, those concerning attribution—are as much questions of a technical and policy nature rather than exclusively or even predominantly questions of law.

Cyberspace remains a new and dynamic operating environment, and we cannot expect that all answers to the new and confounding questions we face will be legal ones.

These questions about effects, dual use, and attribution are difficult legal and policy questions that existed long before the development of cyber tools, and that will continue to be a topic of discussion among our allies and partners as cyber tools develop. Of course, there remain many other difficult and important questions about the application of international law to activities in cyberspace—for example, about the implications of sovereignty and neutrality law, enforcement mechanisms, and the obligations of States concerning "hacktivists" operating from within their territory. While these are not questions that I can address in this brief speech, they are critically important questions on which international lawyers will focus intensely in the years to come.

And just as cyberspace presents challenging new issues for lawyers, it presents challenging new technical and policy issues. Not all of the issues I've mentioned are susceptible to clear legal answers derived from existing precedents—in many cases, quite the contrary. Answering these tough questions within the framework of existing law, consistent with our values and accounting for the legitimate needs of national security, will require a constant dialogue between lawyers, operators, and policymakers. All that we as lawyers can do is to apply in the cyber context the same rigorous approach to these hard questions that arise in the future, as we apply every day to what might be considered more traditional forms of conflict.

III. The Role of International Law in a "Smart Power" Approach to Cyberspace

This, in a nutshell, is where we are with regard to cyberconflict: We have begun work to build consensus on a number of answers, but questions continue to arise that must be answered in the months and years ahead. Beyond these questions and answers and unresolved questions, though, lies a much bigger picture, one that we are very focused on at the State Department. Which brings me to my final two questions:

Final Question 1: *Is international humanitarian law the only body of international law that applies in cyberspace?*

Final Answer 1: **No. As important as international humanitarian law is, it is not the only international law that applies in cyberspace.**

Obviously, cyberspace has become pervasive in our lives, not just in the national defense arena, but also through social media, publishing and broadcasting, expressions of human rights, and expansion of international commerce, both through online markets and online commercial techniques. Many other bodies of international and national law address those activities, and how those different bodies of law overlap and interact with the laws of cyber conflict is something we will all have to work out over time.

Take human rights. At the same time that cyber activity can pose a threat, we all understand that cyber-communication is increasingly becoming a dominant mode of expression in the 21st century. More and more people express their views not by speaking on a soap box at Speakers' Corner, but by blogging, tweeting, commenting, or posting videos and commentaries. The 1948 Universal Declaration of Human Rights (UDHR)—adopted more than 70 years ago—was remarkably forward-looking in anticipating these trends. It says: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and *ideas through any media and regardless of frontiers*." (emphasis added) In short, all human beings are entitled to certain rights, whether they choose to exercise them in a city square or an internet chat room. This principle is an important part of our global diplomacy, and is encapsulated in the Internet

Freedom agenda about which my boss, Secretary Clinton, has spoken so passionately.

You all know of this Administration's efforts not just in the areas of cyberconflict, but also in many other cyber areas: cybersecurity, cybercommerce, fighting child pornography and other forms of cybercrime, stopping intellectual property piracy, as well as promoting free expression and human rights. So the cyberconflict issues with which this group grapples do not constitute the whole of our approach to cyberspace; they are an important part—but only a part—of this Administration's broader "smart power" approach to cyberspace.

What I have outlined today are a series of answers to cyberspace questions that the United States is on the record as supporting. I have also suggested a few of the challenging questions that remain before us, and developments over the next decade will surely produce new questions. But you should not think of these questions and answers as just a box to check before deciding whether a particular proposed operation is lawful or not. Rather, these questions and answers are part of a much broader foreign policy agenda, which transpires in a broader framework of respect for international law.

That leads to my Final Question for this group: *Why should U.S Government lawyers care about international law in cyberspace at all?*

The Answer: **Because compliance with international law frees us to do more, and do more legitimately, in cyberspace, in a way that more fully promotes our national interests. Compliance with international law in cyberspace is part and parcel of our broader "smart power" approach to international law as part of U.S. foreign policy.**

It is worth noting two fundamentally different philosophies about international law. One way to think about law, whether domestic or international, is as a straitjacket, a pure constraint. This approach posits that nations have serious, legitimate interests, and legal regimes restrict their ability to carry them out. One consequence of this view is that, since law is just something that constrains, it should be resisted whenever possible. Resisting so-called "extensions" of the law to new areas often seems attractive: because, after all, the old laws weren't built for these new challenges anyway, some say, so we should tackle those challenges without the legal straitjacket, while leaving the old laws behind.

But that is not the United States Government's view of the law, domestic or international. We see law not as a straitjacket, but as one great university calls it when it confers its diplomas, a body of "wise restraints that make us free." International law is not purely constraint, it frees us and empowers us to do things we could never do without law's legitimacy. If we succeed in promoting a culture of compliance, we will reap the benefits. And if we earn a reputation for compliance, the actions we do take will earn enhanced legitimacy worldwide for their adherence to the rule of law.

These are not new themes, but I raise them here because they resonate squarely with the strategy we have been pursuing in cyberspace over the past few years. Of course, the United States has impressive cyber-capabilities; it should be clear from the bulk of my discussion that adherence to established principles of law does not prevent us from using those capabilities to achieve important ends. But we also know that we will be safer, the more that we can rally other States to the view that these established principles do impose meaningful constraints, and that there is already an existing set of laws that protect our security in cyberspace. And the more widespread the understanding that cyberspace follows established rules—and that we live by them—the stronger we can be in pushing back against those who would seek to introduce brand new rules that may be contrary to our interests.

That is why, in our diplomacy, we do not whisper about these issues. We talk openly and

bilaterally with other countries about the application of established international law to cyberspace. We talk about these issues multilaterally, at the UN Group of Governmental Experts and at other fora, in promoting this vision of compliance with international law in cyberspace. We talk about them regionally, as when we recently co-sponsored an ASEAN Regional Forum event to focus the international community's attention on the problem of proxy actors engaging in unlawful conduct in cyberspace. Preventing proxy attacks on us is an important interest, and as part of our discussions we have outlined the ways that existing international law addresses this problem.

The diplomacy I have described is not limited to the legal issues this group of lawyers is used to facing in the operational context. These issues are interconnected with countless other cyber issues that we face daily in our foreign policy, such as cybersecurity, cyber-commerce, human rights in cyberspace, and public diplomacy through cybertools. In all of these areas, let me repeat again, compliance with international law in cyberspace is part and parcel of our broader smart power approach to international law as part of U.S. foreign policy. Compliance with international law—and thinking actively together about how best to promote that compliance—can only free us to do more, and to do more legitimately, in the emerging frontiers of cyberspace, in a way that more fully promotes our U.S. national interests.

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The First Committee of the UN General Assembly convened a thematic debate at the General Assembly's 67th session on developments in the field of information and telecommunications in the context of international security. On November 2, 2012, the U.S. delegation delivered remarks on the subject of the applicability of international law to activity in cyberspace in connection with hostilities. The U.S. statement, excerpted below and available at *www.state.gov/t/avc/rls/200050.htm*, also expressed U.S. opposition to the draft Code of Conduct for Information Security prepared by several member states and presented at the 66th session of the General Assembly.

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There is now broad recognition among many States, including the United States, that existing international law serves as the appropriate framework applicable to activity in cyberspace in a variety of contexts, including in connection with hostilities. This area of international law involves two related bodies of law. The first one is *jus ad bellum*, which is the framework that addresses the use of force triggering a State's right of self-defense; and the second one is *jus in bello*, which is the body of law governing the conduct of hostilities in the context of an armed conflict and is sometimes called the international law of armed conflict, the law of war, or international humanitarian law.

While some attributes of information technologies are unique, existing principles of international law serve as the appropriate framework in which to identify and analyze the rules and norms of behavior that should govern the use of cyberspace in connection with hostilities. In this vein, much work has been done over the last year in developing a better understanding of the issues related to information and telecommunications in the context of international security, in

particular, by the on-going UN Group of Governmental Experts (GGE) on "Developments in the Field of Information and Telecommunications in the Context of International Security."

The consensus report of the 2010 GGE included two very important recommendations: further dialogue to discuss norms to reduce collective risk and protect critical national and international infrastructure, and the development of confidence-building measures to reduce the risk of misperception.

The 2012-2013 GGE is taking up this important work where the 2010 GGE left off. It is focusing on discussion of a normative framework, confidence-building measures and support for capacity building, and intends to make recommendations in these areas.

During last year's session of the UNFC, the introduction of a draft Code of Conduct for Information Security presented an alternative view that seeks to establish international justification for government control over Internet resources. At its heart, it calls for multilateral governance of the Internet that would replace the multi-stakeholder approach, where all users have a voice, with top down control and regulation by states. It would legitimize the view that the right to freedom of expression can be limited by national laws and cultural proclivities, thereby undermining that right as described in the Universal Declaration on Human Rights.

In addition, the draft Code appears to propose replacing existing international law that governs uses of force and relations among states in armed conflict with new, unclear, and ill-defined rules and concepts. Indeed, one of the primary sponsors of the draft Code has stated repeatedly that long-standing provisions of international law, including elements of *jus ad bellum* and *jus in bello* that would provide a legal framework for the way that states could use force in cyberspace, have no applicability. This position is not justified in international law and risks creating instability by wrongly suggesting that the internet is an ungoverned space to which existing law does not apply.

This draft Code advocates voluntary commitments not to proliferate information technology for offensive purposes, which ignores the fact that this technology is a quintessential dual-use technology. It purports to promote cooperation on cybercrime, but the chief sponsors of the draft Code disavow the only international cybercrime instrument in existence and they seem to be reticent to cooperate effectively on cybercrime matters. Moreover, their definition of criminal activities covers the gamut of all views that may not comport with the prevailing view of the government in power.

While a key provision of the draft purports to ensure ICT supply chain security, other provisions seem to acknowledge a lack of respect for intellectual property rights when they claim that states use their technology and critical infrastructure for advantage and in their call for an equitable division of relevant resources.

Proposals along these lines would discourage the international trade in and the development of information and communications technology (ICT) products and services, which have made the Internet what it is today. We fear that these proposals would also make it easier for governments to suppress free speech, for example through government control over content for the purpose of political domination.

States do not have a monopoly on the ability to innovate, develop technical capacity, or grasp economic opportunities. These activities should be carried out in an appropriate and responsible manner with the participation of all stakeholders. As such, it is unrealistic and undesirable for States to be given the dominant role on Internet operation and development.

The United States favors international engagement to develop a consensus on appropriate cyberspace behavior, based on existing principles of international law, and we cannot support

approaches proposed in the draft Code of Conduct for Information Security that would only legitimize repressive state practices.

It is the view of the United States that transparency, confidence-building, and stability measures should be developed as a voluntary, cooperative effort whose ultimate objective is to enhance international stability and thereby reduce the risk of conflict in cyberspace. Many States could contribute to this goal.

States must unite in the common goal of preserving and enhancing the benefits of information technologies by assuring their security and integrity, while also maintaining an environment that promotes efficiency, innovation, economic prosperity, free trade, and respect for human rights.

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(2) Private military security companies, military contractors, and their accountability

See discussion in Section A.3.c.(3), *infra*, of litigation involving former detainees' claims against U.S. military contractors. See also discussion in Chapter 6.M. of U.S. participation in the working group at the Human Rights Council considering the subject of private military and security companies ("PMSCs").

2. Convention on Certain Conventional Weapons

On October 24, 2012, U.S. Deputy Permanent Representative to the Conference on Disarmament Walter S. Reid addressed the First Committee of the United Nations General Assembly in New York. His remarks, excerpted below and available at *www.state.gov/t/avc/rls/199692.htm*, include a discussion of the Convention on Certain Conventional Weapons ("CCW") and failed efforts to conclude a protocol on cluster munitions. For a discussion of additional excerpts from Mr. Reid's remarks, see section B.11, *infra*.

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Mr. Chairman, the United States is a High Contracting Party to the CCW and all of its five Protocols. The United States attaches importance to the CCW as an instrument that has been able to bring together States with diverse national security concerns.

The United States was deeply disappointed by the failure of the Fourth Review Conference to conclude a protocol on cluster munitions. The protocol would have led to the immediate prohibition of many millions of cluster munitions; placed the remaining cluster munitions under a detailed set of restrictions and regulations; and subjected member states to a detailed list of additional obligations on issues such as clearance, transparency and destruction, all of which would have led to a substantial humanitarian impact around the world.

The United States will continue to minimize potential risks to civilians and civilian

infrastructure through implementation of the U.S. Department of Defense policy on Cluster Munitions and Unintended Harm to Civilians signed by Secretary Gates in June 2008. It states that after 2018, the U.S. Military Departments and Combatant Commands will only employ cluster munitions containing submunitions that, after arming, do not result in more than 1 percent unexploded ordnance across the range of intended operational environments. We encourage other countries to take similar steps.

We look forward to the annual meetings of High Contracting Parties in November and to establishing a program of work for 2013 that will allow CCW states to continue supporting the universalization of the CCW and implementation of all its Protocols.

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3. Detainees

a. General

(1) Presidential Policy Directive on Military Custody

On February 28, 2012, President Obama issued a presidential policy directive, PPD-14, setting out implementing procedures for section 1022 of the Fiscal Year 2012 National Defense Authorization Act ("NDAA"). Daily Comp. Pres. Docs. 2012 Doc. No. 00136, pp. 1-7. Section 1022 of the NDAA mandates temporary military custody for certain non-citizen terrorist suspects ("covered persons") pending "disposition under the law of war." See *Digest 2011* at 575-76 for excerpts from the Presidential signing statement on the NDAA and section 1022 in particular. The term "covered persons" is defined, as it is in section 1022, as those whose detention is authorized by the AUMF, and who have been determined (1) "to be a member of, or part of, al-Qa'ida or an associated force that acts in coordination with or pursuant to the direction of al-Qa'ida;" and (2) "to have participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners." The PPD sets out procedures for determining when the NDAA's temporary military custody requirement applies to covered persons detained by a federal law enforcement agency and explains when and how military custody determinations will be made. In the interest of national security, it waives the temporary military custody requirement in certain categories of cases and sets out procedures for issuing additional case-by-case waivers. Specifically, the President determined it is in the national security interests of the United States to waive the military custody requirement of Section 1022 in the following categories of cases, among others: when placing a foreign country's nationals or residents in military custody will impede counterterrorism cooperation; and when a foreign government indicates that it will not extradite or transfer suspects to the United States if the suspects may be placed in military custody.

The White House released a fact sheet about the PPD on February 28, 2012. The fact sheet is excerpted below and available at *www.whitehouse.gov/sites/default/files/ndaa_fact_sheet.pdf*.

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The procedures include several important elements:

• The procedures provide greater clarity to our counterterrorism professionals by clarifying key phrases in the statute and explaining that Section 1022's military custody requirement applies only to non-U.S. citizens who are closely linked to al-Qa'ida and have participated in planning or carrying out an attack or attempted attack against the United States or our coalition partners. The procedures also make clear that existing Department of Defense policies and procedures satisfy the requirements of Section 1022.

• As expressly contemplated by the NDAA, the procedures establish a process for ensuring that the executive branch has sufficient time and information to make decisions about whether to issue a national security waiver before an individual is transferred to military custody. The President also issued several national security waivers for categories of individuals where he found that the waivers were in our national security interest and that it was impractical, unnecessary, or overly burdensome to rely on individualized waivers.

• The procedures create an interagency process for determining whether an individual is a covered person whom the statute requires to be transferred to military custody. The procedures ensure that an individual will be transferred from civilian to military custody only after a thorough evaluation of all of the relevant facts, based on the considered judgment of the President's senior national security team, and not a rigid statutory requirement that does not account for the unique facts and circumstances of each case. This decision requires the concurrence of the Attorney General, Secretary of State, Secretary of Defense, Secretary of Homeland Security, Chairman of the Joint Chiefs of Staff, and Director of National Intelligence.

• The procedures clarify that, until an individual is formally designated a covered person, federal law enforcement agencies should follow their standard practices. The procedures also make clear that, even after an individual is determined to be a covered person, a transfer to military custody may only occur once it is clear that it will not disrupt ongoing law enforcement and intelligence operations. In the event an individual is transferred to military custody, the procedures provide that the Federal Bureau of Investigation will retain its lead responsibility for coordinating the investigation and interrogation of the individual until a disposition decision is made.

In essence, these procedures are intended to ensure that the executive branch can continue to utilize all elements of national power—including military, intelligence, law enforcement, diplomatic, and economic tools—to effectively confront the threat posed by al-Qa'ida and its associated forces within the framework of our legal authorities, and will retain the flexibility to determine how best to apply those tools to the unique facts and circumstances we face in confronting this diverse and evolving threat.

As the President stated when he signed the NDAA, it is essential for the United States to maintain a clear and flexible framework within our legal authorities for the detention, interrogation and trial of suspected terrorists that maximizes the ability of counterterrorism professionals both to collect intelligence and to incapacitate dangerous individuals. These procedures accomplish that goal.

Our military and intelligence capabilities have been enormously effective in our campaign against international terrorism. Similarly, our criminal justice system has demonstrated

unrivaled effectiveness, unquestioned legitimacy, and the flexibility to preserve and protect the full spectrum of our national security objectives. That system has proven to be invaluable means of disrupting terrorist plots as well as incapacitating and collecting intelligence on terrorists through prosecution and incarceration, and must continue to be an unrestricted counterterrorism tool going forward.

* * * *

…Specifically, as certified in the procedures issued today, the President has determined it is in the national security interests of the United States to waive the military custody requirement of Section 1022 in the following circumstances:

• When placing a foreign country's nationals or residents in military custody will impede counterterrorism cooperation;

• When a foreign government indicates that it will not extradite or transfer suspects to the United States if the suspects may be placed in military custody;

• When an individual is a U.S. lawful permanent resident who is arrested in this country or arrested by a federal agency on the basis of conduct taking place in this country;

• When an individual has been arrested by a federal agency in the United States on charges other than terrorism offenses (unless such individual is subsequently charged with one or more terrorism offenses and held in federal custody in connection with those offenses);

• When an individual has been arrested by state or local law enforcement, pursuant to state or local authority, and is transferred to federal custody;

• When transferring an individual to military custody could interfere with efforts to secure an individual's cooperation or confession; or

• When transferring an individual to military custody could interfere with efforts to conduct joint trials with co-defendants who are ineligible for military custody or as to whom a determination has already been made to proceed with a prosecution in a federal or state court.

When a national security waiver is issued or applies, standard operating procedures would continue to be followed, and the terrorist suspect would remain in law enforcement custody.

The President's procedures also make clear that the Attorney General, in consultation with other senior national security officials, has the authority to issue additional waivers for categories of conduct, or for categories of individuals, or on an individual case-by-case basis, when doing so is in the interest of national security.

* * * *

(2) Detention policies guided by rule of law: Copenhagen Process

On October 19, 2012, representatives of 24 nations concluded "The Copenhagen Process Principles and Guidelines." The Copenhagen Process lasted five years and was an effort to develop principles and good practices for states and international organizations that detain persons in the course of international military operations in situations of non-international armed conflict. The Principles and Guidelines do not create new legal obligations. They are legally non-binding statements that reaffirm existing obligations, shed light on how States

implement these obligations, and identify best practices even when there is no legal obligation. The United States government participated in the Copenhagen Process and endorsed the Principles and Guidelines. The Process was conceived and led by the Danish government. The Principles and Guidelines appear below. The Danish Chair of the Copenhagen Process also prepared a commentary as an annex to the Principles and Guidelines, which is available at *http://um.dk/da/~/media/UM/Danish-site/Documents/Politik-og-diplomati/Nyheder_udenrigspolitik/2012/Copenhangen%20Process%20Principles%20and%20Guidelines.pdf*.

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1. The Copenhagen Process Principles and Guidelines apply to the detention of persons who are being deprived of their liberty for reasons related to an international military operation.

2. All persons detained or whose liberty is being restricted will in all circumstances be treated humanely and with respect for their dignity without any adverse distinction founded on race, colour, religion or faith, political or other opinion, national or social origin, sex, birth, wealth or other similar status. Torture, and other cruel, inhuman, or degrading treatment or punishment is prohibited.

3. Persons not detained will be released.

4. Detention of persons must be conducted in accordance with applicable international law.

When circumstances justifying detention have ceased to exist a detainee will be released.

5. Detaining authorities should develop and implement standard operating procedures and other relevant guidance regarding the handling of detainees.

6. Physical force is not to be used against a detained person except in circumstances where such force is necessary and proportionate.

7. Persons detained are to be promptly informed of the reasons for their detention in a language that they understand.

8. Persons detained are to be promptly registered by the detaining authority.

9. Detaining authorities are responsible for providing detainees with adequate conditions of detention including food and drinking water, accommodation, access to open air, safeguards to protect health and hygiene, and protection against the rigours of the climate and the dangers of military activities. Wounded and sick detainees are to receive the medical care and attention required by their condition.

10. Persons detained are to be permitted to have appropriate contact with the outside world including family members as soon as reasonably practicable. Such contact is subject to reasonable conditions relating to maintaining security and good order in the detention facility and other security considerations.

Persons detained are to be held in a designated place of detention.

11. In non-international armed conflict and where warranted in other situations, the detaining authority is to notify the ICRC or other impartial humanitarian organisation of the deprivation of liberty, release or transfer of a detainee. Where practicable, the detainee's family is to be notified of the deprivation of liberty, release or transfer of a detainee.

Detaining authorities are to provide the ICRC or other relevant impartial international or national organisations with access to detainees.

12. A detainee whose liberty has been deprived for security reasons is to, in addition to a prompt initial review, have the decision to detain reconsidered periodically by an impartial and objective authority that is authorised to determine the lawfulness and appropriateness of continued detention.

13. A detainee whose liberty has been deprived on suspicion of having committed a criminal offence is to, as soon as circumstances permit, be transferred to or have proceedings initiated against him or her by an appropriate authority. Where such transfer or initiation is not possible in a reasonable period of time, the decision to detain is to be reconsidered in accordance with applicable law.

14. Detainees or their representatives are to be permitted to submit, without reprisal, oral or written complaints regarding their treatment or conditions of detention. All complaints are to be reviewed and, if based on credible information, be investigated by the detaining authority.

15. A State or international organisation will only transfer a detainee to another State or authority in compliance with the transferring State's or international organisation's international law obligations. Where the transferring State or international organisation determines it appropriate to request access to transferred detainees or to the detention facilities of the receiving State, the receiving State or authority should facilitate such access for monitoring of the detainee until such time as the detainee has been released, transferred to another detaining authority, or convicted of a crime in accordance with the applicable national law.

16. Nothing in *The Copenhagen Process Principles and Guidelines* affects the applicability of international law to international military operations conducted by the States or international organisations; or the obligations of their personnel to respect such law; or the applicability of international or national law to non-State actors.

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b. Transfers

On July 11, 2012, Sudanese national Ibrahim Ahmed Mahmoud al Qosi was transferred from Guantanamo Bay, Cuba to Sudan following the completion of the unsuspended portion of his military commission sentence. See Department of Defense's press release announcing his transfer, available at *www.defense.gov/releases/release.aspx?releaseid=15434*. For a summary of Mr. al Qosi's case, see *Digest 2010* at 776-77. Mr. al Qosi had pleaded guilty to conspiracy and material support for terrorism charges in proceedings before a military commission and received a 14-year sentence, all but two years of which were suspended pursuant to his plea agreement. The unsuspended portion of his sentence ended on July 7, 2012, and he was subsequently transferred to Sudan. Mr. al Qosi's transfer was exempted from the requirement in the FY12 National Defense Authorization Act ("NDAA") that the Secretary of Defense, with the concurrence of the Secretary of State, certify to Congress in writing 30 days prior to a transfer of any Guantanamo detainee to a foreign country that certain conditions are met by the government receiving the transferred detainee. Mr. Qosi's transfer was excepted from these requirements because it was conducted to effectuate a

pre-trial agreement in a military commission, one of two exceptions to these NDAA transfer certification requirements. Other documents related to Mr. al Qosi's military commission proceedings are available on the Office of Military Commissions website at *www.mc.mil/*.

On September 29, 2012, Omar Ahmed Khadr was transferred from the detention facility at Guantanamo Bay, Cuba to Canada. See Defense Department news release, available at *www.defense.gov/releases/release.aspx?releaseid=15592*. For background on Mr. Khadr's case, see *Digest 2007* at 976-82. Mr. Khadr had pleaded guilty in proceedings before a military commission and received an eight-year sentence, with one year to be served in U.S. custody before he would be eligible for transfer to Canada to serve the remainder of his sentence in accordance with Canadian law. Consistent with the terms of Mr. Khadr's plea agreement, on October 23, 2010, the governments of Canada and the United States exchanged diplomatic notes reflecting that the United States would approve and Canada would "favorably consider" Mr. Khadr's request for transfer to Canadian custody to serve the remainder of his sentence after serving one year in U.S. custody. The diplomatic notes exchanged by the two governments regarding the transfer are available at *www.defense.gov/news/Khadr%20Convening%20Authority%20Diplomatic%20Papers%20AE%20342%2013%20Oct%202010%20(redacted).pdf*. Mr. Khadr's transfer was completed pursuant to the Treaty Between Canada and the United States of America on the Execution of Penal Sentences and relevant domestic authorities. See State Department answer to a taken question from the press, available at *www.state.gov/r/pa/prs/ps/2012/04/188210.htm*. Other documents related to Mr. Khadr's military commission proceedings are available on the Office of Military Commissions website at *www.mc.mil/*.

c. U.S. court decisions and proceedings

(1) Detainees at Guantanamo: Habeas litigation

(i) Overview

On June 11, 2012, the U.S. Supreme Court denied petitions for certiorari in seven cases brought by detainees at Guantanamo seeking habeas relief: *Latif v. Obama*, No. 11-1027*; Al-Madhwani v. Obama*, No. 11-7020; *Al-Alwi v. Obama*, No. 11-7700; *Al-Bihani v. Obama*, No. 10-1383; *Uthman v. Obama*, No. 11-413; *Almerfedi v. Obama*, No. 11-683; and *Al-Kandari v. Obama*, No. 11-1054. By denying certiorari, the Supreme Court let stand the decisions of the Court of Appeals for the D.C. Circuit in these cases which had each denied habeas relief and upheld the U.S. government's detention of the individuals. See *Digest 2011* at 579-80 for discussion of the decisions by the D.C. Circuit in three of these cases: *Latif*, *Al-Madhwani*, and *Almerfedi*.

(ii) Obaydullah v. Obama*: propriety of government withholding intelligence sources in discovery*

Among the habeas cases decided by the D.C. Circuit in 2012 was *Obaydullah v. Obama*, 688

F.3d 784 (D.C. Cir. 2012). In that case, the court of appeals reviewed materials in camera to determine whether the government had properly complied with the discovery order in the case and whether there was evidence of mistreatment of the detainee. In the district court, the detainee had requested, but the government withheld, the identity of its intelligence sources. The petitioner, Obaydullah (his only name), was detained at Guantanamo after apprehension in a raid of the compound where he lived in Afghanistan in 2002 that was conducted on the basis of intelligence reports. During the raid, U.S. forces discovered a notebook in petitioner's pocket with diagrams of explosives as well as 23 anti-tank mines buried outside nearby. The majority opinion is excerpted below (with footnotes and citations to the record omitted).

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* * * *

Obaydullah further contends that the district court improperly denied his requests for discovery on two separate matters, and that it committed a number of additional legal errors. Discovery requests in this case were made pursuant to a Case Management Order (CMO) adopted by the district court that is substantially similar to CMOs used in other Guantanamo habeas cases. Section I.F of the CMO requires the government to provide "on an ongoing basis any evidence contained in the material reviewed in developing the return ... and in preparation for the hearing ... that tends materially to undermine the Government's theory as to the lawfulness of the petitioner's detention." The CMO also states that requests for discovery must be narrowly tailored, that they must specify why the request is likely to produce evidence material to the petitioner's case, and that they must explain "why the burden on the Government to produce such evidence is neither unfairly disruptive nor unduly burdensome." Obaydullah contends that the district court erred when it denied his motion to compel discovery of information relating to the reliability of the government's intelligence source that prompted the raid, and to the circumstances surrounding Obaydullah's interrogation during the raid. We review the district court's discovery rulings only for abuse of discretion. See *Al–Madhwani v. Obama*, 642 F.3d 1071, 1077 (D.C.Cir.2011).

A

Although the government has disclosed the classified pre-raid intelligence reports to Obaydullah's security-cleared counsel, it has redacted the source of this intelligence and any information describing the source. The government contends that the source is highly sensitive—too sensitive, even, to reveal in its classified filings at the Secret level, to which Obaydullah's security-cleared counsel has access.

Obaydullah requested "[a]ll documents relating to the tip on which American forces were operating" when they conducted the raid, "including the nature of the tip and the identity of its source"; "[a]ny and all information regarding fees, bounties, or other monetary or non-monetary remuneration or consideration given to third parties for apprehension, transfer, or investigation of petitioner"; "[d]ocuments sufficient to show whether there was ever a bounty offered or paid for Obaydullah's capture"; and "[t]he identity, by name and any other identifying information, of any and all sources providing the [pre-raid] intelligence." The government does "agree that money provided to a source in exchange for inculpatory information would generally be relevant and already encompassed within the government's disclosure obligation under CMO § I.F." But

it insists it has complied with all of its obligations under the CMO and that it cannot disclose anything further to Obaydullah's counsel without jeopardizing highly sensitive, source-related information. The information at issue here, the government tells us, is classified as "Sensitive Compartmented Information" and "require[s] 'special controls and handling.' "

Obaydullah does not deny that the government may withhold classified national security material consistent with its "legitimate interest in protecting sources and methods of intelligence gathering." *Boumediene v. Bush*, 553 U.S. 723, 796, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008). At oral argument, counsel for Obaydullah conceded that—notwithstanding counsel's security clearance at the Secret level—the government could withhold, as a hypothetical example, the name of a covert agent placed in a sensitive position, even if potentially relevant to the case. Here, the government submitted an ex parte filing to the court containing further information about its source. We have reviewed that material solely for the purpose of determining whether the government has met its obligations under the CMO, and not for the purpose—to which Obaydullah would object—of "bolster[ing] [the government's] case against" him. Finding that the government did not need to disclose further information about its source to Obaydullah's counsel, we conclude that the district court did not abuse its discretion in denying Obaydullah's discovery request.

B

Obaydullah also contends that the district court improperly denied his discovery request for "evidence concerning coercion by U.S. forces who interrogated him during the July 2002 raid." Obaydullah maintains that statements he gave during the raid and later retracted (that he was keeping the mines for "Karim," and that the notebook diagrams depicted wiring for a generator) were "likely the product of coercion." *Id*. at 37–38. As such, he argues that evidence of coercion would have been material to the court in rehabilitating his credibility.

In the district court, Obaydullah made a broad request for any information about his coercion or abuse at the hands of U.S. officials. The district court did not deny that request. To the contrary, it repeatedly made clear that the government was obligated to disclose any and all information relating to coercion. And, in fact, Obaydullah was given such information—specifically in relation to his detention at Chapman Airfield and at Bagram Airbase. Indeed, Obaydullah's allegations of abuse led the government to withdraw reliance on any statements he made at those airbases.

The government represents that there is no other evidence concerning coercion, whether during the raid or otherwise. The government did disclose various reports and debriefings regarding the raid… We have examined this material and find it inconsistent with a claim that Obaydullah was mistreated during the raid. Accordingly, there is nothing that leads us to doubt the government's assertion that it complied with the district court's instruction to disclose any and all information relating to coercion.

* * * *

(2) Former detainees

(i) Gul v. Obama*: attempt to continue habeas litigation post-transfer*

On April 16, 2012, the U.S. Supreme Court denied petitions for certiorari brought by former Guantanamo detainees who had been transferred to other countries but sought to continue their habeas litigation. *Gul v. Obama*, No. 11-7827. The district court denied the petitioners' claims as moot and the appeals court affirmed. 652 F.3d. 12 (D.C. Cir. 2011). The U.S. brief in opposition to the petition for certiorari is excerpted below (with footnotes and citations to the record omitted) and available at *www.state.gov/s/l/c8183.htm*.

* * * *

1. The court of appeals assumed, without deciding, that the mootness analysis in this case is governed by the standards applicable to ordinary habeas petitions. Applying those standards, the court correctly held that, because petitioners have been released from United States custody, they must affirmatively demonstrate that they suffer continuing collateral consequences of their prior detention in order to show that their petitions are not moot. *Spencer v. Kemna*, 523 U.S. 1, 7–8 (1998). "In the context of criminal conviction," this Court has observed that a "presumption of significant collateral consequences" is appropriate because it is an "'obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences,'" *Id*. at 12 (quoting *Sibron v. New York*, 392 U.S. 40, 55 (1968)). In other contexts, however, the Court has declined to presume collateral consequences from completed detention. See *id*. at 12–13; *Lane v. Williams*, 455 U.S. 624, 632–633 (1982). Instead, the Court has applied the principle that "it is the burden of the party who seeks the exercise of jurisdiction in his favor, clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *Spencer*, 523 U.S. at 11 (internal quotation marks omitted).

Petitioners' prior detention was not based on a criminal conviction, but was under the AUMF. As a plurality of this Court explained in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), "[t]he purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again." *Id*. at 518. It is "'neither a punishment nor an act of vengeance,' but 'merely a temporary detention which is devoid of all penal character.'" *Ibid*. (quoting William Winthrop, Military Law and Precedents 788 (rev. 2d ed. 1920)). The court of appeals therefore correctly held that, even under mootness principles applicable in ordinary habeas cases, petitioners may maintain a challenge to their prior detention only if they "make an actual showing [that their] prior detention or continued designation burdens [them] with 'concrete injuries.'"

Petitioners argue that the court of appeals erred in requiring them to demonstrate ongoing collateral consequences of their prior detention. According to petitioners, not only does the collateral-consequences doctrine apply in the circumstances of this case, but also, under that doctrine, the court should have placed the burden on the government to demonstrate that petitioners are not facing such consequences. For the reasons explained by the court of appeals, that argument lacks merit. In any event, this case is an inappropriate vehicle for considering

the appropriate allocation of the burden of showing collateral consequences (or a lack thereof). Under any standard, petitioners are no longer suffering any injury that could be redressed by a decision in their favor, and this case is therefore moot.

2. The court of appeals correctly held that, to the extent there are any collateral consequences of petitioners' prior detention, those consequences could not be redressed in a habeas proceeding. Petitioners' challenges to that conclusion lack merit.

a. Petitioners emphasize that the government has described their transfer to their home countries as a "transfer" rather than a release. But petitioners do not allege that they are being detained in Sudan or Afghanistan under the control of the United States. Indeed, they do not allege that they are being detained at all. Instead, Hamad asserts that the government of Sudan agreed to subject him to various conditions, such as limitations on travel. Even assuming that the government of Sudan has, in fact, imposed such conditions on Hamad, those conditions are not redressable in a habeas suit in a United States court.

As the government explained in declarations submitted to the district court, a Guantanamo Bay detainee is transferred from United States custody to another country only after a dialogue with the receiving government, the purpose of which "is to ascertain or establish what measures the receiving government intends to take pursuant to its own domestic laws and independent determinations that will ensure that the detainee will not pose a continuing threat to the United States and its allies." But once the detainee is transferred to the custody of the other government, he is no longer in the custody of the United States. Therefore, whatever the content of transfer discussions between the United States and Sudan before Hamad's transfer, any restrictions now imposed on him are imposed solely by Sudan pursuant to its independent sovereign judgments. It follows that, if Sudan imposes any restrictions on Hamad under its own laws, a federal court could not order the Sudanese government to lift those restrictions.

This Court has held that when justiciability "'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,'" it is "the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.)). "[U]nadorned speculation" about a relationship between the challenged government action and the alleged third-party conduct "will not suffice to invoke the federal judicial power." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976). In this case, Hamad has not alleged that a United States court would have the authority to modify the behavior of the government of Sudan. Instead, he is asking the district court to issue an advisory opinion declaring his prior confinement invalid, in the hopes that the government of Sudan would take account of that ruling in determining how to treat him. But a ruling that the government had not sufficiently shown that a former detainee was lawfully held under the AUMF would not establish that the individual poses no threat, nor would it mean that he could not be prosecuted under the domestic laws of his own country. It is entirely speculative how the government of Sudan would react to such a ruling.

Petitioners' own description of the relief they seek underscores these points. They suggest that the district court could "issue an order to the government to take all necessary and appropriate diplomatic and other steps to ameliorate the conditions of transfer and the enemy combatant designation." As the court of appeals explained, however, "[r]eframing the remedy that way * * * does not alter the nature of the injury claimed and therefore does not cure [the]

lack of jurisdiction." Indeed, that formulation of the remedy merely highlights that petitioners seek judicial involvement not only in the sovereign affairs of a foreign nation, but see *Munaf v. Geren*, 553 U.S. 674, 702 (2008) ("The Judiciary is not suited to * * * pass judgment on foreign justice systems."), but also in the foreign relations realm of the Executive Branch by mandating particular diplomatic steps it must take with a foreign government. By interfering with the ability of the United States to communicate in candor with a foreign government, the requested remedy would offend the separation of powers. See *Kiyemba v. Obama*, 561 F.3d 509, 515 (D.C. Cir. 2009) (noting that "'[t]he jurisdiction of [a] nation, within its own territory, is necessarily exclusive and absolute,'" and that "[j]udicial inquiry into a recipient country's basis or procedures for prosecuting or detaining a transferee from Guantanamo would implicate not only norms of international comity but also * * * separation of powers principles") (quoting *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812)) (first and second brackets in original), cert. denied, 130 S. Ct. 1880 (2010). Any conditions that may be imposed on petitioners by foreign governments therefore provide no basis for the continuing exercise of jurisdiction over their habeas petitions.

b. The court of appeals also correctly held that the alleged stigma resulting from prior detention does not mean that the habeas petitions are not moot. As this Court explained in Spencer, only the "adverse collateral legal consequences" of prior detention are sufficient to avoid mootness, 523 U.S. at 12 (quoting *Sibron*, 392 U.S. at 55) (emphasis added), and even the stigma resulting from "a finding that an individual has committed a serious felony" is therefore insufficient, *id*. at 16 n.8 (quoting *id*. at 23, 24 (Stevens, J., dissenting)).

* * * *

c. Petitioners also argue that their inclusion on the No Fly List is a collateral consequence of detention. That argument lacks merit. As the court of appeals observed, "there is no evidence in the record suggesting either [petitioner] actually wishes to enter the United States," or that they would be admissible if they did. Therefore, the likelihood that either petitioner will be affected in any concrete way by his inclusion on the No Fly List "is exceedingly remote." Petitioners assert that the court's "conclusion is unwarranted," but their petition conspicuously omits any allegation that they do in fact intend to (or could lawfully) come to the United States, and that case-specific question would not warrant this Court's review in any event.

Moreover, under 49 U.S.C. 44903(j)(2)(C)(v) (Supp. III 2009), the No Fly List must include "any individual who was a detainee held at the Naval Station, Guantanamo Bay, Cuba, unless the President certifies in writing to Congress that the detainee poses no threat to the United States, its citizens, or its allies." As the court of appeals correctly held, an individual's inclusion under that provision does not turn on whether he prevailed in his habeas case or was previously designated an "enemy combatant," but rather on whether he was ever detained at Guantanamo Bay. Because petitioners were in fact detained at Guantanamo Bay, they would be covered by the plain language of the statute regardless of any judicial determination of the lawfulness of their detention.

3. Even if petitioners could demonstrate that their habeas petitions were not technically moot, relief would still be inappropriate under the "equitable principles" that guide the exercise of habeas jurisdiction. *Munaf*, 553 U.S. at 693 (quoting *Fay v. Noia*, 372 U.S. 391, 438 (1963)). In *Munaf*, this Court held that even where a United States citizen has constitutional and statutory habeas rights, "prudential concerns, such as comity and the orderly administration of criminal

justice, may require a federal court to forgo the exercise of its habeas corpus power." *Ibid*. (internal quotation marks and citations omitted). A court possessing jurisdiction "is 'not bound in every case' to issue the writ" when equitable principles counsel against doing so. *Ibid*.(quoting *Ex parte Royall*, 117 U.S. 241, 251 (1886)).

* * * *

…[A]llowing hundreds of former detainees to litigate the legality of their past detention would impose an unwarranted burden on the courts, on the military, and on intelligence agencies. While that burden is constitutionally required in the context of ongoing, long-term detention at Guantanamo Bay, once a detainee is transferred from United States custody, the constitutional imperatives animating habeas review no longer exist.

4. The court of appeals held the habeas petitions in this case are moot because petitioners cannot show that any redressable collateral consequences result from their former detention As explained, that holding is correct and does not warrant this Court's review. But review is also inappropriate for the additional reason that, unlike ordinary habeas petitions, the petitions in this case are based, not on 28 U.S.C. 2241, but directly on the Constitution. See *Boumediene*, 553 U.S. at 799 (Souter, J., concurring) ("Subsequent legislation eliminated the statutory habeas jurisdiction over these claims, so that now there must be constitutionally based jurisdiction or none at all."). In holding that Guantanamo Bay detainees have a constitutional entitlement to habeas to review the lawfulness of their detention in United States custody, this Court in *Boumediene* explained the basic historical contours of the habeas right, emphasizing that "the habeas court must have the power to order the conditional release of an individual unlawfully detained." *Id*. at 779. The Court repeatedly stated that the constitutional habeas right of Guantanamo Bay detainees is, at its core, a right to challenge the legality of detention. *Id*. at 771 ("Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention."); see *id*. at 745 ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody.") (quoting *Preiser*, 411 U.S. at 484) (brackets in original). Nowhere did the Court suggest that the constitutional habeas right it recognized—a right to challenge the lawfulness of detention –would extend to individuals already released from United States custody, or that the district court would have authority to grant relief to such individuals. Because petitioners are no longer in United States custody, the constitutional habeas right recognized in *Boumediene* does not extend to them.

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(ii) Lebron v. Rumsfeld*: civil claims against government and military personnel*

On January 23, 2012, the Court of Appeals for the Fourth Circuit issued its opinion affirming the district court's dismissal of all claims against government officials and military officers brought by plaintiffs Jose Padilla and his mother, Estela Lebron, for relief based on Padilla's former detention as an "enemy combatant." 670 F.3d 540 (4th Cir. 2012). See *Digest 2011* at 582-86 for background on the case and excerpts of the U.S. *amicus* brief filed in the Fourth Circuit. The U.S. Supreme Court denied the petition for certiorari in the case on June

11, 2012. *Lebron v. Rumsfeld,* No. 11-1277. The opinion of the court of appeals is excerpted below (with footnotes and citations to the record omitted).

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Padilla claims that, as a U.S. citizen captured within the United States, he was unconstitutionally designated as an enemy combatant, and alleges a range of constitutional violations stemming from his ensuing military detention: denial of his right to counsel under the First, Fifth, and Sixth Amendments; denial of access to courts protected by Article III, the First and Fifth Amendments, and the Habeas Corpus Suspension Clause; unconstitutionally cruel conditions of confinement in violation of the Fifth and Eighth Amendments; coercive interrogations in violation of the Fifth and Eighth Amendments; denial of his freedom of religion under the First Amendment and the Religious Freedom Restoration Act; denial of access to information protected by the First Amendment; denial of freedom of association under the First Amendment; and general denial of due process protected by the Fifth Amendment. As relief, Padilla seeks a declaration that his designation, military detention, and treatment in custody were unconstitutional; a declaration that the policies that led to his treatment were unconstitutional; an injunction prohibiting his future designation and detention as an enemy combatant; and one dollar in damages from each defendant.

* * * *

On February 17, 2011, the district court granted the defendants' motion to dismiss Padilla's suit. See *Lebron v. Rumsfeld*, 764 F.Supp.2d 787 (D.S.C.2011). This appeal followed.

II.

Padilla first faults the district court for refusing to imply a new cause of action for money damages against top Defense Department officials for a range of policy judgments pertaining to the designation and treatment of enemy combatants.

A.

We review the district court's ruling on a motion to dismiss de novo. See *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 307 (4th Cir.2007). Like the district court, we conclude that a proper regard for the constitutional structure requires us to decline to recognize this novel suit. The designations of persons and groups as special threats to national security may be subject to a variety of checks and to habeas corpus proceedings. But they are not reviewable by the judiciary by means of implied civil actions for money damages.

We begin by discussing the historic restraint applicable to implied causes of action and the judicial standards developed with respect to them. As to all but one of his claims, Padilla asks the judiciary to imply a cause of action for constitutional violations by federal officials, as first recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). However, the Supreme Court has long counselled restraint in implying new remedies at law. A *Bivens* action "has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement." *Wilkie v. Robbins*, 551 U.S. 537, 550, 127 S.Ct. 2588, 168 L.Ed.2d 389 (2007).

* * * *

Given these principles, we must approach Padilla's invitation to imply a *Bivens* action here with skepticism. "The *Bivens* cause of action is not amenable to casual extension," *Holly v. Scott*, 434 F.3d 287, 289 (4th Cir.2006), but rather is subject to a strict test adopted by this court. To maintain a *Bivens* claim, Padilla must demonstrate both that "there are no 'special factors counseling hesitation in the absence of affirmative action by Congress' " and that "Congress has not already provided an exclusive statutory remedy." *Hall v. Clinton*, 235 F.3d 202, 204 (4th Cir.2000) (citation omitted). We do not require congressional action before recognizing a *Bivens* claim, as that would be contrary to *Bivens* itself. We will, however, refuse to imply a *Bivens* remedy where, as in this case, Congress's pronouncements in the relevant context signal that it would not support such a damages claim.

B.

Special factors do counsel judicial hesitation in implying causes of action for enemy combatants held in military detention. First, the Constitution delegates authority over military affairs to Congress and to the President as Commander in Chief. It contemplates no comparable role for the judiciary. Second, judicial review of military decisions would stray from the traditional subjects of judicial competence. Litigation of the sort proposed thus risks impingement on explicit constitutional assignments of responsibility to the coordinate branches of our government. Together, the grant of affirmative powers to Congress and the Executive in the first two Articles of our founding document suggest some measure of caution on the part of the Third Branch.

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When, as here, these two branches exercise their military responsibilities in concert—Congress by enacting the AUMF and the President by detaining Padilla pursuant thereto, see *Padilla V*, 423 F.3d 386—the need to hesitate before using *Bivens* actions to stake out a role for the judicial branch seems clear. It is settled that courts "accord the President the deference that is his when he acts pursuant to a broad delegation of authority from Congress." *Id*. at 395. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), Justice Jackson described the heightened judicial caution signalled by facts such as those presented here: "A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Id*. at 637, 72 S.Ct. 863 (Jackson, J., concurring).

The reasons for this constitutional structure are apparent. Questions of national security, particularly in times of conflict, do not admit of easy answers, especially not as products of the necessarily limited analysis undertaken in a single case. It is therefore unsurprising that "our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." *Hamdi v. Rumsfeld*, 542 U.S. 507, 531, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004).

* * * *

The relevance of these separation of powers concerns is underscored by the nature of Padilla's allegations. The bulk of Padilla's complaint describes the evolution of the "detention and interrogation policies developed by Senior Defense Policy defendants," which Padilla

contends "proximately and foreseeably" caused the harm he suffered from his detention and conditions of confinement. In the course of describing the internal debate over detainee policy, however, the complaint makes very clear the extent to which the progression of this lawsuit would draw courts into the heart of executive and military planning and deliberation.

Padilla primarily challenges "the [detainee] policy developed by Senior Defense Policy Defendants." Padilla describes how this policy was created as part of the broader effort in the fall of 2001 "to develop policy in the war on terrorism." Almost immediately after 9/11, the defendants in this suit sought the advice of the Justice Department, obtaining ten different memoranda from the Office of Legal Counsel discussing the scope of presidential authority under the AUMF, application of the Geneva Conventions to members of al Qaeda, and permissible forms of interrogation. Nor was this the only legal advice the defendants received. The FBI weighed in, as did Alberto Mora, General Counsel of the Navy.

The debate over what interrogation techniques to use in combating al Qaeda received equally high level attention. …

Later, interrogation policy was directed by the "Working Group on Detainee Interrogations in the Global War on Terrorism," which included defendant Haynes, general counsel of the Department of Defense; Michael Mobbs, the head of the Detainee Policy Group; representatives of the Defense Intelligence Agency; and the General Counsels and Judge Advocate Generals of the various departments of the military—all reporting to the Secretary and Deputy Secretary of Defense.

* * * *

In short, Padilla's complaint seeks quite candidly to have the judiciary review and disapprove sensitive military decisions made after extensive deliberations within the executive branch as to what the law permitted, what national security required, and how best to reconcile competing values. It takes little enough imagination to understand that a judicially devised damages action would expose past executive deliber-ations affecting sensitive matters of national security to the prospect of searching judicial scrutiny. It would affect future discussions as well, shadowed as they might be by the thought that those involved would face prolonged civil litigation and potential personal liability.

Of course Congress may decide that providing a damages remedy to enemy combatants would serve to promote a desirable accountability on the part of officials involved in decisions of the kind described above. But to date Congress has made no such decision. …

This history reveals a Congress actively engaged with what interrogation techniques were appropriate and what process was due enemy combatant detainees. …Padilla asks us to ignore this ample evidence that "congressional inaction has not been inadvertent," *Schweiker v. Chilicky*, 487 U.S. 412, 423, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988), and to do what Congress did not do, namely to trespass into areas constitutionally assigned to the coordinate branches of our government.

* * * *

In addition to these structural constitutional concerns, a second factor causing hesitation in the Bivens context is the departure from core areas of judicial competence that such a civil action might entail. This second factor overlaps to some extent with the dangers of intrusion into the constitutional responsibilities of others described above. But it also raises a discrete set of

problems all its own pertaining to the ability of the judiciary to administer a *Bivens* remedy in a case like the one at hand.

The problems of administrability here are at least two-fold. The first has to do with the interruption of the established chains of military command. The Supreme Court has cautioned against entertaining suits that could be so "problematic, raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands." *Stanley*, 483 U.S. at 682–83, 107 S.Ct. 3054. Padilla's suit proposes to do precisely what the Supreme Court has instructed we not do: "require members of the Armed Services" and their civilian superiors "to testify in court as to each other's decisions and actions," *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977) in order "to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions." *United States v. Shearer*, 473 U.S. 52, 58, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985).

* * * *

A second difficulty of administering Padilla's proposed *Bivens* action pertains to its practical impact on military intelligence operations. Padilla's proposed litigation risks interference with military and intelligence operations on a wide scale. Any defense to Padilla's claims—which effectively challenge the whole of the government's detainee policy—could require current and former officials, both military and civilian, to testify as to the rationale for that policy, the global nature of the terrorist threat it was designed to combat, the specific intelligence that led to the application of that policy to Padilla, where and from whom that intelligence was obtained, what specific military orders were given in the chain of command, and how those orders were carried out. …

The Supreme Court has taken such administrability concerns seriously. Cautioning against the implication of a *Bivens* cause of action here are practical concerns about obtaining information necessary for the judiciary to assess the challenged policies. Much of the information relevant to the creation of the detainee policy remains classified. While we have no doubt that courts would seek to protect such sensitive information, see Classified Information Procedures Act, 18 U.S.C.App. III §§ 1–16, even inadvertent disclosure may jeopardize future acquisition and maintenance of the sources and methods of collecting intelligence. As the Supreme Court has recognized, "Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to 'close up like a clam.' " *CIA v. Sims*, 471 U.S. 159, 175, 105 S.Ct. 1881, 85 L.Ed.2d 173 (1985). The chilling effects on intelligence sources of possible disclosures during civil litigation and the impact of such disclosures on military and diplomatic initiatives at the heart of counterterrorism policy often elude judicial assessment. If courts assay such assessments, it should be because the legislative branch has authorized that course.

* * * *

C.

Before recognizing a *Bivens* action, courts must not only consider special factors that would counsel hesitation, but also "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie*, 551 U.S. at 550, 127 S.Ct. 2588. Here, Padilla had

extensive opportunities to challenge the legal basis for his detention.

Padilla challenged his military detention in habeas corpus proceedings before five different courts. In adjudications on the merits before district courts in the Southern District of New York and the District of South Carolina, and on appeals to the Second Circuit and to this court, Padilla was able to present essentially the same arguments that he makes here about the legality of militarily detaining a U.S. citizen. See generally *Padilla II*, 352 F.3d 695; *Padilla V*, 423 F.3d 386 (characterizing Padilla's arguments). Padilla pursued those claims up until the very moment that they were mooted by his transfer into civilian custody. And if Padilla is again detained by the military, he could presumably avail himself further of whatever "adequate and effective substitute for habeas corpus" is in use for detainees at that time. *Boumediene*, 553 U.S. at 795, 128 S.Ct. 2229. With respect to Padilla's claims arising from his enemy combatant designation, this is not a case of "damages or nothing." *Davis*, 442 U.S. at 245, 99 S.Ct. 2264. The Supreme Court has warned that "the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting." *Hamdi*, 542 U.S. at 535, 124 S.Ct. 2633.

"That [Padilla] considers [his] existing remedies insufficient is simply irrelevant" to whether a court should imply a *Bivens* action. *Judicial Watch v. Rossotti*, 317 F.3d 401, 413 (4th Cir.2003). *Bivens* "is concerned solely with deterring individual officers' unconstitutional acts." *Malesko*, 534 U.S. at 71, 122 S.Ct. 515. In such circumstances, we cannot regard the legislative failure to provide Padilla with the monetary damages he seeks from each defendant as an invitation to design some preferred remedial regime of our own.

D.

All these sources of hesitation in recognizing Padilla's *Bivens* claim are related. The practical concerns merely serve to illustrate the wisdom of the constitutional design, which commits responsibility for military governance and the conduct of foreign affairs to the branches most capable of addressing them and most accountable to the people for their choices. Padilla asks us to intervene in a manner courts have not before seen fit to attempt. To say that the cumulative concerns "counsel hesitation" is something of an understatement, and we must decline to create the damages remedy Padilla seeks. Because we conclude that Padilla's *Bivens* action cannot be maintained, we need not reach the questions of whether the defendants are entitled to qualified immunity or whether Padilla has pleaded his claim with adequate specificity.

* * * *

(iii) Al-Shimari v. CACI*: claims against military contractors*

On January 14, 2012, the United States filed a brief as *amicus* in a consolidated en banc appeal in the U.S. Court of Appeals for the Fourth Circuit involving claims brought by former detainees at Abu Ghraib prison in Iraq against the military contractors who participated in their interrogations. *Al-Shimari v. CACI Int'l Inc.* & *Al-Quraishi v. L-3 Services, Inc.*, Nos. 09-1335, 10-1891, 10-1921 (4th Cir. 2012). The defendant contractors in two district court cases appealed the district courts' decisions denying (at least partially) their motions to dismiss. On September 21, 2011, a panel of the court of appeals reversed, finding that the district courts erred in allowing the claims to proceed. *Al–Quraishi v. L–3 Servs., Inc.*, 657 F.3d 201 (4th Cir.2011); *Al Shimari v. CACI Int'l, Inc.*, 658 F.3d 413 (4th Cir.2011). The court

subsequently granted plaintiffs' motions for rehearing en banc and the court invited the United States to participate as *amicus curiae*. The U.S. *amicus* brief, excerpted below (with footnotes and citations to the record omitted) and available at *www.state.gov/s/l/c8183.htm*, includes two main parts. First, the brief argues that appellate review at this stage of the litigation was premature. Second, the brief asserts that in its further consideration of the claims, the courts should apply federal preemption in general to contractors' actions performed within the scope of their contracts—particularly while integrated with the military—but allow for the possibility of liability to the extent a contractor has committed torture.

On May 11, 2012, the Fourth Circuit Court of Appeals issued its en banc decision. A majority of the court dismissed the appeals, agreeing with the argument in the U.S. brief that appellate review was premature. *Al Shimari v. CACI Int'l Inc.*, 679 F.3d 205 (4th Cir. 2012). Three judges dissented, two of them writing separate, lengthy opinions explaining their view that the panel had correctly held that the claims should have been dismissed.

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* * * *

I. …

This Court should conclude that the interlocutory orders denying defendants' motions to dismiss are not immediately appealable. That conclusion does not come easily. Postponing review poses serious concerns, including the risk that prolonged litigation without a dispositive appellate determination on preemption could distract military and civilian personnel from their critical duties to safeguard national security, and could impose intrusive discovery requirements on military personnel. Nevertheless, those concerns can and should be addressed by careful limitation and close supervision of any necessary discovery by the district courts, and by the use of existing mechanisms for interlocutory appellate review, including certification under 28 U.S.C. § 1292(b).

A. Collateral Order Review Is A Narrow Exception.

Defendants seek appellate review of orders denying motions to dismiss that relied on a variety of defenses, including preemption of state law claims, derivative immunity, what defendants term "law-of-war immunity," and the political question doctrine. The Supreme Court has recently reiterated the importance of "the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered." *Mohawk Indus. v. Carpenter*, 130 S. Ct. 599, 605 (2009) (quoting *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994)). The collateral order doctrine, an exception to that general rule, allows for review of "a narrow class of decisions that do not terminate the litigation" but are sufficiently important and collateral to the merits that they should "nonetheless be treated as final." *Digital Equipment*, 511 U.S. at 867.

To qualify as an immediately appealable collateral order, an interlocutory decision must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Johnson v. Jones*, 515 U.S. 304, 310 (1995) (internal quotation marks omitted).

B. Preemption Decisions Are Not Immediately Appealable.

District court decisions declining to dismiss a case on the ground of federal preemption would not typically satisfy the standard for appealable collateral orders. Preemption is typically a defense to liability, and a defendant is generally not entitled to interlocutory appeal from a denial of a motion to dismiss on that ground. Although the preemption defense raised in these cases implicates unique federal interests, including concerns arising from the effect of discovery and other pretrial proceedings on military discipline and readiness, it still does not gives rise to an immediate appeal as of right.

The United States generally agrees that preemption principles, as expressed in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), and as applied here drawing on the combatant activities exception under the [Federal Tort Claims Act or] FTCA, 28 U.S.C. § 2680(j), provide an appropriate framework for analyzing whether state law claims are preempted in this context, taking into account the distinct treatment of claims concerning conduct that would constitute torture as defined in federal law. See *infra*. We also agree that the principles of preemption at issue here should be recognized and given effect "in the early stages of litigation." *Al-Quraishi v. L-3 Services, Inc.*, 657 F.3d 201,205 (4th Cir. 2011), vacated on reh'g en banc (4th Cir. Nov. 8, 2011). Courts should be properly sensitive to the concern that unfettered discovery proceedings could affect military readiness. See, *e.g.*, *Saleh*, 580 F.3d at 8 (concern about "the prospect of military personnel being haled into lengthy and distracting court or deposition proceedings," which "will as often as not devolve into an exercise in finger-pointing between the defendant contractor and the military, requiring extensive judicial probing of the government's wartime policies"); *cf. Vulcan Materials Co. v. Massiah*, 645 F.3d 249, 266 (4th Cir. 2011) (discussing "military discipline" rationale for limiting tort suits involving military decision-making). But the district courts have the authority to manage and properly limit discovery and other proceedings to prevent any adverse effect on military and other government operations.

A district court has the authority to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) should appellate review become necessary before final judgment. Defendants in *Saleh* successfully pursued such an appeal, see *Saleh*, 580 F.3d at 4, and certification under § 1292(b) may be appropriate here as well, following further consideration of the preemption issues by the district courts. In appropriate circumstances, a writ of mandamus also may be available to ensure that important federal interests are protected if a district court were to decline to certify interlocutory appeal at an appropriate stage of litigation. Thus, although a preemption defense of the sort at issue here should be resolved as early as possible, that consideration by itself does not require adoption of a categorical rule that every denial of such a defense should be immediately appealable as of right.

Notably, the panel here did not hold that a preemption decision alone would be immediately appealable. Instead, the decision pointed to the combination of "substantial issues relating to federal preemption, separation-of-powers, and immunity" which the panel majority believed "could not be addressed on appeal from final judgment." *Al-Quraishi*, 657 F.3d at 205. But each of those issues should be analyzed separately to determine whether immediate appeal is available. The particular combination of doctrines, issues, and considerations at issue in these cases does not create appellate jurisdiction where the individual issues themselves would not support immediate review. See *Mohawk*, 130 S. Ct. at 605 ("In making this determination, we do not engage in an individualized jurisdictional inquiry. Rather, our focus is on the entire category to which a claim belongs.") (internal quotation marks and citations omitted).

Every other court of appeals to consider the question has concluded that district court denials of preemption defenses of this sort are not immediately appealable. In the most directly

analogous case, the Fifth Circuit held that a government contractor's claim of preemption informed by the combatant activities exception is not immediately appealable under the collateral order doctrine. See *Martin v. Halliburton*, 618 F.3d 476,486-488 (5th Cir. 2010). The Ninth Circuit similarly held that a government contractor's preemption claim based on the discretionary function exception is not appealable as a collateral order. See *Rodriguez v. Lockheed Martin*, 627 F.3d 1259, 1265-1266 (9th Cir. 2010). And other courts have declined to consider combatant activities preemption issues before final judgment. See *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1366 (11th Cir. 2007) (declining to exercise pendent appellate jurisdiction); *Harris v. Kellogg Brown & Root Servs., Inc.*, 618 F.3d 398, 401-404 (3d Cir. 2010) (no immediate review because district court ruling was tentative). The D.C. Circuit decision in *Saleh* is consistent with that approach—the district court had granted summary judgment as to one defendant, and certified interlocutory appeal under 28 U.S.C. § 1292(b) for the other. See 580 F.3d at 4.

C. The Political Question Doctrine Does Not Require Immediate Review Of These Interlocutory Decisions.

Defendants also seek review of the district courts' determination that the political question doctrine does not bar litigation of the claims in these cases. But, like preemption, political question arguments typically do not require interlocutory appellate intervention. See, *e.g.*, *Doe v. Exxon Mobil Corp.*, 473 F.3d 345,351 (D.C. Cir. 2007). Indeed, defendants here do not contend that immediate review of the political question argument is available under the collateral order doctrine.

Defendants instead argue that this Court should resolve any justiciability concerns before reaching other questions, contending that the political question objection deprived both the district court and this Court of jurisdiction to consider the case at all. But this Court recently rejected an analogous argument in a case where a defendant urged the Court to resolve concerns about standing that would not otherwise be immediately reviewable. See *Rux v. Sudan*, 461 F.3d 461, 476 (4th Cir. 2006). The Court need not resolve defendants' political question arguments at this stage of the litigation.

D. The Defendants' Claims Of Immunity Do Not Require Immediate Review.

Defendants also seek immediate review of their various claims to immunity. While some of those claims could present difficult questions, they do not suffice to create appellate jurisdiction at this stage of the case.

1. Some immunities encompass a freedom from the burdens of litigation altogether, not merely a right to avoid liability. Thus, the Supreme Court has described the doctrines of absolute official immunity and qualified immunity as sharing the essential attribute of "an entitlement not to stand trial under certain circumstances." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). But not all immunity considerations warrant interlocutory appeal. For example, a claim of qualified immunity—which is indisputably an immunity from trial—is not immediately appealable if it turns on questions of disputed fact. See *Johnson*, 515 U.S. at 313. And a number of courts have held that there ordinarily is no right to an interlocutory appeal from the denial of a defense based on federal sovereign immunity or derivative claims of such immunity. See, *e.g.*, *Houston Community Hosp. v. Blue Cross and Blue Shield of Texas, Inc.*, 481 F.3d 265,279 (5th Cir. 2007); *Alaska v. United States*, 64 F.3d 1352, 1356 (9th Cir. 1995); *Pullman Constr. Indus. v. United States*, 23 F.3d 1166, 1168 (7th Cir. 1994).

The Fifth Circuit has recently noted the limited universe of immediately appealable claims, and emphasized that "almost any right can be characterized as a right not to be

confronted with the burdens of trial." See *Martin*, 618 F.3d at 483. And the Supreme Court has emphasized that the final judgment rule "requires courts of appeals to view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." *Digital Equipment*, 511 U.S. at 873. Here, that cautionary guidance counsels against extending collateral order review at this stage of the litigation to the theories of derivative immunity and what defendants refer to as law-of-war immunity.

2. Defendants argue that they are entitled to absolute immunity on the ground that only the laws of war govern their conduct, and that plaintiffs' claims are therefore not amenable to judicial disposition in the courts of the United States. They rest that argument principally on an 1879 Supreme Court decision denying enforcement of a default judgment entered against a Union general by a court in Louisiana for the taking of civilian property by the United States military during the Civil War. See *Dow v. Johnson*, 100 U.S. 158 (1879). The Court in Dow held that, during a period of war or military occupation, the armies of an occupying power are "not subject to [the] laws, nor amenable to [the] tribunals [of the occupied territory] for their acts." *Id*. at 165. Thus, "a foreign army * * * is exempt from [the] civil and criminal jurisdiction" of the "country it ha[s] invaded." *Ibid*. The officers and soldiers of the occupying army "remain subject to the laws of war, and are responsible for their conduct only to their own government, and the tribunals by which those laws are administered." *Id*. at 166.

The Court in *Dow* did not use the term "immunity" to describe its rationale for rejecting the default judgment in that case. The Court determined that the Louisiana court lacked jurisdiction over the Union officer, *Dow*, 100 U.S. at 167, and described the principle as a "doctrine of non-liability," *id*. at 169.

These cases also present different questions from those at issue in *Dow*. Defendants argue that the Supreme Court's jurisdictional determination concerning the courts of an occupied territory should extend as well to the domestic courts of the occupying force, the United States (even though it is unclear whether the reference in Dow to the proposition that officers and soldiers "are responsible for their conduct only to their own government" would allow suits by private parties in the courts of the United States). They argue that the freedom of a military officer to make decisions and give orders to subordinate officers and soldiers should be deemed also to protect the conduct of private contractors working with the military. And they argue that the jurisdictional holding in Dow should be understood to allow an appeal as of right from an interlocutory decision declining to dismiss these claims on the pleadings.

Dow and the policies it reflects may well inform the ultimate disposition of these claims. But we are not prepared at this point to conclude that the contractor defendants have demonstrated a right to immediate review of their contentions based on Dow alone.

3. Defendants also argue that they are entitled to derivative sovereign or official immunity, contending that they acted as agents of the United States. But plaintiffs contest the premise of that argument, alleging that the conduct at issue exceeded the scope of defendants' contracts with the military. The district courts here held that they could not yet rule on the claims of derivative immunity without additional information concerning the nature and scope of defendants' contractual duties on behalf of the government—including the contracts themselves, which are not in the record. See *Al Shimari v. CACI Premier Technology, Inc.*, 657 F. Supp. 2d 700, 714,720 (E.D. Va. 2009) (derivative official immunity); *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 735 (D. Md. 2010) (derivative sovereign immunity).

The decisions of the district courts in these cases demonstrate that an interlocutory appeal to consider defendants' claims of derivative immunity is premature. The district courts denied

defendants' motions seeking dismissal not because immunity could never be available but because defendants' entitlement to immunity would depend on further discovery. For that reason, the decisions here do not satisfy the requirement that an appealable collateral order must be conclusive.

4. A claim of immunity must also be substantial—not merely colorable or non-frivolous—to justify interlocutory appeal. See, *e.g.*, *Martin*, 618 F.3d at 483 (citing *Houston Community Hosp.*, 481 F.3d at 269 & n. 11); *cf. Mitchell*, 472 U.S. at 525 ("the denial of a substantial claim of absolute immunity is an order appealable before final judgment"); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1339 n.6 (11th Cir. 2007) ("A substantial claim to immunity from suit, not immunity itself, is the basis for a collateral order appeal.") (citing cases).

This litigation is still at the pleadings stage, and the district courts have identified unresolved factual questions—including the scope of the defendants' contractual obligations—that may bear on at least some of the immunity claims. See *Al-Quraishi*, 728 F. Supp. 2d at 715; *Al Shimari*, 657 F. Supp. 2d at 704-705. Defendants do not identify a sub-stantial argument at this stage that they are entitled to immunity from all such claims as a matter of law.

II. …

If the Court were to conclude that it has jurisdiction over these appeals, it should hold that federal preemption principles generally apply to the acts of civilian contractors assisting the military in detaining and interrogating enemy aliens in a U.S. military prison in Iraq during wartime. Given the unique federal interests at stake (and the relatively minimal state interests), the scope of federal preemption in this context should be broad but not limitless, and should not apply to conduct by civilian contractors that constitutes torture as defined in federal criminal law.

A. The Supreme Court has recognized that preemption may be found not only where there is a discrete conflict that prevents compliance with both state and federal legal duties, but also where "the application of state law would 'frustrate specific objectives' of federal legislation" and where the federal interest requires a "uniform rule" that would supplant an "entire body of state law." *Boyle*, 487 U.S. at 507-508. In *Boyle*, the Court found such a need for federal primacy where government contractors had been sued on products liability theories for the design of military equipment built for the United States. The Court looked to the FTCA's discretionary function exception, 28 U.S.C. § 2680(a), to discern the contours of that preemption. *Boyle*, 487 U.S. at 511-512.

Boyle is the proper starting point for the preemption analysis in these cases. Here, as in *Boyle*, plaintiffs' claims implicate uniquely federal interests. Those interests include avoiding unwarranted judicial second-guessing of sensitive judgments by military personnel and contractors with which they interact in combat-related activities, and ensuring appropriate limits on private tort suits based on such activities—as well as ensuring that military detention operations are conducted in a manner consistent with humane treatment obligations and the laws of war, and that contractors are held accountable for their conduct by appropriate means. Except in limited instances where the federal interests at stake also include the prohibition against torture, those interests clearly outweigh whatever interests the States might have in regulating contractors through the mechanism of tort claims by foreign nationals seeking redress for injuries allegedly sustained during their detention by the United States military overseas.

The conduct of military combat operations, including the use of contractors in support of those operations, is the province of the federal government, and the detention and interrogation of enemy aliens captured in the course of those military operations is indisputably a matter of federal concern. The FTCA's combatant activities exception, 28 U.S.C. § 2680(j), provides

helpful guidance in determining the scope of federal preemption in this area. The Supreme Court recognized in *Boyle* that the FTCA's discretionary function exception "demonstrates the potential for, and suggests the outlines of, 'significant conflict' between federal interests and state law in the context of Government procurement." *Boyle*, 487 U.S. at 511. So too in the context of military operations, the corollary exception for "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war," 28 U.S.C. 2680(j), identifies the area of significant federal interest that governs such claims.

The D.C. Circuit, faced with similar claims, recognized and applied a federal preemption defense informed by the FTCA's combatant activities exception. See *Saleh*, 580 F.3d at 5-11. That approach is generally consistent with the Supreme Court's decision in *Boyle*. Boyle makes clear that a state-law claim against a government contractor may be preempted insofar as it conflicts with significant federal interests, and that the contours of the preemption may be informed by the FTCA's discretionary function exception, even though that statute does not directly apply to the actions of private contractors or render the United States liable for their actions. See 28 U.S.C. § 2671. Similarly, although the FTCA's combatant activities exception is directly triggered only by the actions of the United States military, *Saleh* correctly determined that the policies embodied in that exception can also be implicated by the actions of contractor employees who are integrated with U.S. personnel in connection with the combatant activities of the military. As *Saleh* recognized, in both situations a state-law tort suit raises "the prospect of military personnel being haled into lengthy and distracting court or deposition proceedings" and "extensive judicial probing of the government's wartime policies." 580 F.3d at 8.

The D.C. Circuit, however, erred in a crucial respect by inquiring whether the contractor was itself "engaging in combatant activities" or was "integrated into combatant activities." *Saleh*, 580 F.3d at 7, 9. In phrasing the test in this manner, the court may have misunderstood the circumscribed role of private contractors in war zones. Under domestic and international law, civilian contractors engaged in authorized activity are not "combatants"; they are rather civilians accompanying the force and, as such, they cannot lawfully engage in combat functions or combat operations, which are uniquely sovereign functions. See Br. For United States as Amicus Curiae, *Saleh v. Titan Corp.*, at 15-16 (S. Ct. No. 09-1313, May 27, 2011). The panel here may have also failed to recognize the significance of this distinction. See *Al Shimari v. CACI Int'l, Inc.*, 658 F.3d 413, 420 (4th Cir. 2011), vacated on reh'g en banc (4th Cir. Nov. 8, 2011).

Application of the FTCA's combatant activities exception, however, does not turn on whether a challenged act is itself a "combatant activity," or whether the alleged tortfeasor is himself engaging in a "combatant activity." The statute instead refers to claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j) (emphases added). Such claims, if brought against the United States (or if brought against a military service member or other federal officer or employee acting within the scope of his or her employment), would be dismissed because Congress expressly retained the sovereign immunity of the United States for claims arising out of combatant activities. The scope of preemption informed by that statute's expression of a uniquely federal interest should likewise turn on whether particular claims "aris[e] out of" the military's combatant activities.

B. For the purpose of these cases, the Court should hold that claims against a contractor are generally preempted to the extent that a similar claim against the United States would be within the combatant activities exception of the FTCA, and the contractor was acting within the scope of its contractual relationship with the federal government at the time of the incident out of which the claim arose, particularly in situations where the contractor was integrated with military

personnel in the performance of the military's combat-related activities. *Cf. Saleh*, 580 F.3d at 4-7 (discussing integration of contractor personnel into military units). Even if all these factors exist, however, state-law claims should not be preempted in these cases to the extent that a contractor committed torture as defined by federal law.

1. The first step of this preemption inquiry requires the Court to determine whether claims against the United States alleging similar conduct would be within the FTCA's exception for combatant activities. The FTCA specifies that the sovereign immunity of the United States has not been waived as to claims arising out of the military's combatant activities. Thus, the Court must determine whether plaintiffs' claims arise out of underlying conduct of the military that qualifies as "combatant activities * * * during time of war." 28 U.S.C. § 2680(j). The Ninth Circuit held, shortly after enactment of the FTCA, that the term "combatant activities" includes "not only physical violence, but activities both necessary to and in direct connection with actual hostilities." *Johnson v. United States*, 170 F.2d 767,770 (9th Cir. 1948), quoted in *Koohi v. United States*, 976 F.2d 1328, 1333 n.5 (9th Cir. 1992). That court has also recognized that the statutory reference to "time of war," 28 U.S.C. § 2680(j), does not require a congressional declaration of war. *Koohi*, 976 F.3d at 1333-1334. No other court of appeals has addressed the interpretation of the combatant activities exception, although district court decisions are generally consistent with the Ninth Circuit's standard in *Johnson* and Koohi. See Construction and Application of Combatant Activities Exception to Federal Tort Claims Act, 23 A.L.R. Fed. 2d 489 (2007).

Moreover, the statute's reference to claims "arising out of" the military's combatant activities is purposefully broad. The relevant inquiry is not whether the plaintiffs' claim includes some non-combatant element, but (at a minimum) whether the conduct giving rise to the cause of action has its foundation in combatant activities of the U.S. armed forces. See, *e.g.*, *Saleh*, 580 F.3d at 6 ("The arising-out-of test is a familiar one used in workmen's compensation statutes to denote any causal connection between the term of employment and the injury."); *Kosak v. United States*, 465 U.S. 848, 854 (1984) (interpreting "arising in respect of" in 28 U.S.C. § 2680(c) as equivalent to "arising out of" and as an "encompassing phrase" that "seems to sweep within the exception all injuries associated in any way with the 'detention' of goods.").

2. If similar claims against the United States would be within the combatant activities exception, the Court should next inquire whether the contractor defendant is entitled to invoke the preemption defense. This aspect of federal preemption requires the adoption of an appropriate federal common-law standard to determine whether the contractor was acting within the scope of its contractual relationship with the federal government at the time of the incident out of which the claim arose. The "scope of the contractual relationship" standard is similar to both the Westfall Act's familiar inquiry into the scope of employment, 28 U.S.C. §2679(d)(1),(2) (claims are deemed to arise against the United States where a federal employee is sued even for wrongful or negligent conduct, if employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose"), and to an earlier standard governing the immunity of federal employees, see *Barr v. Matteo*, 360 U.S. 564 (1959) (plurality opinion) ("The fact that the action here taken was within the outer perimeter of [the employee's] line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint.").

Thus, state-law tort claims would generally be preempted if the alleged conduct occurred within the outer perimeter of the contractual duties relationship between the contractor and the federal government—that is, in these cases, if the conduct was undertaken within the course of

the contractors' work providing the interrogation and interpretation services contracted for by the United States. Under this approach, federal preemption would generally apply even if an employee of a contractor allegedly violated the terms of the contract or took steps not specifically called for in the contract, as long as the alleged conduct at issue was within the scope of the contractual relationship between the contractor and the federal government. But preemption would not apply to conduct of a contractor employee that is unrelated to the contractor's duties under the government contract. Thus, just as a federal employee would not be immune (under *Barr* or the Westfall Act) for tortious conduct while off-duty or for other conduct of a personal or private nature, so too federal preemption would not apply where the conduct giving rise to a plaintiff's claims is beyond the scope of the contractual relationship.

3. To be clear, neither *Barr* immunity nor the Westfall Act directly applies here. Rather, the standards employed in those contexts simply provide useful analogies for courts to use in determining whether preemption is appropriate by identifying whether the plaintiffs' claims—and the allegations of tortious conduct on which they rest—implicate the federal interests giving rise to preemption. In the government-employee context, *Barr* itself has been largely superseded by the Westfall Act, and that statute applies by its terms only to federal employees, not to government contractors.

Moreover, the preemption analysis under *Boyle* and *Saleh* is not equivalent to the immunity conferred on federal employees by the Westfall Act or by *Barr*. Indeed, the Supreme Court in *Boyle* made clear that its preemption decision was distinct from such immunity: "We cite [*Barr* and other] cases merely to demonstrate that the liability of independent contractors performing work for the Federal Government, like the liability of federal officials, is an area of uniquely federal interest." *Boyle*, 487 U.S. at 505 n. 1 (immunity issue "is not before us"). Rather, the standard we propose—based on whether the conduct alleged in the complaint occurred within the scope of the contractual relationship between the contractor and the federal government—provides a distinct, though similar, inquiry for courts to determine whether preemption is appropriate by identifying whether the plaintiffs' claims implicate the federal interests giving rise to preemption.

C. In most cases, the federal preemption principles articulated above further the government's significant federal interests in this unique and sensitive context. But in the limited circumstances where the state law claim is based on allegations that the contractor committed torture, as defined in 18 U.S.C. § 2340, courts should take into account the strong federal interests embodied in that federal law. In these circumstances, the federal interests in ensuring that a contractor's involvement in detention operations is conducted in a manner consistent with that prohibition, and in providing a basis for holding the contractor accountable for its conduct, must also weigh in the balance.

Even in the absence of state tort law, monetary compensation may be available—through the Foreign Claims Act (FCA), an administrative regime established by Congress—to individual detainees who were subjected to abuse and mistreatment. See 10 U.S.C. § 2734. Moreover, in the wake of Abu Ghraib, the United States now has at its disposal a variety of tools to punish the perpetrators of acts of torture, and to prevent acts of abuse and mistreatment. In addition to the criminal prohibition against torture, other criminal and contractual remedies are also available to punish wrongdoers. See, *e.g.*, 18 U.S.C. § 3261(a)(1); 10 U.S.C. § 802(a)(10). The United States Government also has taken a number of steps to improve contractor oversight, see, *e.g.*, Congressional Research Service, Department of Defense Contractors in Afghanistan & Iraq: Background & Analysis 18-19 (Mar. 29, 2011), and Congress has now expressly barred civilian

contractors from performing interrogation functions, and has required private translators involved in interrogation operations to undergo substantial training and to be subject to substantial oversight. See Pub. L. No. 111-84, § 1038, 123 Stat. 2451; 75 Fed. Reg. 67,632 (Nov. 3, 2010).

And even where torture is alleged, the federal interests in avoiding judicial second-guessing of sensitive military judgments and intrusive discovery are still weighty, and the state interests in providing a tort-law remedy against civilian contractors for enemy aliens in U.S. military prison during wartime remain limited. But at the time of the events at Abu Ghraib, the enhanced tools to hold contractors accountable had not yet been adopted, and the balance of federal interests in this case therefore ultimately weighs in favor of allowing a state-law tort claim to proceed to the extent a civilian contractor actually engaged in torture in violation of federal law. There is no need for the Court to consider whether state-law tort remedies would continue to be available in light of measures subsequently instituted by Congress and the Executive Branch, and other developments in the aftermath of Abu Ghraib.

D. Applying those principles here, the first step of the preemption analysis is readily satisfied. The detention and interrogation of enemy aliens captured in and around a battlefield or war zone plainly arise out of the military's combatant activities. "The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.' " *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality) (quoting *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942)); see also *Munaf v. Geren*, 553 U.S. 674, 700 (2008) (recognizing that judicial interference into military detention policies in wartime Iraq would raise "concerns about unwarranted judicial intrusion into the Executive's ability to conduct military operations abroad").

Turning to the second step, the allegations in the complaints are vague and the operative contracts are not in the record. For present purposes, however, we assume that the contractor employees were to work together with service members in the military prisons in Iraq, combining their efforts to conduct the interrogation of plaintiffs and other enemy aliens. The district courts on remand should clarify the allegations, examine the contracts, and analyze the scope of the contractual relationship in accordance with the principles articulated above. Following those undertakings, the contractors may well have a strong argument that they were acting within the scope of their contractual relationship with the United States, for purposes of this specialized legal analysis, at the time of the conduct alleged in the complaint. Notably, the D.C. Circuit has held that federal employees and officials were acting within the scope of their employment when faced with claims of torture in a case concerning military detention and interrogation policies. See, *e.g.*, *Ali v. Rumsfeld*, 649 F.3d 762,774-775 (D.C. Cir. 2011). In these circumstances, moreover, there are other measures under which military personnel may be held accountable, through military discipline and applicable criminal sanctions.

The fact that the complaints in these cases also include allegations that defendants exceeded or violated their contractual obligations to the United States would not preclude a finding that the alleged actions were within the scope of the contractual relationship. Similarly, the inquiry is unaffected by plaintiffs' allegations that the conduct at issue violated approved interrogation techniques or other military directives, or was otherwise unlawful. Measures to be taken in response to such improper contractor actions—such as contractual remedies or criminal sanctions—are ordinarily for the federal government in the first instance.

Finally, in addition to applying the scope of the contractual relationship analysis, the district courts will need to determine the extent to which the allegations constitute torture within

the definition set forth in the federal criminal statute. The parties have had no occasion to address, nor the district courts to decide, whether the conduct at issue would constitute torture under 18 U.S.C. § 2340, and the parties understandably did not plead their case in those terms. If plaintiffs can show that the contractor defendants committed torture as defined in that statute, there should be no preemption of state tort law claims seeking redress for such conduct in the circumstances of this case.

E. The parties have not addressed how the standard we propose would apply to plaintiffs' allegations, and they should have an opportunity to do so before the district courts. Some factual development will likely be required on remand, limited to the federal preemption defense as articulated above. The district court should carefully superintend the discovery process to ensure that military prerogatives are protected. Although the government believes that appropriate case-management techniques can protect the Nation's vital interests in having a military capable of conducting combat operations without undue judicial interference, if experience demonstrates otherwise, the United States will reconsider its position.

* * * *

d. Criminal prosecutions and other proceedings

(1) Overview

As discussed in *Digest 2011* at 587, the Obama administration resumed military commission proceedings for suspected terrorists in 2011. Information on cases before military commissions can be found at *www.mc.mil/CASES/MilitaryCommissions.aspx*.

(2) Military commission proceedings

(i) Hamdan II

On October 16, 2012, the Court of Appeals for the D.C. Circuit vacated the conviction, in a trial before a military commission, of Salim Hamdan, an al-Qaida member who worked for Osama bin Laden (most famously as his driver). *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012). The military commission proceedings from which Mr. Hamdan appealed to the D.C. Circuit concluded with the U.S. Court of Military Commission Review confirming his conviction of providing material support for terrorism in violation of the Military Commissions Act of 2006 ("MCA"). *United States v. Hamdan*, 801 F.Supp.2d 1247 (C.M.C.R.2011) (en banc). Mr. Hamdan's case had previously gone up to the U.S. Supreme Court which held that his trial before a military commission (before the MCA was enacted) violated both the Uniform Code of Military Justice and the Geneva Conventions. See *Digest 2006* at 1138-55.

In its 2012 decision, the D.C. Circuit held that Mr. Hamdan's appeal was not moot although he had carried out his sentence and been released to return to Yemen. The court also held that the MCA did not authorize retroactive prosecution for material support for terrorism committed before the MCA was enacted because material support for terrorism was not a war crime under international law at the time Mr. Hamdan was charged. The

court's opinion is excerpted below (with footnotes and citations to the record omitted).

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* * * *

In war, when the United States captures or takes custody of alien enemy combatants or their substantial supporters, it may detain them for the duration of hostilities. Moreover, the United States may try unlawful alien enemy combatants before military commissions for their war crimes. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518–24, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004); *Ex parte Quirin*, 317 U.S. 1, 26–45, 63 S.Ct. 2, 87 L.Ed. 3 (1942).

This case raises questions about the scope of the Executive's authority to prosecute war crimes under current federal statutes.

This particular dispute involves the military commission conviction of Salim Hamdan, an al Qaeda member who worked for Osama bin Laden. In 2001, Hamdan was captured in Afghanistan. He was later transferred to the U.S. Naval Base at Guantanamo Bay, Cuba.

Hamdan was not just detained at Guantanamo as an enemy combatant. He was also accused of being an unlawful enemy combatant and was tried and convicted by a military commission for "material support for terrorism," a war crime specified by the Military Commissions Act of 2006. See 10 U.S.C. § 950t(25); see also 10 U.S.C. § 950v(b)(25) (2006) (previous codification of same provision). Hamdan's conviction was based on actions he took from 1996 to 2001—before enactment of the Military Commissions Act. At the time of Hamdan's conduct, the extant federal statute authorized and limited military commissions to try violations of the "law of war." 10 U.S.C. § 821.

As punishment for his war crime, Hamdan was sentenced by the military commission to 66 months' imprisonment, with credit for some time already served. Hamdan's sentence expired in 2008. Although the United States may have continued to detain Hamdan until the end of hostilities pursuant to its wartime detention authority, see *Hamdi*, 542 U.S. at 518–22, 124 S.Ct. 2633, Hamdan was transferred in late 2008 to Yemen and then released there. Even after his release, Hamdan has continued to appeal his U.S. war crimes conviction.

This appeal presents several issues. First, is the dispute moot because Hamdan has already served his sentence and been released from U.S. custody? Second, does the Executive have authority to prosecute Hamdan for material support for terrorism on the sole basis of the 2006 Military Commissions Act—which specifically lists material support for terrorism as a war crime triable by military commission—even though Hamdan's conduct occurred from 1996 to 2001, before enactment of that Act? Third, if not, did the pre-existing statute that authorized war-crimes military commissions at the time of Hamdan's conduct—a statute providing that military commissions may try violations of the "law of war," 10 U.S.C. § 821—proscribe material support for terrorism as a war crime?

We conclude as follows:

First, despite Hamdan's release from custody, this case is not moot. This is a direct appeal of a conviction. The Supreme Court has long held that a defendant's direct appeal of a conviction is not mooted by the defendant's release from custody.

Second, consistent with Congress's stated intent and so as to avoid a serious Ex Post Facto Clause issue, we interpret the Military Commissions Act of 2006 not to authorize retroactive prosecution of crimes that were not prohibited as war crimes triable by military

commission under U.S. law at the time the conduct occurred. Therefore, Hamdan's conviction may be affirmed only if the relevant statute that was on the books at the time of his conduct—10 U.S.C. § 821—encompassed material support for terrorism.

Third, when Hamdan committed the relevant conduct from 1996 to 2001, Section 821 of Title 10 provided that military commissions may try violations of the "law of war." The "law of war" cross-referenced in that statute is the international law of war. See *Quirin*, 317 U.S. at 27–30, 35–36, 63 S.Ct. 2. When Hamdan committed the conduct in question, the international law of war proscribed a variety of war crimes, including forms of terrorism. At that time, however, the international law of war did not proscribe material support for terrorism as a war crime. Indeed, the Executive Branch acknowledges that the international law of war did not—and still does not—identify material support for terrorism as a war crime. Therefore, the relevant statute at the time of Hamdan's conduct—10 U.S.C. § 821—did not proscribe material support for terrorism as a war crime.

Because we read the Military Commissions Act not to retroactively punish new crimes, and because material support for terrorism was not a pre-existing war crime under 10 U.S.C. § 821, Hamdan's conviction for material support for terrorism cannot stand. We reverse the judgment of the Court of Military Commission Review and direct that Hamdan's conviction for material support for terrorism be vacated.

* * * *

III

Under a law now codified at 10 U.S.C. § 821, Congress has long authorized the Executive to use military commissions to try war crimes committed by the enemy. See *Ex parte Quirin*, 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed. 3 (1942). That statute authorizes military commissions to try violations of the "law of war"—a term, as we explain below, that has long been understood to mean the international law of war. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 603, 610, 126 S.Ct. 2749, 165 L.Ed.2d 723 (2006) (plurality); *id*. at 641, 126 S.Ct. 2749 (Kennedy, J., concurring); *Quirin*, 317 U.S. at 27–30, 35–36, 63 S.Ct. 2. Two other longstanding statutes separately authorize military commission prosecutions for spying and aiding the enemy. See 10 U.S.C. §§ 904, 906.

After the Supreme Court's 2006 decision in *Hamdan*, Congress enacted a new military commissions statute that, among other things, clarified the scope of the Executive's authority to try war crimes. See Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2600. Of particular relevance here, Congress expanded military commissions beyond trying violations of the generic "law of war," spying, and aiding the enemy. Congress instead also listed a large number of specific war crimes that could be tried by military commission, including conspiracy and material support for terrorism. See *id*. § 3(a), 120 Stat. at 2630 (now codified at 10 U.S.C. § 950t).

* * * *

A

As is clear from the text of the Military Commissions Act of 2006, Congress was quite concerned about the ex post facto implications of retroactively prosecuting someone under the Act for conduct committed before its enactment. Congress tried to deal with any ex post facto

problem by declaring in the text of the statute that "[t]he provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission." § 3(a), 120 Stat. at 2624. The Act continued: "Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter." *Id*.

As Congress well understood when it appended this unusual statement to the statute, the U.S. Constitution bars Congress from enacting punitive ex post facto laws. See U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."). Among other things, the Ex Post Facto Clause bars laws that retroactively punish conduct that was not previously prohibited, or that retroactively increase punishment for already prohibited conduct. See *Collins v. Youngblood*, 497 U.S. 37, 42, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990); *Calder v. Bull*, 3 U.S. 386, 3 Dall. 386, 1 L.Ed. 648 (1798) (opinion of Chase, J.). The Ex Post Facto Clause thus prevents Congress and the Executive from retroactively applying a federal criminal statute to conduct committed before the statute was enacted.

As Congress itself recognized in the statutory text, retroactive prosecution by military commission could similarly raise serious constitutional issues, at the very least. As stated in the statutory text, however, Congress believed that the Act codified no new crimes and thus posed no ex post facto problem. As we explain below, Congress's premise was incorrect. The statute does codify some new war crimes, including material support for terrorism. The question for ex post facto purposes is this: If Congress had known that the Act was codifying some new crimes, would Congress have wanted the new crimes to be enforced retroactively? To begin with, the statutory text reveals a tight causal link between (i) Congress's belief that the statute codified only crimes under pre-existing law and (ii) Congress's statement that the statute could therefore apply to conduct before enactment. That causal link suggests that Congress would not have wanted new crimes to be applied retroactively. The Executive Branch agrees with that interpretation of the statute, stating: "Congress incorporated ex post facto principles into the terms of the MCA itself." At a minimum, we know that the statutory text does not contemplate or address the possibility of retroactively applying new crimes, leaving us with at least something of an ambiguity. And courts interpret ambiguous statutes to avoid serious questions of unconstitutionality. See *Rapanos v. United States*, 547 U.S. 715, 738, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006) (plurality opinion of Scalia, J.) (constitutional avoidance where statute "raises difficult questions" of constitutionality); *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 646, 125 S.Ct. 1172, 161 L.Ed.2d 66 (2005) (avoiding an interpretation that "may violate the Constitution"). To avoid the prospect of an Ex Post Facto Clause violation here, we interpret the Military Commissions Act of 2006 so that it does not authorize retroactive prosecution for conduct committed before enactment of that Act unless the conduct was already prohibited under existing U.S. law as a war crime triable by military commission. In this case, therefore, Hamdan's conviction stands or falls on whether his conduct was prohibited by the pre-existing statute, 10 U.S.C. § 821, at the time he committed the conduct.

B

Before enactment of the Military Commissions Act in 2006, U.S. military commissions could prosecute war crimes under 10 U.S.C. § 821 for violations of the "law of war." The Government suggests that at the time of Hamdan's conduct from 1996 to 2001, material support for terrorism violated the "law of war" referenced in 10 U.S.C. § 821. It is true that in the text of

the Military Commissions Act of 2006, Congress declared its belief that material support for terrorism was a pre-existing crime under the law of war and thus under 10 U.S.C. § 821. See § 3a, 120 Stat. at 2624. But exercising our independent review, as we must when considering the ex post facto implications of a new law, see *Calder v. Bull*, 3 U.S. 386, 3 Dall. 386, 1 L.Ed. 648 (1798) (opinion of Chase, J.); *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L.Ed. 60 (1803), we conclude otherwise. Material support for terrorism was not a war crime under the law of war referenced in 10 U.S.C. § 821 at the time of Hamdan's conduct.

Analysis of this issue begins by determining what body of law is encompassed by the term "law of war" in 10 U.S.C. § 821. The Supreme Court's precedents tell us: The "law of war" referenced in 10 U.S.C. § 821 is the international law of war. See *Hamdan*, 548 U.S. at 603, 126 S.Ct. 2749 (plurality) (act is law of war offense when " universal agreement and practice both in this country and internationally" recognize it as such) (internal quotation marks omitted); *id*. at 610, 126 S.Ct. 2749 (analyzing international sources to determine whether conspiracy was "recognized violation of the law of war"); *id*. at 641, 126 S.Ct. 2749 (Kennedy, J., concurring) ("the law of war" referenced in 10 U.S.C. § 821 "derives from rules and precepts of the law of nations" and is " the body of international law governing armed conflict") (internal quotation marks omitted); *Quirin*, 317 U.S. at 29, 63 S.Ct. 2 ("law of war" referenced in 10 U.S.C. § 821 is a "branch of international law"); *id*. at 27–28, 63 S.Ct. 2 (The "law of war" is "that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals."); see also Instructions for the Government of Armies of the United States in the Field (Lieber Code), General Orders No. 100, arts. 27 & 40 (Apr. 24, 1863) (describing the law of war as a "branch" of the "law of nations"); O.L.C. Memorandum from Patrick F. Philbin to Alberto R. Gonzales 5 (Nov. 6, 2001) ("laws of war" are "considered a part of the 'Law of Nations' "); *id*. at 29, 63 S.Ct. 2 ("the term 'law of war' used in 10 U.S.C. § 821 refers to the same body of international law now usually referred to as the 'laws of armed conflict' ").

Even outside the context of 10 U.S.C. § 821, the term "law of war" in the U.S. Code and precedent generally refers to the international law of war. See *Madsen v. Kinsella*, 343 U.S. 341, 354, 72 S.Ct. 699, 96 L.Ed. 988 (1952) (The "law of war" includes that part of "the law of nations" which "defines the powers and duties of belligerent powers."); *Prize Cases*, 67 U.S. 635, 667, 2 Black 635, 17 L.Ed. 459 (1863) ("The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war."); Hearings on H.R. 2498 (UCMJ) Before the H. Comm. on Armed Servs., 81st Cong. 959 (1949) (Representative Overton Brooks, Chairman, House Subcommittee No. 1 on Armed Services: "What is a law of war?" Colonel John P. Dinsmore: " 'Law of war' is set out in various treaties like the Geneva convention and supplements to that." Representative Brooks: "International law." Colonel Dinsmore: "Yes, sir."); U.S. ARMY JAG, LAW OF WAR HANDBOOK 20 (Maj. Keith E. Puls ed., 2005) (identifying "customary international law"—that is, "the 'unwritten' rules that bind all members of the community of nations" during war as one of the two major sources of the law of war, along with conventional international law); MANUAL FOR COURTS–MARTIAL UNITED STATES, at I–1 (2012) ("The sources of military jurisdiction include the Constitution and international law. International law includes the law of war.").

We turn, then, to the question whether material support for terrorism is an international-law war crime.

It is true that international law establishes at least some forms of terrorism, including the intentional targeting of civilian populations, as war crimes. See, *e.g.*, Rome Statute of the International Criminal Court art. 8(2)(b), July 17, 1998, 2187 U.N.T.S. 90; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), art. 33, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; COMMISSION OF RESPONSIBILITIES, CONFERENCE OF PARIS 1919, VIOLATION OF THE LAWS AND CUSTOMS OF WAR 17 (Clarendon Press 1919) (the Allied Nations condemned Germany for "the execution of a system of terrorism" after World War I).

But the issue here is whether material support for terrorism is an international-law war crime. The answer is no. International law leaves it to individual nations to proscribe material support for terrorism under their domestic laws if they so choose. There is no international-law proscription of material support for terrorism.

To begin with, there are no relevant international treaties that make material support for terrorism a recognized international-law war crime. Neither the Hague Convention nor the Geneva Conventions—the sources that are "the major treaties on the law of war"—acknowledge material support for terrorism as a war crime. See *Hamdan*, 548 U.S. at 604, 126 S.Ct. 2749 (plurality); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex, Oct. 18, 1907, 36 Stat. 2277.

Nor does customary international law otherwise make material support for terrorism a war crime. Customary international law is a kind of common law; it is the body of international legal principles said to reflect the consistent and settled practice of nations. See RESTATEMENT (THIRD) OF FOREIGN RE-LATIONS LAW OF THE UNITED STATES § 102(2) (1987) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation"). It is often difficult to determine what constitutes customary international law, who defines customary international law, and how firmly established a norm has to be to qualify as a customary international law norm. *Cf. Sosa v. Alvarez–Machain*, 542 U.S. 692, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004).

At the same time, the imprecision of customary international law calls for significant caution by U.S. courts before permit-ting civil or criminal liability premised on violation of such a vague prohibition. *Cf. Sosa v. Alvarez–Machain*, 542 U.S. 692, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004). A general prohibition against violations of "international law" or the "law of nations" or the "law of war" may fail in certain cases to provide the fair notice that is a foundation of the rule of law in the United States. Therefore, as the Supreme Court required in an analogous context in *Sosa*, and as the plurality suggested in *Hamdan*, imposing liability on the basis of a violation of "international law" or the "law of nations" or the "law of war" generally must be based on norms firmly grounded in international law. See *Sosa*, 542 U.S. at 724–38, 124 S.Ct. 2739; *Hamdan*, 548 U.S. at 602–03 & n. 34, 605, 126 S.Ct. 2749 (plurality). In this case, the asserted norm has no grounding in international law, much less firm grounding.

But here, the content of customary international law is quite evident. Material support for terrorism was not a recognized violation of the international law of war as of 2001 (or even today, for that matter). As we have noted, the Geneva Conventions and the Hague Convention do not prohibit material support for terrorism. The 1998 Rome Statute of the International Criminal Court, which catalogues an extensive list of international war crimes, makes no mention of material support for terrorism. See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90. Nor does the Statute of the International Tribunal for the Former

Yugoslavia, the Statute of the International Tribunal for Rwanda, or the Statute of the Special Court for Sierra Leone. See Statute of the International Tribunal for the Former Yugoslavia, adopted by S.C. Res. 827, U.N. Doc. S/RES/827 (1993), reprinted in 32 I.L.M. 1159, 1192; Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598, 1602 (includes terrorism itself as a crime); Statute of the Special Court for Sierra Leone art. 3(d), Jan. 16, 2002, 2178 U.N.T.S. 138 (same). Nor have any international tribunals exercising common-law-type power determined that material support for terrorism is an international-law war crime.

* * * *

In short, neither the major conventions on the law of war nor prominent modern international tribunals nor leading international-law experts have identified material support for terrorism as a war crime. Perhaps most telling, before this case, no person has ever been tried by an international-law war crimes tribunal for material support for terrorism.

Not surprisingly, therefore, even the U.S. Government concedes in this case that material support for terrorism is not a recognized international-law war crime. No treaty that the Government has cited or that we are aware of identifies material support for terrorism as a war crime. And the Government further admits: The "offense of providing material support to terrorism, like spying and aiding the enemy, has not attained international recognition at this time as a violation of customary international law."

To be sure, there is a strong argument that aiding and abetting a recognized international-law war crime such as terrorism is itself an international-law war crime. And there are other similar war crimes. But Hamdan was not charged with aiding and abetting terrorism or some other similar war crime. He was charged with material support for terrorism. And as the Government acknowledges, aiding and abetting terrorism prohibits different conduct, imposes different *mens rea* requirements, and entails different causation standards than material support for terrorism. If the Government wanted to charge Hamdan with aiding and abetting terrorism or some other war crime that was sufficiently rooted in the international law of war (and thus covered by 10 U.S.C. § 821) at the time of Hamdan's conduct, it should have done so.

* * * *

Because we read the Military Commissions Act not to sanction retroactive punishment for new crimes, and because material support for terrorism was not a pre-existing war crime under 10 U.S.C. § 821, Hamdan's conviction for material support for terrorism cannot stand. We reverse the decision of the Court of Military Commission Review and direct that Hamdan's conviction for material support for terror-ism be vacated.

* * * *

(ii) Khalid Sheik Mohammed and others responsible for the 9/11 attacks

On April 4, 2012, the U.S. Department of Defense announced that the Office of Military Commissions had referred charges to a military commission in the case of *United States v.*

Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi. The five are accused of planning and carrying out the September 11, 2001 attacks. See news release, available at *www.defense.gov/releases/release.aspx?releaseid=15158*. The charge sheets and further information about the case are available on the website of the Office of Military Commissions. Excerpts from the April 4 press release follow, providing a summary of the charges and the procedures in the case.

> The convening authority referred the case to a capital military commission, meaning that, if convicted, the five accused could be sentenced to death. Pursuant to the reforms in the Military Commissions Act of 2009, each of the five accused have been provided, in addition to their detailed defense counsel, learned counsel, possessing specialized knowledge and experience in death penalty cases, to assist them in their defense.
>
> Based on the allegations outlined in the charge sheets, the five accused are charged with terrorism, hijacking aircraft, conspiracy, murder in violation of the law of war, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, and destruction of property in violation of the law of war. The convening authority has referred all charges to a joint trial.
>
> The charges are only allegations that the five accused have committed offenses punishable under the Military Commissions Act of 2009, and they are presumed innocent unless proven guilty beyond a reasonable doubt.
>
> In accordance with Military Commissions rules and procedures, the chief judge of the Military Commissions Trial Judiciary will assign a military judge to the case, and the five accused will be arraigned at Naval Station Guantanamo Bay, Cuba, within 30 days of service of the referred charges upon them.

(iii) New charges against Ahmed Mohammed Ahmed Haza al Darbi

On August 29, 2012, the Department of Defense announced that the Office of the Chief Prosecutor for Military Commissions had sworn charges against Guantanamo detainee Ahmed Mohammed Ahmed Haza al Darbi, a Saudi Arabian national. The August 29 press release, available at *www.defense.gov/Releases/Release.aspx?ReleaseID=15544*, summarized the charges, background, and next steps in the case:

> The charges sworn today allege that the accused committed offenses triable under the Military Commissions Act of 2009, 10 U.S.C. §§ 948a, et seq, including: (1) Conspiracy to Commit Multiple Offenses Triable by Military Commission; (2) Aiding and Abetting the Offense of Attacking Civilian Objects; (3) Aiding and Abetting the Offense of Hazarding a Vessel; (4) Aiding and Abetting the Offense of Terrorism; (5) Multiple Specifications of Attempt; and (6) Aiding the Enemy. The charges are merely accusations, and the

accused is presumed innocent unless and until proven guilty beyond a reasonable doubt. The maximum sentence for these charges is confinement for life.

These sworn charges allege that al Darbi joined a terrorist conspiracy with al Qaeda by the year 1997. In furtherance of this conspiracy, al Darbi is alleged to have attended the Khalden training camp in Afghanistan, to have received personal permission from Usama bin Laden to train at al Qaeda's Jihad Wahl training camp, and to have worked as a weapons instructor at al Qaeda's al Farouq training camp, both in Afghanistan. From approximately 2000 through 2002, al Darbi is also alleged to have committed multiple overt acts in support of a plot to bomb civilian oil tankers in the Strait of Hormuz and off the coast of Yemen. These alleged acts included: receiving large amounts of money from al Qaeda; purchasing GPS devices and other equipment; purchasing a boat intended to be the attack vessel; registering this boat under the name of an unwitting participant; applying for travel documents that allowed potential attack operatives to travel from Yemen to the UAE; training these potential attack operatives; and sailing the boat he purchased towards Yemen in order to meet with these attack operatives.

In addition to the conspiracy charge, al Darbi is alleged to have aided and abetted the completed terrorist attack against the French oil tanker, the MV Limburg, which severely injured multiple civilians and caused a large oil spill in the Gulf of Aden in 2002.

The Regulation for Trial by Military Commission requires that the chief prosecutor notify the legal advisor to the Convening Authority and the chief defense counsel for Military Commissions within 24 hours of swearing charges. The accused must also be notified of the charges sworn against him as soon as practicable. The chief prosecutor will not immediately forward the charges to the Convening Authority for action in this case. Once the chief prosecutor does so, the Convening Authority makes an independent determination as to whether to refer some, all, or none of the charges for trial by military commission. If the Convening Authority decides to refer the case to trial, he will designate commission panel members (jurors). The chief trial judge of the Military Commissions Trial Judiciary then assigns a military judge to the case.

The Chief Prosecutor, Brigadier General Mark Martins, said upon the swearing of charges, "Mr. al Darbi's alleged crimes are serious violations of the law of war that were committed to terrorize and wreak havoc on the world economy. We will be prepared to proceed toward his trial by reformed military commission if the Convening Authority refers charges."

(iv) Plea agreement with Khan, tied to cooperation in future trials

On February 14, 2012 the Department of Defense announced that military commission charges had been sworn against Majid Shoukat Khan, a Pakistani national who lived in the United States from 1996 to early 2002 before returning to Pakistan. See news release, available at *www.defense.gov/releases/release.aspx?releaseid=15064*. On February 15, 2012, the Department of Defense announced that the charges had been referred to a

military commission. See news release, available at *www.defense.gov/releases/release.aspx?releaseid=15067*. Mr. Khan is charged with conspiracy, murder and attempted murder in violation of the law of war, providing material support to terrorism, and spying. Among the allegations in the charge sheet are that Khan attempted to assassinate former Pakistani President Pervez Musharraf and delivered $50,000 in al Qaeda funding to finance the bombing of the J.W. Marriott hotel in Indonesia in August 2003, resulting in the killing of eleven people, wounding at least eighty-one others, and severely damaging the hotel.

On February 29, 2012, Khan pled guilty to all charges pursuant to a pretrial agreement. The sentencing hearing in his case was delayed for four years to allow him the opportunity to cooperate in other trials. His sentence will be between 19 and 25 years, depending on his level of cooperation. See Defense Department news article, available at *www.defense.gov/News/NewsArticle.aspx?ID=67376*.

B. NONPROLIFERATION, ARMS CONTROL, AND DISARMAMENT

1. General

In August 2012, the State Department released the unclassified version of its report to Congress on Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments, submitted pursuant to Section 403 of the Arms Control and Disarmament Act, as amended, 22 U.S.C. § 2593a. The report contains four parts. Part I addresses U.S. compliance with arms control agreements. Part II discusses compliance by Russia and other successor states of the Soviet Union with treaties and agreements the United States concluded bilaterally with the Soviet Union. Part III assesses compliance by other countries that are parties to multilateral agreements with the United States. And Part IV covers compliance with less formal commitments related to arms control, nonproliferation, or disarmament, such as the Missile Technology Control Regime ("MTCR"). The 2012 report covers the period from January 1, 2011 through December 31, 2011. The report is available at *www.state.gov/t/avc/rls/rpt/197085.htm*.

2. Nuclear Nonproliferation

a. Non-Proliferation Treaty ("NPT")

(1) P5 Conference on Implementing the NPT

Representatives of the five permanent members of the UN Security Council (China, France, Great Britain, Russia, and the United States of America, or the "P5") met in Washington, D.C. from June 27 to 29, 2012, for their third follow-up meeting to the NPT Review Conference. At the conclusion of this "Third P5 Conference: Implementing the NPT," the P5

issued a joint statement. The joint statement appears below and is also available at *www.state.gov/r/pa/prs/ps/2012/06/194292.htm*.

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The five Nuclear Nonproliferation Treaty (NPT) nuclear-weapon states, or "P5," met in Washington on June 27-29, 2012, in the wake of the 2009 London and 2011 Paris P5 conferences to review progress towards fulfilling the commitments made at the 2010 NPT Review Conference, and to continue discussions on issues related to all three pillars of the NPT—nonproliferation, the peaceful uses of nuclear energy and disarmament, including confidence-building, transparency, and verification experiences.

The P5 reaffirmed their commitment to the shared goal of nuclear disarmament and emphasized the importance of working together in implementing the 2010 NPT Review Conference Action Plan. The P5 reviewed significant developments in the context of the NPT since the 2011 Paris P5 Conference. In particular, the P5 reviewed the outcome of the 2012 Preparatory Committee for the 2015 NPT Review Conference, continued their discussion of how to report on their relevant activities, and shared views, across all three pillars of the NPT, on objectives for the 2013 Preparatory Committee and the intersessional period. The 2012 PrepCom outcome included issuance of a P5 statement comprehensively addressing issues in all three pillars (NPT/CONF.2015/PC.I/12).

The P5 continued their previous discussions on the issues of transparency, mutual confidence, and verification, and considered proposals for a standard reporting form. The P5 recognize the importance of establishing a firm foundation for mutual confidence and further disarmament efforts, and the P5 will continue their discussions in multiple ways within the P5, with a view to reporting to the 2014 PrepCom, consistent with their commitments under Actions 5, 20, and 21 of the 2010 RevCon final document.

Participants received a briefing from the United States on U.S. activities at the Nevada National Security Site. This was offered with a view to demonstrate ideas for additional approaches to transparency.

Another unilateral measure was a tour of the U.S. Nuclear Risk Reduction Center located at the U.S. Department of State, where the P5 representatives have observed how the United States maintains a communications center to simultaneously implement notification regimes, including under the New Strategic Arms Reduction Treaty (New START), Hague Code of Conduct Against Ballistic Missile Proliferation (HCOC), and Organization for Security and Co-operation in Europe (OSCE) Vienna Document.

The P5 agreed on the work plan for a P5 working group led by China, assigned to develop a glossary of definitions for key nuclear terms that will increase P5 mutual understanding and facilitate further P5 discussions on nuclear matters.

The P5 again shared information on their respective bilateral and multilateral experiences in verification, including information on the P5 expert level meeting hosted by the UK in April, at which the UK shared the outcomes and lessons from the UK-Norway Initiative disarmament verification research project. The P5 heard presentations on lessons learned from New START Treaty implementation, were given an overview of U.S.-UK verification work, and agreed to consider attending a follow-up P5 briefing on this work to be hosted by the United States.

As a further follow-up to the 2010 NPT Review Conference, the P5 shared their views on how to discourage abuse of the NPT withdrawal provision (Article X), and how to respond to notifications made consistent with the provisions of that article. The discussion included modalities under which NPT States Party could respond collectively and individually to a notification of withdrawal, including through arrangements regarding the disposition of equipment and materials acquired or derived under safeguards during NPT membership. The P5 agreed that states remain responsible under international law for violations of the Treaty committed prior to withdrawal.

The P5 underlined the fundamental importance of an effective International Atomic Energy Agency (IAEA) safeguards system in preventing nuclear proliferation and facilitating cooperation in the peaceful uses of nuclear energy. The P5 discussed concrete proposals for strengthening IAEA safeguards, including through promoting the universal adoption of the Additional Protocol; and the reinforcement of the IAEA's resources and capabilities for effective safeguards implementation, including verification of declarations by States.

The P5 reiterated their commitment to promote and ensure the swift entry into force of the Comprehensive Nuclear-Test-Ban Treaty (CTBT) and its universalization. The P5 reviewed progress in developing the CTBT's verification regime in all its aspects and efforts towards entry into force. Ways to enhance the momentum for completing the verification regime, including the on-site inspection component, were explored. The P5 called upon all States to uphold their national moratoria on nuclear weapons-test explosions or any other nuclear explosion, and to refrain from acts that would defeat the object and purpose of the Treaty pending its entry into force. The moratoria, though important, are not substitutes for legally binding obligations under the CTBT.

The P5 discussed ways to advance a mutual goal of achieving a legally binding, verifiable international ban on the production of fissile material for use in nuclear weapons. The P5 reiterated their support for the immediate start of negotiations on a treaty encompassing such a ban in the Conference on Disarmament (CD), building on CD/1864, and exchanged perspectives on ways to break the current impasse in the CD, including by continuing their efforts with other relevant partners to promote such negotiations within the CD.

The P5 remain concerned about serious challenges to the non-proliferation regime and in this connection, recalled their joint statement of May 3 at the Preparatory Committee of the NPT.

An exchange of views on how to support a successful conference in 2012 on a Middle East zone free of weapons of mass destruction was continued.

The P5 agreed to continue to meet at all appropriate levels on nuclear issues to further promote dialogue and mutual confidence. The P5 will follow on their discussions and hold a fourth P5 conference in the context of the next NPT Preparatory Committee.

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(2) U.S. statement on the NPT at the UNGA First Committee

On October 17, 2012, Ambassador Laura E. Kennedy, U.S. Representative to the Conference on Disarmament, addressed the First Committee of the UN General Assembly at its 67th session. Ambassador Kennedy's remarks, excerpted below and available at

www.state.gov/t/avc/rls/200048.htm, include a discussion of efforts to fulfill the NPT Action Plan.

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The five NPT nuclear-weapon states are engaging intensively on a wide range of topics related to all three pillars of the NPT Action Plan: nuclear disarmament, nonproliferation, and peaceful uses. Washington hosted the latest in a series of P5 Conferences this past June to review and plan P5 progress in fulfilling the NPT Action Plan. This followed the 2009 Conference in London and the 2011 Conference in Paris. As my good colleague Ambassador Wu reported last week, we are working on a common glossary of nuclear terms; focusing on transparency, reporting, confidence building, and verification; working toward entry into force of the Comprehensive Nuclear-Test-Ban Treaty (CTBT) and commencement of FMCT negotiations; and engaging on International Atomic Energy Agency (IAEA) safeguards and the NPT withdrawal issue. Let me commend to your attention copies of the P5 statement from that conference, which are at the back of the room.[*]

We also recognize our responsibilities, along with the Russian Federation, as the countries holding the largest nuclear arsenals. The United States and the Russian Federation are successfully implementing the New START treaty, which is the most comprehensive nuclear disarmament agreement in 20 years. When Treaty reductions are completed, we will have cut American and Russian deployed nuclear weapons to their lowest levels since the 1950s. On-site inspections, data exchanges, notifications, and consultations are providing a very detailed picture of U.S. and Russian strategic forces, enabling each side to confirm the accuracy of each other's nuclear disarmament activities. Its verification regime is, in some ways, the most intrusive nuclear disarmament verification regime yet, and it is setting an important precedent for future negotiations.

The United States is committed to step-by-step reductions, including the pursuit of further reductions with Russia in all categories of nuclear weapons—strategic and non-strategic, deployed and non-deployed. We have begun a bilateral dialogue on strategic stability that can lay the groundwork for future negotiations.

Now, as we make deep reductions and pursue additional ones, I would like to underscore that U.S. policy prohibits the development of new nuclear warheads. The United States is neither developing new nuclear weapons, nor are we pursuing any new nuclear missions. The expenditures we are making in infrastructure and necessary safety improvements should not be conflated or confused with nuclear weapons development.

Another area where we have seen significant progress this past year is in the advancement of nuclear-weapon-free zone treaties. The United States has worked actively to extend legally binding negative security assurances under these treaties. We have submitted to the U.S. Senate for advice and consent to ratification the relevant protocols to the Treaties of Pelindaba and Rarotonga. We are working for P5 signature of the Protocol to the Treaty of Bangkok as soon as possible. After some preliminary discussions we expect that the pace of consultations with the parties to the Central Asia Nuclear-Weapon-Free Zone Treaty will begin

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[*] Editor's note: The statement from the P5 conference referenced by Ambassador Kennedy appears in section B.2.a(1), *supra*.

to accelerate. We are also very pleased to report that the P5 and Mongolia recently made parallel declarations regarding Mongolia's nuclear-weapon-free status. This is the capstone of many years of effort by Mongolia, the P5, and the United Nations, and will be included in a First Committee resolution that we sincerely hope will be adopted by consensus.

More broadly, the United States has in place a declaratory policy that it will not use or threaten to use nuclear weapons against non-nuclear weapon states that are Party to the NPT and in compliance with their nuclear non-proliferation obligations.

In that spirit, we continue our work to implement the 2010 NPT Review Conference Final Document Action Plan and strengthen all three pillars of the NPT. In addition to our disarmament activities, we are working with the IAEA and Member States to resolve all cases of noncompliance with nonproliferation obligations and to strengthen safeguards, including by ensuring the IAEA has the support necessary to fulfill its essential verification mission, and we are continuing our efforts to make the Additional Protocol universal. We continue, as many states here have noted, to have grave concerns about non-compliance by Iran, the DPRK, and Syria with their nonproliferation and UN Security Council obligations. As noted by my Acting Under Secretary Gottemoeller in our opening statement, these cases undermine confidence in the nonproliferation regime and they stand in the way of our shared disarmament goals. They also threaten international security. The international community must insist on a return to compliance, in keeping with the NPT Action Plan.

We are enhancing support for the NPT's vital third pillar, the peaceful use of nuclear energy, not only to strengthen the regime, but to contribute to economic development. In addition to our long-standing support to the IAEA's Technical Cooperation Fund, we pledged $50 million to the IAEA's Peaceful Uses Initiative between 2010 and 2015, and we have already provided approximately $21 million. Funded projects are benefitting over 120 countries under that new program. We welcome the partnership of the twelve other countries that have joined by contributing to this important IAEA initiative.

We believe that the entry into force of the Comprehensive Nuclear-Test-Ban Treaty will play a central role in leading the world towards a diminished reliance on nuclear weapons, reduced nuclear competition, and eventual nuclear disarmament. The CTBT will constrain the development and qualitative improvement of nuclear weapons as well as the development of advanced types of nuclear weapons. We are fully committed to pursuing ratification of the Treaty and its eventual entry into force.

The United States is actively working to reduce its holdings of fissile material stocks that could be used in nuclear weapons. Under the U.S.-Russian Plutonium Management and Disposition Agreement (PMDA), each side will verifiably dispose of no less than 34 metric tons of weapon-grade plutonium—enough in total for 17,000 nuclear weapons. The PMDA entered into force in 2011, and our two countries are working toward an agreement on verification provisions with the IAEA. Once disposed of, this plutonium will be in a form that cannot be used for nuclear weapons. It is irreversible.

A verifiable treaty to prohibit the production of fissile material for use in nuclear weapons is necessary if we are to create the conditions for a world without nuclear weapons. An FMCT is an absolutely essential step for global nuclear disarmament and the next logical step in halting the increase of nuclear arsenals.

As a practical matter, the CD—which includes every major nuclear capable state, operates by consensus, and allows members to ensure their national security concerns are met.

It remains the optimal place to negotiate a multilateral FMCT. However, when it comes to what is in the best interest of international security, the venue for FMCT negotiations is less important than achieving a credible treaty, and for a treaty to be credible, the states most directly affected by FMCT should be involved in its negotiation.

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(3) Nuclear-weapon-free status

On September 17, the P5 and the Permanent Representative of Mongolia to the UN signed parallel political declarations regarding Mongolia's self-declared nuclear-weapon-free status. See State Department media note, available at *www.state.gov/r/pa/prs/ps/2012/09/197873.htm*. The declaration by Mongolia confirmed its compliance with the NPT.

b. Comprehensive Nuclear Test Ban Treaty

On September 26, 2012, Acting Under Secretary of State for Arms Control and International Security Rose Gottemoeller delivered remarks on the status and prospects for the Comprehensive Nuclear Test Ban Treaty ("CTBT") on the occasion of the 20th anniversary of the last underground nuclear explosive test conducted by the United States. Her speech is excerpted below and available in full at *www.state.gov/t/us/198244.htm* For background on the Obama administration's determination to seek ratification of the CTBT, see *Digest 2009* at 764-66.

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The last U.S. explosive nuclear test is not the only anniversary happening this week. Sixteen years ago, this Monday, the Comprehensive Nuclear Test-Ban Treaty (CTBT) was opened for signature. The United States signed the Treaty that same day.

U.S. ratification of the CTBT is in our national security interest. As stated in the April 2010 U.S. Nuclear Posture Review: "Ratification of the CTBT is central to leading other nuclear weapons states toward a world of diminished reliance on nuclear weapons, reduced nuclear competition, and eventual nuclear disarmament."

Since we have maintained a 20-year moratorium on explosive nuclear testing, our policies and practices are consistent with the central prohibition of the Treaty. But ratification of the CTBT would be a significant affirmation of the importance the United States attributes to the international nonproliferation regime. More importantly, by hastening the day the Treaty enters into force, U.S. ratification would concretely contribute to reducing the role of nuclear weapons in international security.

With a global ban on nuclear explosive tests, states interested in pursuing nuclear weapons programs would have to either risk deploying weapons uncertain of their effectiveness, or face international condemnation for conducting nuclear tests. The CTBT would also subject

suspected violators to the threat of intrusive on-site inspections—a further deterrent to those states tempted to carry out a nuclear test in the hope that it can be covered up.

It has been 12 years since the Senate voted against ratification of the Treaty. This Administration has been reviewing the lessons learned and it is clear the lack of support stemmed from concerns regarding the verifiability of the Treaty and our ability to ensure the continuing safety and reliability of America's nuclear deterrent without nuclear explosive testing.

As I have already outlined with regard to our nuclear deterrent, our extensive surveillance methods and computational modeling developed under the Stockpile Stewardship Program over the last 15 years have allowed our nuclear experts to understand how nuclear weapons work and age even better than when nuclear explosive testing was conducted, as our national laboratory directors themselves affirmed to the Vice President.

The Treaty's verification regime has also grown exponentially over the last decade. Today, the International Monitoring System (IMS) is roughly 85 percent complete and when fully completed, there will be IMS facilities in 89 countries spanning the globe. At entry into force, the full body of technical data gathered via the International Monitoring System will be available for verification purposes to all States Parties.

This system is already at work. It detected the two nuclear explosive tests announced by North Korea, and its capabilities will continue to improve as the system is completed. In addition, with the Fukushima nuclear crisis, we have seen the utility of the IMS for non-verification related purposes, such as tsunami warnings and tracking radioactivity from reactor accidents.

Entry into force also will bring to bear the option for an on-site inspection, which will help clarify ambiguities regarding a possible nuclear test.

Taken as a whole, the Treaty's robust verification regime, which supplements our own state-of-the-art capabilities for monitoring, our national technical means, will severely challenge any state trying to conduct militarily significant explosive nuclear tests that escape detection.

As we look towards ratification of the CTBT, we acknowledge that the process will not be easy.

That said, the New START ratification process reinvigorated interest in the topic of nuclear weapons and arms control on Capitol Hill. I am optimistic that interest will continue as we engage with Members and staff on this Treaty.

I like to think of our efforts thus far as an "information exchange." We are working to get the facts out to Members and staff, many of whom have never dealt with this Treaty. We know that the key underlying issues are very technical in nature and we want people to absorb and understand the rationale behind it, that the Treaty is in the U.S. national security interest. There are no set timeframes to bring the Treaty to a vote, and we are going to be patient, but we will also be persistent.

To aid in further understanding of the Treaty, the Administration commissioned a number of classified and unclassified reports, including an updated National Intelligence Estimate and an independent National Academy of Sciences report, to assess the ability of the United States to monitor compliance with the treaty and the ability of the United States to maintain, in the absence of nuclear explosive testing, a safe, secure and effective nuclear arsenal so long as these weapons exist. Those reports and related materials will provide a wealth of information as the Senate considers the merits of ratification of the CTBT.

Of course, we do not expect people to be in receive-only mode – we anticipate and look forward to many substantive questions that will undoubtedly come from the Hill.

Looking outward, the Administration has been calling on the remaining Annex 2 States to join us in moving forward toward ratification. There is no reason for them to delay their own ratification processes because the U.S. has not yet ratified.

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c. Fissile Material Cut-off Treaty

On January 24, 2012, Assistant Secretary Gottemoeller[**] addressed the UN Conference on Disarmament ("CD") in Geneva. Excerpts follow from her discussion of the need for progress at the CD on the Fissile Material Cut-off Treaty ("FMCT"). Her remarks are available in their entirety at *www.state.gov/t/avc/rls/182385.htm*. See *Digest 2009* at 766-68 for prior developments in FMCT negotiations.

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Despite herculean efforts by a number of CD Member States, the CD continues to languish, and a Fissile Material Cutoff Treaty (FMCT), the next logical and necessary step in the multilateral nuclear disarmament process, remains no closer to negotiation.

We did see some rays of hope last year. Australia and Japan hosted a series of extensive FMCT technical experts' discussions on the CD's margins that allowed the international community an opportunity to exchange views and gain perspectives in a sustained and organized way. The Chairs' summaries of these discussions will make a useful contribution to our collective body of knowledge when eventual FMCT negotiations begin.

The United States initiated consultations among the P5 and others on unblocking FMCT negotiations in the CD and to prepare our own countries for what certainly will be a prolonged and technically challenging negotiation.

Last summer, the Secretary-General of the United Nations asked Member States to continue their dialogue on ways to improve the operation and effectiveness of the UN's multilateral disarmament machinery, in particular the CD.

In the view of the United States, all of these efforts have been worthwhile, but regrettably, none has achieved the desired result of moving this body forward on FMCT negotiations and work on other important issues.

Mr. President, when Secretary of State Hillary Clinton addressed the CD last February, she had stressed that, "Global nuclear security is too important to allow this matter [FMCT] to drift forever."

At the most recent session of the UNGA First Committee, we all witnessed and experienced the growing international frustration with the status quo here in Geneva. Not

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[**] Editor's note: In February 2012, President Obama designated Rose Gottemoeller as the Acting Under Secretary for Arms Control and International Security. Acting Under Secretary Gottemoeller continued to serve simultaneously as Assistant Secretary for Arms Control, Verification and Compliance, a position she held since 2009.

surprisingly, and with no small amount of justification, many in the international community are losing patience with the current situation in the CD.

Every government represented in this room has national security concerns and obligations associated with an FMCT, including my own. But as responsible governments, we also have a collective obligation to and responsibility for international peace and security, to which an FMCT would significantly contribute.

An FMCT Is As Vital As Ever

The FMCT is not some sort of deliberate diversion from "real" nuclear disarmament. Along with the CTBT, an FMCT is an absolutely essential step for global nuclear disarmament. Simply stated, we can't get to the end, if we don't start at the beginning. A verifiable end to the production of fissile material for use in nuclear weapons is necessary if we are to create the conditions for a world without nuclear weapons. How can we make progress towards a world without nuclear weapons while some states continue to produce the key component for building up their nuclear arsenals?

A universal halt to the production of fissile materials for use in nuclear weapons is essential. Some states have already declared a moratorium on such production, but others have not. Some, such as the United States, have reduced their military stocks of fissile material, whereas others are actively engaged in further production. The path to a world without nuclear weapons will require many steps. The next logical step in halting the increase of nuclear arsenals is an FMCT.

Mr. President, in Action 15 of the 2010 NPT Review Conference Final Document's Action Plan, all States Parties agreed that the CD should begin immediate negotiation of an FMCT. The United States remains firmly committed to an FMCT as a tangible contribution to our "full, effective and urgent implementation of article VI," as stated in that Action Plan. As the 2015 NPT review process gets under way this year, every NPT State Party has a responsibility to help make an FMCT a reality. In fact, every nation should share in the work that will create the conditions necessary to achieve a nuclear-weapons-free world.

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d. Nuclear Security and Safety

On April 10, 2012, Ambassador Bonnie D. Jenkins, Coordinator for Threat Reduction Programs in the Bureau of International Security and Nonproliferation at the U.S. Department of State, addressed the Council on Foreign Relations on the 2012 Nuclear Security Summit in Seoul that was held on March 26-27. Her remarks are excerpted below and available in full at *www.state.gov/t/isn/rls/rm/187747.htm*.

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I was fortunate to be in Seoul last month where 58 world leaders stood united in their continued commitment toward nuclear security. The Seoul Summit was another milestone in our global efforts at securing vulnerable nuclear material and preventing nuclear terrorism. The Summit

consisted of a number of progress reports made by participants, a number of "gift baskets" made by several nations and a number of joint statements.

Progress Reports

Regarding the progress reports on efforts made by participants based on their 2010 commitments; 90 percent of the country commitments made in Washington have already been fulfilled. I won't go into them in detail but they are on the Department of State hosted Nuclear Security Summit website.[***] Each leader made statements at the Summit that outlined concrete steps taken to promote the security of nuclear materials.

Gift Baskets

These include the following: National Legislation Implementation Kit on Nuclear Security, led by Indonesia. Several nations joined the statement in support. The kit would help States develop a more comprehensive national legislation on nuclear security in accordance with their own respective internal legal processes. States that signed up this gift basket agreed to work with IAEA to explore concrete ways forward to develop the kit.

Nuclear Security Information led by the United Kingdom focused on the need to prevent non-state actors from obtaining information, technology, or expertise required to acquire or use nuclear materials for malicious purposes, or to disrupt information technology based control systems at nuclear facilities. This gift basket focused on national guidance and grading system for nuclear information security.

Cooperation on Counter Nuclear Smuggling; Nations that signed on to this gift basket have taken steps to build national capacities to counter nuclear smuggling. These include increased law enforcement and intelligence efforts to investigate nuclear smuggling networks, increasing use of radiation detection systems and measures to find materials outside of regulatory controls, etc. These states pledged to continue these efforts in the future, promoting the security of nuclear materials while in transit and establishing and coordinating centers of excellence.

Joint Statements

Some of the joint statements include the following:

Trilateral Announcement by The United States, Mexico, and Canada on the completion of a joint nuclear security project to convert the fuel in Mexico's research reactor from HEU to low enriched uranium.

Joint Statement on Outreach efforts: Importance of continuing efforts to reach those nations that did not attend the Summit (Thailand, Morocco, Chile, Poland and Nigeria).

Joint Statement by France, Belgium, the Netherlands and the US on HEU minimization. Belgium, France and Netherlands agreed to convert the use of HEU to LEU by 2015. The US will provide limited exports of HEU to Europe until those nations complete this conversion in 2015 to ensure a reliable source of medical isotopes. These countries plan to remove excess scrap material from Europe and ship to the US.

The United States, Russia and Kazakhstan unveiled the near competition of a joint project to eliminate the remnants of past nuclear testing activities at the former Semipalatinsk nuclear test site. More than dozen weapons worth of nuclear material was removed from the area and other nuclear material is now safely secured.

Other significant accomplishments include:

[***] Editor's note: Links to the referenced website and the joint statements mentioned by Ambassador Jenkins are available at *www.state.gov/t/isn/nuclearsecuritysummit/2012/*.

We're also using every tool at our disposal to break up black markets and nuclear material. Countries like Georgia and Moldova have seized highly enriched uranium from smugglers. Jordan and others are building their own counter-nuclear smuggling teams within a global network of intelligence and law enforcement.

20 New Nations joined the amended Convention on the Physical Protection of Nuclear Material with the total now of 55 nations.

14 new nations ratified the International Convention for the Suppression of Acts of Nuclear Terrorism with a total now of 79 nations.

10 additional nations are in the process today of ratifying these two conventions. The United States and Sweden announced the successful removal of plutonium from Sweden. We're moving forward with Russia to eliminate enough plutonium for about 17,000 nuclear weapons and turn it into electricity.

Since the April 2009 speech of President Obama, efforts significantly accelerated to remove all HEU from 8 countries over a two-year period. HEU has now been removed from 21 countries: Brazil, Bulgaria, Chile, Columbia, Denmark, Greece, Latvia, Libya, Mexico, Philippines, Portugal, Romania, Serbia, Slovenia, South Korea, Spain, Sweden, Taiwan, Thailand, Turkey and Ukraine.

All U.S. domestic research reactors that could be converted with existing, licensed fuel are operating on low enriched uranium.

We've seen a number of major accomplishments since the 2010 Summit in relevant initiatives, for example:

The extension of the 24-member G8 Global Partnership Against the Spread of Weapons and Materials of Mass Destruction. A statement was released by the G-8 Global Partnership of contributions by partners to the IAEA Nuclear Security Fund NSF of over $55 million since 2010.

Expanded membership of the Global Initiative to Combat Nuclear Terrorism with 6 new countries joining (Argentina, Mexico, Philippines, Singapore, Thailand, and Vietnam).

The extension of UN Security Council Resolution 1540. We are working very closely with our international partnerships to help implement and coordinate assistance requests for United Nations Security Council Resolution 1540.

Summit participants also discussed some topics new to the Summit process such as nuclear safety and radiological terrorism.

At the end of the Summit, countries agreed to a detailed Communiqué that sets out 11 priority areas in nuclear security that reflect some of the gift baskets: the global nuclear security architecture, the role of the IAEA, security, accounting, and control of nuclear materials and minimizing the use of highly-enriched uranium, radioactive sources, nuclear security and safety, transportation security, combating illicit trafficking, nuclear forensics, nuclear security culture, information security and international cooperation.[****]

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[****] The Seoul Communiqué is available at *www.cfr.org/proliferation/seoul-communiqu-2012-nuclear-security-summit/p27735*.

e. Country-specific issues

(1) Democratic People's Republic of Korea ("DPRK" or "North Korea")

At the beginning of 2012, the United States continued the process of engaging North Korea in bilateral discussions regarding denuclearization and steps to be taken to permit resumption of the Six-Party Talks. On February 23-24, 2012, a U.S. delegation attended a third exploratory round of bilateral talks in Beijing, the first discussions with North Korea since the death of Kim Jong-Il and the assumption of power by Kim Jong-Un. A State Department press statement on February 29, 2012, available at *www.state.gov/r/pa/prs/ps/2012/02/184869.htm*, reported some limited progress, with the DPRK agreeing to implement a moratorium on long-range missile launches, nuclear tests and nuclear activities at Yongbyon, including uranium enrichment activities, and to the return of IAEA inspectors. Administration officials provided a briefing on the February talks, available at *www.state.gov/r/pa/prs/ps/2012/02/184924.htm*.

However, in April 2012, North Korea attempted to launch a satellite using ballistic missile technology in contravention of UN Security Council resolutions. The Security Council quickly condemned the launch, issuing a unanimous presidential statement on April 16, 2012. U.N. Doc. S/PRST/2012/13. The State Department issued a fact sheet on the presidential statement, which is available at *http://usun.state.gov/briefing/statements/187937.htm*. The G8 foreign ministers also issued a joint statement, available at *www.state.gov/r/pa/prs/ps/2012/04/187834.htm*, condemning the launch and urging the DPRK to meet its international commitments. Ambassador Rice described the significance of the presidential statement in remarks at the Security Council on April 16, 2012, available at *http://usun.state.gov/briefing/statements/187939.htm*:

> Critically, the Security Council made clear that there will be consequences for any future North Korean launch or nuclear test. If North Korea chooses again to defy the international community, then the Council has expressed its determination to take action accordingly. In this PRST, the Security Council underscored that any such launch—no matter whether it is called a satellite or a space launch vehicle—is a "serious violation" of Security Council resolutions 1718 and 1874. The Council also deplored that this launch has caused grave security concerns in the region.
>
> The Security Council demanded that North Korea not proceed with any further launches using ballistic missile technology and that North Korea comply with its obligations under previous Security Council resolutions by suspending all activities related to its ballistic missile program and reestablish a moratorium on missile launches. The Security Council also demanded that North Korea comply immediately with its obligations under previous Security Council resolutions, including that it abandon its nuclear programs, cease all related activities, and not conduct any further launch, any nuclear test, or any further provocation.

To ensure that there is a consequence for North Korea's launch, this PRST also provides for new sanctions. The Security Council directed its North Korea Sanctions Committee to designate additional North Korean entities, including companies, to be subject to an asset freeze, as well as to identify additional proliferation-sensitive technology to be banned for transfer to and from North Korea. The Committee will also take several other actions to improve enforcement of existing sanctions.

By the end of the year, North Korea further demonstrated its unwillingness to uphold its commitments and abide by UN Security Council resolutions, launching a multi-stage rocket using ballistic missile technology on December 11, 2012. The United States and the international community, in particular the UN Security Council, condemned the launch. See remarks of Ambassador Susan Rice after Security Council consultation on North Korea on December 12, 2012, available at *http://usun.state.gov/briefing/statements/201940.htm*. For a discussion of sanctions imposed in 2012 related to North Korea's nuclear program, see Chapter 16.A.3.a.

(2) Iran

For a discussion of sanctions imposed in 2012 relating to Iran's nuclear program, see Chapter 16.A.2. On March 21, 2012, Ambassador Rosemary DiCarlo, U.S. Deputy Permanent Representative to the UN, delivered remarks at the Security Council on Iran and implementation of Resolution 1737. The portion of her remarks calling for further action by the 1737 Committee appears in Chapter 16. Her remarks about the latest report by the Director General of the International Atomic Energy Agency ("IAEA") and efforts to engage with Iran appear below. The full text of her remarks is available at *http://usun.state.gov/briefing/statements/186576.htm*.

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Mr. President, Iran's illicit nuclear program presents a grave threat to international peace and security. Today we are confronted with an unsustainable and dangerous status quo. Without swift and serious progress to resolve the international community's doubts about Iran's nuclear program, there will be further instability in an already tense region.

Since our last meeting, the Director General of the IAEA has released yet another report, which once again affirmed that Iran is not complying with its international nuclear obligations and is not cooperating fully with the IAEA.

The Director General reports that Iran continues to make progress in its nuclear program. Iran has begun to enrich uranium to the near 20-percent level at the previously covert Fordow Fuel Enrichment Plant, which is buried in a hardened bunker underground near Qom. Iran has tripled its capacity to produce such uranium, which is much closer to weapons grade.

In spite of good-faith outreach by the IAEA, Iran has chosen to stonewall it rather than to offer any real cooperation. Iran twice denied IAEA requests to visit a nuclear facility at Parchin, where the Director General reported that Iran may have conducted high-explosive tests relating

to the development of a nuclear weapon. We all know what full cooperation with the IAEA looks like. Mr. President, this is not even minimal cooperation.

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Mr. President, the United States remains determined to prevent Iran from acquiring a nuclear weapon. And we remain committed to doing so through a comprehensive diplomatic approach, which includes substantive engagement and unprecedented pressure.

As part of this strategy, on March 6, the European Union High Representative, on behalf of the P5+1, offered to resume talks with Iran as part of a sustained process that leads to real progress in resolving our long-standing concerns with Iran's nuclear program. P5+1 political directors held preparatory meetings in Brussels yesterday, and efforts are underway to schedule the next round soon.

It is our firm view that resolving this issue will require Iran to come to the table quickly and seriously to discuss in a forthright way how to establish that the intentions of their nuclear program are, as they claim, peaceful. There are verifiable steps Iran can take to be in compliance with its obligations. Such steps would provide the world assurance that Iran is not pursuing a nuclear weapon. The question is whether in these upcoming negotiations, Iran shows itself to be moving clearly and credibly in that direction. Mr. President, we and our partners remain ready to engage with Iran on the basis of the framework proposed by the P5+1….

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(3) Russia

(i) Executive Order blocking property related to disposition of Russian HEU

On June 25, 2012, President Obama issued Executive Order 13617, "Blocking Property of the Government of the Russian Federation Relating to the Disposition of Highly Enriched Uranium Extracted From Nuclear Weapons." 77 Fed. Reg. 38,459 (June 27, 2012). In a letter to Congress conveying the executive order, excerpted below, President Obama explained the need for Russian assets related to the disposition of HEU to be protected from possible attachment, garnishment, or other judicial process. Daily Comp. Pres. Docs. 2012 No. 00511 (June 25, 2012).

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A major national security goal of the United States is to ensure that fissile material removed from Russian nuclear weapons pursuant to various arms control and disarmament agreements is dedicated to peaceful uses, subject to transparency measures, and protected from diversion to activities of proliferation concern. The United States and the Russian Federation entered into an international agreement in February 1993 to deal with these issues as they relate to the disposition of HEU extracted from Russian nuclear weapons (the "HEU Agreement"). The HEU

Agreement provides for 500 metric tons of HEU to be converted to LEU over a 20-year period. This is the equivalent of 20,000 nuclear warheads.

Additional agreements were put in place to effectuate the HEU Agreement, including agreements and contracts on transparency, on the appointment of executive agents to assist in implementing the agreements, and on the disposition of LEU delivered to the United States (collectively, the "HEU Agreements"). Under the HEU Agreements, the Russian Federation extracts HEU metal from nuclear weapons. That HEU is oxidized and blended down to LEU in the Russian Federation. The resulting LEU is shipped to the United States for fabrication into fuel for commercial reactors.

The HEU Agreements provide for the Russian Federation to receive money and uranium hexafluoride in payment for each shipment of LEU converted from the Russian nuclear weapons. The money and uranium hexafluoride are transferred to the Russian Federation executive agent in the United States.

The executive branch and the Congress have previously recognized and continue to recognize the threat posed to the United States national security from the risk of nuclear proliferation created by the accumulation of weapons-usable fissile material in the Russian Federation. This threat is the basis for significant programs aimed at Cooperative Threat Reduction and at controlling excess fissile material. The HEU Agreements are essential tools to accomplish these overall national security goals. The Congress has repeatedly demonstrated support for these agreements.

Payments made to the Russian Federation pursuant to the HEU Agreements are integral to the operation of this key national security program. Uncertainty surrounding litigation and the possible attachment, garnishment, or other judicial process that could impede these payments could lead to a long-term suspension of the HEU Agreements, which creates the risk of nuclear proliferation. This is an unacceptable threat to the national security and foreign policy of the United States.

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(ii) Russia's accession to the NEA

On May 23, 2012, the Organization for Economic Cooperation and Development ("OECD") hosted a ceremony to invite Russia to join the Nuclear Energy Agency ("NEA"). The State Department issued a media note welcoming the step. See May 23, 2012 media note, available at *www.state.gov/r/pa/prs/ps/2012/05/190699.htm*. The media note explained that Russia had requested membership in the NEA, which is an intergovernmental agency within the OECD that assists its member states in "maintaining and further developing the scientific, technological and legal bases required for a safe, environmentally friendly and economical use of nuclear energy for peaceful purposes."

3. G8 Global Partnership

On December 14, 2012, the United States welcomed Mexico as the 25th member of the G8 Global Partnership Against the Spread of Weapons and Material of Mass Destruction

("Global Partnership"). See media note, available at *www.state.gov/r/pa/prs/ps/2012/12/202075.htm*. The Global Partnership, which began in 2002, addresses nuclear and radiological security, biosecurity, scientist engagement, and facilitates the implementation of UN Security Council Resolution 1540 through cooperative projects. The G8 determined at its summit in 2011 to extend the Global Partnership beyond its original 10-year term. For more information about the Global Partnership, see *www.state.gov/t/isn/gp2013/index.htm*.

4. Implementation of UN Security Council Resolution 1540

On April 19, 2012, the UN Security Council issued a presidential statement on nuclear non-proliferation in which it reaffirmed Resolution 1540. U.N. Doc. S/PRST/2012/14. The United States held the presidency of the Security Council in April when the presidential statement was issued. The presidential statement on nuclear non-proliferation is excerpted below and also available at *http://usun.state.gov/briefing/statements/188157.htm*.

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The Security Council reaffirms that proliferation of weapons of mass destruction, and their means of delivery, constitutes a threat to international peace and security.

The Security Council remains gravely concerned about the threat of terrorism, and the risk that non-state actors may acquire, develop, traffic in or use weapons of mass destruction and their means of delivery.

The Security Council reaffirms the need for all Member States to comply fully with their obligations and fulfill their commitments in relation to arms control, disarmament and non-proliferation in all its aspects of all weapons of mass destruction and their means of delivery.

The Security Council reaffirms its support for the multilateral treaties whose aim is to eliminate or prevent the proliferation of nuclear, chemical or biological weapons and the importance for all States Parties to these treaties to implement them fully in order to promote international stability.

The Security Council reaffirms resolution 1540 of 2004, which affirms that States shall take effective measures to prevent non-state actors from acquiring weapons of mass destruction and their means of delivery and to establish domestic controls to prevent proliferation of nuclear, chemical or biological weapons, their means of delivery and related materials, recognizes States' progress in implementing resolution 1540 (2004), endorses the work carried out by the Committee established [pursuant] to resolution 1540 (2004), and, in that regard, recalls resolution 1977 (2011), which extends the mandate of the 1540 Committee for ten years.

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On July 13, 2012, Ambassador Jenkins delivered remarks on assistance and partnering opportunities to implement UN Security Council Resolution 1540 at a conference on Resolution 1540 hosted by Poland. Ambassador Jenkins' remarks, excerpted below, are available in full at *www.state.gov/t/isn/rls/rm/195067.htm*. For background on Resolution

1540, see *Digest 2004* at 1092-118; *Digest 2006* at 1267; *Digest 2008* at 1007-8; *Digest 2009* at 780-81; and *Digest 2011* at 609-10.

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United Nations Security Council Resolution (UNSCR) 1540 provides an important part of the international legal foundation and direction for all nations to play a role in the nonproliferation of weapons of mass destruction (WMD). It also provides a mechanism whereby nations that need assistance to fulfill their 1540 obligations can seek such assistance, and for other nations with the ability to do so to provide the assistance requested. This process of matching assistance requests under 1540 with funding promotes the ability of 1540 to address today's WMD threat.

However, meeting the assistance needs is not an automatic process. Other mechanisms in addition to UNSCR 1540 itself are needed to help promote 1540 assistance requests and that 1540 implementation assistance, both bilateral and multilateral, is partnered with the right entities to efficiently implement the resolution.

In the view of the United States, it is important to use the momentum established by the extension of the 1540 Committee mandate in 2011 and the outcome of the recent Nuclear Security Summit in Seoul to reenergize activities aimed at achieving full implementation. We want to enhance awareness worldwide about the importance of UNSCR 1540 and remind countries that 1540 is a vital part of the global nonproliferation architecture; focus countries on the benefits that 1540 has to their respective national security; and work to improve how implementation is being pursued both nationally and through regional and international organizations.

The decision in April 2011 to extend the mandate of the 1540 Committee for ten years marked a seminal moment in these efforts. Extending the Committee mandate was absolutely the right step, as it allows all countries to focus their respective and collective energy on the real task of achieving full implementation. Momentum in support of 1540 implementation continues to build. 1540 is a consistently recognized part of the global WMD nonproliferation architecture, and it stands as a unique mechanism to strengthen international security. The extension also signals the Council's recognition that full implementation requires a long-term commitment. Strategies must be developed that will continue the momentum already realized, and that will promote the capacity—and political commitment—needed to attain full implementation by all countries.

Actions to implement 1540 can simultaneously strengthen border, port, and aviation management and security, improve mechanisms to prevent illicit trafficking, fortify public health protections, and contribute in other ways to improving overall security. In this respect, partnerships and mechanisms that can promote implementation of UNSCR 1540 not only promote adherence by all nations to 1540 WMD-related obligations but more importantly, promotes the overall and important goal of a safer and more secure world.

One such area of partnerships includes partnering with states willing to host events and activities to promote 1540. One of the biggest challenges to the implementation of the 1540 commitments is the fact that many nations do not have either an understanding of the 1540 obligations or the capacity to fulfill those obligations. When states take it upon themselves to host events and engage in other efforts to promote 1540, those states help with the global

implementation of this important resolution. These types of national efforts are a great partnership with 1540.

In this respect, I would like to congratulate Poland on hosting this event. In addition to Poland, other nations have hosted or sponsored 1540 or 1540-relevant conferences. These include Russia, Norway, Tajikistan, the U.S., Colombia, Serbia, Ethiopia, Romania, U.A.E., Indonesia, Kenya, Austria, France, Panama, Mexico, Saudi Arabia, the Philippines, and Malta.

In addition to such national efforts to promote 1540, there are increasing regional approaches in the field of WMD nonproliferation and combating WMD terrorism. Regional mechanisms provide opportunities to raise awareness in many states simultaneously of 1540 obligations, and take account of the fact that many threats are regional. By addressing threats regionally, there also can be a reduction in the opportunities for proliferators and terrorists to look for a weak link within a region to accomplish their proliferation goals.

By developing partnerships with organizations such as the African Union, the Organization of American States, the Organization for Security and Cooperation in Europe (OSCE), the League of Arab States, and the Association of Southeast Asian Nations (ASEAN), a more efficient process of building capacity, developing best practices, and sharing information can be realized. To date, regional organizations have sponsored or hosted several 1540 conferences, and produced materials and information useful to aid other regions in 1540 implementation activities. The United Nations Office of Disarmament Affairs (UNODA) has also organized or sponsored regional meetings since 2006 in such places as Australia, Argentina, China, Kazakhstan, Ghana, Peru, Jamaica, Jordan, Botswana, Qatar, Sri Lanka, and Costa Rica. The United States strongly supports regional and sub-regional efforts.

Here we congratulate the OSCE for the substantial progress it has made on 1540 implementation, and the OSCE should be encouraged to share its best practices with other countries and regions working to implement UNSCR 1540. The success of the OSCE's 1540 implementation efforts is the result of having established a 1540 Project Team to guide and manage implementation efforts, which has been instrumental in coordinating OSCE efforts, raising awareness, and exploring and implementing concrete proposals for ways the OSCE can facilitate 1540 implementation—to include assisting OSCE participating States to develop national action plans. We should encourage the OSCE to continue to support the 1540 Project Team, and continue implementing strong regional 1540 efforts.

In addition to hosting regional conferences, another vehicle to promote partnerships and promote assistance in 1540 is through the use of regional coordinators. Currently, there are 1540 regional coordinators working to promote 1540 awareness and the fulfillment of 1540 obligations in the Caribbean, in Europe through the OSCE, and in Central America. Having a dedicated individual or office to promote 1540 through these regional coordinators is another way to get as much bang as possible from the buck.

There are also ways to partner through multilateral initiatives. One such avenue is through the Global Partnership Against the Spread of Weapons and Materials of Mass Destruction (GP), which is a vehicle that can promote assistance under the 1540 mandate. This initiative of 24 members, which many of you are familiar with, began in 2002 and is a vehicle to provide assistance in funding and in kind to combat WMD proliferation and terrorism. In this respect, the partners are directly addressing many of the existing 1540 requests for assistance and can continue to help meet the requests for assistance made to the 1540 Committee. In fact, in 2011, the leaders at the G8 Summit agreed that the GP would focus on four key areas: nuclear and radiological security, bio-security, scientist engagement, and implementation of UNSCR

1540. As such, the GP already is mandated to support the 1540 Committee in implementing the resolution because all four key areas are covered under the 1540 mandate. In this respect, all GP programs can be viewed as 1540-related programs.

The GP, which among other things is a funding mechanism that also promotes the coordination of activities, has been very engaged with the 1540 Committee in an effort to find ways to provide assistance to requests made by countries through the 1540 mechanism.

A number of other international organizations are also able to provide assistance to promote 1540 fulfillment and thereby are partners with 1540 efforts, providing assistance to help countries meet their 1540 obligations. These include the International Atomic Energy Agency (IAEA), the Organization for the Prohibition of Chemical Weapons (OPCW), and the Biological Toxin and Weapons Convention Implementation Support Unit (BWC-ISU). As these organizations are engaged in the work of their own mandates, they also promote 1540 goals and obligations, such as in the case of the UNODC, which is dedicated to promoting universal adherence to relevant treaties and conventions, and the IAEA, which promotes the goals of nuclear and radiological security.

Additionally, international and national non-governmental organizations (NGO) such as think tanks also partner with 1540 to promote 1540 goals and obligations. One is the Stimson Center, which has been able to work with the U.S. and other governments to promote 1540 in various regions, including Africa and Latin America. It provides assistance in capacity building and awareness-raising concerning 1540 obligations. This is a good partnership with the 1540 committee and with various governments, which helps provide more synergy in the promotion of 1540 in different regions. Other important NGOs in this area include the Monterey Institute of International Studies, and funders like the MacArthur Foundation.

Another important partnership is with the Nuclear Security Summit. The NSS participants made clear in the communiqués of both 2010 and in 2012 the important role played by 1540 in the area of securing nuclear material and in the larger effort to secure all vulnerable nuclear material in four years. This past March, for example, the declaration from the Nuclear Security Summit in Seoul[*****] reinforced the goal of full implementation of UNSCR 1540. That Summit recognized in particular the importance of efforts to strengthen nuclear security and prevent the possibility of nuclear materials or weapons finding their way into terrorist hands. The United States will be pressing between now and the next Nuclear Security Summit in 2014 to close the remaining gaps in how 1540 is being implemented globally and to support activities that make a contribution to this end. We would like to see a concerted effort internationally, particularly on the nuclear security aspects of 1540, as we look toward the 2014 Nuclear Security Summit in the Netherlands.

Finally, assistance and partnering on 1540 implementation must recognize the critical role of the 1540 Committee and UNODA. The Committee, particularly its experts, can offer extensive input on implementation activities, and UNODA plays a critical role in organizing and supporting implementation activities around the globe. When speaking of assistance, strengthening UNODA's ability to support implementation activities cannot be overemphasized. In this respect, the United States gave a grant of USD 3 million to the UN Trust Fund for Global and Regional Disarmament—a fund used to UNODA to support 1540 Committee activities—and plans to make an additional grant this year. This type of contribution is one other nations should consider, because by providing the Committee with such funding, the Committee will be able to

[*****] Editor's note: See discussion of the Seoul Summit and its outcome in section B.2.d., *supra*.

better promote its work, provide needed support, and engage a broad range of countries in fulfilling their 1540 commitments.

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5. Proliferation Security Initiative

In 2012, the Commonwealth of Dominica, St. Lucia, and the Dominican Republic became, respectively, the 99th, 100th, and 101st states to endorse the Proliferation Security Initiative ("PSI"). See State Department media notes, available at *www.state.gov/t/isn/rls/fs/191965.htm*, *www.state.gov/r/pa/prs/ps/2012/07/194611.htm*, and *www.state.gov/t/isn/rls/fs/198496.htm*. For background on the Obama administration's actions related to the PSI, see *Digest 2010* at 802-4. The PSI began in 2003 and is a collaborative effort to take measures to interdict illicit transfers of weapons of mass destruction and missile-related items. Endorsing states also exchange information, conduct exercises and workshops, and engage in other capacity-building activities. More information on the PSI is available at *www.state.gov/t/isn/c10390.htm*.

6. Chemical and Biological Weapons

a. Chemical weapons

(1) Annual compliance report to Congress

In March 2012, the State Department released its annual report to Congress on compliance by parties to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction ("CWC"). The report is submitted in accordance with one of the conditions of Senate ratification to the CWC in 1997, condition 10(c). Of 188 States Parties to the CWC, the 2012 report addresses compliance issues with four: Iran, Iraq, Libya, and the Russian Federation. The full report is available at *www.state.gov/t/avc/rls/rpt/197222.htm*.

(2) Chemical Weapons Convention

On May 1, 2012, Robert P. Mikulak, U.S. Representative to the Organization for the Prohibition of Chemical Weapons ("OPCW") Executive Council, delivered the U.S. statement at the OPCW Executive Council's 68th session at The Hague. Ambassador Mikulak's remarks are excerpted below and available in full at *www.state.gov/t/avc/rls/189863.htm*.

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This Session is notable particularly because it is taking place immediately after the final extended deadline for the destruction of chemical weapons. The United States has destroyed 90 percent of our stockpile. We are working hard to complete destruction of the remaining 10 percent as soon as practicable. Recently, we submitted to the Council our detailed plan for doing so. We look forward to briefing the Council on our plan later during this session.

Let me reassure everyone that the U.S. commitment to complete chemical weapons destruction remains unwavering. We will faithfully implement this treaty obligation, as well as the additional measures contained in the decision reached at the 16th Session of the Conference of the States Parties to the Chemical Weapons Convention (CWC). We will continue our destruction program with full transparency so that others may judge for themselves how we are doing.

…The recent revelations about chemical weapons hidden by the Qadhafi regime are an unprecedented situation in the fifteen year history of the Convention. The United States welcomes the responsible actions of the new Libyan Government in declaring these hidden chemical weapons, and we also welcome the Council's March 27th decision addressing this serious situation.

We appreciate Libya's intention, as set out in that decision, "to address any matters that need to be clarified with regard to its declaration." We believe more information is needed to address where the hidden chemical weapons, and the chemical agent they contain, were produced. At this session, we look forward to learning more from Libya about these weapons, and from the Technical Secretariat about the results of the inspection conducted on April 18.

Another important task for this session is the establishment of an open-ended working group to prepare for the Third Review Conference. First, however, we must identify a capable Chairperson. This person will be key to ensuring that we are well prepared for a productive, forward-looking Review Conference that will set the course for implementation of the Convention during the following five-year period.

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The United States believes that Articles VII, X, and XI all make critical contributions to enhancing international security. With respect to Article VII, we are seriously concerned that the requirements for national implementation measures, including legislation to criminalize prohibited activities, have not been met by some members of the Council. We understand that States Parties have many competing priorities, but a number of States Parties still have not enacted CWC implementing legislation fifteen years after entry into force.

We also believe that Articles VII, X, and XI are mutually reinforcing and that there should be a facilitator's report on each of them at every session of the Council. If regional Centers of Excellence are to be established, they should be developed jointly to support all three articles, not just one. Any such centers should also be closely tied to existing Centers of Excellence to ensure long term financial viability.

Turning to industry issues, … the number of industry inspections has been agreed upon through 2014. That decision now allows us to focus on ways to ensure that these inspections are conducted at the most relevant sites, and in the most effective and efficient manner possible. We believe that this can be accomplished within the Executive Council decision on policy guidelines for determining the number of Article VI inspections. The methodology for the selection of the

most relevant sites for inspection should be considered a priority within the industry cluster in the coming twelve months.

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On October 22, 2012, Ambassador Kennedy addressed the First Committee of the UN General Assembly in New York on the subject of other weapons of mass destruction. Her remarks included discussion of the work of the OPCW, U.S. commitment to the Chemical Weapons Convention ("CWC"), and the issue of Syria's potential use of chemical weapons. Excerpts from Ambassador Kennedy's remarks appear below; her remarks are available in full at *www.state.gov/t/avc/rls/199712.htm*.

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I would like to emphasize that the United States remains encouraged by the progress made by the Organization for the Prohibition of Chemical Weapons (OPCW) in working toward a world free of chemical weapons. Since entry into force of the Chemical Weapons Convention (CWC) 15 years ago, the OPCW has accomplished a great deal. This is a notable milestone for the OPCW since it remains an indispensable multilateral body with a global responsibility. With a near universal membership of 188 member states, 75% of all declared chemical weapon stockpiles verifiably destroyed, and over 4,700 inspections conducted at military and industry sites since entry into force, we are certainly pleased with what the OPCW has accomplished. This progress is due to the combined efforts and commitment of member states, along with the OPCW's Technical Secretariat which is led by its distinguished Director General, Ahmet Uzumcu.

For our part, the United States has safely destroyed approximately 90 percent of its chemical weapons stockpile under OPCW verification, before the April 2012 deadline. The United States continues its steadfast commitment to the Chemical Weapons Convention and will continue working in a transparent manner towards the complete destruction of our remaining small amount of chemical weapons.

The United States also remains fully committed to the non-proliferation of chemical weapons and for working to ensure that there will be no re-emergence of chemical weapons. Such a goal will take commitment from all States Parties and a continued effort in a number of areas to include Universality. We recognize that preventing the re-emergence of chemical weapons requires a strong inspectorate, a credible industrial verification regime, and enactment by all States Parties of the necessary domestic legal regimes to fully enforce the CWC. These are all areas of vital importance for the success and longevity of the CWC and the Organization responsible for its implementation.

The Third Review Conference of the Chemical Weapons Convention next April provides a good opportunity to reinforce these concerns and to work with international partners to ensure that the CWC remains an important instrument for ensuring global peace and security.

Mr. Chairman, while we remain proud of the accomplishments and cooperation from States Parties and the OPCW, we recognize that there remain real challenges and sobering realities, such as the acknowledged possession of chemical weapons by Syria and its stated willingness to use them in response to "external aggression." President Obama has made it clear

that the use of chemical weapons in Syria would have enormous consequences. The UN Secretary-General and the OPCW Director General also have emphasized that the use of chemical weapons would be reprehensible. Other world leaders have stressed this same point.

Mr. Chairman, the world is now faced with a situation where the possibility of the use of chemical weapons is very real. These chemical weapons pose a grave threat to peace and international security, and further underscore the vital importance and role that the OPCW and States Parties can play in working to ensure the elimination of such weapons and strengthening international security. The United States applauds the on-going cooperation between the UN and the OPCW and encourages continuation of such efforts.

We continue to call on the Syrian government to eliminate its chemical weapons arsenal and join the Chemical Weapons Convention, and we will continue to work with the international community toward that end. In the preamble of the Chemical Weapons Convention, all States Parties "determined for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons through the implementation of the provisions of this Convention." We must stand together to make this goal a reality.

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b. Biological weapons

On February 27, 2012, Assistant Secretary of State for the Bureau of International Security and Nonproliferation Thomas Countryman addressed a meeting of the American Society for Microbiology, Biodefense and Emerging Diseases Research. His subject was the way the U.S. government and its partners work together to prevent the spread and use of biological weapons, including encouraging observation of international legal instruments such as the Biological Weapons Convention ("BWC"). Excerpts follow from Mr. Countryman's remarks; the full text is available at *www.state.gov/t/isn/rls/rm/184891.htm*.

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…President Obama's *National Strategy for Countering Biological Threats* …focuses on preventing the misuse of the life sciences while recognizing and supporting their transformative, positive contributions. The *Strategy* seeks to reduce biological threats by: improving access to the life sciences to combat infectious disease globally; establishing and reinforcing norms against misuse; and identifying, influencing, inhibiting, and where necessary, interdicting those that seek to misuse biology.

Now, these goals go beyond traditional ways of thinking about nonproliferation and require close collaboration with other sectors of government and civil society. When you hear catchphrases like "whole-of-government" and "global health security," this is what it boils down to. The traditional national security players, the State and Defense Departments, working in concert with Health and Human Services, Agriculture, Commerce, Energy, Homeland Security, the FBI, USAID, and a wide range of international and non-governmental partners to address problems that are of shared concern.

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Our "Biosecurity Engagement Program" (BEP) had its origins in the Nunn-Lugar Cooperative Threat Reduction Program. The goal was to prevent the Former Soviet Union's biological weapons and related scientific expertise from falling into the hands of rogue nations or terrorist groups. Today, though, we have a wider agenda. We were engaged in forty-seven countries last year, with a budget of $38.4 million: we promote sustainable laboratory biorisk management and infectious disease surveillance. We listen carefully to our partners' priorities and work with them to promote sustainable health security in areas that are of mutual benefit. BEP also promotes interaction between local experts and their international counterparts to strengthen a global culture of responsible science. In addition, we work to strengthen legal and oversight frameworks around the world, partnering with VERTIC, an NGO that provides legal review and assistance in drafting civil and criminal legislation to implement the BWC and other legally binding international obligations.

We also work through a variety of multilateral organizations and fora: The G8 Global Partnership provides an important means of coordinating international threat reduction and engagement efforts; the ASEAN Regional Forum has been critical as a venue for focused discussion and outreach in the Asia-Pacific region; and we collaborate with a range of international organizations including the World Health Organization and the World Organization for Animal Health. Last year, the U.S. Government and the WHO signed a Memorandum of Understanding creating a framework for collaboration in line with the principles set out in the International Health Regulations. This will facilitate support from U.S. programs, including BEP, for WHO efforts. This year's first meeting of the Global Partnership Against the Spread of Weapons and Materials of Mass Destruction not only included the 24 member states, but also these key international organizations. Again, the security mission and the public health mission are not identical, but in this area they can and should be mutually reinforcing. There is a shared commitment to strengthen cooperation to ensure that the international community effectively manages global and regional public health risks.

Overlay of International Efforts

The International Health Regulations established in 2005 are legally binding on the 194 WHO Member States. They provide a construct for coordinating the management of actions in the event of a public health emergency of international concern. They also improve the capacity of all countries to detect, assess, notify, and respond to public health threats. Their aim is to help the international community prevent and respond to acute public health risks that have the potential to cross borders and threaten people worldwide.

By June 2012, countries are required to have established the IHR core capacities related to national infrastructure such as laboratories capable of sustained disease outbreak response, appropriately trained public health workers, and national and international legal mechanisms that allow a country to accept international assistance. The CTR programs are supporting countries in meeting this June milestone, as President Obama called for in his speech before the UN General Assembly last September. And for those countries who will not [have] core capacities in place by the deadline, and we know there will be several, we have already begun supporting WHO efforts to identify those countries, encourage them to submit extension requests and to assess where gaps are present, so that global efforts, such as those supported by the Global Partnership and our CTR program, can focus their funding. Beginning in 2003, BWC States Parties have conducted an innovative program of information sharing and exchange on topics relevant to the

Convention, which has come to be known as the "intersessional process." The objective of the intersessional process has been to "develop common understandings and promote effective action" on such topics. The intersessional process has been an unequivocal success. Elements of civil society and the scientific community, as well as private industry have increasingly become partners in efforts to support the Convention's goals.

Dialogue in Geneva has generated heightened awareness, convergence of views, and substantial activity at the national and regional levels in areas ranging from biosafety and pathogen security, to the development of implementing legislation, to cooperation in disease surveillance and response. In short, the intersessional process has facilitated cooperation and collaboration by experts from many different sectors in many different countries in our shared goal of most efficiently and effectively addressing issues that lie at the intersection of science, security, health, and law enforcement.

Our approach to the BWC reflects the same issues and approaches I described earlier—the evolution from a traditional arms control focus on state-level programs to a much broader, more nuanced approach to a changing threat. Don't get me wrong. We still worry about state programs and finding ways to convince countries to abide by their commitments. But we also bring together a wider range of stakeholders to address a wider range of issues:

- We've used the BWC as a forum to promote capacity building for international disease surveillance and to discuss the challenges of international assistance and response, in ways that complement and reinforce the work of the World Health Organization.
- We've used it as a forum to discuss issues of legislation, regulation, and enforcement—from the importance of addressing conspiracy and other "inchoate" crimes that let you make an arrest before something happens to agent control lists and safety and security standards.
- And we've used it to discuss dual-use issues and the important role for scientific associations, research institutions, and individual researchers. These efforts have driven a constructive dialogue about responsible conduct in the life sciences and the role of security concerns, and have facilitated progress in incorporating such issues into science education. American industry and scientists have been leaders in these areas and have played a critical role in shaping international discussion.

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From July 16 to 20, 2012, the BWC's Meeting of Experts took place in Geneva. In advance of the Meeting of Experts and in relation to the standing agenda item on cooperation and assistance, the United States submitted its report on U.S. implementation of Article X of the Convention on July 13, 2012. U.N. Doc. BWC/MSP/2012/MX/INF.5. The background section of the U.S. report appears below.

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1. The United States is firmly committed to fulfilling all of its obligations under the Biological Weapons Convention (BWC), including those under Article X of the Convention. Relevant international cooperation and exchange, including assistance programs, encompasses a wide

range of activities in support of the overall advancement of the life sciences.

2. Article X embodies an international commitment to partnership, sharing of information, networking, and the development of mutually beneficial outcomes. Formal "assistance" programs comprise only a part of this much larger undertaking. The United States has supported, and will continue to support, capacity building and other forms of assistance for those countries seeking it. Through our assistance and cooperation efforts, the United States and the international community have worked together collectively to pursue mutual goals, including, inter alia:

(a) Improving global population health through the prevention, detection, and mitigation of disease;

(b) Advancing educational and collaborative opportunities for global scientists; and

(c) Contributing to the advancement of biological sciences for peaceful purposes.

3. The United States continues to invest significant resources in these efforts. In the USA system, exchange, cooperation, and assistance in fulfillment of our Article X commitments are provided in a variety of ways: bilaterally by the US Government to other national entities; through national contributions to international organizations; and by individuals, industry, foundations, and academia, all of which are critical players in American civil society.

4. The United States of America believes that the exchanges during the BWC intersessional process in 2009 and 2010 were extremely productive in building relationships and facilitating real assistance on issues of practical concern to States Parties and we applaud the introduction of the Standing Agenda item for the 2012-2015 intersessional Program of Cooperation and assistance, with a particular focus on strengthening cooperation and assistance under Article X. While the large number of USA programs and wide range of ongoing efforts underway contribute to our implementation of Article X, such efforts do not take place solely, or even primarily, in the BWC forum as previous Review Conferences have noted. Moving forward, we will continue to utilize this broad diversity of institutions, stakeholders, and fora in order to pursue our shared goals.

5. The breadth and scope of USA contributions and assistance precludes a comprehensive listing of each and every program in its entirety, but enclosed in this paper is a selection of examples demonstrating our commitment to fulfilling our obligations related to Article X of the BWC. For the current intersessional program, we look forward to providing additional information about the Article X-related USA Programs, some of which are summarized below. Additionally, one page descriptions of some of our assistance programs, along with contact information, are being submitted to the BWC Implementation Support Unit, for inclusion in the Article X database, as agreed to at the 2011 Review Conference.

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Also at the July Meeting of Experts, the United States submitted a report on national implementation on July 16, 2012. U.N. Doc. BWC/MSP/2012/MX/WP.5. Another key report submitted by the United States at the July Meeting of Experts discusses ways to enable fuller participation in the Confidence-building Measures ("CBMs") U.N. Doc. BWC/MSP/2012/MX/WP.4. That report is excerpted below.

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I. Background

1. The Seventh Review Conference (RevCon) decided that in 2012 and 2013, States Parties should explore ways to improve participation in the annual BWC Confidence Building Measures (CBMs). The CBMs were established in 1986 as a politically binding commitment (the language adopted by the Second RevCon was that the Conference "agrees that the States Parties are to implement"). Nevertheless, fewer than half of all BTWC States Parties submit CBMs. All available evidence suggests that far fewer States Parties actually make use of the CBMs by reviewing the submissions of other States Parties. Submissions intended to demonstrate transparency, alleviate doubts, and increase confidence cannot achieve these ends if they are not read. The question of how to increase participation, therefore, must be approached broadly: not only should States Parties consider how to increase submission of CBM reports, but also how to make the data they contain more readily accessible and how to encourage States Parties to make constructive use of them. Without these steps, submission of CBMs—even on a universal basis—will be a hollow, ceremonial accomplishment, and do little to achieve the goals for which the CBMs were created.

II. Promoting Greater Participation in BTWC CBMs

2. The United States aims to increase participation—in both the submission of CBMs and in the review and use of CBMs— in part by improving the utility and relevance of the data collected under the CBM process. The CBM submissions are one of the BTWC's few tools to engage its members in information exchange that can provide a useful tool for discussions with neighbors and others in times of both cooperation and heightened tensions. Confidence building measures have been a critical component of global and regional efforts to bring peace and establish more transparency between opposing sides for decades. BTWC submissions can be used to promote a wide array of biosafety/biosecurity and regulatory measures. Cooperation and assistance are ever more crucial in a time of austerity, and more detailed review and discussion of submissions will provide avenues for collaboration. National submissions should not be seen as a burden (the USA submission is nearly 300 pages), but as a way to open the door to greater understanding of what others are doing and could potentially do together.

3. The Seventh RevCon took steps toward this goal by modestly revising the CBM reporting forms, urging the Implementation Support Unit (ISU) to work with States Parties to further develop options for electronic submission, and renewing the request for National Points of Contact. We welcome the time set aside this year and next for detailed discussions. A key consideration for increasing participation in all aspects of the CBM process is to ensure that the questions asked by the CBMs are useful, relevant, and result in information that meets the needs of States Parties. The changes adopted by the Seventh RevCon focused mainly on streamlining the CBMs and on clarifying certain questions, leaving more fundamental revision to be considered at a later date.

4. A number of steps can be envisioned to improve participation, both in terms of submission of CBMs and in review of these reports. With respect to increasing submissions:

(a) First, the streamlining undertaken by the Seventh RevCon should reduce reporting burdens and increase participation. It will be important to monitor progress in this respect.

(b) Second, the BTWC Chairman should contact all States Parties that have not yet

designated a National Point of Contact, as called for by the Sixth and Seventh RevCons, and ask them to do so by the time of the Meeting of States Parties in December.

(c) Third, the Chairman should, each year, write to those States Parties who have not submitted their reports for the previous year, noting that they have not reported, stressing that the ISU and various States Parties stand ready to provide assistance, and urging them to submit their CBMs without delay.

(d) Fourth, the ISU should continue and intensify its efforts to move to a fully electronic CBM system that will simplify both reporting and analysis.

(e) Fifth, a CBM assistance network, coordinated by the ISU, should be established. A number of States Parties have standing offers to assist with CBM reporting. These offers should, where necessary, be updated; the offers and contact information posted on the BTWC website; the CBM reporting guidelines published by various sources harmonized if possible; and greater use made of remote assistance (e.g., via phone and email).

(f) Sixth, States Parties should be encouraged to urge others that do not submit CBM reports to do so.

5. With respect to increasing use of CBMs:

(a) An improved electronic reporting process could make the data contained in CBMs much more accessible and useful than it is at present, thereby promoting use;

(b) To the extent that language is a barrier, translation may be an important factor. We welcome Canada's announcement at the Seventh RevCon that it intends to support some CBM translation, and are considering options to support this goal.

(c) Finally, the move toward publicly available CBM submissions in recent years has shown that public access allows civil society—in particular, academia—to play a constructive role in aggregating and analyzing CBM data. This may considerably facilitate analysis and engagement by those States Parties that lack the resources for this exercise, and should therefore be encouraged.

III. Recommendations

6. The 2012 Meeting of States Parties should:

(a) Strongly urge all States Parties to acknowledge, and reiterate to others, the importance of participation in the CBM process.

(b) Call on all States Parties to designate National CBM Points of Contact as agreed at the Sixth RevCon and reiterated at the Seventh RevCon, and request the Chairman to follow up with those States Parties who have not done so.

(c) Call upon the BTWC Chairman to contact States Parties who have not submitted CBMs the previous year, note offers of assistance, and urge submission without delay.

(d) Urge States Parties to assist the ISU with efforts to move to a fully electronic CBM system that will simplify both reporting and analysis and make the data more widely available.

(e) Urge establishment of CBM assistance network, coordinated by the ISU, to provide expert advice in an accessible manner; update and harmonize CBM handbooks; and post this information on ISU website.

(f) Urge States Parties in a position to do so to offer, and coordinate, assistance, training, translations, and workshops in support of national implementation tasks such as compiling and submitting CBMs.

(g) Welcome the decision of many States Parties to post submissions on the publically available ISU website to facilitate aggregating and analyzing CBM data.

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In her October 22, 2012 remarks at the First Committee of the UN General Assembly, excerpted, *supra,* in section B.6.a., Ambassador Kennedy also discussed developments with regard to the BWC, including the expert-level consultations held in July and the accession of the Marshall Islands. Her remarks, excerpted below, are available in full at *www.state.gov/t/avc/rls/199712.htm*.

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… The [Review Conference in 2011] set the stage, but it is up to us—the BWC States Parties—to take meaningful action. In July, BWC States Parties held the first expert-level consultations of the new process under the very able and distinguished chairmanship of Ambassador Delmi of Algeria. Overall, my delegation was impressed with the seriousness with which delegations engaged the issues. Some important proposals were put forward by a number of delegations—mine included—for consideration at the BWC Annual Meeting this December. I hope all member states will join together in making the most of this opportunity to strengthen international security and advance global health.

All 165 BWC States Parties should work together as well to support universalization of this important treaty. In that regard, as one of the depositaries of the BWC, I am particularly pleased to congratulate Ambassador Kabua of the Marshall Islands. The legislature, the Nitijela, has approved the accession of the Marshall Islands to the BWC. Once the instruments of ratification have been duly deposited, the Marshall Islands will become the 166th member state of this important treaty. …

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As mentioned by Ambassador Kennedy in her remarks excerpted above, the annual BWC Meeting of States Parties was held in Geneva from December 10 to 14, 2012. The Meeting of States Parties considered the work of the Meeting of Experts from July 16-20, 2012, discussed *supra*. The Meeting of States Parties also addressed the biennial item of how to enable fuller participation in the Confidence-building Measures ("CBMs"). Documents from the Meeting of States Parties are available at *www.unog.ch/80256EE600585943/(httpPages)/F837B6E7A401A21CC1257A150050CB2A?OpenDocument*. Ambassador Kennedy delivered an opening statement on the first day of the Meeting of States Parties, December 10, 2012. Her opening statement is excerpted below and available in full at *http://geneva.usmission.gov/2012/12/10/statement-by-ambassador-kennedy-at-the-bwc-conference/*.

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We are here today to fulfill the mandate given to us by the Seventh Review Conference: to promote common understandings and effective action on cooperation and assistance, on science

and technology, on ways to strengthen national implementation, and on participation in the Confidence-Building Measures. This is important work: reaching clear understandings and pragmatic, meaningful actions will strengthen the Convention, and demonstrate the value of effective multilateralism. My delegation will, therefore, be seeking to conclude this meeting with a clear, specific, forward-looking report. Our working papers submitted to the Meeting of Experts included specific proposals for inclusion in the report of this meeting, and I refer you to them.

It is important to remember, however, that while agreeing on new understandings and new actions is important, there is a great deal for each of us to do, acting individually and in like-minded groups, to implement the obligations of the Convention and the understandings already reached. We should never lose sight of that.

…The United States remains firmly committed to the undertakings set out in Article X of the Convention, and our assistance and cooperation efforts are wide-ranging. Just last month, the United States and ASEAN agreed to launch the U.S.-ASEAN Innovation in Science through Partners in Regional Engagement, or INSPIRE, initiative. Designed to enhance bilateral science, technology, and health cooperation between the United States and ASEAN's member states, the INSPIRE Initiative includes a range of activities based on three central elements: encouraging cross-border scientific collaboration; promoting an ASEAN scientific "enterprise" linking science, technology, and innovation to drive economic development; and improving our collective response to pandemic outbreaks and disasters.

Our aim at these intersessional meetings is to promote international cooperation and assistance—by identifying needs, addressing impediments, and sharing experiences and opportunities. Our hope, therefore, is that this Meeting will call upon all States Parties in a position to do so to offer advice or assistance in implementing the Convention, and will urge those in need of assistance to take advantage of such offers. We hope those gathered here can also agree on the need to address a specific need identified by the United Kingdom at the Meeting of Experts: the challenges of sustainable biosafety and biosecurity described by the United Kingdom at the Meeting of Experts. We also hope that we will emphasize the importance of the biennial Article X reports requested by the Seventh Review Conference: these reports should be as detailed and specific as possible about opportunities, challenges, and needs—and they should form the basis for our discussions, so that we can grapple with real facts and practical challenges, rather than ideological debates.

…The Meeting of Experts held constructive discussions about not only developments in science and technology, but about their implications for oversight, outreach, and education. In particular, a great deal of attention was paid to the issue of "dual-use research"—that is, experiments conducted for legitimate purposes that yield insights or materials that could also be misused for purposes incompatible with the Convention. This is not a new issue, but it is one that has garnered renewed attention over the past year. Decisions to pursue and fund work that presents substantial dual-use risks must weigh the often-considerable benefits of the research against the risk, and take into account a host of biosafety and biosecurity considerations. This is not an area where there are easy answers. Next week, the United States Department of Health and Human Services (HHS) is hosting an international consultative workshop to discuss the considerations surrounding a particular type of dual-use research—gain-of-function research on highly pathogenic avian influenza viruses. This event aims to advance a global dialogue on the implications of such research for global public health and fundamental principles for the conduct and oversight of such research. HHS will take the information and perspectives offered at the

meeting into account in developing its own framework for making future decisions about funding this type of research. This workshop is not the end, of course—but we believe it will be an important contribution to the ongoing global dialogue.

The BTWC has a contribution to make as well. The report of this MSP should recognize the need for thoughtful approaches that maximize benefits and minimize the risks of dual-use research of concern. It should call upon all States Parties to examine ways of managing these risks throughout the research lifecycle. And we should recognize both the important role that outreach and education can play, and the importance of hearing from the scientific community about what works and what doesn't, when it comes to awareness-raising, and when it comes to developing sound frameworks to manage risks.

Presentations at the Meeting of Experts in July demonstrated that a great deal of progress is being made on strengthening national implementation of the Convention—but it is also clear that a great deal more progress is needed. We need to deepen and clarify our shared understandings of what is required for full and effective implementation of the BTWC. We also need to improve our understanding of the status of implementation across States Parties, so that we can assess the situation, provide encouragement and assistance, and measure progress. The ideas of our French, Canadian, and Swiss colleagues for peer review and assessment processes may be very relevant here. And we need to urge States Parties to take practical steps to strengthen biosafety and biosecurity—not only in the laboratory, but in transportation, sample handling, and at all other stages.

The Review Conference also tasked us to take steps to increase participation in the Confidence-Building Measures. Sixty- eight submitting CBMs out of one hundred and sixty–six is simply not good enough. My government stands ready to advise and assist those who may require support to complete this important task. But simply increasing the number of countries submitting CBMs is insufficient. CBMs do not build confidence unless they are thoughtfully prepared and thoughtfully examined. This MSP should therefore call not only for steps to increase submissions, but also steps, such as automation, open publication, and voluntarily-funded translation, that will facilitate greater understanding and thus build confidence.

…In addition to the four substantive items on our agenda for this meeting, the Review Conference identified a fifth topic, to be addressed in the second half of the intersessional period: "how to strengthen implementation of Article VII, including consideration of detailed procedures and mechanisms for the provision of assistance and cooperation by States Parties." My government knows, from experience with international responses to a variety of international disasters and public health emergencies– that it is also a difficult one. If we are to achieve meaningful results in 2014 and 2015, we should begin now to identify barriers to prompt, effective international response.

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At the Meeting of States Parties in December, the U.S. delegation delivered a statement on Agenda Item 8, Strengthening National Implementation. The U.S. statement is excerpted below and available at *www.state.gov/s/l/c8183.htm*.

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My delegation was very pleased that the Seventh Review Conference decided that measures were needed to address the current, highly uneven state of BWC implementation around the world, and created a standing agenda item on "strengthening national implementation."

In our Working Paper 5, submitted to the Meeting of Experts, the United States suggested several practical steps that BWC States Parties could take to strengthen national implementation. In particular, we called for:

Work to further elaborate existing "common understandings" about effective national implementation, to provide further guidance to relevant national authorities on recommended measures and possible approaches.

Steps to improve our collective understanding of the status of implementation around the world.

Prompt action to address needs and shortcomings, including through focused international cooperation efforts.

We identified practical efforts to strengthen biosafety and biosecurity around the world as a highly relevant and urgent subset of the national implementation agenda.

And we called for stronger ties to regional and subregional organizations and other regional efforts as a valuable means of strengthening implementation, based on our experience cooperating through the ASEAN Regional Forum.

We hope these proposals will find support.

We also hope the report of this meeting could reflect common understandings on the value of:

National biosecurity measures that include more than steps to guard against the theft of biomaterial from laboratories, and in particular the value of measures such as presuitability checks for prospective employees, ongoing personnel reliability and security awareness programs, and active outreach and engagement between the scientific and security communities.

Mr. Chairman, we support many of the recommendations contained in your synthesis paper. We must note, however, that no consensus exists that States Parties should work toward elaboration of a legally-binding instrument.

Mr. Chairman, I would like to note our support for several points raised in the NAM statement:

We strongly agree about the importance of international cooperation to strengthen implementation capacity. We urge States Parties to identify their needs—or even to simply seek assistance in needs assessment—and call on those in a position to do so to provide support. This is the heart of our national proposal and we are very pleased to see the support it commands from this important group.

We also agree with the principle that biodefense activities should not be used to mask offensive programs—this would be a grave breach of the Convention.

Further, we agree on the importance of continued discussion in this forum—among others—of the challenges posed by the dual-use nature of much life science research.
We were very pleased to co-host with the Netherlands a well-attended, substantive discussion of the H5N1 research issue at the Meeting of Experts, and welcome further dialogue.

Mr. Chairman, with respect to initiatives currently being advanced on peer review and compliance assessment: the NAM spokesman has rightly warned about the dangers of a false sense of security. That does not, in our view, mean that such initiatives should not be explored—it means we must be realistic about their limitations. But increasing understanding of how States

Parties implement their obligations is the core of both of these initiatives, and that cannot be a bad thing.

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7. Ballistic Missile Defense

In 2012, the United States continued to support the European Phased Adaptive Approach ("EPAA") in developing ballistic missile defense ("BMD") capability. See *Digest 2011* at 621 and *Digest 2010* at 811-12 for discussion of EPAA and agreements with Turkey, Poland, and Romania. In a speech in Berlin on September 10, 2012, Frank A. Rose, Deputy Assistant Secretary of State for Arms Control, Verification and Compliance, addressed the topic of global cooperation on BMD. His remarks are available at *www.state.gov/t/avc/rls/197547.htm* and included the following:

> On May 20-21 of this year, the NATO Heads of State and Government met in Chicago for the NATO Summit and announced that NATO had achieved an interim BMD capability. This means that the Alliance has an operationally meaningful standing peacetime BMD capability. NATO also agreed on the BMD-related command and control procedures, designated Supreme Allied Commander Europe as the commander for this mission, and demonstrated an interoperable command and control capability.
>
> To support this interim BMD capability, the United States has offered EPAA assets to the Alliance as our voluntary national contributions to the BMD mission. The AN/TPY-2 radar deployed in Turkey is now under NATO operational control. In addition, U.S. BMD-capable Aegis ships in Europe are also now able to operate under NATO operational control when threat conditions warrant.
>
> These decisions have created a framework for Allies to contribute and optimize their own BMD assets for our collective self-defense, and the United States welcomes and encourages such contributions from Allies.

Other speeches on the subject of BMD are available at *www.state.gov/t/186824.htm*, *www.state.gov/t/avc/rls/191958.htm*, and *www.state.gov/t/avc/rls/194453.htm*.

8. New START Treaty

From January 24 to February 7, 2012, the Bilateral Consultative Commission ("BCC") under the Treaty between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms ("New START") held its third session in Geneva. The BCC discussed issues related to the implementation of New START. The sides signed agreements on the amount of telemetric information on ICBM and SLBM launches that each party shall provide, and on procedures for conducting demonstrations of recording media and/or telemetric information playback equipment. The parties also decided on the number

of launches of ICBMs and SLBMs for which an exchange of telemetric information would be carried out in 2012. See State Department February 7, 2012 media note, available at *www.state.gov/r/pa/prs/ps/2012/02/183535.htm*.

The BCC held its fourth session in September 2012. The parties signed two additional agreements. BCC Agreement Number 3 affords the parties the opportunity to acquire telemetric information playback equipment for which a demonstration was conducted. BCC Agreement Number 4 relates to the use of tamper detection equipment. The texts of all BCC agreements are available at *www.state.gov/t/avc/newstart/c39903.htm*.

On June 21, 2012, Acting Under Secretary Gottemoeller testified before the Senate Foreign Relations Committee on the implementation of New START. Her testimony, excerpted below, is available at *www.state.gov/t/us/193605.htm*.

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As you know, New START celebrated its first birthday this past February. Its ratification and entry into force would not have been possible without the strong bipartisan support of this body. We are grateful to senators on both sides of the aisle for supporting a treaty that has done so much to strengthen global and national security.

When the Treaty is fully implemented, it will result in the lowest number of deployed nuclear warheads since the 1950s, the first full decade of the nuclear age: 1550 warheads deployed on 700 delivery vehicles, that is, intercontinental ballistic missiles, submarine-launched ballistic missiles, and bombers.[1] To illustrate the great distance we have traveled in reducing our nuclear weapons, I would like to mention that when the START Treaty was signed in July 1991, the United States and the former Union of Soviet Socialist Republics (USSR) each deployed approximately 10,500 nuclear warheads.

The current implementation process is providing ongoing transparency and predictability regarding the world's two largest deployed nuclear arsenals, while preserving our ability to maintain the strong nuclear deterrent that remains an essential element of U.S. national security and the security of our allies and friends.

The verification regime for New START is a detailed and extensive set of data exchanges and timely notifications covering all strategic offensive arms and facilities covered by the Treaty, as well as on-site inspections, exhibitions, restrictions on where specified items may be located, and additional transparency measures.

In negotiating the Treaty, both sides worked hard to find innovative new mechanisms to aid in the verification of the Treaty and the results of that work are already evident. The regime provides for effective verification and, at the same time, is simpler to implement and lessens disruptions to the day-to-day operations of both sides' strategic forces.

These verification mechanisms are enabling us to monitor and inspect Russia's strategic nuclear forces to ensure compliance with the provisions of the Treaty. For both the United States

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[1] The Treaty's central limits are as follows: 700 deployed ICBMs, deployed SLBMs and deployed heavy bombers; 1,550 warheads on deployed ICBMs and SLBMs and nuclear warheads counted for deployed heavy bombers; and 800 deployed and non-deployed ICBM launchers, SLBM launchers, and heavy bombers.

and Russia, accurate and timely knowledge of each other's nuclear forces helps to prevent the risks of misunderstandings, mistrust, and worst-case analysis and policymaking.

To date, the implementation process has been positive and pragmatic. Under New START, we are continuing the professional working relationship that was established during the negotiation process in Geneva.

In the first Treaty year, the United States and the Russian Federation kept pace with each other on conducting inspections. Both Parties conducted the yearly maximum of 18 inspections. So far this Treaty year, the Russian Federation has conducted 8 inspections and the United States has conducted 7 inspections. These inspections have taken place at intercontinental ballistic missile (ICBM), submarine-launched ballistic missile (SLBM), and heavy bomber bases; storage facilities; conversion or elimination facilities; and test ranges.

Through inspection activities, we have acquired new and valuable information. For example, New START includes intrusive reentry vehicle inspections that are designed to confirm the exact number of reentry vehicles (or warheads) on individual missiles selected for inspection. We are now able to confirm the actual number of warheads on any randomly selected Russian ICBM and SLBM—something we were not able to do under the 1991 Strategic Arms Reduction Treaty (START).

Another new feature in the New START is that each ICBM, SLBM, and heavy bomber has been assigned a unique identifier (UIDs)—a license plate, if you will. These UIDs are helping both sides with a "cradle to grave" tracking of the location and status of strategic offensive arms from arrival at an operating base, movement between facilities, changes in deployment status, maintenance or storage, to eventual conversion or elimination.

Another aspect of Treaty implementation is the exhibition process. The purpose of exhibitions is to demonstrate distinguishing features, to confirm technical characteristics of new types, and to demonstrate the results of conversion of the first item of each type of strategic offensive arms subject to this Treaty. These exhibitions provide both Parties with an opportunity to see new types of strategic offensive arms, view distinguishing features, and confirm declared data. These exhibitions assist in the conduct of on-site inspections. They also serve to enhance transparency and provide a better understanding of each other's systems.

Both sides have conducted delivery vehicle exhibitions. In March 2011, the United States conducted exhibitions of its B-1B and B-2A heavy bombers. Following that, the Russian Federation conducted exhibitions of its RS-24 ICBM and associated mobile launcher. That was the first time we had a chance to see the RS-24, the new Russian mobile missile with multiple warheads. This exhibition provided us with a great amount of information we would have not otherwise had.

In March 2012, the United States conducted the first of four one-time cruise missile submarine (SSGN) exhibitions. The purpose of these exhibitions is to confirm that the launchers on these submarines are incapable of launching SLBMs.

The United States and the Russian Federation have also been sharing a veritable mountain of data with each other. Since entry into force, we have exchanged over 2,500 notifications through our Nuclear Risk Reduction Centers (NRRC). These notifications help to track movement and changes in the status of systems. For example, a notification is sent every time a heavy bomber is moved out of its home base for more than 24 hours. Additionally, when the United States conducts a flight test of an ICBM or SLBM, the NRRC will notify the Russian National Center one day in advance of the flight test. The Russians provide the same information for their launches. Our center receives from the Russian NRRC the incoming notification via our

secure government-to-government communications link. We translate it, make secure telephonic alerts, and issue a State Department cable to concerned U.S. agencies within one hour.

On top of the individual notifications, we exchange a comprehensive database of strategic forces covered by the Treaty every six months. This full account combines with the notifications to create a living, growing document that continuously tracks each side's strategic nuclear forces.

These data exchanges are providing us with an even more detailed picture of Russian strategic forces than we were able to obtain from earlier exchanges and the inspections allow us to confirm the validity of that data. Of course, the verification regime is backed up by our own National Technical Means of verification, our satellites and other monitoring platforms.

Another feature of the New START Treaty implementation process is the Bilateral Consultative Commission (BCC). This compliance and implementation body has met three times since entry into force. The BCC has produced Joint Statements and agreements, memorializing shared understandings of technical issues related to implementation activities. As in the implementation of the Treaty overall the environment in the BCC has been one of practical problem-solving on both sides of the table.

The latest session of the BCC was held in Geneva from January 24 to February 7, 2012. During the session, both sides continued their discussion on practical issues related to the implementation of the Treaty. The United States and the Russian Federation reached agreement there on an outstanding issue from the negotiations—the exchange of telemetric information on an agreed number of ICBM and SLBM launches and the procedures for conducting demonstrations of recording media and/or telemetric information playback equipment. Since this agreement, both the United States and the Russian Federation have conducted demonstrations of telemetric information playback equipment and recording media to be used during telemetry exchanges. Telemetric information was exchanged between the Parties on April 6, 2012.

Our experience so far is demonstrating that the New START's verification regime works, and will help to push the door open to new, more complicated verification techniques for the future. Verification will be crucial to any future nuclear reduction plans and the United States has made it clear that we are committed to continuing a step-by-step process to reduce the overall number of nuclear weapons.

Further, the outstanding working relationship that developed during the negotiations has carried over into the implementation phase, creating an atmosphere of bilateral cooperation to resolve implementation questions as they have arisen. We look forward to reporting further success and additional updates as New START implementation progresses.

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9. Treaty on Conventional Armed Forces in Europe

In March of 2012, the Department of State submitted its report to Congress on compliance with the Treaty on Conventional Armed Forces in Europe ("CFE") for the period December 1, 2010 to December 31, 2011. The report is available at *www.state.gov/t/avc/rls/rpt/197082.htm*. The report identifies the following countries for which the President was not able to certify compliance with the CFE and its associated documents: Armenia, Azerbaijan, Belarus, Russia, and Ukraine. The report describes

compliance issues in those countries and U.S. responses and provides an assessment of the significance and security risks of compliance concerns.

10. Treaty on Open Skies

On March 24, 2012, the Department of State marked the 20th anniversary of the Treaty on Open Skies. A department media note issued on March 23, excerpted below and available at *www.state.gov/r/pa/prs/ps/2012/03/186723.htm*, provides background on the treaty. Further information on the Treaty on Open Skies is available at *www.state.gov/t/avc/cca/os*.

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… In 1992, the Treaty was signed in Helsinki, Finland during a Summit meeting of the Conference on Security and Cooperation in Europe (CSCE).

The United States was among 27 signatory nations for the conventional arms control Treaty, which was designed to enhance mutual understanding and confidence by giving all participants a direct role in gathering information about military forces and activities. The Treaty enhances transparency by affording each State Party the opportunity to overfly the territory of other States Parties using sensor-equipped observation aircraft. The observation flights provide a platform for confidence and security-building that reduces the probability of misunderstanding and regional tensions.

The Treaty's current 34 member states have successfully conducted more than 835 observation flights over each other's territory. The concept of "mutual aerial observation" was initially proposed by President Eisenhower in 1955 as a bilateral arrangement with the Soviet Union to ensure that neither side was engaged in offensive preparations or destabilizing measures. In 1989, President H.W. Bush re-introduced the concept as a multilateral agreement among those states that were then NATO Allies and the former Warsaw Pact members.

Stretching from Vancouver in the west to Vladivostok in the east, this landmark agreement is one of the most wide-ranging international arms control efforts to date and provides a key mechanism in support of U.S. Euro-Atlantic security objectives.

The United States remains committed to maintaining the viability of the Treaty by enhancing transparency, employing new imaging technologies, and strengthening international cooperation through the effective and efficient implementation of the Treaty's confidence building measures. In this regard, the Open Skies Treaty continues to be one of the most successful and valuable arms control regimes.

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11. Arms Trade Treaty

The United States government actively participated in a conference to negotiate the Arms Trade Treaty ("ATT") in July 2012 at UN Headquarters in New York. Prior to the conference, Mr. Countryman laid out the U.S. positions and objectives regarding the ATT in remarks

delivered in Washington on April 16, 2012. Mr. Countryman's remarks are excerpted below and available in full at *www.state.gov/t/isn/rls/rm/188002.htm*.

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What do we see as the objective of these negotiations, and what are the key elements of a successful Treaty? Well, these are the elements that the United States is keeping in mind in our approach:

First, this is not a disarmament negotiation; it is an arms trade regulation negotiation. International transfer of conventional armaments is a legitimate commercial and national security activity. Providing defense equipment to reliable partners in a responsible manner actually enhances security, stability, and promotion of the rule of law. We want any Treaty to make it more difficult and expensive to conduct illicit, illegal and destabilizing transfers of arms. But we do not want something that would make legitimate international arms trade more cumbersome than the hurdles United States exporters already face.

What we want is for other countries, which do not have an adequate level of control to agree to create, or improve effective national systems that will review, and approve or deny arms transfers under their national responsibility. In short, we would want the Treaty to elevate the international standard for export control of armaments to get it as close to the level that we have in the United States as we can get it. This would be a big step forward over the status quo, where many countries have excellent export control standards, but in other countries a rogue arms merchant can operate with impunity from the territory of a state that simply takes no notice of such activity.

Second, let me be clear once more on the question of domestic transfers. The Treaty must not touch on domestic transfers or ownership. The United States has received widespread international support for this oft-repeated position that only international transfers would come within the purview of this Treaty. We will not support outcomes that would in any way infringe on the Second Amendment to the United States Constitution. We have received, in fact, letters from United States Senators opposing any Treaty restricting the Second Amendment. This has been the position of the Executive Branch since 2009, and it remains our position today. We will not support or agree to any Treaty that would do so. We believe that the international community can draft a Treaty on international arms transfers that would both increase international security and still protect sovereign rights of nations. That is the Treaty that the United States will pursue in July and for which we expect there will be widespread support.

Third, you know that this Administration has been working long and hard to complete an Export Control Reform that will change how a number of armaments-associated items are treated under United States' export control laws and regulations. Now, that effort is completely independent of our negotiations on the ATT, though we have carefully ensured throughout our deliberations that the two efforts do not conflict with each other. One of the central points of our position in the July Conference is that the Treaty will correspond and be supportive of United States Export Control Reform.

We believe, and will strongly advocate, that implementation of any ATT is strictly a national process. There will not be international organizations, or regulators or regimes responsible for defining, determining, or deciding, what is an appropriate arms transfer for any

country. Instead, there must be a senior-level and responsible national decision on any such export. We want the Treaty to tell each State Party what factors it must consider before authorizing a transfer—that is, criteria to keep in mind to review seriously and decide whether the transfer in question is responsible or not. But the Treaty should not tell each State Party how it must evaluate such a transfer—what bureaucratic process it needs to follow. That position is not only sensible for the sovereignty of states, but it is also consistent with the kind of bureaucratic streamlining we are seeking to finalize in our Export Control Reform.

The US has made our position on one other issue very clear in the preliminary discussions with international partners. Many states and organizations—many of them without major armaments industries or significant international arms trade—have sought to include ammunition in the scope of an ATT. The United States, which produces over seven billion rounds of ammunition a year, has resisted those efforts on the grounds that including ammunition is hugely impractical. We have asked our international partners, who proposed this inclusion, to lay out some specific means where such a fungible and consumable commodity could effectively and practically be accounted for and that would result in a degree of real control consistent with the goals of the Treaty. We are skeptical that there is such a proposal on the table or ready to be proposed, but we will remain open-minded in respecting the wishes of international parties and partners in studying such a proposal.

Many of you have already heard these positions of the United States at some earlier time in this process. If you've heard them before, you've just heard them again. They have not evolved, but I wanted to review them so you know that our national position going into the July Conference is consistent, it's balanced and it has generated a good deal of understanding and support from key international partners who will also be in New York in July. We believe that these positions are exactly how an effective, practical Treaty can be adopted and can contribute to international security.

I don't wish to minimize how difficult it can be to get a multilateral consensus on an actual text. Four weeks is a very short time to find acceptable language. On the other hand, as I said earlier, this is an arms trade regulation document, not a disarmament document, so there is no need for an extensive framework or extensive definitions to make it work. The outcome of the Conference ought to be a good, short document that spells out principles of what states must do in implementing an effective arms export control. And it should not require extensive documentation, or multiple annexes. For example, each State Party should have its own detailed list of what it controls by its export control regime—but we do not need an exhaustive, common universal list included in the Treaty Text.

Our point about national implementation also steers us in the right direction with regard to the criteria that must be considered before exporting conventional weapons. There are very few absolute bars to an arms transfer, given the competing principle of the right to self-defense. We do not see a role for international bodies to adjudicate national decisions or an absolute application of criteria that are not already obligatory under international law—such as a UN Security Council arms embargo. So we don't see a need to try to do more than list principles, factors, criteria that each country must consider before it takes on a transfer, and which may result in a different decision made by the individual national authority.

We also expect to see in negotiations a great deal of international agreement that there should be assistance available to states that need it to help set up an effective mechanism for arms export control. By the way, we already do this. The Bureau of International Security and Nonproliferation, through its Export Control and Related Border Security Program (EXBS), has

helped a number of countries already to draft exactly such legislation.

Nor does a control mechanism need be equally elaborate or identically defined in every state—after all, some countries do not export arms on a regular basis. There is, of course, the issue of unscrupulous brokers finding such a country to use as a place of business, and we would want to see provisions in the Treaty that seek to prevent that kind of exploitation. But part [of] that problem is addressed if we have a near-universal Treaty where all the potential sources of arms are under the control of effective export regimes.

So let me be clear one more time about what the US hopes to see emerge, and what we are not naïve enough to expect.

We do not believe that this Conference, or any Treaty emerging from it, will result in the complete harmonization of arms transfers around the world. There are arms exporters who consciously decide to export arms to recipients that the United States would prefer not receive weapons. There are some arms exports that the US approves, after careful review in our process that other states in the world would prefer we not approve. These kinds of transfers, even with a universal ATT, would still be matters of national security, of national interest, and of bilateral diplomatic exchanges to seek to find mutual accommodations about our differing views of the world and the common interest of promoting regional security. An effective ATT could make the appropriate route for such diplomatic exchanges a little clearer, but it will not fundamentally change the nature of international politics nor can it by itself bring an end to the festering international and civil conflicts around the world.

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On July 12, 2012, Ambassador Donald Mahley, U.S. Representative to the Arms Trade Treaty Conference, addressed the conference, registering the U.S. objection to Iran having a leading role at the conference:

> In this regard, Mr. President, the U.S. must underscore its objection and formally express our strong condemnation of the selection of Iran to the ceremonial role of one of the fourteen vice presidents of this conference. Iran's longstanding record of weapons proliferation, illicit nuclear activities, and gross human rights abuses properly disqualifies it from serving in any such position in the United Nations. At a time when Iran is violating UN Security Council obligations, including by helping rearm Hezbollah in Lebanon and providing weapons to the Asad regime to use to slaughter its own people, this selection makes a mockery of this conference's underlying purposes and undermines the credibility of the United Nations. Furthermore, we note that according to media reports, Iran has misrepresented its ceremonial role at the Conference by implying it secured its election on the basis of their record on international peace and security. The United States rejects the legitimacy of Iran's claimed capacity to play a credible role in this Conference.

Opening Statement of Ambassador Mahley, July 12, 2012, available at *www.state.gov/t/isn/rls/rm/194955.htm*.

The conference concluded on July 27, 2012, without reaching consensus on a treaty text. The State Department issued a press statement expressing the U.S. view that further

negotiations could result in the successful conclusion of an ATT. That July 27 press statement is excerpted below and available at *www.state.gov/r/pa/prs/ps/2012/07/195622.htm.*[*]

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The United States supports the outcome today at the Arms Trade Treaty Conference. While the Conference ran out of time to reach consensus on a text, it will report its results and the draft text considered back to the UN General Assembly (UNGA). The United States supports a second round of negotiations, conducted on the basis of consensus, on the Treaty next year; we do not support a vote in the UNGA on the current text. The illicit trafficking of conventional arms is an important national security concern for the United States. While we sought to conclude this month's negotiations with a Treaty, more time is a reasonable request for such a complex and critical issue. The current text reflects considerable positive progress, but it needs further review and refinement.

With that in mind, we will continue to work towards an Arms Trade Treaty that will contribute to international security, protect the sovereign right of states to conduct legitimate arms trade, and meet the objectives and concerns that we have been articulating throughout the negotiation, including not infringing on the constitutional right of our citizens to bear arms. The United States took a principled stand throughout these negotiations that international trade in conventional arms is a legitimate enterprise that is and should remain regulated by the individual nations themselves, and we continue to believe that any Arms Trade Treaty should require states to develop their own national regulations and controls and strengthen the rule of law regarding arms sales.

We support an Arms Trade Treaty because we believe it will make a valuable contribution to global security by helping to stem illicit arms transfers, and we will continue to look for ways for the international community to work together to improve the international arms transfer regime so that weapons aren't transferred to people who would abuse them.

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On October 24, 2012, U.S. Deputy Permanent Representative to the Conference on Disarmament Walter S. Reid addressed the First Committee of the United Nations General Assembly in New York. His remarks, excerpted below and available at *www.state.gov/t/avc/rls/199692.htm*, include a discussion of progress on the ATT.

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[*] Editor's note: On April 2, 2013 the UN General Assembly adopted the final text of the Arms Trade Treaty. The text and other information about the treaty are available at *www.un.org/disarmament/ATT/*. The treaty will be discussed further in *Digest 2013*.

The United States is steadfast in its commitment to achieve a strong ATT that will respond to the adverse impacts of the illicit international arms trade on global peace and stability. An effective treaty—one that recognizes that each nation must tailor and enforce its national export control mechanisms—can help ensure that conventional arms crossing international borders will be used for legitimate purposes and not strengthen the hand of those who would use them to violate international law.

We said at the end of the July Conference that the topic required additional time to improve the outcome. A workable and implementable ATT is within our reach. What we want—what we need—is to get it right. We will continue to work hard towards an ATT that will contribute to international security, protect the sovereign right of states to conduct legitimate arms trade, and meet the objectives and concerns that we have been articulating throughout the negotiation, including not infringing on the constitutional right of our citizens to bear arms.

The United States strongly supports convening a short UN conference next spring to continue our efforts to negotiate an effective ATT that will address the issues of international arms trade and its regulation by establishing high standards, that can be implemented on a national basis, and that the overwhelming majority of other states can embrace and take forward effectively.

The United States supports the ATT Co-Authors' resolution, because it appropriately recognizes both where we are in the process of developing an effective treaty, and how we should capitalize on our efforts in July to bring these negotiations to a successful conclusion. We should use the time between now and the spring to reflect on the text that our Conference President of last July, Roberto Garcia Moritan, put together as a result of his extensive consultations, and to determine what additional changes are required to make that text an acceptable and effective treaty. It is unfortunate that the Conference President was prevented from delivering the report in person.

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12. Arms Embargoes

See Chapter 16.

Cross References

Constitutionality of U.S. statute enacting the Chemical Weapons Convention, **Chapter 4.B.1.**
UNGA resolutions on Iran, DPRK, and Syria, **Chapter 6.A.2.**
Extrajudicial, summary, or arbitrary executions, **Chapter 6.I.2.**
PMSCs, **Chapter 6.M.**
Immunity of head of state from deposition in military commission proceeding, **Chapter 10.C.6.**
Outer space, **Chapter 12.B.**
Nonproliferation-related sanctions and export controls, **Chapter 16.A.1.–3. and C.2.**
Conflict avoidance and atrocities prevention, **Chapter 17.C.**